Annual Review
Statutes and Regulations
Supplementary Materials
Part 1

Table of Contents

FEDERAL PROCUREMENT STATUTORY DEVELOPMENTS FOR 2020

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I. Payment Integrity Information Act of 2019, Pub. L. No. 116-117, 134 Stat. 113 (March 2, 2020)

On March 2, 2020, the President signed into law the Payment Integrity Information Act. The purpose of the Act "is to improve efforts to identify and reduce Government-wide improper payments" by "codifying, updating, and improving previous improper payments laws." S. Rept. 116-35, at 1 (2019). An improper payment is "any payment that should not have been made or that was made in an incorrect amount, including an overpayment or underpayment, under a statutory, contractual, administrative, or other legally applicable requirement" and includes "(i) any payment to an ineligible recipient; (ii) any payment for an ineligible good or service; (iii) any duplicate payment; (iv) any payment for a good or service not received, except for those payments where authorized by law; and (v) any payment that does not account for credit for applicable discounts."

Since 2002, Congress has passed "piecemeal bills" including the Improper Payments Information Act of 2002, the Recovery Audit Act of 2002, the Improper Payments Elimination and Recovery Act of 2010, the Improper Payments Elimination and Recovery Improvement Act of 2012, and the Fraud Reduction and Data Analytics Act of 2015, that "while incrementally improving statutory authorities, are not well coordinated." S. Rept. 116-35, at 2. The Committee recognized that "statutory requirements concerning Federal improper payments are scattered throughout the U.S. Code, … some of these statutory requirements were not incorporated into the U.S. Code as positive law," and the statutes in total lacked coherence and left certain aspects up to agency interpretation. *Id.* at 3. To "improve the coherence of improper payments laws and to improve agency compliance, the Act repeals the previous improper payments laws and combines the language of each into" a new Subchapter IV of Chapter 33 in U.S. Code Title 31. It also "omits areas of duplication, and improves and updates areas that warrant attention." *Id.*

On Aug. 20, 2020, the Council of the Inspectors General on Integrity and Efficiency issued guidance to assist OIGs that are required to conduct an annual improper payment review under this Act. *See* CIGIE Guidance for Payment Integrity Information Act Compliance Reviews, available at https://www.ignet.gov/sites/default/files/files/8-20-2020%20CIGIE%20Improper%20Pmt%20Guide.pdf. The guidance indicates that the OMB is updating Appendix C of OMB Circular A-123, Management's Responsibility for Internal Control, to include guidance related to the OIG's annual improper payment review. This update fulfills the Act's requirement that OMB develop and promulgate guidance for the compliance determination reports issued by the Inspectors General. The revised Appendix C is expected to be issued in February 2021.

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II. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. Law No. 116-136, 134 Stat. 281 (March 27, 2020)

Section 3610 of the CARES Act provides Federal agencies the authority to modify contracts or agreements, without consideration, to reimburse contractors, under limited circumstances, for paid or sick leave a contractor provides employees or subcontractors to maintain a "ready state," including to protect the life and safety of Government and contractor personnel. This authority is subject to several notable statutory requirements or restrictions: (1) reimbursement by the Government is discretionary, not mandatory; (2) subject contracts must be modified to provide for reimbursement; (3) reimbursement is limited to the minimum contract billing rates and cannot exceed an average of 40 hours per week for paid leave, including sick leave; (4) the reimbursed expense must be used to retain employees (or subcontractors) in a ready state, including to protect the life and safety of Government and contractor personnel; (5) reimbursable expenses are limited to those incurred between March 27, 2020 (although it can be argued based on the statutory language that the start date should be Jan. 31, 2020) and Sept. 30, 2020, which Congress has extended (most recently) through March 31, 2021, *see* Consolidated Appropriations Act, 2021 (Dec. 27, 2020), § 1002; DOD Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, & Economic Security (CARES) Act, Frequently Asked Questions (Oct. 14, 2020), https://www.acq.osd.mil/dpap/pacc/cc/docs/covid-19/FAQ_Implementation_Guidance_CARES_Act_Sec_3610_10.14.20.pdf; (6) reimbursable expenses are limited to those employees or subcontractors that cannot perform work on a federally approved site, including a federally owned or leased facility or site, due to facility closures or other restrictions, and who cannot telework because their job duties cannot be performed remotely during the public health emergency; and (7) the contractor must offset reimbursements under the authority of § 3610 by the amount of any credits the contractor receives under other sections of the CARES Act and under the Families First Coronavirus Response Act, P.L. 116-127.

Because the authority is limited to circumstances where employees or subcontractors cannot perform work at an approved work site due to facility closures or "other restrictions," and cannot telework, it is unclear from the statutory language what "restrictions" will qualify. It is also unclear from the statute whether restrictions contained in state or local COVID-19-related orders or declarations that impact contractor employee or subcontractor access to qualifying facilities will trigger this authority. Moreover, since this authority is discretionary, satisfaction of § 3610's criteria does not guarantee that a contracting officer will utilize this authority and provide the permitted reimbursement. Reimbursement is subject to availability of appropriations under the CARES Act and/or other relevant acts.

As a result, it is critical to review agency guidance on this subject. While review of such guidance is beyond the scope of this article, DOD – which obligated a rather modest $18.3 million as of July 20, 2020 under § 3610 – has issued guidance (including FAQs), regulations (e.g., class deviations), and instructions concerning eligibility for relief and the applicable procedures for contractors to follow to be reimbursed and, as of Sept. 30, 2020, reimbursed contractors $68.3 million in leave costs. *See* GAO, *COVID-19 Contracting: Observations on Contractor Paid Leave Reimbursement Guidance & Use*, GAO-20-662 (Washington, D.C.: Sept. 3, 2020); DOD IG, Audit of Department of Defense Implementation of Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act (Dec. 9, 2020), available at *https://www.dodig.mil/reports.html/Article/2443741/audit-of-department-of-defense-*

implementation-of-section-3610-of-the-coronaviru/ (identifying 135 contracts for which, as of Sept. 30, 2020, $68.3 million in leave costs had been reimbursed and an additional 157 contracts for which contracting officers plan to use § 3610 authority to reimburse at least an additional $49.9 million in costs). Notably, the DOD IG observed that DOD's "use of section 3610 authority was limited; as of Sept. 30, 2020, only 96 of the 781 DoD affected contractors received assistance through section 3610." The IG further stated that it "identified that section 3610 authority was not more widely used within the DoD because contracting officers were flexible and creative, the defense industrial base was declared a critical infrastructure, there was no appropriation of funds specifically for section 3610, and contractors used other forms of COVID-19 assistance." Other agencies (e.g., GSA, DOE, NASA) have issued their own guidance.

Section 4017 of the CARES Act amends the Defense Production Act (DPA) to expand certain existing DPA authority. The DPA provides the President with broad emergency procurement (and other) powers to respond and recover from, for example, public health emergencies. *See* The Impact of Recent Stafford Act and Defense Production Act Declarations on COVID-19 Procurements, *www.gtlaw.com/en/insights/2020/3/the-impactof-recent-stafford-act-and-defense-production-actdeclarations-on-covid19-procurements;* GAO, *"Defense Production Act: Opportunities Exist to Increase Transparency & Identify Future Actions to Mitigate Medical Supply Chain Issues,"* GAO-21-108 (Washington, D.C.: Nov. 19, 2020). In an Executive Order dated March 18, 2020, the President invoked the DPA in response to the COVID-19 pandemic. *See https://www.whitehouse.gov/presidential-actions/executive-order-prioritizingallocating-health-medical-resources-respond-spreadcovid-19/*; *see also* GAO, *"Defense Production Act: Opportunities Exist to Increase Transparency & Identify Future Actions to Mitigate Medical Supply Chain Issues,"* GAO-21-108, at 7 (Table 1 identifying "Executive Orders Related to Defense Production Act for Medical Supplies, March 2020-August 2020"); Presidential Memorandum on Allocating Certain Scarce or Threatened Health and Medical Resources to Domestic Use (April 3, 2020), *https://www.whitehouse.gov/presidential-actions/memorandum-allocating-certain-scarce-threatenedhealth-medical-resources-domestic-use/*; Presidential Memorandum on Order Under the Defense Production Act Regarding the Purchase of Ventilators (April 2, 2020), *https://www.whitehouse.gov/presidentialactions/memorandum-order-defense-production-actregarding-purchase-ventilators/*. For an excellent historical summary and current analysis of the DPA, see McQuade et al., "The History and Use of the Defense Production Act: Parts 1 & 2," available at *https://www.historyassociates.com/the-history-and-use-of-the-defense-production-act-part-1/* and *https://www.historyassociates.com/the-history-and-use-of-the-defense-production-act-part-2/*.

Section 4017 modifies the DPA to remove certain funding limitations on purchases and commitments to create, maintain, protect, expand or restore domestic industrial base capabilities. Specifically, for the 2-year period beginning March 27, 2020, the CARES Act modifies the DPA to: (1) eliminate a $50 million limit on aggregate outstanding industrial resource shortfall actions, *see* 50 U.S.C. § 4533(a)(6)(C), and (2) suspend requirements that DPA fund balances in excess of $750 million at the end of a fiscal year be remitted to the Treasury. *See* 50 U.S.C. § 4534(e).

Similarly, for the 1-year period beginning on March 27, 2020, the CARES Act modifies DPA loan authority to: (1) eliminate a $50 million limit on aggregate outstanding amount of loans, *see* 50 U.S.C. § 4532(d)(1), and (2) eliminate congressional notification requirements and a 30-day waiting period when actions to correct a domestic industrial-base shortfall would cause the

aggregate outstanding amount of all such actions to exceed $50 million. *See* 50 U.S.C. § 4533(a)(6)(B). These amendments to the DPA are intended to remove potential barriers, limits or delays that could hinder effective use of DPA authority to respond to the COVID-19 pandemic.

Section 3301 provides expanded Other Transaction Agreement (OTA) authority to the Department of Health and Human Services' Biomedical Advanced Research and Development Authority (BARDA). *See* BARDA Other Transaction Agreements, *www.phe.gov/about/amcg/otar/Pages/default.aspx.* BARDA uses OTAs, a type of flexible, strategic partnership between the Government and industry, to foster innovation and promote collaboration on efforts to develop and procure needed medical countermeasures, including vaccines, therapeutics, diagnostics and non-pharmaceutical countermeasures, against a broad array of public health threats. Unlike procurement contracts, OTAs are generally exempt from the Federal Acquisition Regulation, including the FAR's competition requirements.

Section 3301 modifies BARDA's authority under the Public Health Service Act, 42 U.S.C. § 247d–7e, to remove the requirement for a written determination to approve OTAs expected to cost more than $100 million during a public health emergency. This change should speed up the solicitation and execution of larger OTAs critical to COVID-19 countermeasures. The Act also provides that not less than $3.5 billion of the $27 billion Public Health and Social Services Emergency Fund approved by the Act shall be available to BARDA for necessary expenses of manufacturing, production and purchase of various supplies and services.

Section 13006 relaxes statutory restrictions and requirements applicable to certain DOD OTAs. Statutory authority for DOD OTAs for prototype projects (10 U.S.C. § 2371b) includes a requirement that high-level DOD officials authorize high-dollar value OTAs in writing and provide 30-day advance written notice to Congress of any OTA award in excess of $500 million. *See* 10 U.S.C. § 2371b(a)(2). Section 13006 relaxes these requirements by authorizing DOD to delegate OTA approval authority to lower level officials and requiring congressional notification only "as soon as practicable after the commencement" of performance when the OTA is related to the COVID-19 pandemic national emergency. By relaxing these requirements, it is intended that there will be more rapid award of OTAs in response to the COVID-19 pandemic.

Section 3102 amends existing statutory authority providing for procurements for the Strategic National Stockpile and Security Countermeasure. *See* 42 U.S.C. § 247d-6b. The Act expands the statutory definition of materials to be maintained in the National Stockpile to specifically include "personal protective equipment [PPE], ancillary medical supplies and other applicable supplies required for the administration of drugs, vaccines and other biological products, medical devices, and diagnostic tests." This amendment clarifies that certain procurements for PPE and other identified supplies and equipment will be mandatory moving forward, to the extent determined to be appropriate and practicable by the HHS secretary. *See* 42 U.S.C. § 247d–6b(a)(1).

Sections 13004 and 13005 include provisions relaxing restrictions on the use of undefinitized contract actions (UCAs) to respond to the COVID-19 pandemic. An UCA is a procurement action for which price, the contractual terms and/or specifications are not agreed upon before performance begins. Agencies use UCAs to authorize contractors to begin performance before the contract is finalized for the purposes of meeting an urgent need. During performance,

an UCA becomes "definitized" when the agency and contractor agree to all contract terms. *See* DFARS Subpart 217.74, "Undefinitized Contract Actions." Statutory authority includes restrictions on how long UCAs may remain undefinitized and what percentage of an UCA's ceiling price an agency may obligate before the UCA is definitized. *See* 10 U.S.C. § 2326(b). For UCAs related to the COVID-19 pandemic national emergency, § 13004 waives the requirement that an agency obligate no more than 75% of a UCA's ceiling price before definitizing the contract. In turn, § 13005 authorizes the agency head to waive all deadlines and spending caps for UCAs set out in 10 U.S.C. § 2326(b), if the agency head determines that the waiver is necessary due to the COVID-19 pandemic national emergency. These changes provide greater flexibility and reduce administrative burdens for agencies using UCAs to respond to COVID-19.

III. Department of Veterans Affairs Contracting Preference Consistency Act of 2020, Pub. L. No. 116-155, 134 Stat. 698 (Aug. 8, 2020)

On Aug. 8, 2020, the President signed into law the Department of Veterans Affairs Contracting Preference Consistency Act of 2020 ("Consistency Act"), which "clarifies the relationship between the AbilityOne Program and the Department of Veterans Affairs' (VA) Veterans First Program." *See* 165 CONG. REC. E1597 (daily ed. Dec. 17, 2019) (statement of Rep. Roe). Congress passed this legislation in response to the Federal Circuit's ruling in *PDS Consultants, Inc. v. United States*, 907 F.3d 1345, 1360 (Fed. Cir. 2018). *Id.* at E1599. In relevant part, the Federal Circuit held that "where a product or service is on the [AbilityOne Procurement List] and ordinarily would result in the contract being awarded to a nonprofit qualified under the [Javits-Wagner-O'Day Act], the [Veterans Benefits, Health Care, and Information Technology Act of 2006] unambiguously demands that priority be given to veteran-owned small businesses." The Javits-Wagner-O'Day Act, *see* at 41 U.S.C. § 8501 et seq., is the enabling legislation for the AbilityOne Program, which is one of the largest sources of employment in the U.S. for people who are blind or have significant disabilities. The U.S. AbilityOne Commission is required to maintain a list of: (i) products suitable for Federal Government procurements that are "produced by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely disabled" individuals, and (ii) "services those [non-profit] agencies provide" that the Committee has determined to be suitable for the Federal Government to procure. *See* 41 U.S.C. § 8503(a); FAR 8.703. Congress was concerned about the impact of the Federal Circuit's *PDS Consultants* decision, including "[t]he destruction of employment and employment opportunities for individuals who are blind or disabled." 65 CONG. REC. E1599 (daily ed. Dec. 17, 2019) (statement of Rep. Roe).

The Consistency Act amends the Veterans Benefits, Health Care, and Information Technology Act of 2006 ("VBA"), Pub. L. 109-461, which established the "Rule of Two" requirement. Under the "Rule of Two," a VA contracting officer must restrict competition to VOSBs or SDVOSBs if s/he "has a reasonable expectation that two or more" small veteran owned businesses "will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d)(1). The Consistency Act amends 38 U.S.C. § 8127 by providing that a "Rule of Two" analysis generally is not mandated for those requirements added to the AbilityOne Procurement List before VBA's Dec. 22, 2006 enactment and that were in effect on the day before the enactment of the Consistency Act (i.e., Aug. 7, 2020).

The Consistency Act also provides an exception to protect some of the requirements that the VA had transitioned to VOSBs and SDVOSBs. Specifically, if the VA awarded a "covered product or service" to a VOSB pursuant to a Rule of Two determination between Dec. 22, 2006 and Aug. 7, 2020, the Agency is prohibited from transitioning the requirement back to the AbilityOne program until the current contract for the covered product or service is terminated or expires and the VA Secretary determines in writing that there is no reasonable expectation that 2 or more VOSBs or SDVOSBs will submit offers for the work and that the award can be made at a fair and reasonable price that offers best value to the VA.

On Aug. 14, 2020, the VA issued a memorandum, "Class Deviation from the VA Acquisition Regulation 808.002, Priorities for Use of Mandatory Government Sources (VIEWS 03255281)", to "implement legislative amendments to VA's Veteran's First Contracting Program (VFCP) to provide for an exception to small business contracting requirements applicable to the VA's procurement of certain goods and services covered under the AbilityOne program."

In Sept. 2020, a SDVOSB filed a bid protest at the Court of Federal Claims claiming that the VA violated the Consistency Act when it transferred requirements involving prescription eyeglasses and optical services that were set-aside for veteran-owned small businesses back to the AbilityOne program. *Superior Optical Labs Inc. v. United States* (Fed. Cl. 2020), 2020 WL 6375739. The question before the Court was "whether, after the passage of the Consistency Act, the VA was required to set-aside all contracts awarded under a Rule of Two analysis for veteran-owned small businesses, or just those that were competitively awarded." *Id.* at *8. The Court agreed with the Protester that the VA's transfer of the requirements to the AbilityOne program violated the Consistency Act. The Court found that "Section 8127(d)(1), formerly § 8127(d), refers to all contracts awarded pursuant to a Rule of Two analysis" and that "[c]ontrary to the Government's and IFB's assertion, § 8127(d)(1) is not limited only to those contracts that were awarded pursuant to a Rule of Two analysis and on the basis of competition." *Id.* at *9.

IV. Protecting Business Opportunities for Veterans Act of 2019, Pub. L. No. 116-183, 134 Stat. 895 (Oct. 30, 2020)

On October 30, 2020, President Trump signed into law the Protecting Business Opportunities for Veterans Act of 2019. The Act applies the "requirements applicable to a covered small business concern under section 46 of the Small Business Act (15 U.S.C. 657s [Limitations on subcontracting])" "to a small business concern owned and controlled by veterans that is awarded a contract" by the VA under 38 U.S.C. § 8127.

Specifically, this Act amends 38 U.S.C. § 8127 to add a new subsection (k), "Limitations on Subcontracting." Before awarding a contract under 38 U.S.C. § 8127, which concerns the VA's Veterans First Contracting Program that permits VA contracting officers to restrict competition under certain conditions to Service-Disabled Veteran Owned Small Businesses (SDVOSBs) and Veteran-Owned Small Businesses (VOSBs), the VA is now required to obtain a certification from the offeror that it will comply with subcontracting limitations if awarded the contract. The certification must specify the applicable performance requirements and explicitly acknowledge that the certification is subject to criminal penalties for making false statements. The VA has identified "pass-through schemes" and, in particular, SDVOSBs and VOSBs obtaining contracts reserved for those entities but performing little (if any) of the work, as major issues. *See, e.g.*,

Statement of Quentin G. Aucoin, Assistant Inspector General for Investigations, Office of Inspector General, Dep't of Veterans Affairs Before the Subcommittee on Oversight & Investigations, Committee on Veterans' Affairs & the Subcommittee on Contracting and Workforce, Committee on Small Business, U.S. House of Representatives, Joint Hearing on "An Examination of Continued Challenges in VA's Vets First Verification Process" (Nov. 4, 2015). The legislation is intended to help the VA identify instances where SDVOSBs or VOSBs improperly pass through work on prime contracts set aside for SDVOSBs and VOSBs to ineligible entities, and to take action against entities that fail to perform the minimum amount of work as the prime contractor. *See also* VAAR 819.7003(e); VAAR Subpart 819.72, VA Subcontracting Compliance Review Program,

The Act requires VA's Director of Small and Disadvantaged Business Utilization and VA's Chief Acquisition Officer to monitor compliance and to jointly refer any violation or suspected violation to the VA Inspector General. If the VA determines that a contractor awarded a contract under 38 U.S.C. § 8127 did not act in good faith with respect to its subcontracting restrictions, the contractor shall be subject to: (1) referral to the VA Debarment and Suspension Committee, (2) a fine under 15 U.S.C. § 645(g)(1), and/or (3) criminal prosecution for violating 18 U.S.C. § 1001.

Finally, the Act requires the VA IG to report by Nov. 30 of each of fiscal years 2021 through 2025 to the House and Senate Committees on Veterans' Affairs on: (1) the number of referred violations and suspected violations of the limitation on subcontracting requirements; and (2) "the disposition of such referred violations, including the number of small business concerns suspended or debarred from Federal contracting or referred to the Attorney General for prosecution."

V. Internet of Things ("IoT") Cybersecurity Improvement Act of 2020, Pub. L. No. 116-207, 134 Stat. 1001 (Dec. 4, 2020)

On Dec. 4, 2020, President Trump signed the IoT Cybersecurity Improvement Act of 2020 into law. No later than 90 days after the Act's enactment, the National Institute of Standards and Technology ("NIST") must "develop and publish … standards and guidelines for the Federal Government on the appropriate use and management by agencies of [IoT] devices owned or controlled by an agency and connected to information systems owned or controlled by an agency, including minimum information security requirements for managing cybersecurity risks associated with such devices." IoT devices "are devices that— (A) have at least one transducer (sensor or actuator) for interacting directly with the physical world, have at least one network interface, and are not conventional Information Technology devices, such as smartphones and laptops, for which the identification and implementation of cybersecurity features is already well understood; and (B) can function on their own and are not only able to function when acting as a component of another device, such as a processor." NIST must review and revise its standards and guidelines as appropriate within 5 years of their issuance, and must review and revise the standards (as appropriate) at least once every five years thereafter.

The standards must be consistent with existing NIST efforts regarding "examples of possible security vulnerabilities of Internet of Things devices" and "considerations for managing" those vulnerabilities. The standards must also be consistent with existing NIST efforts "with respect to the following considerations for Internet of Things devices:" "(i) Secure Development";

"(ii) Identity management"; "(iii) Patching"; and "(iv) Configuration management." Additionally, in developing the standards, NIST must "consider relevant standards, guidelines, and best practices developed by the private sector, agencies, and public-private partnerships."

Within 180 days of the publishing of NIST standards and guidelines, the OMB Director, in consultation with the Director of the Cybersecurity and Infrastructure Security Agency ("CISA") of the Department of Homeland Security ("DHS"), must review agencies' existing information security policies and principles for consistency with NIST standards and guidelines, and must issue policies and procedures to ensure such information security policies are consistent with NIST standards and guidelines. The review will not include "agency information security policies and principles pertaining to [IoT] of devices owned or controlled by agencies that are or comprise a national security system," as defined by 44 U.S.C. § 3552(b)(6), and the policies and principles issued by the OMB Director pursuant to this section will not apply to national security systems. The OMB Director must update the policies and principles within 180 days after NIST completes its quinquennial review of its standards and guidelines. The FAR must be revised to implement the standards and guidelines issued under the Act.

Within 180 days of the Act's enactment, NIST must, in consultation with the DHS Secretary and "cybersecurity researchers and private sector industry experts as the [NIST] Director considers appropriate," develop guidelines for "reporting, coordinating, publishing, and receiving of information about" "(A) a security vulnerability relating to information systems owned or controlled by an agency (including Internet of Things devices owned or controlled by an agency); and (B) the resolution of such security vulnerability." "Information system" has the meaning set forth in 44 U.S.C. § 3502(8), which defines that term as "a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information." NIST must also develop and publish guidelines "for a contractor providing to an agency an information system (including an IoT device) and any subcontractor thereof at any tier providing such information system to such contractor, on— (A) receiving information about a potential security vulnerability relating to the information system; and (B) disseminating information about the resolution of a security vulnerability relating to the information system." The guidelines for agencies and contractors must "include example content, on the information items that should be reported, coordinated, published, or received pursuant to this section by a contractor, or any subcontractor thereof at any tier, providing an information system (including [IoT] device) to the Federal Government."

Within two years of the Act's enactment, the OMB Director, in consultation with the DHS Secretary, must "develop and oversee the implementation of policies, principles, standards, or guidelines as may be necessary to address security vulnerabilities of information systems (including [IoT] devices)." The FAR must be amended as necessary to implement the policies, principles, standards, or guidelines.

The Act prohibits agency heads "from procuring or obtaining, renewing a contract to procure or obtain, or using an Internet of Things device, if the Chief Information Officer ["CIO")] of that agency determines during a review … of a contract for such device" "that the use of such device prevents compliance" with the security standards and guidelines for agencies on IoT device use and management developed under section 4 of the Act or the guidelines on the disclosure process for security vulnerabilities relating to information systems developed under section 5 of

the Act. This prohibition applies equally to acquisitions below and above the simplified acquisition threshold. The prohibition is effective on Dec. 4, 2022.

An agency head may waive the prohibition on procuring IoT devices that do not comply with the standards and guidelines issued under the Act if the agency's CIO determines that "(A) the waiver is necessary in the interest of national security; (B) procuring, obtaining, or using such device is necessary for research purposes; or (C) such device is secured using alternative and effective methods appropriate to the function of such device."

For the first 6 years following the Act's enactment, GAO must submit a report every 2 years to the relevant congressional committees on the effectiveness of the waiver process. The report must also contain "recommended best practices for the procurement of [IoT] devices" and must list "(i) the number and type of each [IoT] device for which a waiver … was granted during the 2-year period prior to the submission of the report; and (ii) the legal authority under which each such waiver was granted, such as whether the waiver was granted" for national security reasons, research purposes, or because the device is secured using alternative and effective methods appropriate to the function of such device.

Within one year of the Act's enactment, GAO must brief the relevant congressional committees "on broader [IoT] efforts, including projects designed to assist in managing potential security vulnerabilities associated with the use of traditional information technology devices, networks, and systems with—(1) [IoT] devices, networks, and systems; and (2) operational technology devices, networks, and systems." Within two years of the Act's enactment, GAO must submit a report to those congressional committees on the broader IoT efforts addressed in the briefing.

On Dec. 15, 2020, NIST released 4 new draft publications to begin providing guidance as mandated by the Act, i.e., NIST Special Publication 800-213 and NIST Interagency Reports 8259B, 8259C and 8259D. NIST Special Publication 800-213 provides overall guidance to federal agencies on what security capabilities an IoT device needs to provide for the agency to integrate it into its federal information system. The NIST Interagency Reports provide guidance for IoT device manufacturers that build IoT devices for the Federal Government to help them implement NIST's guidance from Special Publication 800-213. The public comment period on these documents ens on Feb. 12, 2021.

VI. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (Dec. 27, 2020)

On December 27, 2020, President Trump signed this Act into law. Section 330 permits any 8(a) certified business that was in the 8(a) Program "on or before September 9, 2020" to extend its participation in the program by an additional year. The extension appears to be a response to the difficulties experienced by many small businesses due to COVID-19. The SBA Administrator must issue regulations implementing this section within 15 days of this Act's enactment, without regard to the Administrative Procedure Act's rulemaking requirements, which means that the deadline for the regulations is January 11, 2021. This one-year extension of participation in the 8(a) Program and the emergency rulemaking requirement also was included in § 869 of the FY 2021 NDAA (discussed below).

As discussed above, § 1002 of this Act extends potentially eligible reimbursable contractor paid leave under § 3610 of the CARES Act to that incurred between March 27, 2020 (and possibly as early as Jan. 31, 2020) and March 31, 2021. Section 8131 establishes a pilot program for software development with significant budget flexibility. Specifically, this section states that appropriated funds under title IV, budget activity VIII "may be used for expenses for the agile research, development, test and evaluation, procurement, production, modification, and operation and maintenance" for the 8 listed "Software and Digital Technology Pilot programs."

VII. Secure Federal Leases from Espionage and Suspicious Entanglements Act, Pub. L. No. 116-276 (Dec. 31, 2021)

On December 31, 2021, President Trump signed this Act into law. Its purpose is "to provide ownership information to Federal tenants leasing high-security space that would allow the tenants to mitigate potential national security risks." S. Rept. 116-92, at 1 (2019). More specifically, "[b]efore entering into a lease agreement … or approving a novation agreement involving a change of ownership under a lease that will be used for high-security leased space," a Federal lessee "shall require" the identification and disclosure of "whether the immediate or highest-level owner of the leased space, including an entity involved in the financing thereof, is a foreign person or a foreign entity, including the country associated with the ownership entity." If such "disclosure is made," "the Federal lessee shall notify the Federal tenant of the building … that will be used for high-security space" and "consult with the Federal tenant, regarding security concerns and necessary mitigation measures" prior to award of the lease or approval of the novation agreement. A Federal lessee "shall require" an annual update of this information.

A lease agreement "for high-security leased space shall include language that provides" that: (1) the lessor and "any member of the property management company who may be responsible for oversight or maintenance of the high-security leased space shall not" "maintain access to the high-security leased space" or "have access to the high-security leased space without prior approval from the Federal tenant;" and (2) "the Federal lessee shall have written procedures in place, signed by the Federal lessee" and the lessor, "governing access to the high-security leased space in case of emergencies that may damage the leased property."

This Act is applicable to Federal lessees, i.e., GSA, the Architect of the Capitol, "or the head of any Federal agency, other than [DOD], that has independent statutory leasing authority." In addition to DOD, this Act is not applicable to the intelligence community. (Section 2876 of the FY 2018 NDAA (P.L. 115-91) provided DOD similar authority with respect to its high-security leased space.) This Act, which applies to leases and novation agreements related to leased property, becomes effective 6 months after its passage.

The impetus for the Act was Congress' finding that GSA was not required to collect beneficial ownership information about leased property and, therefore, lacked important information about whether foreign owners have a stake in buildings leased by Federal agencies. Congress acknowledged a recent GAO Report, GAO-17-195, "GSA Should Inform Tenant Agencies When Leasing High-Security Space from Foreign Owners" (Jan. 3, 2017), which identified that some law enforcement agencies were leasing high-security office space in foreign-owned properties.

VIII. National Defense Authorization Act for FY 2021, Pub. L. No. 116-283 (Jan. 1, 2021)

On Jan. 1, 2021, three months after the Oct. 1, 2020 start of FY 2021, the William M. (Mac) Thornberry National Defense Authorization Act ("NDAA") for Fiscal Year ("FY") 2021, was enacted into law after Congress overrode a presidential veto. While this is the 60th fiscal year in a row that a NDAA has been enacted, it was delayed by certain partisan Congressional disputes over its proposed contents and by the President's Dec. 23, 2020 veto of it, which was overridden in the House (on Dec. 28, 2020) and in the Senate (on Jan. 1, 2021). Unfortunately, it has become common practice for the NDAA to be enacted well after the start of its fiscal year. For example, over the last five years, three NDAAs became law in December (the FY 2020, FY 2018, and FY 2017 NDAAs) and the FY 2016 NDAA became law in late November (after initially being vetoed by President Obama largely for budgetary and funding reasons and then being amended. The FY 2019 NDAA is the only NDAA since 1997 to become law before the start of its fiscal year, a testament in part to Senator McCain, for whom the law was named. Like the FY 2021 NDAA, the FY 2013 NDAA also did not become law until three months after the start of its fiscal year, i.e., in early January.

The President's veto was based on, among other issues, the NDAA's failure to repeal Section 230 of the Communications Decency Act (which, in general, shields technology and social media companies from liability for content posted to their platforms), its requirement for the renaming of certain military installations honoring Confederate leaders, its alleged unconstitutional interference with the president's authority to withdraw troops from overseas, its "slow down [of] the rollout of nationwide 5G, especially in rural areas," and its restrictions on the president's "ability to preserve our Nation's security by arbitrarily limiting the amount of military construction funds that can be used to respond to a national emergency," i.e., the southern border wall. *See* Dec. 23, 2020 Presidential Veto Message, available at https://www.whitehouse.gov/briefings-statements/presidential-veto-message-house-representatives-h-r-6395/#:~:text=I%20oppose%20endless%20wars%2C%20as%20does%20the%20American%20public.&text=I%20will%20not%20approve%20this,of%20Representatives%20without%20my%20approval. Although the border wall provision will likely impact the amount of military construction funds spent on the United States' southern border wall, none of these provisions is likely to have a significant impact on procurement law or policy.

The FY 2021 NDAA broadly focuses on China, cybersecurity, and the defense industrial base. These themes can be seen in some of the procurement-related provisions. The FY 2021 NDAA's procurement-related reforms and changes are primarily located (as usual) in the Act's "Title VIII—Acquisition Policy, Acquisition Management, and Related Matters," which includes 63 provisions addressing procurement matters. This is modestly less than the past four NDAAs: FYs 2020, 2019, 2018, and 2017 NDAAs, respectively, contained 78, 71, 73, and 88 Title VIII provisions. Although the impact and importance of a NDAA on Federal procurement should not be measured simply on the total number of procurement provisions, the FY 2021 NDAA includes more Title VIII provisions addressing procurement matters than some other recent NDAAs (37, 13 and 49 provisions, respectively, in FYs 2015, 2014 and 2013). *See, e.g.,* CRS Report R45068 (Jan. 19, 2018), *Acquisition Reform in the FY2016–FY2018 National Defense Authorization Acts (NDAAs)*, at 1-2, & App. A. As discussed below, certain provisions in other titles of the FY 2021

NDAA are very important to procurement law and some of them could have been included in Title VIII (and have been in past NDAAs). Some of the FY 2021 NDAA's provisions will not become effective until the FAR or DFARS (and, depending on the circumstances, possibly other regulations) are amended or new provisions are promulgated (which sometimes can take 2 to 4 years or more).

Certain parts of the FY 2021 NDAA, including § 806 and Title XVIII, were recommended in whole or in part by the "Section 809 Panel," an independent advisory panel established by § 809 of the FY 2016 NDAA (as amended by FY 2017 NDAA § 863(d), and FY 2018 NDAA §§ 803(c) and 883) and tasked with finding ways to streamline and improve defense acquisition regulations. *See*https://section809panel.org/about/. In January and February of 2019, respectively, the Section 809 Panel issued a "Volume 3 Report" and a "Roadmap to the Section 809 Panel Reports." As compared to its impact on the FY 2019 NDAA, the Section 809 Panel only had a modest impact on the FY 2021 NDAA (and, likewise, on the FY 2020 NDAA). In any event, although the FY 2021 NDAA has 63 procurement related provisions in Title VIII (plus others elsewhere), its actual impact on procurement law is generally fairly modest. Finally, certain FY 2021 NDAA provisions relating to cybersecurity, e.g., §§ 1744, 1745, 1870, were recommended in whole or in part by the Cyberspace Solarium Commission, which was established by § 1652 of the FY 2019 NDAA.

The debate concerning the FY 2022 NDAA is likely to be dominated by the same general themes applicable to the FY 2021 NDAA, i.e., China, cybersecurity, and industrial base (with a focus on strategic reshoring and, as emphasized in several FY 2021 NDAA provisions discussed below, the role of working with allied nations).

Section 801, Report on Acquisition Risk Assessment and Mitigation as Part of Adaptive Acquisition Framework Implementation—This section requires each Service Acquisition Executive to submit to the Secretary of Defense, the Under Secretary of Defense for Acquisition and Sustainment, the Under Secretary for Research and Engineering, and the DOD Chief Information Officer ("CIO") a report on how the Service Acquisition Executive is assessing, mitigating, and reporting (within DOD and to Congress) on the following acquisition program risks: (1) "Technical risks in engineering, software, manufacturing and testing"; (2) "Integration and interoperability risks, including complications related to systems working across multiple domains while using machine learning and artificial intelligence capabilities to continuously change and optimize system performance"; (3) "Operations and sustainment risks, including as mitigated by appropriate sustainment planning earlier in the lifecycle of a program, access to technical data, and intellectual property rights"; (4) "Workforce and training risks, including consideration of the role of contractors as part of the total workforce"; and (5) "Supply chain risks, including cybersecurity, foreign control and ownership of key elements of supply chains, and the consequences that a fragile and weakening defense industrial base, combined with barriers to industrial cooperation with allies and partners, pose for delivering systems and technologies in a trusted and assured manner." By March 31, 2021, the Under Secretary for Acquisition and Sustainment must submit to the congressional defense committees a report on the input received from the Service Acquisition Executives and the Under Secretary's views on the 5 acquisition program risks identified in this section (and described above).

The FY 2021 NDAA's Joint Explanatory Statement indicates that, while the "conferees continue to appreciate the careful consideration paid by [DOD] to its Adaptive Acquisition

Framework, which implements the acquisition reforms legislated over the last 5 years," they "believe that [DOD] can no longer afford to use cost, schedule, and performance thresholds as simple proxies for" acquisition program risks. The Joint Explanatory Statement notes that "[e]xclusive attention to cost, schedule, and performance of major defense acquisition programs and other development programs obscures myriad other risks in programs, large and small, any one of which could be single points of failure for successful acquisitions." The language concerning cost schedule and performance is identical to the language in the Joint Explanatory Statement for FY 2020 NDAA § 836, Report on Realignment of the DOD Acquisition System to Implement Acquisition Reforms.

Section 804, Implementation of Modular Open Systems Approaches—This section requires that, within one year of the FY 2021 NDAA's enactment, DOD prescribe regulations and issue guidance facilitating access to and use of modular system interfaces for program offices "responsible for the prototyping, acquisition, or sustainment of a new or existing weapon system." "Not earlier than 1 year before, and not later than 2 years after the regulations and guidance … are issued for weapon systems," the regulations may be extended to software-based, non-weapons systems. This section also amends 10 U.S.C. § 2446a, which addresses modular open systems approaches requirements in acquisition programs, to require non-MDAPs (i.e., non-Major Defense Acquisition Programs) to also use modular open systems approaches to the extent practicable and amends 10 U.S.C. § 2320(a)(2)(G), which covers rights in technical data, to grant government purpose rights to a modular system interface developed wholly or in part with federal funds. Previously, 10 U.S.C. § 2320(a)(2)(G) permitted the Federal Government to assert "government purpose rights" in "major system interfaces." Finally, the section requires DOD to establish a central repository of interfaces and related items that can then be distributed, consistent with 10 USC § 2320.

According to the Joint Explanatory Statement, the intent of this section is to "expand the use of modularity in the design of weapons systems, as well as business systems and cybersecurity systems, to more easily enable competition for upgrades as well as sustainment throughout a product's lifecycle, while protecting the proprietary intellectual property embodied within the modules of modular systems."

Section 806, Definition of Material Weakness for Contractor Business Systems—This section amends section 893 of the FY2011 NDAA by replacing the term "significant deficiency" with respect to a contractor business system (defined as "a shortcoming in the system that materially affects the ability of officials of [DOD] and the contractor to rely upon information produced by the system that is needed for management purposes") with the term "material weakness." Section 806 provides that "'material weakness' means a deficiency or combination of deficiencies in the internal control over information in contractor business systems, such that there is a reasonable possibility that a material misstatement of such information will not be prevented, or detected and corrected, on a timely basis." A "reasonable possibility exists when the likelihood of an event occurring" is either "probable" or "more than remote but less than likely." The Joint Explanatory Statement indicates that the purpose of this change is to eliminate confusion about the seriousness of deficiencies in DOD contractor business systems and provide for "a more nuanced approach to classifying" such deficiencies by aligning the standards used to evaluate contractor business systems with generally accepted auditing standards. The Joint Explanatory Statement

observes that the "Section 809 Panel's 'Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations' recommended this terminology change after finding [DOD's] definition of 'significant deficiency' was inconsistent with the two-tiered characterization of internal control deficiencies used in generally accepted auditing standards." The Joint Explanatory Statement directs DOD "to ensure definitions for associated terms are also updated or incorporated [in the DFARS] as appropriate and in line with generally accepted auditing standards, including: 'significant deficiency,' 'material misstatement,' and 'acceptable contractor business system.'" The current (and presumably to be amended) DFARS are located at DFARS Subpart 242.70, Contractor Business Systems, and DFARS 252.242-7005, Contractor Business Systems.

Section 807, Space System Acquisition and the Adaptive Acquisition Framework— This section directs DOD to ensure that its "adaptive acquisition framework (as described in [DOD] Instruction 5000.02, 'Operation of the Adaptive Acquisition Framework') includes one or more pathways specifically tailored for Space Systems Acquisition in order to achieve faster acquisition, improve synchronization and more rapid fielding of critical end-to-end capabilities (including by using new commercial capabilities and services), while maintaining accountability for effective programs that are delivered on time and on budget." This section further provides that there must be an Air Force Service Acquisition Executive for Space Systems "[b]efore implementing the application of the adaptive acquisition framework to a Space Systems Acquisition pathway." The Service Acquisition Executive may delegate milestone decision authority to an appropriate program executive officer for major defense acquisition programs of the Space Force, who "may further delegate authority over major systems to an appropriate program manager."

By May 15, 2021, the Secretary of Defense is required to "submit to the congressional defense committees a report on the application of the adaptive acquisition framework to any Space Systems Acquisition pathway" that includes: (A) "Proposed United States Space Force budget line items for fiscal year 2022"; (B) "Proposed revised, flexible, and streamlined options for joint requirements validation in order to be more responsive and innovative, while ensuring the ability of the Joint Chiefs of Staff to ensure top-level system requirements are properly prioritized to address joint-warfighting needs"; (C) A list of Space Force acquisition programs for which multiyear contracting authority is recommended; (D) "A list of space systems acquisition programs for which alternative acquisition pathways may be used"; (E) "Policies or procedures for potential new pathways in the application of the adaptive acquisition framework to a Space Systems Acquisition with specific acquisition key decision points and reporting requirements for development, fielding, and sustainment activities that meet the requirements of the adaptive acquisition framework"; (F) "An analysis of the need for updated determination authority for procurement of useable end items that are not weapon systems"; (G) "Policies and a governance structure, for both the Office of the Secretary of Defense and each military department, for a separate United States Space Force budget topline, corporate process, and portfolio management process"; and (H) "An analysis of the risks and benefits of the delegation of the authority of the head of contracting activity authority to the Chief of Space Operations in a manner that would not expand the operations of the" Space Force. Within 60 days after the Secretary submits this report, GAO must review it and submit an analysis and recommendations based on the report to the congressional defense committees.

Section 814, Cost or Pricing Data Reporting Requirements for DOD Contracts—This section modifies the Truthful Cost or Pricing Data statute (commonly known as the Truth in Negotiations Act or TINA), which generally applies to contracts without adequate price competition (e.g., sole source) that are not commercial products and/or services (i.e., as still referred to in the FAR, "commercial items"). Under this section and subject to these exceptions: (i) a DOD prime contractor is required to submit cost or pricing data before the pricing of a change or modification to the "contract if the price adjustment is expected to exceed $2,000,000"; (ii) an offeror for a subcontract (at any tier) under a DOD prime contract shall be required to submit cost or pricing data before the subcontract award if the prime contractor (and, if applicable, each higher-tier subcontractor) have been required to make available cost or pricing data under this "section and the price of the subcontract is expected to exceed $2,000,000"; and (iii) the subcontractor for a subcontract covered by (ii), above, shall be required to submit cost or pricing data before the pricing of a change or modification to the subcontract "if the price adjustment is expected to exceed $2,000,000."

The Joint Explanatory Statement notes that this provision "establish[es] a standard $2.0 million threshold for application of the requirements of [TINA] with respect to subcontracts and price adjustments." The Joint Explanatory Statement further observes that:

> [DOD] and the military services have represented … that the authority in this provision will promote efficiency, improve acquisition timelines, and reduce administrative costs associated with executing certain contracts with lengthy periods of performance. The … purpose of this provision is to streamline the administration of cost accounting, and to reduce inefficiencies associated with the need to maintain dual accounting systems, not to reduce governmental oversight over contracts beneath the applicable threshold. As [DOD] uses the flexibility associated with this authority, the conferees emphasize the importance of rigorous oversight by acquisition executives to mitigate risks of paying higher prices that are neither fair nor reasonable.

Not later than July 1, 2022, the Secretary of Defense, in consultation with the Secretaries of the Military Departments, "shall provide to the congressional defense committees a report analyzing the impact, including any benefits to the Federal Government, of the amendments made by this section."

Section 815, Prompt Payment of DOD Contractors—As the Joint Explanatory Statement explains, this section amends 10 U.S.C. § 2307(a)(2) to "strengthen the requirement that [DOD] establish a goal to pay small business contractors" and small business first-tier subcontractors "within 15 days of receipt of" a proper invoice. On this issue, the Joint Explanatory Statement appeared to be both critical and complimentary of DOD when it observed that:

> the Defense Logistics Agency decision in November 2019 to move from 15-day payment terms to 30-day terms may have a detrimental effect on small businesses' ability to continue to do business for the U.S. Government, especially during economic downturns. The conferees further note that modern invoicing and payment systems should be able to support expedited review and payment of invoices, and therefore support [DOD's] efforts to leverage existing commercial

systems to facilitate the prompt payments. The conferees are aware that during the COVID-19 pandemic, [DOD] has supported its contractors by taking steps to improve the timeliness of payments.

Section 816, Documentation Pertaining to Commercial Item Determinations—The Section 809 Panel recommended that the ambiguous phrase "commercial item" in 41 U.S.C. § 103 be clarified. *See* Section 809 Panel Report, Vol. 1 (Jan. 2018), at 19–20. Section 836 of the FY 2019 NDAA removed the ambiguity by replacing "commercial item" with two new phrases, "commercial product" and "commercial service," and revised numerous other parts of statutes that referred to "commercial items." *Id*. In the title of Section 816 (see above), Congress forgot about this change but, fortunately, in the text of this new provision Congress got it right. If a procurement is for a commercial product or service, it is subject to substantially fewer regulations.

"In making a determination whether a particular product or service offered by a contractor meets the definition of a commercial product or commercial service," this section amends 10 U.S.C. § 2380 to provide that a DOD contracting officer "may": (A) "request support from" the Defense Contract Management Agency, the Defense Contract Audit Agency, "or other appropriate [DOD] experts" "to make a determination whether a product or service is a commercial product or commercial service;" and (B) "consider the views of appropriate public and private sector entities." Within 30 days of a contract award, the DOD contracting officer "shall … submit a written memorandum summarizing the [commercial product or service] determination," "including a detailed justification for such determination."

The Joint Explanatory Statement observes that 10 U.S.C. § 2380 "requires" DOD "to maintain a centralized capability, necessary expertise, and resources to provide assistance in making commercial product and commercial service determinations, and to provide access to previous commercial product and commercial service determinations." On this subject, the Joint Explanatory Statement was "encouraged by the Secretary of Defense's support for the Commercial Items Group within the Defense Contract Management Agency," but noted that DOD "has failed to fully comply with statutory requirements and internally manage commercial product and commercial service determinations to ensure consistency across [DOD]." As a result, the Secretary of Defense is directed "to provide a briefing to the congressional defense committees by March 1, 2021 describing [DOD's] process for making the written memoranda determination summaries available for use by contracting officers, and [DOD's] plan for compliance with commercial product and commercial service statutes." *See* DFARS PGI 212.102.

Section 817, Modification to Small Purchase Threshold Exception to the Berry Amendment—The Berry Amendment, 10 U.S.C. § 2533a, provides that DOD funds (appropriated or otherwise) "may not be used for the procurement of" certain items "if the item is not grown, reprocessed, reused, or produced in the United States." Those items generally include food; clothing and the materials and components thereof; tents (and the structural components thereof), tarpaulins, or covers; cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products, or wool or any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials; hand or measuring tools; stainless steel flatware; and dinnerware. *See* DFARS 225.7002.

This section modifies 10 U.S.C. § 2533a(h) to make its prohibition inapplicable "to purchases for amounts not greater than $150,000," which decreases the previous exception which was for amounts "not greater than the simplified acquisition threshold," which currently is $250,000 (but is also subject to certain exceptions that may increase that amount). The statute warns that a "proposed procurement of an item in an amount greater than $150,000 may not be divided into several purchases or contracts for lesser amounts in order to qualify for this exception." Finally, every 5 years (starting in 2025), DOD "may adjust the dollar threshold" "based on changes in the Consumer Price Index."

Section 818, Repeal of Program for Qualified Apprentices for Military Construction Projects—Section 865 of the FY 2020 NDAA required each offeror for a DOD contract for a military construction project to "certify … that, if awarded such a contract, the offeror will" "(1) establish a goal that not less than 20 percent of the total workforce employed in the performance of such a contract are qualified apprentices"; and "(2) make a good faith effort to meet or exceed such goal." This section repeals Section 865, and its implementing statute, 10 U.S.C. § 2870.

Section 819, Modifications to Mitigating Risks Related to Foreign Ownership, Control, or Influence of DOD Contractors and Subcontractors—This section builds upon FY 2020 NDAA § 847, which directed DOD to "improve its processes and procedures for the assessment and mitigation of risks related to foreign ownership, control, or influence (FOCI) of [DOD] contractors and subcontractors." Section 847 is reviewed in detail in Schaengold, Prusock and Muenzfeld, Feature Comment, "The FY 2020 National Defense Authorization Act's Substantial Impact On Federal Procurement Law—Part II," 62 GC ¶ 14, at 8-9.

With respect to Section 819, the Joint Explanatory Statement "direct[s]" DOD "to establish contract administration procedures for appropriately responding to changes in contractor or subcontractor beneficial ownership status." More specifically, the "process and procedures for the assessment and mitigation of risk relating to" FOCI is amended by this section to add a "requirement for" DOD "to require reports and conduct examinations on a periodic basis of covered contractors or subcontractors in order to assess compliance with the requirements of" FY 2020 NDAA § 847. Covered contractors or subcontractors include "a company that is an existing or prospective [DOD] contractor or subcontractor … on a contract or subcontract" "in excess of $5,000,000."

This section also adds a requirement for "[p]rocedures for appropriately responding to changes in covered contractor or subcontractor beneficial ownership status based on changes in disclosures of their beneficial ownership and whether they are under FOCI," which is tied to the new requirement (discussed in the paragraph immediately above) for "reports and examinations."

Not later than March 1, 2021, DOD "shall provide to the congressional defense committees a plan and schedule for implementation of" FY 2020 NDAA § 847, as amended by this section, including: (A) "a timeline for issuance of regulations, development of training for appropriate officials, and development of systems for reporting of beneficial ownership and FOCI by covered contractors or subcontractors;" and (B) "the designation of officials and organizations responsible for such implementation." Finally, not later than July 1, 2021, DOD "shall revise relevant directives, guidance, training, and policies, including revising the [DFARS], to fully implement

the requirements of such section 847." Currently, the FAR and DFARS do not specifically reference "FOCI" or "foreign ownership, control, or influence".

Section 831, Contract Authority for Development and Demonstration of Initial or Additional Prototype Units—This section enhances DOD's authority under 10 U.S.C. § 2302e to streamline the process for moving certain technologies into production by permitting activities to be performed under the same contract as the technology matures. Prior to the FY 2021 NDAA's enactment, 10 U.S.C. § 2302e provided that a science and technology contract could include a line item or contract option for "the provision of advanced component development, prototype, or initial production of technology developed under the contract." Section 831 expands this provision by replacing "provision of advanced component development, prototype" with "development and demonstration." It also adds a new subsection to 10 U.S.C. § 2302e which directs the Secretary of Defense to "establish procedures to collect and analyze information on the use and benefits of the authority under this section and related impacts on performance, affordability, and capability delivery." The Joint Explanatory Statement states that the conferees believe this provision will "help to implement the National Defense Strategy as a reform effort to enable greater performance and affordability, capability delivery at the speed of relevance, and rapid, iterative approaches from development to fielding," and "direct[s] the Secretary of Defense to report by March 31, 2021, on the use of the authority under 10 U.S.C. 2302e."

Section 832, Extension of pilot program for streamlined awards for innovative technology programs—Section 832 provides for a three-year extension of a pilot program established by FY 2016 NDAA § 873, which provided an exemption from the Truthful Cost or Pricing Data statute's (commonly known as TINA) requirements to provide cost or pricing data for DOD contracts, subcontracts and modifications valued at less than $7.5 million and "awarded to a small business or nontraditional defense contractor pursuant to" "(1) a technical, merit-based selection procedure, such as a broad agency announcement, or (2) the Small Business Innovation Research Program." This exemption does not apply if the agency head "determines that submission of cost and pricing data should be required based on past performance of the specific small business or nontraditional defense contractor, or based on analysis of other information specific to the award." FY 2016 NDAA § 873 also exempts such contracts, but not subcontracts or modifications, from certain Defense Contract Audit Agency record examination and audit requirements (under 10 U.S.C. § 2313(b)) "unless the head of the agency determines that auditing of records should be required based on past performance of the specific small business or nontraditional defense contractor, or based on analysis of other information specific to the award."

The Joint Explanatory Statement indicates that the extension of this pilot program "has the potential to accelerate the awards of Small Business Innovation Research contracts and other contracts to innovative non-traditional defense contractors." Additionally, the Joint Explanatory Statement "direct[s] the Secretary of Defense to provide a briefing no later than March 1, 2021 on the use and benefits of this authority and a recommendation on the extension or permanent authorization of the pilot program." It further states that "[t]he conferees expect the briefing to include a description of the mechanisms by which [DOD] is collecting data and analyzing the benefits of the authority and the best practices for its use. The conferees note that unless [DOD] collects data and demonstrates the value of authorities that enable streamlined acquisition practices, the conferees are unlikely to extend such authorities in the future."

Section 833, Listing of Other Transaction Authority Consortia- Within 90 days of the FY 2021 NDAA's enactment, the Secretary of Defense must publish and maintain on beta.SAM.gov (or successor system), "a list of the consortia used by the Secretary to announce" other transactions opportunities or otherwise make such opportunities available.

The Joint Explanatory Statement notes that there is limited information available regarding DOD's use of consortia for other transaction awards. Accordingly, in addition to making a list of consortia used by DOD for other transactions opportunities, the Joint Explanatory Statement directs GAO to submit a report to the congressional defense committees by Dec. 1, 2021 on the "nature and extent" of DOD's use of consortia for other transactions. The report must "assess the number and dollar value of other transaction awards through consortia, the benefits and challenges of using consortia, how [DOD's] use of consortia compares to other Federal agencies with other transaction authority, and any other matters the Comptroller General determines to be appropriate."

Section 835, Balancing Security and Innovation in Software Development and Acquisition—This section requires the Under Secretary of Defense for Acquisition and Sustainment, in coordination with the DOD CIO, to "develop requirements for appropriate software security criteria to be included in solicitations for commercial and developmental solutions" "including a delineation of what processes were or will be used for a secure software development life cycle." These requirements "include—(1) establishment and enforcement of secure coding practices; (2) management of supply chain risks and third-party software sources and component risks; (3) security of the software development environment; (4) secure deployment, configuration, and installation processes; and (5) an associated vulnerability management plan and identification of tools that will be applied to achieve an appropriate level of security." The Under Secretary, in coordination with the DOD CIO, must develop procedures for the security review of code and "other procedures necessary to fully implement the pilot program required under" FY 2018 NDAA § 875. The requirements and procedures developed under this section must be in coordination with DOD efforts "to develop new cybersecurity and program protection policies and guidance that are focused on cybersecurity in the context of acquisition and program management and on safeguarding information."

According to the Joint Explanatory Statement, this provision is intended to ensure the security of software and address "the risks posed by reliance—whether known or inadvertent—on code produced by or within adversary nations." The Joint Explanatory Statement expresses concern about DOD's "non-compliance" with FY 2018 NDAA § 875, which required DOD to initiate the DOD "open software pilot program established by the Office of Management and Budget Memorandum M-16-21 titled 'Federal Source Code Policy: Achieving Efficiency, Transparency, and Innovation through Reusable and Open Source Software' and dated August 8, 2016." The Joint Explanatory Statement states that DOD has cited security concerns as a reason for not complying with FY 2018 NDAA § 875. However, the Joint Explanatory Statement observes that DOD has "no comprehensive Department-wide process for conducting security reviews of code or parts of code and that the National Security Agency, which should have similar security concerns to [DOD] as a whole, has such a process for the purpose of maximizing appropriate public release" of code. The Joint Explanatory Statement: (i) "encourage[s DOD] to pursue the appropriate balance of innovation and security in developing, acquiring, and

maintaining software"; and (ii) directs the under secretary and the DOD CIO "to develop a roadmap with milestones that will enable [DOD] to require and effectively manage the submission by contractors of a software bill of materials."

The Joint Explanatory Statement further directs the Under Secretary "to update [DOD's] policy defining a Software Pathway to more clearly demonstrate compliance with" FY 2020 NDAA § 800, which required the Secretary of Defense to "establish" at least two and "as many pathways as the secretary deems appropriate" "to provide for the efficient and effective acquisition, development, integration, and timely delivery of secure software." In particular, the Joint Explanatory Statement directs DOD to more clearly demonstrate compliance with FY 2020 NDAA § 800's requirements to "[e]nsure applicability to defense business systems" and to "[p]rovide for delivery of capability to end-users not later than 1 year after funds are obligated noting that other Government-wide policy and best practices call for updates no less frequently than once every 6 months."

Section 836, Digital Modernization of Analytical and Decision-Support Processes for Managing and Overseeing DOD Acquisition Programs—This section directs the Secretary of Defense to develop and implement direct digital modernization of analytical and decision-support processes for managing and overseeing DOD acquisition programs. The Joint Explanatory Statement notes that several GAO "reports have cited the need for improved data management processes surrounding [DOD's] overall management framework." It further explains "that while most relevant data is Government-owned and authorized for Department-wide use, there is no enterprise mechanism facilitating the discovery, access, correlation or integration, and use of acquisition-related data across organizational boundaries; instead, each functional organization has established and locally optimized its own data and analytic processes for its own needs, and in many cases even these local practices are highly manual and inefficient." The Joint Explanatory Statement indicates that DOD has not implemented certain GAO recommendations "pertaining to the roles, responsibilities, and activities to execute portfolio management of acquisition programs" because it partially disagreed with the recommendations. It further states that sections 830 and 836 directed DOD "to update its decision-support processes to facilitate holistic, comprehensive management and oversight of acquisition programs under the new adaptive acquisition framework." While the Joint Explanatory Statement indicates that "the conferees are encouraged by [DOD's] expansion of its Advanced Analytics (ADVANA) system to provide analytics and decision support for certain of [DOD's] processes, the conferees are concerned that, notwithstanding ADVANA, [DOD] is squandering opportunities to reshape management and oversight, and expect [DOD] to take seriously the direction under this section."

Section 837, Safeguarding Defense-Sensitive United States Intellectual Property, Technology, and Other Data and Information—Section 837 requires the Secretary of Defense, "in coordination with relevant departments and agencies" to "identify policies and procedures protecting defense-sensitive United States intellectual property, technology, and other data and information, including hardware and software, from acquisition by the government of China;" and to develop additional policies and procedures if the Secretary determines that existing policies and procedures are insufficient. In developing the policies, the Secretary must: (1) "Establish and maintain a list of critical national security technology that may require certain restrictions on current or former" DOD "employees, contractors, or subcontractors (at any tier)" "that contribute

to such technology"; (2) "Review the existing authorities under which" DOD employees "may be subject to post-employment restrictions with foreign governments and with organizations subject to foreign ownership, control, or influence"; and (3) "Identify additional measures that may be necessary to enhance" the existing authorities. This section further requires the Secretary to "consider mechanisms to restrict current or former employees of [DOD] contractors or subcontractors (at any tier) … that contribute significantly and materially to" a critical national security technology "from working directly for companies wholly owned by the government of China, or for companies that have been determined by a cognizant Federal agency to be under the ownership, control, or influence of the government of China."

Section 838, Comptroller General Report on Implementation of Software Acquisition Reforms—By March 15, 2021 GAO must brief the congressional defense committees on the Secretary of Defense's implementation of "required acquisition reforms with respect to acquiring software for weapon systems, business systems, and other activities that are part of the defense acquisition system." GAO will also be required to submit to the congressional defense committees "one or more reports based on such briefing," to be jointly determined by the committees and GAO. The briefing and any subsequent reports must include an assessment of the extent to which the Secretary has implemented the recommendations set forth in (A) the final report of the Defense Innovation Board submitted to the congressional defense committees under FY 2018 NDAA § 872; (B) "the final report of the Defense Science Board Task Force on the Design and Acquisition of Software for Defense Systems described in" FY 2019 NDAA § 868; and (C) "other relevant studies on" DOD "software research, development, and acquisition activities."

The report must also include an assessment of the extent to which DOD has "carried out software acquisition activities, including programs required under" 10 U.S.C. § 2322a ("Requirement for consideration of certain matters during acquisition of noncommercial computer software") and FY 2018 NDAA § 875 ("Pilot Program for Open Source Software"). Additionally, the report must assess whether DOD has used the authority provided under FY 2020 NDAA § 800 ("Authority for Continuous Integration and Delivery of Software Applications and Upgrades to Embedded Systems"). The report must further assess whether DOD has carried out software acquisition pilot programs, including pilot programs required under FY 2018 NDAA §§ 873 ("Pilot Program to Use Agile or Iterative Development Methods to Tailor Major Software-Intensive Warfighting Systems and Defense Business Systems") and 874 ("Software Development Pilot Program Using Agile Best Practices"). Each report submitted by GAO must include an evaluation of the extent to which DOD software acquisition policy, guidance, and practices reflect implementation of relevant recommendations from software studies and pilot programs and directives from the congressional defense committees.

Section 839, Comptroller General Report on Intellectual Property Acquisition and Licensing—By Oct. 1, 2021, GAO must submit to the congressional defense committees a report evaluating the implementation of DOD Instruction 5010.44 relating to Intellectual Property Acquisition and Licensing (or successor instruction). The report must assess: (1) the extent to which DOD "is fulfilling the core principles established in such Instruction"; (2) the extent to which the Defense Acquisition University and the elements of DOD identified in 10 U.S.C. § 111(b)(1)-(10) are carrying out the requirements of such Instruction; (3) the secretary of defense's progress "in establishing a cadre of intellectual property experts" (as required under 10 U.S.C. §

2322(b)), "including the extent to which members of such cadre are executing their roles and responsibilities"; (4) the secretary of defense's performance in assessing and demonstrating the implementation of such Instruction, including the effectiveness of the cadre of intellectual property experts; (5) the effectiveness of the cadre of intellectual property experts in providing resources on the acquisition and licensing of intellectual property; (6) the "effect implementation of such Instruction has had on particular acquisitions"; (7) the extent to which feedback from appropriate stakeholders was incorporated, including large and small businesses, traditional and nontraditional defense contractors, and maintenance and repair organizations; and (8) any other matters GAO determines to be appropriate.

Section 846, Improving Implementation of Policy Pertaining to the National Technology and Industrial Base—This section requires that in developing a national security strategy for the national technology and industrial base pursuant to 10 U.S.C. § 2501, carrying out the program for analysis of the national technology and industrial base required by 10 U.S.C. § 2503, and preparing selected assessments of the capability of the national technology and industrial base pursuant to 10 U.S.C. § 2505, the Secretary of Defense, in consultation with the Under Secretaries for Acquisition and Sustainment and Research and Engineering, must "assess the research and development, manufacturing, and production capabilities of the national technology and industrial base … and other allies and partner countries." 10 U.S.C. § 2500(1) defines "national technology and industrial base" as "the persons and organizations that are engaged in research, development, production, integration, services, or information technology activities conducted within the United States, the [U.K.], Australia, and Canada." Additionally, this section requires that the "map of the industrial base described in" 10 U.S.C. § 2504 must "highlight specific technologies, companies, laboratories, and factories of, or located in, the national technology and industrial base of potential value to current and future [DOD] plans and programs."

Section 846 also amends 10 U.S.C. § 2440 by adding a new subsection (b) that requires the Secretary to "develop and promulgate acquisition policy and guidance to the Service Acquisition Executives, the heads of the appropriate Defense Agencies and [DOD] Field Activities, and relevant program managers" that is "germane to the use of the research and development, manufacturing, and production capabilities" under 10 U.S.C. chapter 148 ("National Defense Technology and Industrial Base, Defense Reinvestment, and Defense Conversion") "and the technologies, companies, laboratories, and factories in specific [DOD] research and development, international cooperative research, procurement, and sustainment activities."

This section also requires the Secretary, in consultation with other relevant agency heads, to establish a process for considering whether to include additional member countries in the national technology and industrial base. The process must consider the national security, foreign policy, and economic costs and benefits of including additional member countries.

The Joint Explanatory Statement expresses concern that the National Technology and Industrial Base Council (comprised of the Secretaries of Defense, Energy, Commerce, and Labor, and other officials appointed by the President, *see* 10 U.S.C. § 2502(b)) "is not convening regularly, particularly at the level of principals." The Joint Explanatory Statement "strongly encourage[s] persistent periodic meetings" and directs the Secretary of Defense "to report on the

frequency and level at which the Council convenes, as part of" otherwise required quarterly briefings.

Section 848, Supply of Strategic and Critical Materials for DOD—Under section 848, the Secretary of Defense must, "to the maximum extent practicable, acquire strategic and critical materials required to meet … defense, industrial, and essential civilian needs" from sources in the following order of preference: (i) "sources located within the United States"; (ii) "sources located within the national technology and industrial base," as defined by 10 U.S.C. § 2500(1), *see supra* regarding section 846; and (iii) "other sources as appropriate." Section 848 does not define "strategic and critical materials." However, section 851 states that "strategic and critical materials" are materials, including rare earth elements, that are necessary to meet national defense and national security requirements, including requirements relating to supply chain resiliency, and for the economic security of the United States." See also section 849, which requires an assessment of "[s]trategic and critical materials, including rare earth materials."

Section 848 requires the Secretary of Defense to pursue three goals. The first is "ensuring access to secure sources of supply for strategic and critical materials that will—(i) fully meet the demands of the domestic defense industrial base; (ii) eliminate the dependence … on potentially vulnerable sources of supply for strategic and critical materials; and (iii) ensure [DOD] is not reliant upon potentially vulnerable sources of supply for the processing or manufacturing of any strategic and critical materials" that the secretary deems "essential to national security." The second goal is to "[p]rovide incentives for the defense industrial base to develop robust processing and manufacturing capabilities in the United States to refine strategic and critical materials" for DOD. The third goal is to "[m]aintain secure sources of supply for strategic and critical materials required to maintain current military requirements in the event that international supply chains are disrupted." The Secretary may use various methods to achieve these goals, including "development of guidance in consultation with appropriate officials of the Department of State, the Joint Staff, and the Secretaries of the military departments," "continued and expanded use of existing programs, such as the National Defense Stockpile," authority under the Defense Production Act, or other methods that the Secretary deems appropriate.

Section 849, Analyses of Certain Activities for Action to Address Sourcing and Industrial Capacity—This section requires the Secretary of Defense, acting through the Under Secretary for Acquisition and Sustainment and other appropriate officials, to perform analyses of certain items to determine and develop appropriate actions with respect to sourcing or investment to increase domestic industrial capacity and explore ways to encourage critical technology industries to move production to the U.S. for national security purposes, consistent with the policies, programs, and activities required under chapter 148 of title 10 ("National Defense Technology and Industrial Base, Defense Reinvestment, and Defense Conversion"), the Buy American Act, and the Defense Production Act. Analyses must be performed with respect to the following items: (1) "Goods and services covered under existing restrictions, where a waiver, exception, or domestic non-availability determination has been applied"; (2) Microelectronics; (3) Pharmaceuticals, including active ingredients; (4) "Medical devices"; (5) "Therapeutics"; (6) "Vaccines"; (7) "Diagnostic medical equipment and consumables, including reagents and swabs"; (8) "Ventilators and related products"; (9) "Personal protective equipment"; (10) "Strategic and critical materials, including rare earth materials"; (11) "Natural or synthetic graphite"; (12) "Coal-

based rayon carbon fibers"; and (13) "Aluminum and aluminum alloys." The analyses must "consider national security, economic, and treaty implications, as well as impacts on current and potential suppliers of goods and services." According to the Joint Explanatory Statement, the impetus for this provision is continuing concern "about overreliance on non-domestic sources of supply for certain technologies and products that are critical to the national defense," and the "significant supply chain vulnerability" that "has further been demonstrated by the recent COVID–19 pandemic."

Actions that DOD may take based on its analyses include: (A) restricting procurement to U.S. suppliers, national technology and industrial base suppliers, suppliers in other allied nations, or other suppliers (subject to "appropriate waivers for cost, emergency requirements, and non-availability of suppliers"); (B) "increasing investment through use of research and development or procurement activities and acquisition authorities to" "expand production capacity," "diversify sources of supply," or "promote alternative approaches for addressing military requirements;" or (C) "prohibiting procurement from selected sources or nations." DOD may also take a combination of the above actions, or take no action where appropriate.

By January 15, 2022, the Secretary must submit to the congressional defense committees "a summary of the findings of the analyses undertaken for each item" listed above, "relevant recommendations resulting from the analyses," and "descriptions of specific activities undertaken as a result" thereof, "including schedule and resources allocated for any planned actions." Additionally, the secretary must include the analyses, recommendations, and descriptions of activities in each of nine different types of reports and guidance documents "submitted during the 2022 calendar year."

Section 850, Implementation of Recommendations for Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency—Within 540 days of the FY 2021 NDAA's enactment, the Under Secretary of Defense for Acquisition and Sustainment must submit to the Secretary of Defense recommendations regarding U.S. industrial policies "to fully implement the recommendations of the report of the Interagency Task Force (established by [DOD] pursuant to section 2 of Executive Order 13806 (82 Fed. Reg. 34597; July 21, 2017)) titled 'Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States: Report to President Donald J. Trump by the Interagency Task Force in Fulfillment of Executive Order 13806' (September 2018)" (the "Interagency Task Force Report"). The additional recommendations must "consist of specific executive actions, programmatic changes, regulatory changes, and legislative proposals and changes, as appropriate." The recommendations must "aim to expand the defense industrial base to leverage contributions and capabilities of allies and partner countries," "identify and preserve the viability of domestic and trusted international suppliers," and "strengthen the domestic industrial base, especially in areas subject to the risk archetypes" (e.g., sole source, foreign dependency) identified in the Interagency Task Force report. In developing the recommendations, the Under Secretary may consult with the Defense Science Board, the Defense Innovation Board, the Defense Business Board, entities representing industry interests, and entities representing labor interests. The Secretary must submit the Under Secretary's recommendations (and any supplemental views or recommendations) to the President within 30 days of receiving the recommendations. Within 30 days of submitting the recommendations to the President, the

Secretary must "submit to and brief the congressional defense committees on such recommendations."

Section 862, Transfer of Verification of Small Business Concerns Owned and Controlled by Veterans or Service-Disabled Veterans to the Small Business Administration—This section transfers the responsibility for verifying Veteran Owned Small Business ("VOSB") status and Service Disabled Veteran Owned Small Business ("SDVOSB") status from the Department of Veterans Affairs ("VA") to the Small Business Administration ("SBA"). Section 1832 of the FY 2017 NDAA required SBA and VA to standardize their definitions for VOSBs and SDVOSBs by directing VA to use SBA's regulations to determine ownership and control of VOSBs and SDVOSBs. FY 2021 NDAA § 862 completes the consolidation of the two programs by eliminating the VA's separate certification program through the Center for Verification and Evaluation and requiring all SDVOSBs and VOSBs, working with VA or any other Federal agency, to be certified (and periodically recertified) through the SBA. The VA will be responsible for verifying an individual's status as a veteran or service-disabled veteran, but the SBA will be responsible for verifying the ownership and control of business concerns and their small business status. SBA will also take over responsibility for maintaining a database of eligible SDVOSBs and VOSBs. The transfer will become effective two years after the FY 2021 NDAA's enactment.

The SBA Administrator must "establish procedures relating to" "the filing, investigation, and disposition" of challenges to a VOSB's or SDVOSB's status "including a challenge, filed by an interested party, relating to the veracity of a certification made or information provided to [SBA] …," and verification of the accuracy of any certification made or information provided to SBA by a VOSB or SDVOSB.

This section also phases out self-certification of SDVOSB status. Once the transfer to SBA is complete (i.e., two years after the FY 2021 NDAA's enactment), SDVOSBs pursuing contracts with agencies other than the VA will have a one-year grace period to apply to SBA for certification. SDVOSBs pursuing non-VA work that apply within the one-year grace period may continue to rely on self-certification until SBA decides whether to grant their application. SDVOSBs pursuing non-VA work that fail to submit an application within the grace period will "lose, at the end of such 1-year period, any self-certification of the concern as a" SDVOSB. SBA must notify self-certified SDVOSBs of these requirements.

Section 863, Employment Size Standard Requirements for Small Business Concerns—On Dec. 17, 2018, President Trump signed into law the Small Business Runway Extension Act of 2018, Pub. L. No. 115-324. The Runway Extension Act changed the formula for determining whether a firm meets revenue-based small business size standards by lengthening the period for calculating average annual receipts from three years to five years. However, the Act did not impact size standards for manufacturing contracts, which are generally based on employee count. Section 863 amends the Small Business Act to extend the period of measurement for employee-based size standards for manufacturers from 12 to 24 months. This means a company would be small if the average of its employees for each pay period during the prior 24 months is below the applicable size standard, which should help businesses continue to qualify as small despite temporary increases in the number of employees. However, it could also cause a business

that would have qualified as small if the number of employees were measured over a 12 month period to be ineligible if the business had a very high average number of employees in the first 12 months of the two years used for measurement.

Section 868, Past Performance Ratings of Certain Small Business Concerns—This section amends Section 15(e) of the Small Business Act (15 U.S.C. § 644(e)) to add a new subsection entitled "Past Performance Ratings of Joint Ventures for Small Business Concerns," which allows small businesses bidding on prime contracts that have previously participated in a joint venture, but have no relevant past performance information of their own, to use the past performance of the joint venture for evaluation purposes. If the small business elects to use the joint venture's past performance, it is required to: "(i) to identify to the contracting officer the joint venture of which the small business concern was a member; and (ii) to inform the contracting officer what duties and responsibilities the small business concern carried out as part of the joint venture." The contracting officer is required "to consider the past performance of the joint venture when evaluating the past performance of the small business concern, giving due consideration to the information" regarding the duties and responsibilities that the small business carried out under the joint venture.

This section also amends Section 8(d)(17) of the Small Business Act (15 U.S.C. § 637(d)(17)) to provide that prime contractors that have performed contracts that require small business subcontracting plans to provide first tier small business subcontractors with a past performance record of their performance on the contract upon request from the first tier small business subcontractor. "If a small business concern elects to use such record of past performance, a contracting officer shall consider such record of past performance when evaluating an offer for a prime contract made by such small business concern."

While the statute provides no guidance on how prime contractor past performance reviews will work in practice, the SBA Administrator is required to issue rules carrying out the section within 120 days after the FY 2021 NDAA's enactment.

Section 869, Extension of Participation in 8(a) Program—Section 869 permits any 8(a) certified business that was in the 8(a) Program "on or before September 9, 2020" to extend its participation in the program by an additional year. The extension appears to be a response to the difficulties experienced by many small businesses due to COVID-19. The SBA Administrator must issue regulations implementing this section within 15 days of the FY 2021 NDAA's enactment, without regard to the Administrative Procedure Act's rulemaking requirements.

This one-year extension of participation in the 8(a) Program and the emergency rulemaking requirement also was included in substantively identical language in section 330 of the Consolidated Appropriations Act, 2021, which President Trump signed into law on December 27, 2020. Therefore, based on the December 27, 2020 passage of the Consolidated Appropriations Act, 2021, the rulemaking implementing the extension is required no later than January 11, 2021.

Section 883, Prohibition on Awarding of DOD Contracts to Contractors that Require Nondisclosure Agreements Relating to Waste, Fraud, or Abuse—Pursuant to this section, DOD "may not award a contract for the procurement of goods or services to a contractor unless the contractor represents that": (1) "it does not require its employees to sign internal confidentiality

agreements or statements that would prohibit or otherwise restrict such employees from lawfully reporting waste, fraud, or abuse related to the performance of a [DOD] contract to" investigative or law enforcement representatives of DOD "authorized to receive such information;" and (2) "it will inform its employees" of these "limitations on confidentiality agreements and other statements." This section further provides that a DOD contracting officer "may rely on the representation of a contractor" as to these requirements in awarding a contract unless the contracting officer "has reason to question the accuracy of the representation."

The Joint Explanatory Statement directs the Secretary of Defense "to provide a briefing to the" House and Senate Armed Services Committees "not later than 180 days after" the NDAA's enactment, detailing DOD's "plan and mechanism for ensuring contractor compliance with the statutory prohibition against reprisal against an employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor for disclosing information that the employee reasonably believes is evidence of gross mismanagement of a DOD contract or grant; an abuse of authority; a violation of law, rule, or mismanagement related to a [DOD] contract or grant; or a substantial and specific danger to public health or safety."

Certain FAR clauses already exist to address some of these issues. *See* FAR 52.203-18, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements-Representation (Jan 2017);" FAR 52.203-19, "Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (Jan 2017)." Relying on "section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts," FAR 3.909-1(a) prohibits the "Government" "from using fiscal year 2015 and subsequent fiscal year funds for a contract with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse." FAR 3.909-2 further provides that "to be eligible for contract award, an offeror must represent that it will not require its employees or subcontractors to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the Inspector General)." Significantly, "[a]ny offeror that does not so represent is ineligible for award of a contract." Finally, the contracting officer "may rely on an offeror's representation" on this subject "unless the contracting officer has reason to question the representation."

Section 885, Disclosure of Beneficial Owners in Database for Federal Agency Contract and Grant Officers—This section amends 41 U.S.C. § 2313(d) to require identification and disclosure in the Federal Awardee Performance and Integrity Information System (FAPIIS) database of the "beneficial owners" of a "corporation" that is bidding on or awarded a federal contract or grant. *See* FAR 9.104-6 (applying FAPIIS to contract awards above the simplified acquisition threshold). The term "corporation" is interpreted broadly to mean "any corporation, company, limited liability company, limited partnership, business trust, business association, or other similar entity." The term "beneficial owner" is "determined in a manner that is not less stringent than the manner set forth in" 17 C.F.R. § 240.13d–3, "Determination of beneficial owner" (as in effect on Dec. 20, 2019), which provides "a beneficial owner of a security includes

any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares: (1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or, (2) Investment power which includes the power to dispose, or to direct the disposition of, such security."

Section 886, Repeal of Pilot Program on Payment of Costs for Denied GAO Protests—In a controversial and also ambiguous provision, section 827 of the FY 2018 NDAA required the Secretary of Defense to establish a "pilot program to determine the effectiveness of requiring contractors to reimburse" DOD "for costs incurred in processing covered protests." A covered protest was defined as a "bid protest that was—(1) denied in an opinion issued by [GAO]; (2) filed by a party with revenues in excess of $250,000,000" during the previous year and in 2017 dollars; and "(3) filed on or after October 1, 2019 and on or before September 30, 2022." The pilot program was scheduled to begin in December 2020. Section 886, however, repeals FY 2018 § 827 and its pilot program.

The Joint Explanatory Statement noted "that the pilot program is unlikely to result in improvements to the bid protest process given the small number of bid protests captured by the pilot criteria and lack of cost data." It further "direct[ed] the Secretary of Defense to undertake a study through the Center for Acquisition Innovation Research, to examine elements of" FY 2017 § 885 "for which the RAND National Defense Research Institute was unable to obtain full and complete data during its analysis." This study shall address:

> (1) The rate at which protestors are awarded the contract that was the subject of the bid protest; (2) A description of the time it takes [DOD] to implement corrective actions after a ruling or decision, the percentage of those corrective actions that are subsequently protested, and the outcomes of those protests; (3) Analysis of the time spent at each phase of the procurement process attempting to prevent a protest, addressing a protest, or taking corrective action in response to a protest, including the efficacy of any actions attempted to prevent the occurrence of a protest; and (4) Analysis of the number and disposition of protests filed within [DOD].

The Joint Explanatory Statement "emphasize[d] the potential benefits of a robust agency-level bid protest process." As a result, it directed the study to

> evaluate the following factors for agency-level bid protests: prevalence, timeliness, outcomes, availability, and reliability of data on protest activities; consistency of protest processes among the military Services; and any other challenges that affect the expediency of such protest processes. In doing so, the study should review existing law, the [FAR], and agency policies and procedures and solicit input from across the DOD and industry stakeholders. The conferees note that an academic study recently examined the agency-level bid protest process at various federal agencies, including [DOD], and reported on that study to the Administrative Conference of the United States. [*See* C. Yukins, Stepping Stones to Reform: Making Agency Level Bid Protests Effective for Agencies and Bidders by Building on Best Practices from Across the Federal Government, *https://www.acus.gov/sites/default/files/documents/ACUS%20Agency%20Bid%20Protest%20Report%20-%20FINAL.pdf*.] The conferees direct [DOD] to consider

these recommendations among those it might make to improve the expediency, timeliness, transparency, and consistency of agency-level bid protests.

Finally, not later than September 1, 2021, the Secretary of Defense "shall provide the congressional defense committees with a report detailing the results and recommendations of the study, together with such comments as the Secretary determines appropriate."

Section 888, Revision to Requirement to Use Firm Fixed-Price Contracts for Foreign Military Sales—This section repeals section 830 of the FY 2017 NDAA (22 U.S.C. § 2762 note). Section 830 had required the Secretary of Defense to prescribe regulations to require the use of firm-fixed price contracts for foreign military sales.

Section 890, Identification of Certain Contracts Relating to Construction or Maintenance of a Border Wall—This section requires the Secretary of Defense to identify on the Federal Procurement Data System (or any successor system) any contracts (including any task order contracts and contract modifications) entered into "relating to the construction or maintenance of a barrier along the international border between the United States and Mexico that have an estimated value greater than or equal to $7,000,000."

Section 891, Waivers of Certain Conditions for Progress Payments Under Certain Contracts During the COVID–19 National Emergency—In certain circumstances with respect to an undefinitized contractual action (UCA), this section authorizes the Secretary of Defense to waive 10 U.S.C. § 2307(e)(2), which restrict progress payments to not "more than 80 percent of the work accomplished under a defense contract so long as the Secretary has not made the contractual terms, specifications, and price definite." Specifically, the Secretary may waive this restriction if the Secretary determines that it "is necessary due to the national emergency for [COVID-19] and": "(1) a contractor performing the contract for which a UCA is entered into has not already received increased progress payments from the Secretary of Defense on contractual actions other than UCAs; or (2) a contractor performing the contract for which a UCA is entered into, and that has received increased progress payments from the Secretary of Defense on contractual actions other than UCAs, can demonstrate that the contractor has promptly provided the amount of the increase to any subcontractors (at any tier), small business concerns …, or suppliers of the contractor."

If a UCA has "not been definitized for a period of 180 days beginning on the date on which such UCA was entered into, the Secretary of Defense may only use the waiver authority … if the Secretary (or a designee at a level not below the head of a contracting activity) provides a certification to the congressional defense committees that such UCA will be definitized within 60 days after the date on which the waiver is issued." For each use of the waiver authority, the secretary of defense is required to "submit to the congressional defense committees an estimate of the amounts to be provided to subcontractors (at any tier), small business concerns, and suppliers, including an identification of the specific entities receiving an amount from an increased progress payment described under" this section.

In the Joint Explanatory Statement, the conferees acknowledged their support for DOD's "actions to increase cash flow to the defense industry during the ongoing pandemic, which included increasing the rate of progress payments from 80 percent up to 95 percent for certain companies, and guidance on the use of advance payments in certain cases, among others." *See*

also 2020-O0010, Rev. 1, Class Deviation—Progress Payment Rates (Apr. 16, 2020), available at https://www.acq.osd.mil/dpap/policy/policyvault/USA000801-20-DPC.pdf.

The Joint Explanatory Statement also expresses concern about whether and how companies that received funds from the increased progress payment rates are increasing the rate for progress payments for their subcontractors and suppliers, who "are in many cases small and medium sized firms that were potentially more at risk during this period." Accordingly, the Joint Explanatory Statement directs GAO to assess DOD's actions "to provide and monitor the use of advance payments and the increased rate of progress payments." It further requires GAO to brief the congressional defense committees by Sept. 30, 2021 on certain, specified matters regarding advanced payments or increased rates of progress payments and to provide a final report to the congressional defense committees at a mutually agreed upon date following the briefing.

Section 901, Repeal of the Office of the Chief Management Officer (CMO)—This section repeals 10 U.S.C. § 132a, which established the office of the CMO, effective on the date of the FY 2021 NDAA's enactment. The position of CMO was established by section 910 of the FY 2018 NDAA (P.L. 115–91). Prior to the FY 2018 NDAA, 10 U.S.C. § 132a had already established the position of the deputy CMO, who reported to the Deputy Secretary of Defense. With the repeal of 10 U.S.C. § 132a, there will be no statutory requirement for either a CMO or a Deputy CMO.

Section 1603, Requirements to Buy Certain Satellite Components from the National Technology and Industrial Base—This section amends 10 U.S.C. § 2534, concerning miscellaneous sourcing requirements, to require that a star tracker used in a satellite weighing more than 400 pounds and whose primary purpose is national security or intelligence, shall be purchased from national technology and industrial base sources for all programs receiving Milestone A approval on or after Oct. 1, 2021. The Joint Explanatory Statement directs the Secretary of Defense to submit to the congressional defense committees by July 1, 2021 "a report on implementation of this provision, including whether and how the waiver authority will be used. In addition, the report shall include an analysis of potential impacts on domestic suppliers of star trackers[.]" The report must also include an analysis of the impact the provision has on domestic suppliers, the mission capability of the satellites, and the impact on relations with U.S. allies and partners.

Section 1623, Efficient Use of Sensitive Compartmented Information Facilities—According to the Joint Explanatory Statement, **t**his section requires the Director of National Intelligence, in consultation with the Secretary of Defense, "to issue revised guidance" within 180 days of the FY 2021 NDAA's enactment, "authorizing and directing Government agencies and their appropriately cleared contractors to process, store, use, and discuss sensitive compartmented information at facilities previously approved to handle such information, without need for further approval by agency or by site." The revised guidance is to apply to controlled access programs of the intelligence community and special access programs of the DOD.

NDAA Title XVII, Cyberspace-Related Matters—This title contains 52 provisions that focus on a variety of cybersecurity issues effecting government operations and the defense industrial base. Some of these provisions came from the Cyberspace Solarium Commission, established by FY 2019 NDAA § 1652, and which, according to the FY 2019 NDAA's Joint

Explanatory Statement, was tasked "with developing consensus on a strategic approach to defending the Nation in cyberspace against cyber attacks of significant consequences."

Section 1712, Modification of Requirements for the Strategic Cybersecurity Program and Evaluation of Cyber Vulnerabilities of Major Weapon Systems—This section amends § 1647 of the FY 2016 NDAA (as amended by § 1633 of the FY 2020 NDAA) by requiring DOD to establish requirements "for each major weapon system, and the priority critical infrastructure essential to the proper functioning of major weapon systems in broader mission areas," to be assessed for cyber vulnerabilities. It also amends § 1640 of the FY 2018 NDAA to require, by Aug. 1, 2021, establishment of a Strategic Cybersecurity Program to improve systems, critical infrastructure, kill chains, and processes related to nuclear deterrence and strike, certain long-range conventional strike missions, offensive cyber operations, and homeland missile defense.

Section 1714, Cyberspace Solarium Commission— This section extends the life of the commission by amending section 1652 of the FY 2019 NDAA to change its termination date from "the end of the 120-day period beginning on the date on which the final report" was submitted to Congress (i.e., July 2020), to "20 months after" the report was submitted to Congress (i.e., Nov. 2021). The commission was extended for various purposes, including "collecting and assessing comments and feed-back from the Executive Branch, academia, and the public on the analysis and recommendations contained in the Commission's report" and "providing an annual update regarding any such revisions, amendments, or new recommendations."

Section 1716, Subpoena Authority for the Cybersecurity and Infrastructure Security Agency (CISA)—This section adds to CISA's national cybersecurity and communications integration center the responsibility for "detecting, identifying, and receiving information for a cybersecurity purpose about security vulnerabilities relating to critical infrastructure in information systems and devices." The section also grants the Center's Director the authority to "issue a subpoena for the production of information necessary to identify and notify such entity at risk, in order to carry out" the added responsibilities. The authority to issue a subpoena is limited to "a device or system commonly used to perform industrial, commercial, scientific, or governmental functions or processes that relate to critical infrastructure." Personal devices, home computers, and residential or consumer devices are not covered by the subpoena authority.

Section 1736, Defense Industrial Base Cybersecurity Sensor Architecture Plan—This section requires DOD, within 180 days of the FY 2021 NDAA's enactment, to assess "the feasibility, suitability, and resourcing required to establish a Defense Industrial Base Cybersecurity Sensor Architecture Program, responsible for deploying commercial-off-the-shelf solutions to remotely monitor the public-facing internet attack surface of the defense industrial base."

Section 1737, Assessment of Defense Industrial Base Participation in a Threat Information Sharing Program—This section requires DOD, within 270 days of the FY 2021 NDAA's enactment, to assess the "feasibility and suitability of, and requirements for, the establishment of a defense industrial base threat information sharing program, including cybersecurity incident reporting requirements applicable to the defense industrial base" that extend beyond current incident reporting requirements and establish "a central DOD clearinghouse for mandatory cybersecurity incident reporting." The assessment is required to include recommendations on "incentives for defense industrial base entities to participate in the threat

information sharing program" and prohibiting procurements from entities that do not comply with the requirements of the program. The Secretary of Defense must consult with and solicit recommendations from representative industry stakeholders across the defense industrial base in conducting the assessment. If the assessment determines that such a program is necessary, the section requires DOD to establish the program and to promulgate regulations within 120 days of completion of the assessment.

Section 1738, Assistance for Small Manufacturers in the Defense Industrial Base Supply Chain on Matters Relating to Cybersecurity—According to the Joint Explanatory Statement, this section allows DOD, subject to availability of appropriated funds, to "provide funds to Manufacturing Extension Partnership Centers for the provision of cybersecurity services to small manufacturers." Such assistance can only be provided if DOD publishes on grants.gov (or a successor website) "criteria for selecting recipients" for the program, and funds can only be used for specific purposes, including compliance with DFARS cybersecurity requirements and the Cybersecurity Maturity Model Certification framework. The authority to provide funds under this section terminates five years from its enactment.

Section 1739, Assessment of a Defense Industrial Base Cybersecurity Threat Hunting Program—This section requires DOD, within 270 days of the FY 2021 NDAA's enactment, to assess the "feasibility, suitability, definition of, and resourcing required to establish a defense industrial base cybersecurity threat hunting program to actively identify cybersecurity threats and vulnerabilities within the defense industrial base," including networks containing controlled unclassified information. The assessment is also required to examine existing defense industrial base threat hunting policies and programs, "suitability of a continuous threat hunting program, as a supplement to the cyber-hygiene requirements of the Cybersecurity Maturity Model Certification," mechanisms for DOD to share malicious information on the evolving threat landscape, incentivizing private sector participation, and prohibiting procurements from entities that do not comply with the requirements of the program. The section requires DOD to consult with industry during the assessment. If the assessment determines that such a program is necessary, the section requires DOD to establish it and to promulgate regulations within 120 days of completion of the assessment.

Section 1742, DOD Cyber Hygiene and Cybersecurity Maturity Model Certification Framework—This section requires that, by March 1, 2021, DOD "assess each Department component against" the CMMC framework and "submit to the congressional defense committees a report that identifies each such component's CMMC level and implementation of the cybersecurity practices and capabilities required in each of the levels of the CMMC framework." This section further requires DOD to provide a briefing to the congressional defense committees on how it plans to implement a variety of specified cybersecurity recommendations. Finally, this section states that of the funds authorized to be appropriated for FY 2021 to implement CMMC, "not more than 60 percent of such funds may be obligated or expended until the Under Secretary of Defense for Acquisition and Sustainment delivers to the congressional defense committees a plan for implementation of the CMMC via requirements in procurement contracts" to include "a timeline for pilot activities, a description of the planned relationship between DOD and the auditing or accrediting bodies, a funding and activity profile for the Defense Industrial Base Cybersecurity Assessment Center, and a description of efforts to ensure that the Service

Acquisition Executives and service program managers are equipped to implement the CMMC requirements and facilitate contractors' meeting relevant requirements."

Title XVIII, Transfer and Reorganization of Defense Acquisition Statutes (FY 2021 NDAA §§ 1801-85)—Title XVIII transfers, reorganizes (including making conforming changes), redesignates, and consolidates defense acquisition statutes into Part V of subtitle A, *Acquisition*, of Title 10 of the U.S. Code. Title XVIII also creates a more rational organization of acquisition statutes, loosely following the structure set forth in the FAR. The reorganization is intended to have no policy impact and is not intended to change the meaning of the impacted statutes.

The genesis of Title XVIII stems from a Section 809 Panel recommendation to consolidate and reorganize all DOD-related acquisition statutes into a single Part V. *See* Section 809 Panel Report, Vol. 2 (June 2019), at EX-4, 171-177, available at https://section809panel.org/wp-content/uploads/2019/01/Sec809Panel_Vol2-Report_JUN2018_012319.pdf. Congress implemented a version of this recommendation when it established a new Part V in the FY 2019 NDAA, in section 801—Framework for New Part V of Subtitle A, and sections 806-809—Redesignation of Numerous DOD Statutes. The FY 2019 NDAA did not transfer any statutes into the newly created Part V of Title 10. Title XVIII of the FY 2021 NDAA transfers existing Title 10 acquisition statutes into the Part V shell.

Not later than March 15, 2021, the Secretary of Defense is required to submit to the congressional defense committees a report evaluating Title XVIII and its amendments to include: (1) "Specific recommendations for modifications to the legislative text of [Title XVIII] and [its] amendments …, along with a list of conforming amendments to law required by" Title XVIII and its amendments; (2) "[A]n assessment of the effect" of Title XVIII and its amendments "on related [DOD] activities, guidance, and interagency coordination"; and (3) "An implementation plan for updating the regulations and guidance relating to" Title XVIII and its amendments.

Title XVIII has an effective date of Jan. 1, 2022. According to the Joint Explanatory Statement "the intention of the 1-year enactment delay is to provide time for [DOD] and for other stakeholders to identify adjustments and specific and actionable recommendations to address them. Further, the conferees note the implementation delay is intended to provide [DOD] a reasonable amount of time to make necessary administrative updates to implement the transfer and reorganization."

By Jan. 1, 2023, the Secretary of Defense is required to amend the DFARS and other relevant authorities to reflect the changes made by Title XVIII. From Jan. 1, 2022 until the DFARS is updated (but no later than Jan. 1, 2023), DOD "shall apply the law as in effect on December 31, 2021, with respect to contracts entered into during" that period.

Title XVIII (including its amendments) "is intended only to reorganize title 10, United States Code, and may not be construed to alter": (1) "the effect of a provision of title 10" "including any authority or requirement therein;" (2) a DOD or agency "interpretation with respect to title 10;" or (3) "a judicial interpretation with respect to title 10." Finally, any "regulation, order, or other administrative action in effect under a provision of title 10" "redesignated by [Title VIII] continues in effect under the provision as so redesignated."

REGULATORY UPDATE

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I. SMALL BUSINESS-RELATED RULES

- **FAR Council: Consolidation and Substantial Bundling**. The FAR Council, consisting of the Office of Federal Procurement Policy ("OFPP"), Department of Defense ("DoD"), National Aeronautics and Space Administration ("NASA"), and General Services Administration ("GSA"), proposed to amend the FAR to implement Section 863 of the FY16 National Defense Authorization Act ("NDAA"), which requires contracting entities to provide public notices of determinations for substantial bundling and consolidation of contract requirements. The notice must be published by the head of the contracting agency on a public website and any solicitation for a procurement related to the acquisition plan may not be published earlier than seven days after such notice is published. The agency must also provide a justification for the determination. This justification must address the specific benefits anticipated, any alternative approaches, impediments to participation by small business concerns as prime contractors, and actions designed to maximize participation of small business concerns as subcontractors. 85 Fed. Reg. 23299 (Apr. 27, 2020); FAR Parts 5 and 7.

- **FAR Council: Good Faith in Small Business Subcontracting Plans.** The FAR Council proposed to amend the FAR to implement Section 1821 of the FY17 NDAA and associated SBA regulations (see 84 Fed. Reg. 65647, Nov. 19, 2019) that provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. The proposed FAR changes are intended to reflect the related SBA rules. 85 Fed. Reg. 34155 (June 3, 2020); FAR Parts 19, 42, and 52.

- **FAR Council: Policy on Joint Ventures**. The FAR Council proposed amending the FAR to implement statutory and regulatory changes regarding joint ventures made by the Small Business Administration ("SBA") in its final rule published in the Federal Register on July 25, 2016. The rule would amend the FAR to require contracting officers to consider the past performance of the joint venture as well

[1] *Thank you to Nicole E. Giles, an associate at Wiley, for her assistance in preparing these materials as well as the associated PowerPoint slides.

as the past performance of each party to the joint venture, if the joint venture does not have demonstrated past performance. For consistency and fairness, the FAR Council proposed applying this requirement to joint ventures regardless of size status. The rule would also clarify that 8(a) joint ventures are not certified into the 8(a) program and that 8(a) joint venture agreements need only be approved by the SBA prior to contract award. These changes align the FAR to SBA's regulations which provide that a joint venture comprised of entities in an SBA-approved mentor-protégé relationship qualify as a small business or under a socioeconomic program for which the protégé qualifies. These changes also provide updated requirements for other joint ventures to qualify as a small business or under a socioeconomic program. 85 Fed. Reg. 34561 (June 5, 2020); *see also* 81 Fed. Reg. 48558 (July 25, 2016); FAR Parts 2, 9, 15, 19, and 52.

- **Dep't of Defense: Prompt Payments of Small Business Contractors.** The DoD issued a final rule to amend the Defense Federal Acquisition Regulation Supplement ("DFARS") to implement Section 852 of the FY19 NDAA. Section 852 provided accelerated payments to small business contractors and subcontractors, including by accelerating payments to their prime contractors, regardless of size. Specifically, Section 852 required DoD to establish an accelerated payment date for small business contractors, with a goal of 15 days after receipt of a proper invoice, unless a specific payment date was established by contract. For prime contractors, Section 852 required DoD to establish an accelerated payment date, again with a goal of 15 days after receipt of a proper invoice, if (i) a specific payment date was not established by contract, and (ii) the contractor agreed to make accelerated payments to the small business subcontractor without any further consideration or fees from the subcontractor. 85 Fed. Reg. 19692 (Apr. 8, 2020); 84 Fed. Reg. 25225 (May 31, 2019); DFARS Parts 212, 232, and 252.

- **Dep't of Defense: Justification and Approval Threshold for 8(a) Contracts.** The DoD issued a final rule amending the DFARS to implement Section 823 of the FY20 NDAA. Section 823 increased the threshold for requiring a justification and approval to award a sole source contract to a participant in the 8(a) program to actions exceeding $100 million. The previous threshold was $22 million. Section 823 also designated the head of the procuring activity as the approval authority. The revised threshold was added in a new DFARS § 206.303–1, Requirements, and the new approval authority was added in DFARS 206.304, Approval of the Justification. 85 Fed. Reg. 34528 (June 5, 2020); DFARS Parts 206 and 219.

- **Small Business Administration: Business Loan Program Temporary Changes; Paycheck Protection Program-Requirements**. On April 2, 2020, the SBA posted its first interim final rule announcing the implementation of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act" or the Act). The Act temporarily added a new program, titled the "Paycheck Protection Program," ("PPP") to the SBA's Loan Program under Section 7(a) of the Small Business Act. The Act also provided for forgiveness of up to the full principal amount of qualifying loans guaranteed under the PPP. The PPP was intended to provide economic relief to small businesses nationwide adversely impacted by the COVID–19 pandemic.

  Over the subsequent months, the SBA issued guidance on the PPP through multiple interim rules, including a rule released with the Treasury Department. On April 15, 2020, the SBA issued an interim final rule regarding the application of certain affiliate rules applicable to SBA's implementation of sections 1102 and 1106 of the CARES Act. This included four tests for affiliation based on control: 1) affiliation based on ownership; 2) affiliation arising under stock options, convertible securities, and agreements to merge; 3) affiliation based on management; and 4) affiliation based on identity of interest. Affiliation means that the headcounts of the two entities are aggregated for purposes of the PPP small business threshold. On April 28, 2020, SBA published an interim final rule supplementing its previous regulations and guidance on several issues benefiting lenders intended to accelerate closing and disbursing PPP loans. On May 4 and 8, 2020, the SBA issued yet more interim rules to provide additional guidance regarding disbursements, the criteria for non-bank lender participation in the PPP and limiting the amount of PPP loans that any single corporate group may receive. The SBA continued to implement the PPP and provide further guidance through interim rules throughout the following months, such as additional guidance on eligible payroll costs. In late October 2020, SBA issued an information collection that included, among other things, a PPP Loan Necessity Questionnaire, which has been challenged in federal court, regarding borrower's "good-faith certification that economic uncertainty made [the borrower's] loan request necessary to support [its] ongoing operations."

  85 Fed. Reg. 67809 (Oct. 26, 2020); 85 Fed. Reg. 39066 (June 30, 2020); 85 Fed. Reg. 38301 (June 26, 2020); 85 Fed. Reg. 33004-10 (June 1, 2020); 85 Fed. Reg. 31357 (May 26, 2020); 85 Fed. Reg. 30835 (May 21, 2020); 85 Fed. Reg. 29842-47 (May 19, 2020); 85 Fed. Reg. 27287 (May 8, 2020); 85 Fed. Reg. 26321-24 (May 4, 2020); 85 Fed. Reg. 23450 (Apr. 28, 2020); 85 Fed. Reg. 20817 (Apr. 15, 2020).

- **Small Business Administration: Regulatory Reform Initiative: Small Disadvantaged Businesses.** The SBA issued a final rule removing sixteen regulations that were no longer necessary because they are either redundant or obsolete. This rule was in response to Executive Order 13777, Enforcing the Regulatory Reform Agenda, under which SBA initiated a review of its regulations to determine which might be revised or eliminated. SBA's final rule removed 13 C.F.R. § 124.516—which states that the procuring activity decides all contract disputes arising between an 8(a) Participant and a procuring activity contracting officer after the award of an 8(a) contract—as redundant. This rule also removed 13 C.F.R. § 124.1002 through 124.1016, which pertain to the no-longer active Small Disadvantaged Business ("SDB") Program. However, SBA retained and re-designated the SDB definition currently set forth in 13 C.F.R. § 124.1002 as guidance for federal subcontracting programs. 85 Fed. Reg. 27290 (May 8, 2020).

- **Small Business Administration: Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business Certification**. The SBA issued a final rule amending its regulations at 13 C.F.R. Parts 124, 125, 126, and 127 to implement a statutory requirement to certify Women-Owned Small Business Concerns ("WOSB") and Economically Disadvantaged Women-Owned Small Business Concerns ("EDWOSB") participating in the WOSB Contract Program. The certification requirement applies only to those businesses wishing to compete for set-aside or sole source contracts under the Program, and to those seeking to be awarded multiple award contracts for pools reserved for WOSBs and EDWOSBs.

  In this rule, SBA implements the statutory mandate to provide certification, to accept certification from certain identified government entities, and to allow certification by SBA-approved third-party certifiers. As part of the changes necessary to implement a certification program, this final rule amended SBA's regulations on continuing eligibility by requiring annual representations and program examinations every three years. After the effective date, July 15, 2020, WOSBs and EDWOSBs that are not certified would not be eligible for contracts under the WOSB Contract Program. Other women-owned small business concerns that do not participate in the Program may continue to self-certify their status, receive contract awards outside the Program, and count toward an agency's goal for awards to WOSBs. For such purposes, contracting officers may accept self-certifications without requiring the company to verify any documentation. For consistency across programs, this final rule also increased the $250,000 initial 8(a) program threshold for determining whether an individual qualifies as economically disadvantaged to match the $750,000 EDWOSB and 8(a) continued

eligibility thresholds. 85 Fed. Reg. 27650 (May 11, 2020); 84 Fed. Reg. 21256 (May 14, 2019).

- **Small Business Administration—Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments**. The SBA issued a final rule consolidating the 8(a) and All-Small Mentor-Protégé Programs. The rule eliminated the 8(a) version of the program, including its unique requirements and separate review process for 8(a) mentor-protégé agreements. It formalized SBA's practice of allowing a mentor-protégé relationship cancelled within the first 18 months not to count towards the firm's two-mentor lifetime limit provided that the protégé does not abuse the privilege and clarified the rules to quality as a protégé when the concern is small under its secondary North American Industry Classification System ("NAICS") code but other than small under its primary NAICS code.

  In addition, the final rule also amended several other small business contracting rules, including those related to the 8(a) program, recertification, joint ventures, and affiliation. For example, the rule eliminated the requirement for all 8(a) joint ventures to obtain approval from SBA prior to award. It also eliminated the "3-in-2" rule for all joint ventures that limited the joint venture to receiving three contracts in two years, and instead set a blanket rule providing only that all joint ventures have a two-year time limit starting from the date of its first contract award.

  Thes rule adds clarifying language regarding size or socioeconomic status protests in connection with orders issued against a multiple award contract ("MAC"). Prior rules authorized a size protest where an order is issued against a MAC if the contracting officer requested a recertification in connection with that order. This rule authorizes a size protest relating to an order issued against a MAC where the order is set aside for small business and the underlying MAC was awarded on an unrestricted basis, except for orders or Blanket Purchase Agreements issued under any FSS contract. The rule also authorizes a socioeconomic protest relating to set-aside orders based on a different socioeconomic status from the underlying set-aside MAC. 85 Fed. Reg. 66146 (Oct. 16, 2020).

- **General Services Admin.: Class Deviation on Payments to Small Business Contractors**. On April 10, 2020, the GSA issued a class deviation to allow GSA to provide accelerated payments to small business contractors, with a goal of 15 days after receipt of a proper invoice. As with DoD above, GSA accelerated its implementation of Section 873 of the FY20 NDAA, which expands the FAR's provisions for accelerated payments to prime contractors subcontracting with small business concerns to also include prime contractors that are small

businesses. The class deviation also prohibits prime contractors from charging consideration or a fee to subcontractors when issuing accelerated payments. GSA Civilian Agency Acquisition Council (CAAC) Letter 2020-02 (Apr. 10, 2020).

II. FOREIGN SUPPLIES AND COMPANIES

- **FAR Council: Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment.** The FAR Council issued an interim rule to amend the FAR to implement Section 889(a)(1)(B) of the FY19 NDAA. Section 889 covers certain telecommunications equipment and services produced or provided by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of those entities) and certain video surveillance products or telecommunications equipment services produced or provided by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of those entities). Section 889(a)(1)(B) prohibits executive agencies from entering into, extending, or renewing a contract with an entity that uses any equipment, system, or service that uses such "covered" telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, on or after August 13, 2020, unless an exception applies or a waiver is granted. The statute is not limited to contracting with entities that use end-products produced by those companies; it also covers the use of any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. The Interim Rule confirms that its prohibition on "use" of covered equipment or services applies "regardless of whether that usage is in performance of work under a Federal contract."

  The FAR Council issued a second interim rule amending the FAR to implement Section 889(a)(1)(B) by requiring an offeror to represent annually, after conducting a reasonable inquiry, whether it uses covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services. The rule is intended to reduce burden on contractors by allowing an offeror that represents "does not" in a new annual representation at FAR 52.204–26(c)(2), Covered Telecommunications Equipment or Services—Representation, or in paragraph (v)(2)(ii) of FAR 52.212– 3, Offeror Representations and Certifications-Commercial Items, to skip the offer-by-offer representation within the provision at FAR 52.204–24(d)(2), Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment. These annual representations are made in entities' System for Award

Management registrations at SAM.gov. 85 Fed. Reg. 42665 (July 14, 2020); 85 Fed. Reg. 53126 (Aug. 27, 2020); FAR Parts 1, 4, 14, 39, and 52.

- **Bureau of Industry and Security: Addition of Huawei Non-U.S. Affiliates to the Entity List, the Removal of Temporary General License, and Amendments to General Prohibition Three; Clarification of Entity List Requirements for Listed Entities When Acting as a Party to the Transaction Under the Export Administration Regulations.** The Bureau of Industry and Security ("BIS") issued two final rules ramping up the export restrictions on Huawei, its affiliates, and other prohibited parties. Collectively, the rules (1) added 38 additional Huawei companies to BIS's Entity List; (2) removed the Temporary General License that formerly allowed certain transactions with Huawei and replaced it with a more limited, permanent authorization for security research and disclosure; (3) tightened the loopholes in BIS's special foreign direct product rule applicable to Huawei and its affiliates designated on BIS's Entity List in an effort to cut off Huawei's chip supply; and (4) amended the Entity List generally to make clear that the prohibitions apply when such entities are acting as a purchaser, intermediate consignee, ultimate consignee, or end-user. 85 Fed. Reg. 51335 (Aug. 20, 2020); 85 Fed. Reg. 51596 (Aug. 20, 2020); 15 C.F.R. Parts 736, 744, and 762.

III. CYBERSECURITY AND NATIONAL SECURITY

- **Dep't of Defense: Assessing Contractor Implementation of Cybersecurity Requirements**. DoD issued an interim rule to implement two new frameworks for verifying contractor compliance with cybersecurity requirements: (1) NIST SP 800-171 DOD Assessment Methodology and (2) the Cybersecurity Maturity Model Certification ("CMMC"). This rule combined two items: (1) a new assessment framework, which will have an immediate impact on contractors, and (2) additional information about the CMMC framework, which DoD will roll out over the next five years. Under the NIST SP 800-171 DOD Assessment Methodology, contractors are required to complete a self-assessment of their compliance with NIST SP 800-171 before they can receive DoD contracts. The interim rule defines three levels of assessment: To be eligible for award, a contractor must complete the first level (a Basic Assessment). The other two levels (Medium and High) are assessments that DoD may conduct itself during the course of performance.

  Building upon the Assessment Methodology, the CMMC framework adds a comprehensive and scalable certification element to verify the implementation of processes and practices associated with the achievement of a particular

cybersecurity maturity level. 85 Fed. Reg. 61505 (Sept. 29, 2020); DFARS Parts 204, 212, 217, 252.

- **Dep't of Defense: NISPOM and Access to Classified Information.** DoD issued a final rule that added the National Industrial Security Program Operating Manual (NISPOM) to the Code of Federal Regulations. The rule also made changes to industry access to classified information. 85 Fed. Reg. 83300 (Dec. 21, 2020); 32 CFR Part 117.

IV. MISCELLANEOUS FAR RULEMAKINGS

- **Construction Contract Administration.** The FAR Council proposed to amend the FAR to implement Section 855 of the FY 2019 NDAA. Section 855 requires federal agencies to provide a notice, along with solicitations for construction contracts anticipated to be awarded to small businesses, to prospective offerors including information about the agency's policies or practices in complying with FAR requirements related to the timely definitization of requests for equitable adjustment on construction contracts. The notice must include data regarding the time it took the agency to definitize requests for equitable adjustment on construction contracts for the three-year period preceding the issuance of the notice. 85 Fed. Reg. 18181 (Apr. 1, 2020); FAR Parts 12, 19, 36, 43, and 52.

- **Revocation of Executive Order on Nondisplacement of Qualified Workers.** The FAR Council issued a final rule removing FAR subpart 22.12, the FAR subpart on nondisplacement of qualified workers. The subpart had been codified in response to an Obama Administration Executive Order, Executive Order 13495, dated January 30, 2009, Nondisplacement of Qualified Workers under Service Contracts. The Trump Administration revoked EO 13495 in Executive Order 13897, Improving Federal Contractor Operations by Revoking Executive Order 13495, dated November 5, 2019. 85 Fed. Reg. 27087 (May 6, 2020); FAR Parts 1, 2, 22, and 52.

- **Evaluation Factors for Multiple-Award Contracts**. The FAR Council issued a final rule amending the FAR to implement Section 825 of the FY17 NDAA. Section 825 modified the requirement to consider price or cost as an evaluation factor for the award of certain multiple-award task-order contracts ("MATOCs" or "MACs") issued by DoD, NASA, and the Coast Guard. Section 825 provides that, at the Government's discretion, solicitations for MACs that will be awarded for the same or similar services and intended for every qualifying offeror do not require price or cost as an evaluation factor. When price or cost is not evaluated during contract award, the contracting officer shall consider price or cost as a factor for the award of each order under the contract. Consistent with statute, the

rule specifies that, when using the authority of Section 825, the solicitation must be for the ‘‘same or similar services.’’ This language aligns with FAR 16.504(c)(1)(i), which requires contracting officers, to the maximum extent practicable, to give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources. The final rule excludes solicitations for MACs that provide for sole-source orders to SBA's 8(a) program participants. 85 Fed. Reg. 40068 (July 2, 2020); FAR Parts 2, 4, 13, 15, and 16.

- **Modifications to Cost or Pricing Data Requirements.** The FAR Council issued a final rule amending the FAR to implement Section 811 of the FY18 NDAA to increase the threshold for requiring certified cost or pricing data from $750,000 to $2 million for contracts entered after June 30, 2018. The threshold for application of the Cost Accounting Standards is required by 41 U.S.C. 1502(b)(1)(B) to be the same threshold as the one for requesting certified cost or pricing data and was also increased. 85 Fed. Reg. 40071 (July 2, 2020); FAR Parts 14, 15, 30, and 52.

- **Definition of "Commercial Item."** The FAR Council proposed amending the FAR to change the definition of "commercial item" at FAR 2.101, so that the regulatory definition conforms to statutory changes in Section 836 of the FY19 NDAA. Section 836 separated the definition of "commercial item" at 41 U.S.C. 103 into the definitions of "commercial product" and "commercial service," at 41 U.S.C. 103 and 103a. The separation of "commercial item" from one definition into two separate definitions was created at the recommendation of the Section 809 panel. 85 Fed. Reg. 65610 (Oct. 15, 2020); FAR Parts 1-16, 18-19, 22-23, 25-32, 37-39, 42, 44, 46-47, 49, 52, and 53.

V. MISCELLANEOUS DEP'T OF DEFENSE RULEMAKINGS

- **Expediting Contract Closeout.** The DoD proposed to amend the DFARS to provide for expedited contract closeout through a waiver by the contractor and the Government of entitlement to any residual dollar amounts that are due to either party at the time of final contract closeout. The clause is to be used when the contracting officer intends to expedite the contract closeout process by having the contractor and the Government waive entitlement to any residual dollar amounts up to $1,000 at the time of final contract closeout, saving administrative costs for both parties. 85 Fed. Reg. 19719 (Apr. 8, 2020); ; DFARS Parts 204, 232, and 252.

- **Market Research and Consideration of Value for the Determination of Price**. The DoD issued a final rule amending the DFARS to implement several sections of the FY17 NDAA to address how contracting officers may require the offeror to

submit relevant information to support market research for price analysis and allow an offeror to submit information relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item. The rule directs contracting officers to use the "relevant" pricing information submitted under DFARS 234.7002(d) when acquiring major weapon systems as commercial items. The final rule removed discussion of value analysis at DFARS 234.7002(d)(5) and the associated definition of "value analysis" at DFARS 234.7001 from the proposed rule. 85 Fed. Reg. 34530 (June 5, 2020); 84 Fed. Reg. 50812 (Sept. 26, 2019); DFARS Parts 210, 212, 215, and 234.

- **Notification of Anticipated Contract Termination or Reduction.** The DoD issued a final rule amending the DFARS to modify the text of DFARS clause 252.249-7002, Notification of Anticipated Contract Termination or Reduction, to: (1) Update legal and DFARS citations in the clause; (2) remove text that is no longer necessary to implement 10 U.S.C. 2501 note; and (3) conform the clause text to the current DFARS convention for referencing dollar thresholds in a clause. The rule is pursuant to action taken by the DoD Regulatory Reform Task Force. 85 Fed. Reg. 34535 (June 5, 2020); 84 Fed. Reg. 58366 (Oct. 31, 2019); DFARS Parts 249 and 252.

- **Commercial Item Determinations.** The DoD proposed to amend the DFARS to implement Section 848 of the FY18 NDAA. Section 848 modified 10 U.S.C. § 2380(b) which provides that a contract for a FAR Part 12 commercial item serves as a prior commercial item determination unless a relevant official determines in writing that the prior determination was improper or that the item should not be acquired using FAR Part 12 procedures. This rule also proposes to remove the procedures at DFARS subpart 212.70, established pursuant to Section 856 of the FY16 NDAA, which apply to procurements over $1 million previously procured under a prime contract using FAR Part 12 procedures. The authority for these procedures expired on November 25, 2020. 85 Fed. Reg. 74636 (Nov. 23, 2020); DFARS Part 212.

VI. MISCELLANEOUS DEPARTMENT OF LABOR RULEMAKINGS

- **Dep't of Labor: Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors (TRICARE Providers).** The Department of Labor's ("DOL") Office of Federal Contract Compliance Programs ("OFCCP") issued a final rule amending its regulations at 41 C.F.R. Parts 60-1, 60-300, and 60-741 pertaining to its authority over TRICARE health care providers. The final rule amended the regulations to confirm that OFCCP lacked jurisdiction over health care providers whose sole government contract is based on the providers' participation in TRICARE, ending uncertainty over the issue. In the alternative, the final rule establishes a national interest

exemption from Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 for health care providers with agreements to furnish medical services and supplies to individuals participating in TRICARE. The final rule is intended to increase access to care for uniformed service members and veterans and provide certainty for health care providers who serve TRICARE beneficiaries. 85 Fed. Reg. 39834 (July 2, 2020).

- **Dep't of Labor: Religious Exemption for Government Contractors**. DOL's OFCCP issued a final rule expanding the religious exemption from anti-discrimination laws for federal contractors. The rule makes the religious exemption applicable to any employer that holds itself out to the public as "carrying out a religious purpose." OFCCP states that the exemption is intended to encourage "full and equal participation" of religious groups as federal contractors and to clarify the kinds of organizations that will qualify for the exemption and the obligations that apply to those organizations. 85 Fed. Reg. 79324 (Dec. 9, 2020); 41 C.F.R. Part 60-1.

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Part III

Small Business Administration

13 CFR Parts 121, 124, 125, et al.
Small Business Mentor Protégé Programs; Final Rule

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 124, 125, 126, 127, and 134

RIN 3245–AG24

Small Business Mentor Protégé Programs

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) is amending its regulations to implement provisions of the Small Business Jobs Act of 2010, and the National Defense Authorization Act for Fiscal Year 2013. Based on authorities provided in these two statutes, the rule establishes a Government-wide mentor-protégé program for all small business concerns, consistent with SBA's mentor-protégé program for Participants in SBA's 8(a) Business Development (BD) program. The rule also makes minor changes to the mentor-protégé provisions for the 8(a) BD program in order to make the mentor-protégé rules for each of the programs as consistent as possible. The rule also amends the current joint venture provisions to clarify the conditions for creating and operating joint venture partnerships, including the effect of such partnerships on any mentor-protégé relationships. In addition, the rule makes several additional changes to current size, 8(a) Office of Hearings and Appeals and HUBZone regulations, concerning among other things, ownership and control, changes in primary industry, standards of review and interested party status for some appeals. Finally, SBA notes that the title of this rule has been changed.

DATES: This rule is effective August 24, 2016.

FOR FURTHER INFORMATION CONTACT: Brenda Fernandez, U.S. Small Business Administration, Office of Government Contracting, 409 3rd Street SW., 8th Floor, Washington, DC 20416; (202) 205–7337; *brenda.fernandez@sba.gov.*

SUPPLEMENTARY INFORMATION: This rule initially appeared in the Regulatory Agenda of Fall 2010 with the title ''Small Business Jobs Act: Small Business Mentor-Protégé Programs.'' SBA carried this rule title until the Regulatory Agenda of Spring 2013 when the reference to the Jobs Act was taken out, and the title changed to ''Small Business Mentor-Protégé Programs.'' This change reflected the statutory amendments in section 1641 of NDAA 2013. However, when the proposed rule was published, the title had been changed to: ''Small Business Mentor Protégé Program; Small Business Size Regulations; Government Contracting Programs; 8(a) Business Development/ Small Disadvantaged Business Status Determinations; HUBZone Program; Women-Owned Small Business Federal Contract Program; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals.'' In drafting this final rule, SBA concluded that the simpler current title (''Small Business Mentor Protégé Programs'') is easier for the public to understand and would be consistent with the title that has been publicly reported in the Regulatory Agenda since 2013.

I. Background

On September 27, 2010, the President signed into law the Small Business Jobs Act of 2010 (Jobs Act), Public Law 111–240, 124 Stat. 2504, which was designed to protect the interests of small businesses and increase opportunities in the Federal marketplace. With the enactment of the Jobs Act, Congress recognized that mentor-protégé programs serve an important business development function for small business and authorized SBA to establish separate mentor-protégé programs for the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) Program, the HUBZone Program, and the Women-Owned Small Business (WOSB) Program, each modeled on SBA's existing mentor-protégé program available to 8(a) Business Development (BD Program Participants. See section 1347(b)(3) of the Jobs Act.

On January 2, 2013, the President signed into law the National Defense Authorization Act for Fiscal Year 2013 (NDAA 2013), Public Law 112–239, 126 Stat. 1632. Section 1641 of the NDAA 2013 authorized SBA to establish a mentor-protégé program for all small business concerns. This section further provides that a small business mentor-protégé program must be identical to the 8(a) BD mentor-protégé program, except that SBA may modify the program to the extent necessary, given the types of small business concerns to be included as protégés. Section 1641 also provides that a Federal department or agency could not carry out its own agency specific mentor-protégé program for small businesses unless the head of the department or agency submitted a plan for such a program to SBA and received the SBA Administrator's approval of the plan. Finally, section 1641 requires the head of each Federal department or agency carrying out an agency-specific mentor-protégé program to report annually to SBA the participants in its mentor-protégé program, the assistance provided to small businesses through the program, and the progress of protégé firms to compete for Federal prime contracts and subcontracts.

On February 5, 2015, SBA published in the **Federal Register** a comprehensive proposal to implement a new Government-wide mentor-protégé program for all small businesses. 80 FR 6618. SBA decided to implement one new small business mentor-protégé program instead of four new mentor-protégé programs (one for small businesses, one for SDVO small businesses, one for WOSBs and one for HUBZone small businesses) since the other three types of small businesses (SDVO, HUBZone and women-owned) would be necessarily included within any mentor-protégé program targeting all small business concerns. SBA did not eliminate the 8(a) BD mentor-protégé program. Thus, the intent was to propose two separate mentor-protégé programs, one for 8(a) BD Participants and one for all small businesses (including 8(a) Participants if they choose to create a small business mentor-protégé relationship instead of a mentor-protégé relationship under the 8(a) BD program). The small business mentor-protégé program was drafted to be as similar to the 8(a) mentor-protégé program as possible.

The proposed rule called for a 60-day comment period, with comments required to be made to SBA by April 6, 2015. The overriding comment SBA received in the first few weeks after the publication was to extend the comment period. In response to these comments, SBA published a notice in the **Federal Register** on April 7, 2015, extending the comment period an additional 30 days to May 6, 2015. 80 FR 18556. In addition to providing a 90-day comment period, SBA also conducted a series of tribal consultations pursuant to Executive Order 13175, Tribal Consultations. SBA conducted three in-person tribal consultations (in Washington, DC on February 26, 2015, in Tulsa, Oklahoma on April 21, 2015, and in Anchorage, Alaska on April 23, 2015) and two telephonic tribal consultations (one on April 7, 2015, and a Hawaii/Native Hawaiian Organization specific one on April 8, 2015).

Currently, the mentor-protégé program available to firms participating in the 8(a) BD program is used as a business development tool in which mentors provide diverse types of business assistance to eligible 8(a) BD protégés. This assistance may include, among other things, technical and/or management assistance; financial

assistance in the form of equity investments and/or loans; subcontracts; and/or assistance in performing Federal prime contracts through joint venture arrangements. The explicit purpose of the 8(a) BD mentor-protégé relationship is to enhance the capabilities of protégés and to improve their ability to successfully compete for both government and commercial contracts. Similarly, the mentor-protégé program for all small business concerns is designed to require approved mentors to provide assistance to protégé firms in order to enhance the capabilities of protégés, to assist protégés with meeting their business goals, and to improve the ability of protégés to compete for contracts.

One commenter opposed expanding the mentor-protégé program beyond the 8(a) BD program. The commenter believed that it has not been established that the 8(a) mentor-protégé program is bestowing a substantial benefit on 8(a) Participants, and, therefore, SBA should perform additional research and analysis before expanding the program. SBA disagrees. In the current 8(a) BD mentor-protégé program, in order for any mentor-protégé relationship to continue, the 8(a) protégé firm must demonstrate annually what benefits it has derived from the mentor-protégé relationship. Where the benefits provided to the protégé firm are minimal or where it appears that the relationship has been used primarily to permit a non–8(a) (oftentimes, large) mentor to benefit from contracts with its approved protégé, through one or more joint ventures, that it would otherwise not be eligible for, SBA will terminate the mentor-protégé relationship. The proposed rule also provided that SBA may terminate the mentor-protégé agreement (MPA) where it determines that the parties are not complying with any term or condition of the MPA. This rule requires similar reporting of benefits for non–8(a) protégé firms and similar consequences where the benefits provided to the protégé firm do not adequately justify the mentor-protégé relationship. One commenter requested clarification as to when and how SBA would cancel a MPA. SBA's analysis as to whether a protégé firm is adequately benefitting from the relationship or whether non-compliance with one or more specific terms or conditions of the MPA should warrant termination of the agreement is a fact specific determination to be made based on the totality of the circumstances. SBA would not terminate a particular MPA where there are de minimus or inadvertent violations of the agreement. In addition, it is not SBA's intent to terminate a particular MPA without considering the views of the protégé firm. However, the mere fact that a protégé wants the mentor-protégé relationship to continue will not be dispositive if SBA believes that termination is justified.

Conversely, SBA received a significant number of comments supporting a small business mentor-protégé program. These commenters believed that a small business mentor-protégé program would enable firms that are not in the 8(a) BD program to receive critical business development assistance that would otherwise not be available to them. Many of these commenters expressed support for the opportunity to gain meaningful expertise that would help them to independently perform more complex and higher value contracts in the future.

This rule implements a mentor-protégé program similar to the 8(a) BD mentor-protégé program for all small business concerns. The rule adds this program to a new § 125.9 of SBA's regulations. SBA proposed one program for all small businesses because SBA believed it would be easier for the small business and acquisition communities to use and understand. However, SBA specifically requested comments as to whether SBA should finalize one small business mentor-protégé program, as proposed, or, rather, five separate mentor-protégé programs for the various small business entities. Most commenters supported having one new small business mentor-protégé program instead of four new mentor-protégé programs (one for SDVO small businesses, one for HUBZone small businesses, one for WOSBs, and one for small businesses not falling into one of the other categories). They agreed that it would be less confusing to deal with one new program, rather than four new programs, and that it was not necessary to have four separate mentor-protégé programs since the three subcategories of small business are necessarily included within the overall category of small business. Many of the commenters were concerned, however, that changes could be made to the current 8(a) BD mentor-protégé program. Specifically, commenters were concerned that SBA might want to eliminate the 8(a) BD mentor-protégé program as a separate program and instead roll it into the small business mentor-protégé program. SBA has considered those concerns and has decided to keep the 8(a) BD mentor-protégé program as a separate program. That program has independently operated successfully for a number of years and SBA believes that it serves important business development purposes that should continue to be coordinated through SBA's Office of Business Development, rather than through a separate mentor-protégé office managed elsewhere within the Agency. As such, this final rule makes no changes as to how MPAs are processed for the 8(a) BD program.

In addition, the final rule revises the joint venture provisions contained in § 125.15(b) (for SDVO SBCs, and which are now contained in § 125.18(b)), § 126.616 (for HUBZone SBCs), and § 127.506 (for WOSB and Economically Disadvantaged Women-Owned Small Business (EDWOSB) concerns) to more fully align those requirements to the requirements of the 8(a) BD program. The rule also adds a new § 125.8 to specify requirements for joint ventures between small business protégé firms and their mentors. The rule also makes several additional changes to current size, 8(a) BD and HUBZone regulations that are needed to clarify certain provisions or correct interpretations of the regulations that were inconsistent with SBA's intent. These changes, the comments to the proposed rule, and SBA's response to the comments are set forth more fully below.

In response to the 90-day comment period, SBA received 113 comments, with most of the commenters commenting on multiple proposed provisions. With the exception of comments that did not set forth any rationale or make suggestions, SBA discusses and responds fully to all the comments below.

Summary of Comments and SBA's Response

Definition of Joint Venture (13 CFR 121.103(h))

SBA's size regulations recognize that joint ventures may be formal or informal. The proposed rule amended § 121.103(h) to clarify that every joint venture, whether a separate legal entity or an ''informal'' arrangement that exists between two (or more) parties, must be in writing. SBA never meant that an informal joint venture arrangement could exist without a formal written document setting forth the responsibilities of all parties to the joint venture. SBA merely intended to recognize that a joint venture need not be established as a limited liability company or other formal separate legal entity.

A few comments opposed that provision of the proposed rule that identified informal joint ventures as partnerships, believing that entering into a formal or informal partnership

often comes with certain obligations that may not be intended under a joint venture. For example, partners generally have fiduciary duties to each other, bind one another with their actions, and are jointly and severally liable for the debts of the business. One commenter recommended that SBA should replace the phrase ''formal or informal partnership'' with the words ''contractual affiliation.'' SBA does not agree that this recommended change would be beneficial. First, SBA believes that the term ''contractual affiliation'' is not precise and would cause confusion. Moreover, SBA continues to believe that state law would recognize an ''informal'' joint venture with a written document setting forth the responsibilities of the joint venture partners as some sort of partnership. As such, this rule merely identifies the consequences of forming an informal joint venture and should assist firms in determining what type of joint venture meets the parties' needs in each case. If the joint venture partners do not want the associated consequences of being considered a partnership, then it might be beneficial for the joint venture to be formed as a limited liability company. Therefore, this final rule adopts the proposed language and specifies that a joint venture may be a formal or informal partnership or exist as a separate limited liability company or other separate legal entity. However, regardless of form, the joint venture must be reduced to a written agreement.

In addition, the proposed rule specified that if a joint venture exists as a formal separate legal entity, it may not be populated with individuals intended to perform contracts awarded to the joint venture. This is a change from the current regulation that allows a separate legal entity joint venture to be unpopulated, to be populated with administrative personnel only, or to be populated with its own separate employees that are intended to perform contracts awarded to the joint venture. SBA explained that it is concerned that allowing populated joint ventures between a mentor and protégé would not ensure that the protégé firm and its employees benefit by developing new expertise, experience, and past performance. The separate joint venture entity would gain those things. If the individuals hired by the joint venture to perform the work under the contract did not come from the protégé firm, there is no guarantee that they would ultimately end up working for the protégé firm after the contract is completed. In such a case, the protégé firm would have gained nothing out of that contract. The company itself did not perform work under the contract and the individual employees who performed work did not at any point work for the protégé firm.

SBA received comments on both sides of this issue. Several commenters supported the proposed change, noting that forming a separate legal entity is an undue burden, and questioned whether the firm admitted to the 8(a) program (the protégé small business) would gain any direct benefits if all the work was performed by a separate legal entity. In addition, several of the commenters appreciated SBA's attempt to simplify these regulatory requirements. Several other commenters opposed the elimination of populated joint ventures. Many of these commenters believed that populated joint venture companies are an important mechanism for an entity-owned firm to remain competitive. They argued that this method of business organization facilitates the development of the disadvantaged small business because it makes the company more competitive in the marketplace. Specifically, these commenters pointed out that a populated joint venture has its own lower indirect costs, which, in turn, lowers the cost to the Government. Although SBA understands the benefit of using lower indirect costs from a populated joint venture, SBA continues to believe that a small protégé firm does not adequately enhance its expertise or ability to perform larger and more complex contracts on its own in the future when all the work through a joint venture is performed by a populated separate legal entity. A joint venture between a protégé firm and its mentor is intended to promote the business development of the protégé firm. SBA questions how that can be accomplished where the protégé itself performs no work on a particular joint venture contract, and the employees who do the work for the separate legal entity may or may not have any present or future connection to the protégé firm. In the 8(a) BD context, the purpose is to promote the business development of the firm that was admitted to the 8(a) BD program, the protégé firm, not a separate legal entity that is not itself a certified 8(a) Participant. In addition, populated joint ventures create unique problems in the HUBZone program. HUBZone's unique requirements with regard to employees, principal office, and residency make maintaining HUBZone status while participating in populated joint ventures difficult. In determining whether an individual should be determined an employee, the HUBZone program utilizes the totality of the circumstances approach and oftentimes a firm will have some individuals not on its payroll considered an employee for HUBZone eligibility purposes. Populated joint ventures present a problem because it can be difficult for firms to determine whom should be counted as an employee at any given time.

SBA continues to believe that the benefits received by a protégé from a joint venture are more readily identifiable where the work done on behalf of the joint venture is performed by the protégé and the mentor separately. In such a case, it is much easier to determine that the protégé firm performed at least 40% of all work done by the joint venture, performed more than merely ministerial or administrative work, and otherwise gained experience that could be used to perform a future contract independently. Thus, this rule adopts the proposed language to allow a separate legal entity joint venture to have its own separate employees to perform administrative functions, but not to have its own separate employees to perform contracts awarded to the joint venture.

SBA also proposed to require joint venture partners to allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, to access its files and inspect and copy records and documents when necessary. Several commenters requested SBA to clarify that the access should be limited to documents and records relating to the joint venture, not to unrelated documents of the joint venture partners themselves. SBA agrees and has amended §§ 124.513(i), 125.8(h), 125.18(b)(8), 126.616(h), and 127.506(i) to clarify that SBA's access would be related to files, records and documents of the joint venture. A few commenters also recommended that SBA should provide reasonable notice before it sought access to such records. SBA disagrees. SBA's Office of Inspector General must be able to have unlimited access when investigating potential violations of SBA's regulations. In a potential fraud case, providing notice could cause a destruction of records or provide time for a party to create the appearance of complying with applicable requirements. As such, this final rule does not require SBA to provide reasonable notice before seeking access to joint venture files, records and documents. SBA notes, however, that in its normal oversight responsibilities not related to any investigation of alleged wrongdoing, SBA would generally provide reasonable notice.

Place of Performance

In the case of *Latvian Connection General Trading and Construction LLC,* B–408633, Sept. 18, 2013, 2013 CPD ¶ 224, GAO ruled that § 19.000(b) of the Federal Acquisition Regulation (FAR) limits the application of FAR part 19 (dealing with SBA's small business programs) to acquisitions conducted in the United States (and its outlying areas). The basis for GAO's ruling was that SBA's regulations were silent on this issue and therefore, the more specific FAR regulation controlled. Heeding this advice, SBA promulgated regulations to address this issue. Specifically, SBA made wholesale changes to 13 CFR 125.2 on October 2, 2013. As a result, SBA issued a final rule recognizing that small business contracting could be used ''*regardless of the place of performance.''* 13 CFR 125.2(a) and (c).

The February 5, 2015 proposed rule proposed to add similar language to §§ 124.501, 125.22(b), 126.600, and 127.500, thus specifically authorizing contracting in the 8(a) BD, SDVO, HUBZone and WOSB programs regardless of the place of performance, where appropriate. Although SBA believes that the authority to use those programs in appropriate circumstances overseas already exists, the proposed rule merely sought to make that authority clear. Nothing in the Small Business Act would prohibit the use of those programs in appropriate circumstances overseas. SBA received a few comments on this issue. The commenters supported clarification of the current authority. The regulatory text merely highlights contracting officers' discretionary authority to use these programs where appropriate regardless of the place of performance.

HUBZone Joint Ventures (13 CFR 126.616)

The HUBZone program is a community growth and development program in which businesses are incentivized to establish principal office locations in, and employ individuals from, areas of chronically high unemployment and/or low income in order to stimulate economic development. To further this purpose, the HUBZone program regulations permitted a joint venture only between a HUBZone SBC and another HUBZone SBC. In authorizing a mentor-protégé relationship for HUBZone qualified SBCs, the proposed rule provided language to allow joint ventures for HUBZone contracts between a HUBZone protégé firm and its mentor, regardless of whether the mentor was itself a HUBZone qualified SBC.

SBA received a significant number of comments on this provision. The commenters overwhelmingly supported allowing a HUBZone qualified SBC that obtained an SBA-approved small business mentor-protégé relationship to be able to joint venture with its mentor on all contracts for which the protégé individually qualified, including HUBZone contracts. The commenters felt that such a provision would allow protégés to perform contracts that they otherwise could not have obtained and truly provide them with expertise and past performance that would help them to individually perform additional contracts in the future.

The commenters expressed that they felt that the purposes of the HUBZone program would be appropriately served by allowing non-HUBZone firms to act as mentors and joint venture with protégé HUBZone firms because the HUBZone firm itself would be developed and would necessarily be required to hire additional HUBZone employees if it sought to remain eligible for future HUBZone contracts.

Joint Venture Certifications and Performance of Work Reports (13 CFR 125.8, 125.18, 126.616, 127.506)

The proposed rule required all partners to a joint venture agreement that perform a SDVO, HUBZone, WOSB, or small business set-aside contract to certify to the contracting officer and SBA prior to performing any such contract that they will perform the contract in compliance with the joint venture regulations and with the joint venture agreement. In addition, the parties to the joint venture are required to report to the contracting officer and to SBA how they are meeting or have met the applicable performance of work requirements for each SDVO, HUBZone, WOSB or small business set-aside contract they perform as a joint venture.

SBA received comments both supporting and opposing this approach. One commenter suggested use of an honor system for the reporting. SBA did not view this as a viable alternative. Others believed that certifications in the System for Award Management (SAM) should be sufficient. Other commenters supported the proposed approach as a reasonable way to ensure compliance. SBA believes that affirmative reporting by the joint venture parties to both the contracting officer and SBA will provide the necessary information to track the use and performance of joint ventures. SBA also believes that the certification and reporting requirements implemented in this rule will assist the Government in its ability to deter wrongdoing. Regular reporting and monitoring of the limitations on subcontracting requirements will allow all parties to know where the joint venture stands with respect to those requirements and what must be done to come into compliance in the future if the joint venture's performance is below the required amount at any point in time. A contracting officer will be able to more closely oversee the performance of a contract where the reports show inadequate performance to date.

As such, the final rule adopts the proposed language requiring joint venture partners to annually report compliance to both the contracting officer and SBA.

Tracking Joint Venture Awards

The proposed rule announced that SBA was considering various methods of tracking awards to the joint ventures permitted by SBA's regulations. The possible approaches included: Requiring all joint ventures permitted by the regulations to include in their names ''small business joint venture,'' and, if a mentor-protégé joint venture, to include in their names ''mentor-protégé small business joint venture;'' requiring contracting officers to identify awards as going to small business joint ventures or to mentor-protégé small business joint ventures; requiring SBCs to amend their SAM entries to specify that they have formed a joint venture; requiring each joint venture to get a separate DUNS number; or a combination of all of these actions. SBA sought to ensure that governmental agencies and members of the public could track joint venture awards, which would promote transparency and accountability. SBA specifically asked for comments on how best to track awards to joint ventures. SBA believes a tracking approach will deter fraudulent or improper conduct, and promote compliance with SBA's regulations.

SBA received numerous comments on these proposals both in support and in opposition to the alternate approaches contemplated. Several commenters opposed the naming requirement, expressing concern about the administrative burden on the participating firms to change names, establish duns numbers and meet other compliance requirements in order to meet this requirement. Other commenters recommended that the cleanest way to track awards to joint ventures would in fact be to require a joint venture to form a new entity in SAM and identity itself to be a joint venture in SAM. Several commenters suggested the SAM system adopt a

certification for joint ventures, or alternatively contracting officers designate in SAM that an award was made to a joint venture.

In response to the comments, SBA first notes that any SAM certification process is beyond SBA's authority and outside the scope of this rule. SBA also notes that current participants in the 8(a) BD program annually report to SBA the joint venture awards they have received and how they are meeting the limitations on subcontracting requirements. To track small business joint venture awards, SBA could require similar reporting. However, SBA does not seek to impose any unnecessary burdens on small business. With that in mind, SBA believes that additional reporting is not necessary, but continues to believe that some sort of joint venture identification is required. Thus, this final rule requires joint ventures to be separately identified in SAM so that awards to joint ventures can be properly accounted for. A joint venture must be identified as a joint venture in SAM, with a separate DUNS number and CAGE number than those of the individual parties to the joint venture. In addition, the Entity Type in SAM must be identified as a joint venture, and the individual joint venture partners should also be listed.

Applications for SBA's Small Business Mentor-Protégé Program (13 CFR 125.9)

As noted above, SBA proposed implementing one universal small business mentor-protégé program instead of a separate mentor-protégé program for each type of small business (*i.e.,* HUBZone, SDVO, WOSB program, and small business). In addition, the proposed rule indicated that SBA intended to maintain a separate mentor-protégé program for eligible 8(a) BD Program Participants. The proposed rule provided that a small business seeking a mentor-protégé relationship would be required to submit an application to SBA and that SBA's Director of Government Contracting (D/GC) would review and either approve or decline small business MPAs. SBA's Associate Administrator for BD (AA/BD) would continue to review and approve or decline mentor-protégé relationships in the 8(a) BD program. Under the proposed language, an eligible 8(a) BD Program Participant could choose to seek SBA's approval of a mentor-protégé relationship through the 8(a) BD program, or could seek a small business mentor-protégé relationship through SBA's mentor-protégé program for all small businesses. SBA announced it was considering having one office review and either approve or decline all MPAs to ensure consistency in the process, and specifically sought comments as to whether that approach should be implemented. Finally, the supplementary information to the proposed rule provided that SBA may institute certain ''open'' and ''closed'' periods for the receipt of mentor-protégé applications if the number of firms seeking SBA to approve their mentor-protégé relationships becomes unwieldy. In such a case, SBA would then accept mentor-protégé applications only in ''open'' periods.

SBA received a significant number of comments regarding applications for mentor-protégé relationships. Commenters applauded SBA's proposal to keep the 8(a) BD mentor-protégé program separate from the small business mentor-protégé program. Commenters also supported establishing a separate office to process applications for the small business mentor-protégé program. The commenters were concerned, however, about the administrative burden the additional small business mentor-protégé program will have on SBA's resources. They felt that the volume of firms seeking mentor-protégé relationships could excessively delay SBA's processing of applications. Commenters also opposed the proposal to have open enrollment periods to receive small business mentor-protégé applications. They thought that such a process would cause significant delays in allowing firms to benefit from the mentor-protégé program. They also felt that open enrollment periods could cause firms to miss out on developmental procurement opportunities if they had to wait several months before they could apply to participate in the program. If there were open enrollment periods, then commenters believed that firms should be processed on a first come first served basis, and different types of small businesses should not be given priority or processed first over other types of small businesses.

SBA understands the concerns raised by the commenters. It is not SBA's intent to delay participation in the small business mentor-protégé program. In order to reduce the processing time for a small business mentor-protégé application, SBA considered changing final approval from the D/GC to six senior SBA district directors. SBA thought that six decision makers instead of one might speed up the processing time for applications and eliminate the need for open enrollment periods. However, such a structure could also cause inconsistent results and could require more overall resources (by requiring additional staff in six different locations) than simply providing adequate staff at one location. SBA recognizes that the D/GC is responsible for many other functions, and understands several commenters' concerns that mentor-protégé applications might not be the highest priority of that office. Therefore, SBA intends to establish a separate unit within the Office of Business Development whose sole function would be to process mentor-protégé applications and review the MPAs and the assistance provided under them once approved. This final rule provides that this new unit will process and make determinations with respect to all small business MPAs, with the ultimate decision to be made by the AA/BD or his/her designee. SBA believes that the efficiencies gained by having a dedicated staff for the small business mentor-protégé program will allow SBA to timely process applications for mentor-protégé status, and that the need for open and closed enrollment periods will be reduced. Of course, it is still possible that the number of applications could overwhelm the dedicated small business mentor-protégé unit. If that is the case, open enrollment periods could still be a possibility. Several commenters suggested that SBA may have an enormous volume of applications, and others suggested otherwise. SBA believes that additional information is needed before a decision to control the acceptance of applications is necessary. If the need arises, SBA will provide advance notice to allow potential applicants the opportunity to properly plan.

Mentors (13 CFR 124.520 and 125.9)

The proposed rule permitted any for-profit business concern that demonstrates a commitment and the ability to assist small business concerns to be approved to act as a mentor and receive the benefits of the mentor-protégé relationship. SBA also proposed to limit mentors to for-profit business entities based on the language contained in the NDAA 2013. Section 1641 of the NDAA 2013 added section 45(d)(1) of the Small Business Act, 15 U.S.C. 657r(d)(1), which defines the term mentor to be ''a for-profit business concern of any size.'' In order to make the 8(a) BD mentor-protégé program consistent with the small business mentor-protégé program, SBA proposed that mentors in the 8(a) BD mentor-protégé program must be for profit businesses as well. This was a change for the 8(a) BD program, which previously allowed non-profit entities to be mentors. SBA felt that the change to the 8(a) BD program made sense because

Congress intended the new mentor-protégé program for small businesses to be as similar to the 8(a) BD mentor-protégé program as possible.

A small number of commenters disagreed with having a small business mentor-protégé program at all, and argued that the statutory authorities were discretionary and did not require SBA to implement additional small business mentor-protégé programs. A few of these commenters also felt that if there were such a program, the mentors should be limited to other small businesses. They expressed the view that individual small businesses could be harmed competing against joint ventures in which a large business mentor was a partner. Although SBA understands that the small business mentor-protégé programs authorized by the Jobs Act and the NDAA 2013 are discretionary, SBA believes that they will serve an important developmental function that will enable many small businesses to grow to be able to independently perform procurements that they otherwise would not have been able to perform. In addition, the vast majority of commenters supported a small business mentor-protégé program and many of those comments believed that it would be critical in helping them to advance and be able to perform larger and more complex contracts on their own. SBA agrees with the majority of commenters on this issue and this final rule implements a small business mentor-protégé program. Because the language of section 45(d)(1) of the Small Business Act, 15 U.S.C. 657r(d)(1), specifies a mentor in the small business mentor-protégé program to be ''a for-profit business concern of any size'' and section 45(a)(2) of the Small Business Act, 15 U.S.C. 657r(a)(2), requires the mentor-protégé program for small businesses to be ''identical to the [8(a) BD] mentor-protégé program . . . as in effect on the date of enactment of this section . . .,'' which authorized large business mentors, this final rule authorizes only other than small businesses that are organized for profit to be mentors. Specifically, the final rule authorizes any ''concern,'' regardless of size, to be a mentor, and the term ''concern'' has historically been defined in SBA's size regulations to mean a business entity organized for profit.

The proposed rule also required a firm seeking to be a mentor to demonstrate that it ''possesses a good financial condition.'' Several commenters urged SBA to clarify what it means to possess good financial condition. In addition, during the tribal consultations, several individuals spoke of situations where SBA denied a large multi-national firm from being a mentor because one or more financial documents indicated a loss. These individuals believed SBA did not take the proper approach when considering whether a business concern should be a mentor. They stressed that SBA should look only at whether the proposed mentor can deliver what it has said it will bring to the protégé. They believed that anything beyond that was not necessary. SBA agrees that the ''good financial condition'' requirement has caused some confusion. SBA believes that the key issue is whether a proposed mentor can meet its obligations under its MPA. If a proposed mentor can fulfill those obligations and has the financial wherewithal to provide all of the business development assistance to the protégé firm as described in its MPA, SBA should not otherwise care about the proposed mentor's financial condition. SBA wants to ensure that the protégé firm receives needed business development assistance through the mentor-protégé relationship. If that can be demonstrated, SBA will be satisfied with the arrangement. As such, this final rule changes the requirement that a mentor have good financial condition to one requiring that the mentor must demonstrate that it can fulfill its obligations under the MPA.

In addition, the proposed rule provided that a mentor participating in any SBA-approved mentor-protégé program would generally have no more than one protégé at a time. It also provided that SBA could authorize a concern to mentor more than one protégé at a time where it can demonstrate that the additional mentor-protégé relationship would not adversely affect the development of either protégé firm (*e.g.,* the second firm may not be a competitor of the first firm). The rule also proposed, however, that no firm could be a mentor of more than three protégés in the aggregate at one time under either of the mentor-protégé programs authorized by § 124.520 or § 125.9. A mentor could choose to have: Up to three protégés in the 8(a) BD program; or up to three protégés in the small business program; or one or more protégés in one program and one or more in another program, but no more than three protégés in the aggregate. SBA received comments on both sides of this issue. A few commenters believed that all SBA should care about is whether a mentor can adequately provide needed business development assistance to a proposed protégé. If they could, these commenters believed that a specific firm could be a mentor for more than three protégé firms. They argued that some of the best potential mentors could be large firms that were already mentoring other small businesses, and by limiting the number of protégés that a mentor could have could deprive a particular firm of a mentor that could be an ideal partner. Conversely, several other commenters agreed with SBA that allowing one firm to mentor an unlimited number of protégé firms could allow a large business to unduly benefit from contracts that are intended to primarily benefit small business. One commenter believed that allowing three protégés at the same time for one mentor was too much, and recommended restricting it to two protégé firms at one time. SBA continues to believe that there must be a limit on the number of firms that one business, particularly one that is other than small, can mentor. Although SBA believes that the small business mentor-protégé program will certainly afford business development opportunities to many small businesses, SBA remains concerned about large businesses benefitting disproportionately. If one firm could be a mentor for an unlimited number (or even a larger limited number) of protégés, that firm would receive benefits from the mentor-protégé program through joint ventures and possible stock ownership far beyond the benefits to be derived by any individual protégé. In addition, the 8(a) BD program in effect at the time that the Jobs Act and the NDAA 2013, also limited mentors to having no more than three protégé firms. Since those authorities permitted SBA to implement a small business mentor-protégé program as similar as possible to the 8(a) BD mentor-protégé program, it makes sense that SBA should limit any mentor to a total of three protégé firms. Therefore, this final rule adopts the language of the proposed rule, which permits any mentor to have up to a total of three protégé firms at one time. One commenter requested that SBA clarify that a mentor can have no more than three protégé firms at one time, not three firms in the mentor's entire existence. SBA believes that is adequately spelled out in the regulatory text and does not further clarify that provision in this final rule.

Finally, the proposed rule provided that a protégé in the small business mentor-protégé program may not become a mentor and retain its protégé status. That proposal was patterned off the 8(a) BD mentor-protégé program. SBA received several comments opposing this proposal. The commenters felt that firms that have

themselves been protégés may be in the best position to act as mentors. In addition, they argued that just because a firm can act as a mentor to smaller or less experienced firms does not mean that they too don't need help getting to the next level. They did not believe that it would make sense to require a current protégé to terminate the MPA with its mentor before it will be approved as a mentor to another small business concern. The commenters believed that in both the 8(a) BD and small business mentor-protégé programs a firm should be permitted to be both a protégé and mentor in appropriate circumstances. SBA agrees with this position; thus, this final rule provides that SBA may authorize a small business to be both a protégé and a mentor at the same time where the firm can demonstrate that the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship.

Protégés (13 CFR 124.520 and 125.9)

In order to qualify as a protégé, the proposed rule required a business concern to qualify as small for the size standard corresponding to its primary NAICS code. This was a departure for the current 8(a) BD mentor-protégé program, which required an 8(a) Program Participant to: Have a size that is less than half the size standard corresponding to its primary NAICS code; or be in the developmental stage of its 8(a) program participation; or not have received an 8(a) contract. SBA received a significant number of comments supporting the change to loosen the requirements to qualify as a protégé for the 8(a) BD mentor-protégé program. These commenters supported consistency between the two programs and believed that allowing more mature small businesses to participate as protégés in the 8(a) BD mentor-protégé program would facilitate more dynamic developmental assistance and strengthen the contractor base for government procurements. Several commenters also felt that the proposed change made the requirement clearer to understand and implement. Conversely, a few commenters did not support changes to the size of the protégé for the 8(a) BD mentor-protégé program. These commenters believed that the 8(a) mentor-protégé program should not be made available to larger, or successful, or experienced 8(a) Participants, and that allowing participation by firms that are close to exceeding their applicable size standard would thwart the purpose of the program. SBA also received several comments recommending that a firm should be able to form a mentor-protégé relationship as long as it qualified as small for the particular type of work for which a mentor-protégé relationship is sought, even if the firm no longer qualified as small for its primary business activity. These commenters believed that there would be no harm in allowing such a mentor-protégé relationship because the protégé firm would still have to qualify as a small business for any contract opportunity requiring status as a small business that it sought. In other words, if SBA approved a mentor-protégé relationship that focused on assisting a firm to gain access to or expand its experience in a particular industry or NAICS code where the proposed protégé firm qualified as a small business for the size standard corresponding to that NAICS code but not for the size standard corresponding to its primary industry, the protégé firm could form a joint venture with its mentor and be considered small for a contract opportunity only where the protégé firm qualified as small. It could not take that mentor-protégé relationship, form a joint venture and be considered small for contract opportunities in the protégé's primary industry if the protégé did not qualify as small for that NAICS code.

SBA believes that consistency between the 8(a) BD mentor-protégé program and the small business mentor-protégé program is critical, particularly where this final rule authorizes an 8(a) mentor-protégé relationship to transition to a small business mentor-protégé relationship when the 8(a) protégé graduates from or otherwise leaves the 8(a) BD program. Therefore, SBA believes that it does not make sense to have different rules regarding who can qualify as a protégé for the two mentor-protégé programs. As such, SBA does not agree with the commenters who recommended that SBA continue to limit protégés in the 8(a) BD mentor-protégé program only to Participants whose size was less than half the size standard corresponding to their primary industry. Moreover, SBA feels that any small business could gain valuable business development assistance through the mentor-protégé program. For this reason, SBA agrees with the commenters who recommended that a firm that does not qualify as small for its primary NAICS code should be able to form a mentor-protégé relationship in a secondary NAICS code for which it does qualify as small. However, SBA would not authorize mentor-protégé relationships in secondary NAICS codes where the firm had never performed any work in that NAICS code previously or where the protégé would bring nothing to a potential joint venture with its mentor other than its status as a small business. The intent of allowing joint ventures between a protégé firm and its mentor is to provide a protégé firm the opportunity to further develop its expertise and enhance its ability to independently perform similar contracts in the future. The mentor-protégé program is not intended to enable firms that have outgrown a particular size standard to find another industry in which they have no expertise or past performance merely to be able to continue to receive additional contracts as a small business. As long as the firm can demonstrate how the mentor-protégé relationship is a logical progression for the firm and will further develop current capabilities, SBA believes that a mentor-protégé relationship may be appropriate. Thus, the final rule provides that a concern must qualify as small for the size standard corresponding to its primary NAICS code or identify that it is seeking business development assistance with respect to a secondary NAICS code and qualify as small for the size standard corresponding to that NAICS code.

The proposed rule provided that a protégé participating in either of the mentor-protégé programs generally would have no more than one mentor at a time. However, it authorized a protégé to have two mentors where the two relationships would not compete or otherwise conflict with each other and the protégé demonstrates that the second relationship pertains to an unrelated, secondary NAICS code, or the first mentor does not possess the specific expertise that is the subject of the MPA with the second mentor. The comments supported this provision and, therefore, SBA adopts it in this final rule.

In addition, § 125.9(c)(1) of the proposed rule required that SBA verify that a firm qualifies as a small business before approving that firm to act as a protégé in a small business mentor-protégé relationship. SBA was attempting to make eligibility for the small business mentor-protégé program similar to that of the 8(a) BD mentor-protégé program. Just as only firms that have been certified to be eligible to participate in the 8(a) BD program and verified to meet at least one of the three requirements set forth in the prior 8(a) BD regulations could be a protégé, the proposed rule would have permitted only those firms that have been affirmatively determined to be small to qualify as protégés for the small business mentor-protégé program. Several commenters believed that such a requirement was overly burdensome.

These commenters did not believe that size and 8(a) BD status were comparable. They argued that size has always been a self-certification process that is open to review and protest in connection with any individual procurement, and that the same should be true in the mentor-protégé context. They felt that SBA should be able to rely on the size self-certification of a firm seeking to qualify as small for a small business mentor-protégé relationship. The commenters believed that a firm approved to be a small business protégé would not gain any undue benefit from the program merely by entering a mentor-protégé relationship. If a firm that was approved to be a protégé was not in fact small and was awarded a joint venture contract with its mentor based solely on its status as a protégé, of course that would be objectionable. However, because the size protest procedures permit any interested party to protest the size of any apparent successful offeror, the commenters believed that a protégé that was not small would ultimately be found ineligible for award of the contract and, thus, would not unduly benefit from its mentor-protégé relationship. SBA agrees, and as long as it is clear that SBA's approval of a mentor-protégé relationship does not amount to a formal determination of size eligibility, SBA believes that the size protest procedures would in fact be sufficient to protect the integrity of the program.

The proposed rule provided that a protégé firm that graduates or otherwise leaves the 8(a) BD program but continues to qualify as a small business may transfer its 8(a) mentor-protégé relationship to a small business mentor-protégé relationship. Several commenters supported this proposal as a natural extension of SBA's implementation of a small business mentor-protégé program. A few commenters sought clarification, however, as to whether the transfer from an 8(a) BD mentor-protégé relationship to a small business mentor-protégé relationship would be automatic or whether the protégé firm would have to apply and again receive SBA approval. It was not SBA's intent to require a firm to apply to transfer its 8(a) BD mentor-protégé relationship to a small business mentor-protégé relationship. SBA intended that a firm merely inform SBA of its intent to transfer its mentor-protégé relationship. There would be no SBA review or approval required of such a transfer. As such, this final rule adopts the language of the proposed rule and adds clarifying language that a firm seeking to transfer its mentor-protégé relationship could do so by notification, without applying to and receiving approval from SBA to do so. In light of that change, the final rule also deletes § 124.520(d)(5) as unnecessary. That provision provided that SBA would not approve an 8(a) BD mentor-protégé relationship where the proposed protégé firm had less than six months remaining in its 8(a) program term. Because SBA will now permit an 8(a) protégé to transfer its mentor-protégé relationship to a small business mentor-protégé relationship after it leaves the 8(a) BD program (provided the firm continues to qualify as a small business), it does not make sense that SBA would not approve a mentor-protégé relationship for a proposed 8(a) protégé that has less than six months remaining in its program term. SBA will give such a firm the option of pursuing an 8(a) mentor-protégé relationship during its last six months in the 8(a) BD program, and then transferring that relationship to a small business mentor-protégé relationship when the protégé firm leaves the 8(a) BD program, or pursuing a small business mentor-protégé relationship during that same time frame.

Mentor-Protégé Programs of Other Departments and Agencies (13 CFR 125.10)

As noted above, section 1641 of the NDAA 2013 provided that a Federal department or agency cannot carry out its own agency specific mentor-protégé program for small businesses unless the head of the department or agency submitted a plan for such a program to SBA and received the SBA Administrator's approval of the plan. The NDAA 2013 specifically excluded the Department of Defense's mentor-protégé program, but included all other current mentor-protégé programs of other agencies. Under its provisions, a department or agency that is currently conducting a mentor-protégé program (except the Department of Defense) may continue to operate that program for one year but must then go through the SBA approval process in order for the program to continue after one year. Thus, in order to continue to operate any current mentor-protégé program beyond one year after SBA's mentor-protégé regulations are final, each department or agency would be required to obtain the SBA Administrator's approval. These statutory provisions were proposed to be implemented in new § 125.10 of SBA's regulations.

Because the SBA's 8(a) BD and small business mentor-protégé programs will apply to all Government small business contracts, and thus to all Federal departments and agencies, conceivably other agency-specific mentor-protégé programs for small business would not be needed. In the proposed rule, SBA specifically requested comments as to whether other Federal mentor-protégé programs should continue after the one-year grace period expires. SBA understands that many of the agency-specific mentor-protégé programs incentivize mentors to utilize their protégés as subcontractors. For instance, some agencies provide additional evaluation points to a large business submitting an offer on an unrestricted procurement where the business has an active MPA, where the business has used the protégé firm as a subcontractor previously, or where the mentor and protégé are submitting an offer as a joint venture. In addition, some mentor-protégé programs give additional credit to a large business mentor toward its subcontracting plan goals when the mentor uses the protégé as a subcontractor on the mentor's prime contract(s) with the given agency. SBA's mentor-protégé programs assume more of a prime contractor role for protégés, but would also encourage subcontracts from mentors to protégés as part of the developmental assistance that protégés receive from their mentors. Because one or more mentor-protégé programs of other agencies ultimately may not be continued after SBA's various mentor-protégé programs are finalized, SBA requested comments as to whether the subcontracting incentives authorized by mentor-protégé programs of other agencies should specifically be incorporated into SBA's mentor-protégé programs.

SBA received only a few comments regarding this proposed new section. These commenters agreed with the statutory provisions in questioning the utility of other Federal mentor-protégé programs. Their only concern was whether SBA would have the necessary resources to handle mentor-protégé applications for the entire government. SBA is working to assure that it can adequately process mentor-protégé applications, but, as noted above, if the number of firms seeking SBA to approve their mentor-protégé relationships becomes unwieldy, SBA may institute certain ''open'' and ''closed'' periods for the receipt of further mentor-protégé applications. In such a case, SBA would then accept mentor-protégé applications only in ''open'' periods.

Assuming that many agencies will decide not to continue their own mentor-protégé programs, one commenter recommended that SBA should incorporate the subcontracting incentives found in other mentor-

protégé programs to ensure that these useful benefits are not eliminated. Although SBA believes that it is up to individual procuring agencies whether to provide subcontracting incentives for any specific procurement, SBA also believes that these incentives should be authorized and used, where appropriate. As such, this final rule identifies subcontracting incentives as a possible benefit to be provided by procuring activities in appropriate circumstances. The final rule authorizes procuring activities to provide incentives in the contract evaluation process to a firm that will provide significant subcontracting work to its SBA-approved protégé firm. SBA does not intend that a mentor receive an incentive where it lists the protégé as a subcontractor that would perform merely ministerial functions that would not enhance the protégé's business development. Any such incentive would be at the discretion of the procuring activity.

Benefits of Mentor-Protégé Relationships (13 CFR 124.520 and 125.9)

As with the 8(a) BD program, under the proposed small business mentor-protégé program, a protégé may joint venture with its SBA-approved mentor and qualify as a small business for any Federal government contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement. Commenters supported this provision. They believed that it provides incentives to firms to become mentors and encourages meaningful business development assistance to protégés on any small business contracts for which they qualify as small. As such, SBA adopts the proposed language in this final rule.

This means that a joint venture between a protégé and its approved mentor in the small business mentor-protégé program will be deemed to be a small business concern for any Federal contract or subcontract. It does not mean that such a joint venture affirmatively qualifies for any other small business program. For example, a joint venture between a small business protégé firm and its SBA-approved mentor will be deemed a small business concern for any Federal contract or subcontract for which the protégé qualified as small, but the joint venture will qualify for a contract reserved or set-aside for eligible 8(a) BD, HUBZone SBCs, SDVO SBCs, or WOSBs only if the protégé firm meets the particular program-specific requirements as well.

Several commenters sought clarification of the requirement that the project manager of a joint venture between a protégé firm and its SBA-approved mentor must be an employee of the protégé firm. These comments pointed out that many times a firm that is awarded a contract will hire many, if not all, of the individuals currently performing the work under the contract for a different firm. These commenters recommended that SBA clarify that an individual identified as the project manager need not be an employee of the protégé firm at the time the joint venture makes an offer, as long as there is a commitment by the individual to work for the protégé if the joint venture wins the award. SBA agrees and has clarified that the individual identified as the project manager of the joint venture need not be an employee of the protégé firm at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the protégé firm if the joint venture is the successful offeror. The final rule also clarifies that the individual identified as the project manager cannot be employed by the mentor and become an employee of the protégé firm for purposes of performance under the joint venture. SBA is concerned that such an ''employee'' of the protégé has no ties to the protégé, is not bound to stay with the protégé after performance of the contract is complete, and could easily go back to the mentor at that time. If that happens, the business development of the protégé firm would be diminished.

Consistent with the 8(a) BD program, the proposed rule permitted a mentor to a small business to own an equity interest of up to 40% in the protégé firm in order to raise capital for the protégé firm. SBA requested comments as to whether this 40% ownership interest should be a temporary interest, being authorized only as long as the mentor-protégé relationship exists, or whether it should be able to survive the termination of the mentor-protégé relationship. SBA was concerned that allowing a mentor to own 40% of a small business protégé after the mentor-protégé relationship ends may allow far-reaching influence by large businesses that act as mentors and enable them to receive long-term benefits from programs designed to assist only small businesses. Several commenters believed that mentors should not be required to divest themselves of their ownership interest in a protégé firm once the mentor-protégé relationship ends. They noted that, outside the 8(a) BD program (which has ownership restrictions on firms in the same or similar line of business), a large business may currently own a substantial ownership interest in a small business (up to 49% where one individual owns the remaining 51%) without a finding of affiliation, and that the affiliation rules are sufficient to protect against a large business from unduly benefitting from small business contracting programs. After further consideration, SBA agrees. During the mentor-protégé relationship, the protégé firm is shielded from a finding of affiliation where a large business mentor owns 40% of the protégé. Once the mentor-protégé relationship ends, any protection from a finding of affiliation also ends. As such, if the large business mentor's 40% ownership interest is controlling (or deemed to be controlling under SBA's affiliation rules), the two firms will be affiliated and the former protégé would not qualify as a small business. For this reason, there is no need to require a former mentor to divest itself of its 40% ownership interest in the former protégé after the mentor-protégé relationship ends. If it does not divest, the former protégé will be found to be ineligible for any contract as a small business where the 40% ownership interest causes affiliation under SBA's size rules. As such, this final rule does not add any language requiring a mentor to divest itself of its ownership interest in a protégé firm once the mentor-protégé relationship ends.

Written Mentor-Protégé Agreement (13 CFR 124.520 and 125.9)

The key to any mentor-protégé relationship is the benefits to be received by the proposed protégé firm from the proposed mentor. It is essential that such benefits be identified as clearly and specifically as possible. To this end, the proposed rule required that all MPAs be in writing, identifying specifically the benefits intended to be derived by the projected protégé firms. Commenters universally supported requiring a written MPA and that the benefits to be provided through a MPA must be clearly identified. Specifically, they felt that the proposed provision requiring that there be a detailed timeline for the delivery of the assistance in the MPA was critical to ensuring that assistance was timely provided to protégé firms. They understood that without clear and identifiable deliverables set forth in MPAs, both protégé firms and SBA would lack the ability to require mentors to provide specific business development assistance. One

commenter noted that the proposed regulatory language identified subcontracts as a benefit that a protégé can receive through its MPA. The commenter agreed that subcontracts are an important developmental benefit, but requested clarification that business development assistance can be gained by a protégé both by receiving a subcontract from its mentor and by subcontracting specific work to its mentor. SBA agrees that a subcontract in either direction can be beneficial to the protégé and that a subcontract from a protégé to its mentor should not, by itself, give rise to a finding of affiliation as something outside the MPA. As such, this final rule clarifies that a subcontract from a protégé to a mentor can be developmental assistance authorized by a MPA.

The proposed rule also required a firm seeking approval to be a protégé in either the 8(a) BD or small business mentor-protégé programs to identify any other mentor-protégé relationship it has through another Federal agency or SBA and provide a copy of each such MPA to SBA. The proposed rule required that the MPA submitted to SBA for approval must identify how the assistance to be provided by the proposed mentor is different from assistance provided to the protégé through another mentor-protégé relationship, either with the same or a different mentor. Several commenters opposed this requirement. They thought that the requirement might cause disputes as to whether the proposed MPA was different enough from a MPA with another agency. One commenter questioned whether a MPA of another agency could be transferred into the SBA's 8(a) BD or small business mentor-protégé program. This commenter reasoned that if one or more mentor-protégé programs of other agencies cease because of the new Government-wide SBA small business mentor-protégé program, a firm should be able to use that agreement, or at least the assistance that had been committed but not yet provided through the agreement, in the SBA's program. SBA continues to believe that assistance that has already been provided or pledged in a MPA of another agency should not be used as the basis for an SBA MPA. The intent is that a protégé firm gain business development assistance that it otherwise would not be able to obtain. SBA agrees, however, that if certain specified assistance was identified in a MPA of another agency, but that assistance had not yet been provided, a firm should be able to choose to terminate the mentor-protégé relationship with the other agency and use the not yet provided assistance as part of the assistance that will be provided through the 8(a) BD or small business mentor-protégé relationship. Therefore, SBA has clarified the regulatory text to better implement its intent in this final rule.

The proposed rule also provided that SBA will review a mentor-protégé relationship annually to determine whether to approve its continuation for another year. SBA intended to evaluate the relationship and determine whether the mentor provided the agreed-upon business development assistance, and whether the assistance provided appears to be worthwhile. SBA also proposed to limit the duration of a MPA to three years and to permit a protégé to have one three-year MPA with one entity and one three-year MPA with another entity, or two three-year MPAs (successive or otherwise) with the same entity. SBA invited comments regarding whether three years is an appropriate length of time and whether SBA should allow a mentor and protégé to enter into an additional MPA upon the expiration of the original agreement. Several commenters did not believe that three years was an appropriate length to authorize a mentor-protégé relationship. A few commenters disagreed with any specific limit on the number of years that a MPA may be in place. They believed that as long as the protégé continues to qualify as a small business and to receive developmental assistance, and the mentor is capable of and actually providing the assistance, then the mentor-protégé relationship should be allowed to continue. A few other commenters thought that three years was too short and recommended a longer length. They believed that in many instances it takes several years in order for both the mentor and protégé to understand how best to work with each other, and three years is not sufficient to allow that process to develop. They felt that the proposed rule would, in effect, limit a protégé to one mentor throughout its life as a small business. Although the rule proposed to authorize two three-year MPAs with two separate mentors, the commenters felt that because it takes a few years to get one mentor-protégé relationship to operate smoothly, most protégés would elect to keep the first MPA for a second three years instead of seeking a new three-year MPA with a different mentor.

SBA believes that the mentor-protégé program serves an important business development function for 8(a) Participants and other small businesses. However, SBA does not believe that any mentor-protégé relationship should last indefinitely (*i.e.,* for as long as the protégé qualifies as a small business). The mentor-protégé program should be a boost to a small business's development that enables the small business to independently perform larger and more complex contracts in the future. It should not be a crutch that prevents small businesses from seeking and performing those larger and more complex contracts on their own. SBA understands that it may take longer than three years to develop a meaningful mentor-protégé relationship. Therefore, the final rule will continue to authorize two three-year MPAs with different mentors, but will allow each to be extended for a second three years provided the protégé has received the agreed-upon business development assistance and will continue to receive additional assistance. SBA intends to limit all small businesses, including 8(a) Participants, to having two mentors. Although an 8(a) Participant can transfer its 8(a) mentor-protégé relationship to a small business mentor-protégé relationship after it leaves the 8(a) BD program, it can have only two mentor-protégé relationships in total. If it transfers its 8(a) mentor-protégé relationship to a small business mentor-protégé relationship after it leaves the program, it may enter into one additional mentor-protégé relationship. It cannot enter into two additional small business mentor-protégé relationships.

The proposed rule also solicited comments on clarifying language not currently contained in the 8(a) mentor-protégé regulations authorizing the continuation of a mentor-protégé relationship where control or ownership of the mentor changes during the term of the MPA. Specifically, the proposed rule provided (for the 8(a) BD and small business mentor-protégé programs) that if control of the mentor changes (through a stock sale or otherwise), the previously approved mentor-protégé relationship may continue provided that, after the change in control, the mentor expresses in writing to SBA that it acknowledges the MPA and that it continues its commitment to fulfill its obligations under the agreement. Commenters supported this provision, and it is not changed in this final rule.

Size of 8(a) Joint Venture (13 CFR 124.513).

The rule also proposed to amend § 124.513 to clarify that interested parties may protest the size of an SBA-approved 8(a) joint venture that is the apparent successful offeror for a competitive 8(a) contract. This change alters the rule expressed in *Size Appeal of Goel Services, Inc. and Grunley/Goel Joint Venture D LLC,* SBA No. SIZ–5320 (2012), which concluded that the size of

an SBA-approved 8(a) joint venture could not be protested because SBA had, in effect, determined the joint venture to qualify as small when it approved the joint venture pursuant to § 124.513(e). SBA's decision to authorize a joint venture between a current 8(a) Program Participant and another party by its Office of Business Development was never intended to act as a formal size determination. Only SBA's Office of Government Contracting may issue formal size determinations. SBA received a few comments supporting this proposed change, believing that the size protest procedures should be available with respect to any apparent successful offeror in a competitive 8(a) procurement, including joint ventures. Accordingly, this revision makes clear that unsuccessful offerors on a competitive 8(a) set-aside contract may challenge the size of an apparently successful joint venture offeror.

One commenter encouraged SBA to add additional language to clarify that the only issue that may be challenged is size, and not the underlying terms, conditions, or structure of the joint venture agreement itself. SBA believes such a clarification is not necessary. As part of a size protest, an SBA Office of Government Contracting Area Office will review a joint venture agreement to make sure that the agreement complies with § 124.513, but in no way would that office seek or have the authority to invalidate certain terms or conditions of the joint venture.

A few commenters also sought clarification of SBA's regulations regarding when SBA will determine the eligibility of an 8(a) joint venture. They questioned whether approval would occur as part of the offer and acceptance process or at some later point in time. SBA's regulations provide that SBA approval of an 8(a) joint venture must occur prior to the award of an 8(a) contract. § 124.513(e)(1). That being the case, requiring an eligibility determination for a joint venture as part of the offer and acceptance process would make that requirement meaningless. SBA believes that a district office has flexibility to determine the eligibility of a particular 8(a) joint venture depending upon its workload. As long as that determination occurs any time prior to award, SBA has complied with the regulatory requirement. For a competitive 8(a) procurement, SBA does not receive an offering letter on behalf of any particular 8(a) Participant or potential offeror. As such, requiring SBA to determine the eligibility of a potential joint venture offeror at the time of acceptance would not make any sense. There is no certainty that the joint venture will submit an offer, and, if it does, that it will be the apparent successful offeror. Section 124.507(e) provides that within five working days after being notified by a contracting officer of the apparent successful offeror, SBA will verify the 8(a) eligibility of that entity. If the apparent successful offeror is a joint venture and SBA has not yet approved the joint venture, the five-day period for determining general eligibility would then apply to the joint venture also. If the SBA district office has asked for clarifications or changes with respect to the joint venture and has not received them by the end of this five-day period (and the contracting officer has not granted SBA additional time to conduct an eligibility determination), SBA will have to say that it was unable to verify the eligibility of the apparent successful offeror joint venture.

Agency Consideration of the Past Performance and Capabilities of Team Members (13 CFR 124.513(f), 125.8(e), 125.18(b)(5), 126.616(f), and 127.506(f))

In the proposed rule, SBA proposed that an Agency must consider the past performance of the members of a joint venture when considering the past performance of an entity submitting an offer as a joint venture. SBA proposed this for both 8(a) joint ventures (proposed § 124.513(f)) and small business joint ventures (proposed § 125.8(e)). This proposal was in response to agencies that were considering only the past performance of a joint venture entity, and not considering the past performance of the very entities that created the joint venture entity. Where an agency required the specific joint venture entity itself to have experience and past performance, it made it extremely hard for newly established (and impossible for first-time) joint venture partners to demonstrate positive past performance. Each partner to a joint venture may have individually performed on one or more similar contracts previously, but the joint venture would not be credited with any experience or past performance of its individual partners. Commenters generally supported these changes. A few commenters recommended that SBA clarify that the same policy should also apply to joint ventures in the SDVO, HUBZone and WOSB programs, arguing that joint ventures in those programs could also be hurt where a procuring agency did not consider the experience and past performance of the individual partners to a joint venture. SBA agrees. As such, this final rule adds similar language to that proposed for 8(a) and small business joint ventures to SDVO joint ventures (§ 125.18(b)(5)), HUBZone joint ventures (§ 126.616(f)), and WOSB joint ventures (§ 127.506(f)).

Recertification When an Affiliate Acquires Another Concern (13 CFR 121.404(g)(2)(ii)(A))

In the final rule, SBA is clarifying its position that recertification is required when an affiliate of an entity acquires another concern. Under SBA's general principles of affiliation, if a firm is an affiliate it means that one entity controls or has the power to control the other or a third party controls both, and SBA aggregates the receipts or employees of the concern in question and its affiliates. In our view, an acquisition by an affiliate must be deemed an acquisition by the concern in question. Otherwise, firms could easily circumvent SBA's recertification rules by simply creating affiliates to acquire or merge with other firms. The clear intent of SBA's recertification rule was to require recertification when an entity exceeds the size standard due to acquisition, merger or novation, and there is no public policy rationale for not requiring recertification based on the whether it is the entity in question that acquires another concern, or an affiliate of the entity in question. The bottom line is the entity, including its affiliates, no longer qualifies as small and agencies should not receive future small business credit for dollars awarded to the concern in question, or its affiliates.

Establishing Social Disadvantage for the 8(a) BD Program (13 CFR 124.103)

SBA also proposed amendments to § 124.103(c) in order to clarify that an individual claiming social disadvantage must present a combination of facts and evidence which by itself establishes that the individual has suffered social disadvantage that has negatively impacted his or her entry into or advancement in the business world. Under the proposed rule, SBA could disregard a claim of social disadvantage where a legitimate alternative ground for an adverse action exists and the individual has not presented evidence that would render his/her claim any more likely than the alternative ground. A statement that a male co-worker received higher compensation or was promoted over a woman does not amount to an incident of social disadvantage by itself. Additional facts are necessary to establish an instance of social disadvantage. A statement that a male co-worker received higher compensation or was promoted over a woman and that the woman had the

same or superior qualifications and responsibilities would constitute an incident of social disadvantage.

A few commenters opposed this proposed change. They did not believe that it would be appropriate to require proof of certain events that are not easily documented. One commenter noted that SBA currently permits individuals to prove social disadvantage with affidavits and sworn statements attesting to events in their lives that they believe were motivated by bias or discrimination, and questioned how an individual could in fact present additional evidence to prove his or her claim of alleged discriminatory conduct. SBA believes that these commenters misunderstood SBA's intent. SBA does not intend that individuals provide additional supporting documentation or evidence. Rather, SBA is merely looking for the individual's statement to contain a more complete picture. As noted in the proposed rule, the example of a man being promoted over a woman without additional facts does not lead to a more likely than not conclusion of discriminatory conduct. If the man had 10 years of experience to the woman's 3 years of experience, there could be a legitimate reason for his promotion over the woman. However, if she can say that the two had similar experience and qualifications and yet he was promoted and she was not, her claim of discriminatory conduct would have merit. All SBA is looking for is the complete picture, or additional facts, that would make an individual's claim of bias or discriminatory conduct more likely than not. Absent any evidence to the contrary, SBA would continue to rely on affidavits and sworn statements, and as long as those statements presented a clear picture, they would be sufficient to establish an instance of social disadvantage.

SBA is not intending to raise the evidentiary burden placed on an 8(a) applicant above the preponderance of the evidence standard. SBA is not seeking definitive proof, but rather additional facts to support the claim that a negative outcome (*e.g.,* failure to receive a promotion or needed training) was based on discriminatory conduct instead of one or more legitimate non-discriminatory reasons. It is not SBA's intent to disbelieve an applicant. In fact, SBA intends to rely on personal narratives to support claims of social disadvantage. As long as those claims are complete and are not contradictory, SBA will depend solely on the narratives, and consider them to be instances of social disadvantage.

Control of an 8(a) BD Applicant or Participant

Section 124.106 of SBA's regulations currently provides that one or more disadvantaged individuals must control the daily business operations of an 8(a) BD applicant or Participant. In determining whether the experience of one or more disadvantaged individuals claiming to manage the applicant or Participant is sufficient for SBA to determine that control exists, SBA's regulations require that the individuals must have managerial experience ''of the extent and complexity needed to run the concern.'' Although the regulations also provide that a ''disadvantaged individual need not have the technical expertise or possess a required license to be found to control an applicant or Participant,'' several comments indicated that there is confusion as to what type of managerial experience is needed to satisfy SBA's requirements. SBA did not intend to require in all instances that a disadvantaged individual must have managerial experience in the same or similar line of work as the applicant or Participant. A middle manager in a multi-million dollar large business or a vice president in a concern qualifying as small but nevertheless substantial may have gained sufficient managerial experience in a totally unrelated business field. The words ''of the extent and complexity needed to run the concern'' were meant to look at the degree of management experience, not the field in which that experience was gained. For example, an individual who has been a middle manager of a large aviation firm for 20 years and can demonstrate overseeing the work of a substantial number of employees may be deemed to have managerial experience of the extent and complexity needed to run a five-employee applicant firm whose primary industry category was in emergency management consulting even though that individual had no technical knowledge relating to the emergency management consulting field. SBA believes, however, that more specific industry-related experience may be needed in appropriate circumstances to ensure that the disadvantaged individual(s) claiming to control the day-to-day operations of the firm do so in fact. This would be particularly true where a non-disadvantaged owner (or former owner) who has experience related to the industry is actively involved in the day-to-day management of the firm. In order to clarify SBA's intent, this rule adds language to § 124.106 to specify that management experience need not be related to the same or similar industry as the primary industry classification of the applicant or Participant.

8(a) BD Application Processing (13 CFR 124.202, 124.203, 124.104(b), and 124.108(a))

SBA's regulations require applicants to the 8(a) BD program to submit certain specified supporting documentation, including financial statements, copies of signed Federal personal and business tax returns and individual and business bank statements. The regulations also required that an applicant must submit a signed IRS Form 4506T, Request for Copy or Transcript of Tax Form, in all cases. A commenter questioned the need for every applicant to submit IRS Form 4506T. SBA agrees that this form is not needed in every case. SBA always has the right to request any applicant to submit specific information that may be needed in connection with a specific application. As long as SBA's regulations clearly provide that SBA may request any additional documents SBA deems necessary to determine whether a specific applicant is eligible to participate in the 8(a) BD program, SBA will be able to request that a particular firm submit IRS Form 4506T where SBA believes it to be appropriate. As such, this final rule eliminates the requirement from § 124.203 that an applicant must submit IRS Form 4506T in very case, and clarifies that SBA may request additional documentation when necessary.

In addition, a commenter noted that SBA's regulations provide that applications for the 8(a) BD program must generally be filed electronically, and questioned the need to allow hard copy applications at all. The commenter was concerned that there is a greater possibility for one or more attachments to be misplaced when an applicant files a hard copy application, that SBA staff could incorrectly transpose information when putting it into an electronic format, and that in today's business world there is no excuse for not having access to the internet and SBA's electronic application. SBA agrees. As such, this final rule amends § 124.202 to require applications to be filed electronically, with the understanding that certain supporting documentation may also be required under § 124.203.

Section 124.203 also requires that an applicant must provide a wet signature from each individual claiming social disadvantage status. Several commenters questioned the need for ''wet'' signatures, arguing that this requirement placed a significant burden on applicants. These commenters noted that an applicant that files an electronic

8(a) BD application must also sign and manually send a wet signature to SBA. They argued that such a requirement did not make sense, as long as the individual(s) upon whom eligibility is based take responsibility for any information submitted on behalf of the applicant. SBA agrees and has eliminated the requirement for a wet signature. Any electronic signing protocol must ensure the Agency is able to specifically identify the individual making the representation in an electronic system. As long as applicants know that the individual(s) upon whom eligibility is based take responsibility for the accuracy and truthfulness of any information submitted on behalf of the applicant, an electronic, uploaded signature should be sufficient.

SBA's regulations also provided that if during the processing of an application, SBA receives adverse information regarding possible criminal conduct by the applicant or any of its principals, SBA would automatically suspend further processing of the application and refer it to SBA's Office of Inspector General (OIG) for review. Commenters believed that both of these provisions unnecessarily delayed SBA's processing of 8(a) applications. These commenters believed that referral to SBA's OIG should not occur in every instance, such as where a minor infraction occurred many years ago, but that SBA should have the discretion to refer matters to SBA's OIG in appropriate instances. SBA is committed to reducing the processing time for 8(a) applications and agrees that mandatory OIG referral may be unnecessary. SBA agrees that an application evidencing a 20 year old disorderly conduct offense for an individual claiming disadvantaged status when that individual was in college should not be referred to the OIG where that is the only instance of anything concerning the individual's good character. Such an offense has nothing to do with the individual's business integrity. In addition, even if it did, an offense that was that old (with no other instances of such misconduct) could also be determined not to be relevant for a present good character determination, and thus, not be one that caused SBA to suspend an 8(a) application and refer the matter to the OIG for review. This final rule provides necessary discretion to SBA to allow SBA to determine when to refer a matter to the OIG.

In addition, SBA's regulations provide that each individual claiming economic disadvantage must describe such economic disadvantage in a narrative statement, and must submit personal financial information to SBA. SBA believes that the written narrative on economic disadvantage is an unnecessary burden imposed on applicants to the 8(a) BD program. SBA's determination as to whether an individual qualifies as economically disadvantaged is based solely on an analysis of objective financial data relating to the individual's net worth, income and total assets. As such, this final rule eliminates the requirement that each individual claiming economic disadvantage must submit a narrative statement in support of his or her claim of economic disadvantage.

Substantial Unfair Competitive Advantage Within an Industry Category (13 CFR 124.109, 124.110, and 124.111)

Pursuant to section 7(j)(10)(J)(ii)(II) of the Small Business Act, 15 U.S.C. 636(j)(10)(J)(ii)(II), ''[i]n determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) [for purposes of 8(a) BD program entry and 8(a) BD contract award], each firm's size shall be independently determined without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.'' For purposes of the 8(a) BD program, the term ''Indian tribe'' includes any Alaska Native village or regional or village corporation (within the meaning of the Alaska Native Claims Settlement Act). 15 U.S.C. 637(a)(13). SBA's regulations have extended this broad exclusion from affiliation to the other entity-owned firms authorized to participate in the 8(a) BD program (*i.e.,* firms owned by Native Hawaiian Organizations (NHOs) and Community Development Corporations (CDCs)). *See* §§ 124.109(a), 124.109(c)(2)(iii), 124.110(b), and 124.111(c). The proposed rule attempted to provide guidance as to how SBA will determine whether a firm has obtained or is likely to obtain ''a substantial unfair competitive advantage within an industry category.''

SBA received a significant number of comments supporting the clarifying language of the proposed rule. Commenters agreed that the term ''industry category'' should be defined by six digit NAICS code, as that application would be consistent with other similar terms in SBA's regulations. They also agreed that an industry category should be looked at nationally since size standards are established on a national basis. Thus, the final rule provides that an entity-owned business concern is not subject to the broad exemption to affiliation set forth in 13 CFR part 124 where one or more entity-owned firms are found to have obtained, or are likely to obtain, a substantial unfair competitive advantage on a national basis in a particular NAICS code with a particular size standard.

In making this assessment, SBA will consider a firm's percentage share of the national market and other relevant factors to determine whether a firm is dominant in a specific six-digit NAICS code with a particular size standard. SBA will review Federal Procurement Data System (FPDS) data to compare the firm's share of the industry as compared to overall small business participation in that industry to determine whether there is an unfair competitive advantage. The rule does not contemplate a finding of affiliation where an entity-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.

Management of Tribally-Owned 8(a) Program Participants (13 CFR 124.109)

The proposed rule sought to add language to § 124.109(c)(4) specifying that the individuals responsible for the management and daily operations of a tribally-owned concern cannot manage more than two Program Participants at the same time. This language is taken directly from section 7(j)(11)(B)(iii)(II) of the Small Business Act (15 U.S.C. 636(j)(11)(B)(iii)(II)), but does not currently appear in SBA's 8(a) BD regulations. The proposed rule provided that SBA believes it is necessary to incorporate this provision into the regulations to more fully apprise tribally-owned 8(a) applicants and Participants of the control requirements applicable to them. Those commenting on this provision understood the change and supported it. Thus, this final rule adopts the proposed language.

Native Hawaiian Organizations (NHOs) (13 CFR 124.110)

The proposed rule also sought to add language to § 124.110(d) to clarify that the members or directors of an NHO need not have the technical expertise or possess a required license to be found to control an applicant or Participant owned by the NHO. Rather, the NHO, through its members and directors, must merely have managerial experience of the extent and complexity needed to run the concern. As with individually owned 8(a) applicants and Participants,

individual NHO members may be required to demonstrate more specific industry-related experience in appropriate circumstances to ensure that the NHO in fact controls the day-to-day operations of the firm. This is particularly true where a non-disadvantaged owner (or former owner) who has experience related to the industry is actively involved in the day-to-day management of the firm. Commenters supported this change as a needed clarification to the control requirements for NHOs. They believed that this change will allow NHOs with significant management experience to participate in and branch out into diverse industries, and that such a change will have a positive effect on the Native Hawaiian community. The final rule adopts the language as proposed.

The Small Business Act authorizes small business concerns owned by ''economically disadvantaged'' NHOs to participate in the 8(a) BD program. 15 U.S.C. 637(a)(4)(A)(i)(III). Neither the statute nor its legislative history provides any guidance on how to determine whether an NHO is economically disadvantaged. Currently, § 124.110(c)(1) provides that in determining whether an NHO is economically disadvantaged, SBA will look at the individual economic status of the NHO's members. The NHO must establish that a majority of its members qualify as economically disadvantaged under the rules that apply to individuals as set forth in § 124.104. The proposed rule solicited comments as to whether this is the most sensible approach to establishing economic disadvantage for NHOs.

SBA received a significant number of comments from the Native Hawaiian community on this issue, including several commenters who appeared at one or more of the tribal consultations. These commenters recommended that NHOs should establish economic disadvantage in the same way that tribes currently do for the 8(a) BD program: that is, by providing information relating to members, including the tribal unemployment rate, the per capita income of tribal members, and the percentage of tribal members below the poverty level. For the Native Hawaiian community, this would mean that an NHO would have to describe the individuals to be served by the NHO and provide the economic data regarding those individuals. SBA agrees that basing the economic disadvantage status of an NHO on individual Native Hawaiians who control the NHO does not seem to be the most appropriate way to do so. The Small Business Act defines the term ''Native Hawaiian Organization'' to mean ''any community service organization serving Native Hawaiians in the State of Hawaii which (A) is a nonprofit corporation . . ., (B) is controlled by Native Hawaiians, and (C) whose business activities will principally benefit such Native Hawaiians.'' 15 U.S.C. 637(a)(15). The crucial point is that an NHO must be a community service organization that benefits Native Hawaiians. It is certainly understood that an NHO must serve economically disadvantaged Native Hawaiians, but nowhere is there any hint that economically disadvantaged Native Hawaiians must control the NHO. The statutory language merely requires that an NHO must be controlled by Native Hawaiians. In order to maximize benefits to the Native Hawaiian community, SBA believes that it makes sense that an NHO should be able to attract the most qualified Native Hawaiians to run and control the NHO. If the most qualified Native Hawaiians cannot be part of the team that controls an NHO because they may not qualify individually as economically disadvantaged, SBA believes that is a disservice to the Native Hawaiian community. As such, this final rule changes the way that SBA will determine whether an NHO qualifies as economically disadvantaged. It makes NHOs similar to Indian tribes by requiring an NHO to present information relating to the economic disadvantaged status of Native Hawaiians, including the unemployment rate of Native Hawaiians and the per capita income of Native Hawaiians. The difference between tribes and NHOs, however, is that one tribe serves and intends to benefit one distinct group of people (*i.e.,* its specific tribal members), and multiple NHOs may be established to serve and benefit the same group of people (*i.e.,* the entire Native Hawaiian community). As with economic disadvantage for tribes, once an NHO establishes that it is economically disadvantaged in connection with the application of one firm owned and controlled by the NHO because the intended beneficiaries are economically disadvantaged, it need not reestablish its economic disadvantage for another firm owned by the NHO. In addition, unless a second NHO intends to serve and benefit a different population than that of the first NHO that established its economic disadvantage status, the second NHO also need not submit information to establish its economic disadvantage. Of course, in any case, the AA/BD may request an NHO to reestablish/establish its economic disadvantage status where the AA/BD believes that circumstances of the Native Hawaiian community may have changed.

Sole Source 8(a) Awards

Pursuant to § 8(a)(1)(D) of the Small Business Act, 8(a) procurements that exceed $7.0 million for those assigned a manufacturing NAICS code and $4.0 million for all others must generally be competed among eligible 8(a) Program Participants. 15 U.S.C. 637(a)(1)(D). However, pursuant to section 303 of the Business Opportunity Reform Act of 1988 (Pub. L. 100–656), 102 Stat. 3853, 3887–3888, 8(a) Program Participants owned by Indian tribes and Alaska Native Corporations (ANCs) are exempt from those competitive threshold limitations. As such, a Participant owned by an Indian tribe or ANC can receive an 8(a) sole source award in any amount under the Small Business Act. Section 811 of the National Defense Authorization Act for Fiscal Year 2010 (NDAA 2010) (Section 811), Public Law 111–84, imposed justification and approval requirements on any 8(a) sole source contract that exceeds $20 million. 123 Stat. 2190, 2405. Specifically, section 811 provides that the head of an agency may not award a sole source 8(a) contract for an amount exceeding $20 million ''unless the contracting officer for the contract justifies the use of a sole-source contract in writing'' and ''the justification is approved by the appropriate official designated to approve contract awards for dollar amounts that are comparable to the amount of the sole-source contract. . .'' *Id.* This provision has been implemented in FAR 19.808–1(a) and 6.303–1(b), which currently provide that SBA cannot accept for negotiation a sole-source 8(a) contract that exceeds $22 million unless the requesting agency has completed a justification in accordance with the requirements of FAR 6.303. The FAR recently increased the $20 million amount to $22 million in order to take into account inflation. Several commenters to the proposed rule noted that SBA's regulations do not take into account section 811 or FAR 19.808–1, and requested that SBA amend its regulations to be consistent with the FAR. This final rule merely incorporates the section 811 and FAR requirements into SBA's regulations. In addition, it requires a procuring agency that is offering a sole source requirement that exceeds $22 million for award through the 8(a) BD to provide a statement in its offering letter that the necessary justification and approval under the FAR has occurred. SBA will not question and does not need to obtain a copy of the justification and

approval, but merely ensure that it has been done.

SBA believes that there is some confusion in the 8(a) and procurement communities regarding the requirements of section 811. There is a misconception by some that there can be no 8(a) sole source awards that exceed $22 million. That is not true. Nothing in either section 811 or the FAR prohibits 8(a) sole source awards to Program Participants owned by Indian tribes and ANCs above $22 million. All that is required is that a contracting officer justify the award and have that justification approved at the proper level. In addition, there is no statutory or regulatory requirement that would support prohibiting 8(a) sole source awards above any specific dollar amount, higher or lower than $22 million.

As noted above, 8(a) procurements that exceed $7.0 million for those assigned a manufacturing NAICS code and $4.0 million for all others must generally be competed among eligible 8(a) Program Participants. This final rule also amends § 124.506(a)(2)(ii) regarding the competitive threshold amounts to make it consistent with the inflationary adjustment made to the FAR. As such, the final rule replaces the outdated $6.5 million competitive threshold for procurements assigned a manufacturing NAICS, and replaces it with the $7.0 million competitive threshold currently contained in § 19.805–1(a)(2) of the FAR.

Change in Primary Industry Classification (13 CFR 124.112)

The proposed rule sought to authorize SBA to change the primary industry classification contained in a Participant's business plan where the greatest portion of the Participant's total revenues during a three-year period have evolved from one NAICS code to another. It also provided discretion to SBA in deciding whether to change a Participant's primary industry classification because SBA recognized that whether the greatest portion of a firm's revenues is derived from one NAICS code, as opposed to one or more other NAICS codes, is a snapshot in time that is ever changing. The rule also proposed to require SBA to notify the Participant of its intent to change the Participant's primary industry classification and afford the Participant the opportunity to submit information explaining why such a change would be inappropriate. Although the language of the proposed rule specifically authorized the opportunity for a Participant to dispute any intent to change its primary NAICS code, the supplementary information to the proposed rule also requested comments as to whether an alternative that would permit SBA to change a Participant's primary industry automatically, based on FPDS data, should be considered instead.

SBA received a vast number of comments on this particular provision, both as formal written comments and as part of the various tribal consultations. In fact, this was the most heavily commented on provision of the proposed rule. Commenters focused on the alternative to allow SBA to change a Participant's primary industry unilaterally and strenuously opposed that alternative. Commenters presented many reasons why they opposed any automatic change in Participants' primary industry category. They felt that it would inappropriately impose a significant change on a firm based on inherently incomplete date in FPDS, which does not take all revenue streams into consideration. Commenters also noted that firms are not limited to pursuing work only in their primary NAICS code, and naturally pursue work in multiple NAICS codes. They believed that it would be contrary to the business development purposes of the program to discourage firms from branching out into several related industry categories. In addition, commenters noted that the work to be performed for a particular requirement may often be classified under more than one NAICS code. Commenters argued that if there are several reasonable NAICS codes that could be assigned to a requirement and a procuring agency selects one code (that happens to be a Participant's secondary NAICS code) instead of another (which is the Participant's primary NAICS code), the Participant should not be penalized for not performing work in its identified primary NAICS code. Commenters also felt that a unilateral change by SBA would deny a Participant due process rights and argued that there definitely should be dialogue between SBA and the Participant before any change is made to the Participant's primary NAICS code. Finally, although several commenters supported SBA's belief that it needed the ability to change a Participant's primary NAICS code in appropriate circumstances, a few different commenters opposed any change to a Participant's primary NAICS code.

SBA continues to believe that it should have the ability to change a Participant's primary NAICS code in appropriate circumstances. Because an entity-owned applicant need not have a track record of past performance to be eligible to participate in the 8(a) BD program (*i.e.,* it can meet the potential for success requirement simply by having the entity make a firm written commitment to support the operations of the applicant), the applicant has wide latitude in selecting its primary NAICS code. If the applicant selects a primary NAICS code merely to avoid the primary NAICS code of another Participant owned by the entity and has no intention of doing any work in that NAICS code, SBA believes that it should be able to change that Participant's primary NAICS code. Without such ability, there would be no requirement that the newly admitted Participant actually perform most, or any, work in the six digit NAICS code selected as its primary business classification in its application after being certified to participate in the 8(a) BD program. A firm could circumvent the intent of SBA's regulations by selecting a primary business classification that is different from the primary business classification of any other Participant owned by that same entity merely to get admitted to the 8(a) BD program, and then perform the majority, or even all, of its work in the identical primary NAICS code as another Participant owned by the entity. That should not be permitted to occur. However, SBA agrees with the commenters that SBA should not change a Participant's primary NAICS code without discussion back and forth between SBA and the Participant. SBA merely wants to ensure that the Participant has made and will continue to make good faith efforts to receive contracts (either Federal or non-Federal) in the NAICS code it identified as its primary NAICS code. For example, where a Participant details contract opportunities under its primary NAICS code that it submitted offers for in the last year, but was not successful in winning, and its concrete plans to continue to seek additional opportunities in that NAICS code, SBA would not change the Participant's primary industry classification. SBA understands the cyclical nature of business and that different factors may affect what type of contract opportunities are available. SBA does not expect a Participant to do no business when there is a downward turn in the industry identified as its primary NAICS code. Where SBA believes that a Participant's revenues for a secondary NAICS code exceed those of its identified primary NAICS code over the Participant's last three completed fiscal years, SBA would notify the Participant of its belief and ask the firm for input as to what its primary NAICS code is.

At that point, SBA would be looking for a reasonable explanation as to why the identified primary NAICS code should remain as the Participant's primary NAICS code. The Participant should identify: all non-Federal work that it has performed in its primary NAICS code; any efforts it has made to obtain contracts in the primary NAICS code; all contracts that it was awarded that it believes could have been classified under its primary NAICS code, but which a contracting officer assigned another reasonable NAICS code; and any other information that it believes has a bearing on why its primary NAICS code should not be changed despite performing more work in another NAICS code.

The proposed rule also provided that if SBA determined that a change in a Participant's primary NAICS code was appropriate and that Participant was an entity-owned firm that could not have two Participants in the program with the same primary NAICS code, the entity (tribe, ANC, NHO, or CDC) would be required to choose which Participant should leave the 8(a) BD program if the change in NAICS codes caused it to have two Participants with the same primary NAICS code. Several commenters opposed requiring an entity to terminate the continued participation of one of its 8(a) BD Participants where it would have two Participants having the same primary NAICS code after SBA changes the primary NAICS of one of the firms. Instead, these commenters recommended that the second, newer firm be permitted to continue to participate in the 8(a) BD program, but not be permitted to receive any additional 8(a) contracts in the six-digit NAICS code that is the primary NAICS code of the other 8(a) Participant. SBA agrees that that would be a more suitable approach. The second firm is the one that should not have been able to have been admitted to the 8(a) BD program to perform most of its work in a NAICS code that was the primary NAICS code of another Participant owned by the same entity. Allowing the entity to choose to end the participation of the first firm, which may already be near the end of its program term, while allowing the second firm to continue to receive 8(a) contracts in a primary NAICS code that it never should have had would not appear to be much of a deterrent to others to continue this practice, and would not in any way penalize the second Participant that made no reasonable attempt to perform work in the NAICS code that it identified as its primary NAICS code to SBA. Thus, SBA adopts the recommendation and incorporates it into this final rule.

8(a) BD Program Suspensions (13 CFR 124.305)

SBA proposed to add two additional bases for allowing a Participant to elect to be suspended from 8(a) BD program participation: Where the Participant's principal office is located in an area declared a major disaster area or where there is a lapse in Federal appropriations. The changes were intended to allow a firm to suspend its term of participation in the 8(a) BD program in order to not miss out on contract opportunities that the firm might otherwise have lost due to a disaster or a lapse in Federal funding.

SBA received only comments in support of these two new bases to allow a Participant to elect suspension from 8(a) BD program participation. As such, the final rule adopts the language contained in the proposed rule. Upon the request of a certified 8(a) firm in a major declared disaster area, SBA will be able to suspend the eligibility of the firm for up to a one year period while the firm recovers from the disaster to ensure that it is able to take full advantage of the 8(a) BD program, rather than being impacted by lack of capacity or contracting opportunities due to disaster-induced disruptions. During such a suspension, a Participant would not be eligible for 8(a) BD program benefits, including set-asides, however, but would not ''lose time'' in its program term due to the extenuating circumstances wrought by a disaster. Similarly, this rule will allow a Participant to elect to suspend its participation in the 8(a) BD program where: Federal appropriations for one or more Federal departments or agencies have expired without being extended via continuing resolution or other means and no new appropriations have been enacted (*i.e.,* during a lapse in appropriations); SBA has previously accepted an offer for a sole source 8(a) award on behalf of the Participant; and award of the 8(a) sole source contract is pending. A Participant could not elect a partial suspension of 8(a) BD program benefits. If it elects to be suspended during a lapse in Federal appropriations, the Participant would be ineligible to receive any new 8(a) BD program benefits during the suspension.

Benefits Reporting Requirement (13 CFR 124.602)

The proposed rule included an amendment to the time frame for the reporting of benefits for entity-owned Participants in the 8(a) BD program. Previously, SBA required an entity-owned Participant to report benefits as part of its annual review submission. SBA believes it is more appropriate that this information be submitted as part of a Participant's submission of its annual financial statements pursuant to § 124.602. SBA wants to make clear that benefits reporting should not be tied to continued eligibility, as may be assumed where such reporting is part of SBA's annual review analysis. The proposed rule changed the timing of benefits reporting from the time of a Participant's annual review submission to the time of a Participant's annual financial statement submission. SBA believes that the data collected by certain Participants in preparing their financial statements submissions may also help them report some of the benefits that flow to the native or other community. The regulatory change will continue to require the submission of the data on an annual basis but within 120 days after the close of the concern's fiscal year instead of as part of the annual submission.

Commenters supported this change, believing that it was important to remove any doubt that benefits reporting should not in any way be tied to continued eligibility. Although a few commenters opposed the reporting of benefits flowing back to the native or other community entirely, most commenters understood that this requirement was generated in response to a GAO audit and was intended to support the continued need for the tribal 8(a) program. The final rule adopts the proposed language.

Reverse Auctions (13 CFR 125.2 and 125.5)

SBA also proposed to amend §§ 125.2(a) and 125.5(a)(1) to address reverse auctions. Specifically, SBA proposed to reinforce the principle that all of SBA's regulations, including those relating to set-asides and referrals for a Certificate of Competency, apply to reverse auctions. With a reverse auction, the Government is buying a product or service, but the businesses are bidding against each other, which tends to drive the price down (hence the name reverse auction). In a reverse auction, the bidders actually get to see all of the other bidders' prices and can ''outbid'' them by offering a lower price. Although SBA believes that the small business rules currently apply to reverse auctions, the proposed rule intended to make it clear to contracting officials that there are no exceptions to SBA's small business regulations for reverse auctions. SBA received no adverse comments in response to this provision.

As such, the final rule makes no changes from the proposed rule.

Reconsideration of Decisions of SBA's OHA (13 CFR 134.227)

The proposed rule added clarifying language to § 134.227(c) to recognize SBA as a party that may file a request for reconsideration in an OHA proceeding in which it has not previously participated. The final rule adopts the language as proposed. This provision is intended to alter the rule expressed in *Size Appeal of Goel Services, Inc. and Grunley/Goel JVD LLC,* SBA No. SIZ–5356 (2012), which held that SBA could not request reconsideration where SBA did not appear as a party in the original appeal. The SBA believes that it is axiomatic that SBA is always an interested party regarding an appeal of an SBA decision to OHA, and that SBA may request reconsideration of an OHA appeal decision even where SBA chose not to or otherwise did not file a response to the initial appeal petition.

Compliance With Executive Orders 12866, 13563, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule is a significant regulatory action for purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act.

Regulatory Impact Analysis

1. *Is there a need for the regulatory action?*

The final rule implements section 1347(b)(3) of the Small Business Jobs Act of 2010, Public Law 111–240, 124 Stat. 2504, which authorizes the Agency to establish mentor-protégé programs for SDVO SBCs, HUBZone SBCs, and WOSB concerns, modeled on the Agency's mentor-protégé program for small business concerns participating in programs under section 8(a) of the Small Business Act (15 U.S.C. 637(a)). In addition, the final rule implements section 1641 of the NDAA 2013, Public Law 112–239, which authorized SBA to establish a mentor-protégé program for all small business concerns. SBA is also updating its rules to clarify areas where small business concerns may have been confused or where OHA's interpretations of SBA rules do not conform to SBA's interpretation or intent.

2. *What are the alternatives to this rule*?

As noted above in the supplementary information, this rule seeks to implement the Jobs Act of 2010 and NDAA 2013 authorities by creating one new mentor-protégé program in which any small business could participate instead of implementing four new separate small business mentor-protégé programs (*i.e.,* having a separate mentor-protégé program for SDVO SBCs, HUBZone SBCs, WOSB concerns, and all other small business concerns, in addition to the current mentor-protégé program for 8(a) BD Participants). SBA decided to implement one program for all small businesses because SBA believed it would be easier for the small business and acquisition communities to use and understand. The statutory authority for this rule specifically mandates that the new mentor-protégé programs be modeled on the existing mentor-protégé program for small business concerns participating in the 8(a) BD program. Thus, to the extent practicable, SBA has attempted to adopt the regulations governing the 8(a) mentor-protégé program in establishing the mentor-protégé program for SBCs.

3. *What are the potential benefits and costs of this regulatory action*?

The final rule enhances the ability of small business concerns to obtain larger prime contracts that would be normally out of the reach of these businesses. The small business mentor-protégé program should allow all small businesses to tap into the expertise and capital of larger firms, which in turn should help small business concerns become more knowledgeable, stable, and competitive in the Federal procurement arena.

SBA estimates that under the final rule, approximately 2,000 SBCs, will become active in the small business mentor-protégé program, and protégé firms may obtain Federal contracts totaling possibly $2 billion per year. SBA notes that these estimates represent an extrapolation from data on the percentage of 8(a) BD Program Participants with signed MPAs and joint venture agreements, and are based on the dollars awarded to SBCs in FY 2012 according to data retrieved from the Federal Procurement Data System—Next Generation (FPDS–NG). With SBCs able to compete for larger contracts and thus a greater number of contracts in general, Federal agencies may choose to set aside more contracts for competition among small businesses, SDVO SBCs, HUBZone SBCs, and WOSB concerns, rather than using full and open competition. The movement from unrestricted to set-aside contracting might result in competition among fewer total bidders, although there will be more small businesses eligible to submit offers. The added competition for many of these procurements could result in lower prices to the Government for procurements reserved for SBCs, HUBZone SBCs, WOSB concerns, and SDVO SBCs, although SBA cannot quantify this benefit. To the extent that more than two thousand SBCs could become active in the small business mentor-protégé program, this might entail some additional administrative costs to the Federal Government associated with additional bidders for Federal small business procurement opportunities.

The small business mentor-protégé program may have some distributional effects among large and small businesses. Although SBA cannot estimate with certainty the actual outcome of the gains and losses among small and large businesses, it can identify several probable impacts. There may be a transfer of some Federal contracts from large businesses to SBC protégés. However, large business mentors will be able to joint venture with protégé firms for contracts reserved for small business and be eligible to perform contracts that they would otherwise be ineligible to perform. Large businesses may have fewer Federal prime contract opportunities as Federal agencies decide to set aside more Federal contracts for SBCs, SDVO SBCs, HUBZone SBCs, and WOSB concerns. In addition, some Federal contracts may be awarded to HUBZone protégés instead of large businesses since these firms may be eligible for an evaluation adjustment for contracts when they compete on a full and open basis. This transfer may be offset by a greater number of contracts being set aside for SBCs, SDVO SBCs, HUBZone SBCs, and WOSB concerns. SBA cannot estimate the potential distributional impacts of these transfers with any degree of precision.

The small business mentor-protégé program is consistent with SBA's statutory mandate to assist small businesses, and this regulatory action promotes the Administration's objectives. One of SBA's goals in support of the Administration's objectives is to help individual small businesses, including SDVO SBCs, HUBZone SBCs, and WOSB concerns, succeed through fair and equitable access to capital and credit, Federal contracts, and management and technical assistance.

Executive Order 13563

A description of the need for this regulatory action and the benefits and costs associated with this action, including possible distributional impacts that relate to Executive Order 13563, is included above in the Regulatory Impact Analysis.

Executive Order 12866

In an effort to engage interested parties in this action, SBA met with representatives from various agencies to obtain their feedback on SBA's proposed mentor-protégé program. For example, SBA participated in a Government-wide meeting involving Office of Small and Disadvantaged Business Utilization (OSDBU) representatives responsible for mentor-protégé programs in their respective agencies. It was generally agreed upon that SBA's proposed mentor-protégé program would complement the already existing Federal programs due in part to the differing incentives offered to the mentors under the various programs. SBA also presented proposed small business mentor-protégé programs to businesses in thirteen cities in the U.S. and sought their input as part of the Jobs Act tours. In developing the proposed rule, SBA considered all input, suggestions, recommendations, and relevant information obtained from industry groups, individual businesses, and Federal agencies.

Finally, SBA also conducted a series of tribal consultations pursuant to Executive Order 13175, Tribal Consultations. SBA conducted three in-person tribal consultations (in Washington, DC on February 26, 2015, in Tulsa, Oklahoma on April 21, 2015, and in Anchorage, Alaska on April 23, 2015) and two telephonic tribal consultations (one on April 7, 2015, and a Hawaii/Native Hawaiian Organization specific one on April 8, 2015). These consultations highlighted those issues specifically relevant to the tribal, ANC, and NHO communities, but also solicited comments regarding all of the provisions of the proposed rule. SBA considered the statements and recommendations received during the consultation process in finalizing this rule.

Executive Order 12988

For purposes of Executive Order 12988, SBA has drafted this final rule, to the extent practicable, in accordance with the standards set forth in sections 3(a) and 3(b)(2) of that Executive Order, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that this final 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, SBA has determined that this final rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act

For purposes of the Paperwork Reduction Act, 44 U.S.C. Chapter 35, SBA has determined that this final rule would impose new reporting requirements. These collections of information include the following: (1) Information necessary for SBA to evaluate the success of a mentor-protégé relationship; (2) information necessary for SBA to determine whether a prospective mentor is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement; (3) information necessary for SBA to evaluate compliance with performance of work requirements, including work performed by the joint venture; and (4) information detailing the proposed relationship between the mentor and protégé. The rule also eliminates the collection of information currently contained in SBA's regulations. Specifically, the final rule eliminates the requirement that each individual claiming economic disadvantage for purposes of 8(a) eligibility must submit a narrative statement in support of his or her claim of economic disadvantage. SBA eliminated this requirement because SBA believes it to be burdensome and unnecessary.

Finally, the final rule also makes a minor change to the benefits reporting schedule from the time of an 8(a) Participant's annual review submission to when the Participant submits its financial statement as required by § 124.602; specifically, within 120 days after the close of the Participant's fiscal year. The 8(a) Participants Benefits Report form has been approved by OMB (OMB Control No. 3245–0391). This rule makes no substantive changes to the benefits information to be reported to SBA, it merely adjusts the reporting date. The title, summary of each information collection, description of respondents, and an estimate of the reporting burden are discussed below. Included in the estimate is the time for reviewing instructions, searching existing data needed, and completing and reviewing each collection of information.

SBA solicited public comments on these collections of information at the proposed rule stage. Except as discussed below, there was very little feedback on these changes. SBA will submit the final information collections to OMB for approval.

1. *Title and Description:* Mentor-Protégé Agreement [SBA Form 2459]. The agreement between a mentor and protégé will include an assessment of the protégé's needs and goals; a description of the how the mentor intends to assist protégé in meeting its goals; and the timeline for delivery of such assistance.

Need and Purpose: The agreement must be submitted to SBA for review and approval, to help the Agency to determine whether the proposed assistance will enhance the development of the protégé and not merely further the interest of the mentor. The information will also be beneficial to SBA's efforts to reduce fraud, waste, and abuse in Federal contracting programs.

OMB Control Number: New Collection.

Description and Estimated Number of Respondents: This information will be collected from small business protégés pursuant to § 125.9(e). SBA estimates this number to be 2,000.

Estimated Response Time: 1 hour.

Total Estimated Annual Hour Burden: 2,000.

Overall, commenters agreed that the collection of information identified in the proposed rule is necessary for the proper performance of SBA's functions, and would not be overly burdensome for affected business concerns.

2. *Title and Description:* Mentor-Protégé Financial and Other Information. [Form number not applicable] The final rule requires concerns seeking to participate in the small business mentor-protégé program to submit certain financial information to SBA, including copies of Federal tax returns or audited financial statements, if applicable, filings required by the Securities and Exchange Commission, as well as payroll records.

Need and Purpose: The information requested is necessary for SBA to determine whether prospective mentors are in good financial condition and capable of meeting their obligations under the mentor–protégé agreement to provide assistance to protégés and enhance their ability to successfully compete for Federal contracts. SBA will use the information to help determine whether the mentor can meet its obligations to provide business

development assistance under the mentor-protégé agreement, and also whether the protégé is an appropriate participant in the program. This information is to be submitted along with the mentor-protégé agreement as part of the program approval process. SBA believes that any additional burden imposed by this requirement would be minimal since the firms maintain the information in their general course of business.

OMB Control Number: New Collection.

Description of and Estimated Number of Respondents: Pursuant to § 125.9(b)(2), this information will be collected from concerns seeking to benefit as mentors from SBA's mentor-protégé programs under § 125.9. SBA estimates this number to be between 1500 and 2000, since SBA has estimated the number of protégés to be 2,000.

Estimated Response Time: 1 hour.

Total Estimated Annual Hour Burden: 1,500–2,000.

3. *Title and Description:* Mentor-Protégé Benefits Report [SBA Form number 2460]. Protégés participating in the small business mentor-protégé program are required to submit to SBA annual reports on their mentor-protégé relationships. The information to be included in these annual reports is the same type of information that is currently required of protégés participating in SBA's 8(a) Business Development program, and as such will be modeled on the mentor-protégé annual reporting requirements in Attachment B of SBA Form 1450 (OMB Control Number 3245–0205). Such information includes identification of the technical, management and/or financial assistance provided by mentors to protégés; and a description of how that assistance has impacted the development of the protégés. Once a mentor-protégé relationship ends, the protégé must submit a close out report to SBA on whether the protégé believed the mentor-protégé relationship was beneficial and describe any lasting benefits it received.

Need and Purpose: This information collection is necessary for SBA to, among other things, evaluate whether and to what extent the protégés are benefiting or have benefitted from the relationship and in general, the effectiveness of the program in meeting its objectives. The information will also help SBA to determine whether to approve the continuation of the mentor-protégé agreement, approve a second mentor-protégé agreement with the same parties, or take other actions as necessary to protect against fraud, waste, or abuse in SBA's mentor-protégé programs.

OMB Control Number: New Collection.

Description of and Estimated Number of Respondents: This information will be collected from small business protégés pursuant to proposed § 125.9(g). SBA estimates this number to be 2,000.

Estimated Response Time: 2 hours.

Total Estimated Annual Hour Burden: 4,000

4. *Title and Description:* Joint venture agreement. [Form number not applicable] The final rule requires participants to enter into a joint venture agreement that contains certain required provisions, pertaining to ownership, profits, bank accounts, itemization of equipment and specification of responsibilities. Commenters recommended that no specific format should be required for this agreement; therefore no specific format is mandated. However, the agreement must include the information outlined in § 125.8; § 125.18 ; § 126.616; and § 127.506.

Need and Purpose: This information collection is necessary to ensure that joint venture agreements contain the provisions and information required by regulation, including ownership, distribution of profits, bank accounts, itemization of equipment, and specification of responsibilities.

OMB Control Number: New Collection.

Description and Estimated Number of Respondents: This information will be collected from SBC, SDVO SBC, HUBZone SBC, and WOSB joint venture partners SBA estimates this number to be between 1,500 and 2,000.

Estimated Response Time: 1 hour.

Total Estimated Annual Hour Burden: 1,500–2,000

5. *Title and Description:* Joint venture performance of work report [Form number not applicable]. The final rule imposes a requirement on SBC joint venture partners to annually submit to the applicable contracting officers and SBA performance of work reports demonstrating their how they are meeting or have met (for completed contracts), the applicable performance of work requirements for each SDVO, HUBZone, WOSB or small business set-aside contract they perform as a joint venture. Commenters recommended that no specific format should be required by which the information should be transmitted to SBA. Thus, SBA will permit any format that is easiest for the joint venture partners.

Need and Purpose: This requirement will greatly enhance SBA's ability to monitor compliance with the limitations on subcontracting requirements in its effort to reduce fraud, waste, and abuse. SBA believes that any additional burden imposed by this recordkeeping requirement would be minimal because firms are already required to track their compliance with these requirements.

OMB Control Number: New Collection.

Description and Estimated Number of Respondents: This information will be collected from SBC, SDVO SBC, HUBZone SBC, and WOSB joint venture partners under § 125.8(i), § 125.18(b), § 126.616(i), and § 127.506(j). SBA estimates this number to be between 1,500 and 2,000.

Estimated Response Time: 1 hour.

Total Estimated Annual Hour Burden: 1,500–2,000.

Regulatory Flexibility Act 5 U.S.C., 601–612

Under the Regulatory Flexibility Act (RFA), this final rule may have a significant impact on a substantial number of small businesses. Immediately below, SBA sets forth a final regulatory flexibility analysis (FRFA) addressing the impact of this final rule in accordance with section 604, Title 5, of the United States Code. The FRFA examines the need and objectives for this final rule; the significant issues raised by public comment and SBA's responses thereto; kind and number of small entities that may be affected; the projected recordkeeping, reporting, and other requirements; and a description of the steps SBA has taken to minimize the significant economic impact on small entities.

1. *What are the need for and objective of the rule*?

This final rule implements section 1347(b)(3) of the Small Business Jobs Act of 2010, Public Law 111–240, and section 1641 of the NDAA 2013, Public Law 112–239. As discussed above, the Small Business Jobs Act tasked the Agency with establishing mentor-protégé programs for SDVO SBCs, HUBZone SBCs, and WOSB concerns, modeled on the Agency's mentor-protégé program for small business concerns participating in programs under section 8(a) of the Small Business Act (13 U.S.C. 637(a)), commonly known as the 8(a) Business Development program. Similarly, section 1641 of NDAA 2013 authorized SBA to establish a mentor-protégé program for all small business concerns that is identical to the 8(a) BD mentor-protégé program, except that SBA may modify the program to the extent necessary given the types of small

business concerns included as protégés. SBA chose to implement one small business mentor-protégé program, in addition to the 8(a) BD mentor-protégé program.

2. *What are the significant issues raised by the public comments, SBA's assessment of such issues, and any changes made in the proposed rule as a result of such comments*?

As noted above, SBA received 113 comments in response to the proposed rule, with most of the commenters commenting on multiple proposed provisions. A description of the comments received, SBA's response to such comments, and the changes made to the final rule in response to the comments is identified in detail in the supplementary information section of this final rule. The most heavily commented on provision of the proposed rule was the provision authorizing SBA to change the primary NAICS code of an 8(a) BD Program Participant in appropriate circumstances. SBA believed that many of the commenters misconstrued SBA's intent. SBA alleviated the concern that SBA would unilaterally change a firm's primary NAICS code without input from the firm by clarifying in the final rule that there will be a dialogue between SBA and the affected Participant before any NAICS code change is made, and that a change will not occur where the firm provides a reasonable explanation as to why the identified primary NAICS code should remain as the Participant's primary NAICS code.

SBA received a significant number of comments supporting a small business mentor-protégé program. These commenters believed that a small business mentor-protégé program would enable firms that are not in the 8(a) BD program to receive critical business development assistance that would otherwise not be available to them. Many of these commenters expressed support for the opportunity to gain meaningful expertise that would help them to independently perform more complex and higher value contracts in the future.

3. *What are SBA's description and estimate of the number of small entities to which the rule will apply*?

The final rule will apply to all small business concerns participating in the Federal procurement market that seek to form mentor-protégé relationships. SBA estimates this number to be about two thousand, based upon the number of 8(a) Participants that have established mentor-protégé relationships in that program.

4. *What are the projected reporting, recordkeeping, and other compliance requirements of the rule and an estimate of the classes of small entities which will be subject to the requirements*?

The final rule imposes the following reporting and recordkeeping requirements: (1) Information necessary for SBA to evaluate the success of a mentor-protégé relationship; (2) information necessary for SBA to determine whether a prospective mentor is meeting its obligations under its MPA; and (3) information necessary for SBA to evaluate compliance with performance of work requirements. SDVO SBC, HUBZone SBC, and WOSB joint venture partners would be required to submit to SBA performance of work reports demonstrating their compliance with the limitations on subcontracting requirements. SBA estimates this number to be approximately 2,000.

The Paperwork Reduction Act requirements are addressed further above.

5. *What steps has SBA taken to minimize the significant economic impact on small entities*?

Thirteen Federal agencies, including SBA, currently offer mentor-protégé programs aimed at assisting small businesses to gain the technical and business skills necessary to successfully compete in the Federal procurement market. While the mentor-protégé programs offered by other agencies share SBA's goal of increasing the participation of small businesses in Government contracts, the other Federal mentor-protégé programs are structured differently than SBA's proposed mentor-protégé programs, particularly in terms of the incentives offered to mentors. For example, some agencies offer additional points to a bidder who has a signed mentor-protégé agreement in place, while other agencies offer the benefit of reimbursing mentors for certain costs associated with protégés' business development. SBA, as the agency authorized to determine small business size status, is uniquely qualified to offer mentor-protégé program participants the distinctive benefit of an exclusion from affiliation. This incentive makes SBA's mentor-protégé programs particularly attractive to potential mentors. Having a larger and more robust mentor pool increases the likelihood that small business protégés will indeed obtain valuable business development assistance.

SBA decided to implement one new small business mentor-protégé program instead of four new mentor-protégé programs (one for small businesses, one for SDVO small businesses, one for WOSBs and one for HUBZone small businesses) since the other three types of small businesses (SDVO, HUBZone and women-owned) would be necessarily included within any mentor-protégé program targeting all small business concerns. Having one additional program instead of four additional programs will be easier for small business concerns to use and understand, and cause less of a burden on them.

In addition, where the benefits provided to a protégé firm are minimal or where it appears that the relationship has been used primarily to permit a large mentor to benefit from contracts with its approved protégé, through one or more joint ventures, that it would otherwise not be eligible for, SBA will terminate the mentor-protégé relationship. This will allow a small protégé firm to get out of a bad mentor-protégé relationship that may have a negative impact on its economic development and seek and enter a new mentor-protégé relationship that will prove to be more beneficial to the small protégé firm.

Throughout this final rule, SBA has attempted to minimize any costs to small business. SBA believes that the benefits to be gained through a productive mentor-protégé relationship will far outweigh any administrative costs associated with the mentor-protégé program. In addition, the provisions of the final rule attempt to impose safeguards that ensure that small businesses receive meaningful business development assistance, while at the same time ensuring that large businesses do not unduly benefit from small business contracts for which they would otherwise be ineligible to perform.

List of Subjects

13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Individuals with disabilities, Loan programs-business, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 124

Administrative practice and procedures, Government procurement, Hawaiian natives, Indians—business and finance, Minority businesses, Reporting and recordkeeping requirements, Tribally-owned concerns, Technical assistance.

13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

13 CFR Part 126

Administrative practice and procedure, Government procurement, Penalties, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 127

Government contracts, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 134

Administrative practice and procedure, Organization and functions (Government agencies).

For the reasons set forth in the preamble, SBA amends 13 CFR parts 121, 124, 125, 126, 127, and 134 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 662, and 694a(9).

■ 2. Amend § 121.103 by revising paragraphs (b)(2)(ii), (b)(6), the last two sentences of paragraph (h) introductory text, and paragraph (h)(3)(ii) to read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(b) * * *

(2) * * *

(ii) Business concerns owned and controlled by Indian Tribes, ANCs, NHOs, CDCs, or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs, are not considered to be affiliated with other concerns owned by these entities because of their common ownership or common management. In addition, affiliation will not be found based upon the performance of common administrative services so long as adequate payment is provided for those services. Affiliation may be found for other reasons.

(A) Common administrative services which are subject to the exception to affiliation include, bookkeeping, payroll, recruiting, other human resource support, cleaning services, and other duties which are otherwise unrelated to contract performance or management and can be reasonably pooled or otherwise performed by a holding company, parent entity, or sister business concern without interfering with the control of the subject firm.

(B) Contract administration services include both services that could be considered ''common administrative services'' under the exception to affiliation and those that could not.

(*1*) Contract administration services that encompass actual and direct day-to-day oversight and control of the performance of a contract/project are not shared common administrative services, and would include tasks or functions such as negotiating directly with the government agency regarding proposal terms, contract terms, scope and modifications, project scheduling, hiring and firing of employees, and overall responsibility for the day-to-day and overall project and contract completion.

(*2*) Contract administration services that are administrative in nature may constitute administrative services that can be shared, and would fall within the exception to affiliation. These administrative services include tasks such as record retention not related to a specific contract (*e.g.,* employee time and attendance records), maintenance of databases for awarded contracts, monitoring for regulatory compliance, template development, and assisting accounting with invoice preparation as needed.

(C) Business development may include both services that could be considered ''common administrative services'' under the exception to affiliation and those that could not. Efforts at the holding company or parent level to identify possible procurement opportunities for specific subsidiary companies may properly be considered ''common administrative services'' under the exception to affiliation. However, at some point the opportunity identified by the holding company's or parent entity's business development efforts becomes concrete enough to assign to a subsidiary and at that point the subsidiary must be involved in the business development efforts for such opportunity. At the proposal or bid preparation stage of business development, the appropriate subsidiary company for the opportunity has been identified and a representative of that company must be involved in preparing an appropriate offer. This does not mean to imply that one or more representatives of a holding company or parent entity cannot also be involved in preparing an offer. They may be involved in assisting with preparing the generic part of an offer, but the specific subsidiary that intends to ultimately perform the contract must control the technical and contract specific portions of preparing an offer. In addition, once award is made, employee assignments and the logistics for contract performance must be controlled by the specific subsidiary company and should not be performed at a holding company or parent entity level.

* * * * *

(6) A firm that has an SBA-approved mentor-protégé agreement authorized under § 124.520 or § 125.9 of this chapter is not affiliated with its mentor firm solely because the protégé firm receives assistance from the mentor under the agreement. Similarly, a protégé firm is not affiliated with its mentor solely because the protégé firm receives assistance from the mentor under a federal mentor-protégé program where an exception to affiliation is specifically authorized by statute or by SBA under the procedures set forth in § 121.903. Affiliation may be found in either case for other reasons as set forth in this section.

* * * * *

(h) * * * For purposes of this provision and in order to facilitate tracking of the number of contract awards made to a joint venture, a joint venture: must be in writing and must do business under its own name; must be identified as a joint venture in the System for Award Management (SAM); may be in the form of a formal or informal partnership or exist as a separate limited liability company or other separate legal entity; and, if it exists as a formal separate legal entity, may not be populated with individuals intended to perform contracts awarded to the joint venture (*i.e.,* the joint venture may have its own separate employees to perform administrative functions, but may not have its own separate employees to perform contracts awarded to the joint venture). SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture, and that affiliation between the two exists, pursuant to paragraph (h)(5) of this section.

* * * * *

(3) * * *

(ii) Two firms approved by SBA to be a mentor and protégé under § 125.9 of this chapter may joint venture as a small business for any Federal government prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement, and the joint venture meets the requirements of § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate.

* * * * *

■ 3. Amend § 121.404 by revising paragraph (g)(2)(ii)(A) to read as follows:

§ 121.404 When is the size status of a business concern determined?

* * * * *

(g) * * *

(2) * * *

(ii) * * *

(A) When a concern, or an affiliate of the concern, acquires or is acquired by another concern;

* * * * *

§ 121.406 [Amended]

■ 4. Amend § 121.406(b)(5) introductory text by removing the phrase ''paragraph (b)(1)(iii)'' and adding in its place the phrase ''paragraph (b)(1)(iv)''.

§ 121.702 [Amended]

■ 5. Amend § 121.702(a)(1)(i) by adding the words ''an Indian tribe, ANC or NHO (or a wholly owned business entity of such tribe, ANC or NHO),'' before the words ''or any combination of these''.

■ 6. Amend § 121.1001 by redesignating paragraph (b)(10) through (12) as paragraphs (b)(11) through (13), respectively, and by adding a new paragraph (b)(10) to read as follows:

§ 121.1001 Who may initiate a size protest or request a formal size determination?

* * * * *

(b) * * *

(10) For purposes of the small business mentor-protégé program authorized pursuant to § 125.9 of this chapter (based on its status as a small business for its primary or identified secondary NAICS code), the business concern seeking to be a protégé or SBA may request a formal size determination.

* * * * *

PART 124—8(A) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

■ 7. The authority citation for part 124 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d) and 644; Pub. L. 99–661; Pub. L. 100–656, sec. 1207; Pub. L. 101–37; Pub. L. 101–574, section 8021; Pub. L. 108–87; and 42 U.S.C. 9815.

■ 8. Amend § 124.103 as follows:

■ a. Add a sentence at the end of paragraph (c)(1);

■ b. Revise paragraph (c)(2)(ii);

■ c. Redesignate paragraph (c)(2)(iii) as (c)(2)(iv);

■ d. Add a new paragraph (c)(2)(iii);

■ e. Revise newly redesignated paragraph (c)(2)(iv) introductory text; and

■ f. Add paragraphs (c)(3) through (6).

The additions and revisions read as follows:

§ 124.103 Who is socially disadvantaged?

* * * * *

(c) * * *

(1) * * * Such individual should present corroborating evidence to support his or her claim(s) of social disadvantage where readily available.

(2) * * *

(ii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries;

(iii) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant; and

(iv) The individual's social disadvantage must have negatively impacted on his or her entry into or advancement in the business world. SBA will consider any relevant evidence in assessing this element, including experiences relating to education, employment and business history (including experiences relating to both the applicant firm and any other previous firm owned and/or controlled by the individual), where applicable.

* * * * *

(3) An individual claiming social disadvantage must present facts and evidence that by themselves establish that the individual has suffered social disadvantage that has negatively impacted his or her entry into or advancement in the business world.

(i) Each instance of alleged discriminatory conduct must be accompanied by a negative impact on the individual's entry into or advancement in the business world in order for it to constitute an instance of social disadvantage.

(ii) SBA may disregard a claim of social disadvantage where a legitimate alternative ground for an adverse employment action or other perceived adverse action exists and the individual has not presented evidence that would render his/her claim any more likely than the alternative ground.

Example 1 to paragraph (c)(3)(ii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She certifies that while working for company X, she received less compensation than her male counterpart. Without additional facts, that claim is insufficient to establish an incident of gender bias that could lead to a finding of social disadvantage. Without additional facts, it is no more likely that the individual claiming disadvantage was paid less than her male counterpart because he had superior qualifications or because he had greater responsibilities in his employment position. She must identify her qualifications (education, experience, years of employment, supervisory functions) as being equal or superior to that of her male counterpart in order for SBA to consider that particular incident may be the result of discriminatory conduct.

Example 2 to paragraph (c)(3)(ii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She certifies that while working for company Y, she was not permitted to attend a professional development conference, even though male employees were allowed to attend similar conferences in the past. Without additional facts, that claim is insufficient to establish an incident of gender bias that could lead to a finding of social disadvantage. It is no more likely that she was not permitted to attend the conference based on gender bias than based on non-discriminatory reasons. She must identify that she was in the same professional position and level as the male employees who were permitted to attend similar conferences in the past, and she must identify that funding for training or professional development was available at the time she requested to attend the conference.

(iii) SBA may disregard a claim of social disadvantage where an individual presents evidence of discriminatory conduct, but fails to connect the discriminatory conduct to consequences that negatively impact his or her entry into or advancement in the business world.

Example to paragraph (c)(3)(iii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She provides instances where one or more male business clients utter derogatory statements about her because she is a woman. After each instance, however, she acknowledges that the clients gave her contracts or otherwise continued to do business with her. Despite suffering discriminatory conduct, this individual has not established social disadvantage because the discriminatory conduct did not have an adverse effect on her business.

(4) SBA may request an applicant to provide additional facts to support his or her claim of social disadvantage to substantiate that a negative outcome was based on discriminatory conduct instead of one or more legitimate non-discriminatory reasons.

(5) SBA will discount or disbelieve statements made by an individual seeking to establish his or her individual social disadvantage where such statements are inconsistent with other evidence contained in the record.

(6) In determining whether an individual claiming social disadvantage meets the requirements set forth in this paragraph (c), SBA will determine whether:

(i) Each specific claim establishes an incident of bias or discriminatory conduct;

(ii) Each incident of bias or discriminatory conduct negatively impacted the individual's entry into or advancement in the business world; and

(iii) In the totality, the incidents of bias or discriminatory conduct that negatively impacted the individual's entry into or advancement in the business world establish chronic and substantial social disadvantage.

* * * * *

■ 9. Amend § 124.104 by revising paragraph (b)(1) to read as follows:

§ 124.104 Who is economically disadvantaged?

* * * * *

(b) *Submission of financial information.* (1) Each individual claiming economic disadvantage must submit personal financial information.

* * * * *

■ 10. Amend § 124.105 by revising paragraph (h)(2) introductory text to read as follows:

§ 124.105 What does it mean to be unconditionally owned by one or more disadvantaged individuals?

* * * * *

(h) * * *

(2) A non-Participant concern in the same or similar line of business or a principal of such concern may not own more than a 10 percent interest in a Participant that is in the developmental stage or more than a 20 percent interest in a Participant in the transitional stage of the program, except that a former Participant in the same or similar line of business or a principal of such a former Participant (except those that have been terminated from 8(a) BD program participation pursuant to §§ 124.303 and 124.304) may have an equity ownership interest of up to 20 percent in a current Participant in the developmental stage of the program or up to 30 percent in a transitional stage Participant.

* * * * *

■ 11. Amend § 124.106 introductory text by adding a new fifth sentence to read as follows:

§ 124.106 When do disadvantaged individuals control an applicant or Participant?

* * * Management experience need not be related to the same or similar industry as the primary industry classification of the applicant or Participant. * * *

* * * * *

■ 12. Amend § 124.108 by revising paragraph (a)(1) and by removing ''10 percent'' in paragraph (a)(4) and adding in its place ''20 percent''.

The revision reads as follows:

§ 124.108 What other eligibility requirements apply for individuals or businesses?

(a) * * *

(1) If during the processing of an application, SBA receives adverse information from the applicant or a credible source regarding possible criminal conduct by the applicant or any of its principals, SBA may suspend further processing of the application and refer it to SBA's Office of Inspector General (OIG) for review. If the SBA suspends the application, but does not hear back from OIG within 45 days, SBA may proceed with application processing. The AA/BD will consider any findings of the OIG when evaluating the application.

* * * * *

■ 13. Amend § 124.109 by adding paragraphs (c)(2)(iv) and (c)(4)(iii) to read as follows:

§ 124.109 Do Indian tribes and Alaska Native Corporations have any special rules for applying to the 8(a) BD program?

* * * * *

(c) * * *

(2) * * *

(iv) In determining whether a tribally-owned concern has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category, SBA will examine the firm's participation in the relevant six digit NAICS code nationally as compared to the overall small business share of that industry.

(A) SBA will consider the firm's percentage share of the national market and other relevant factors to determine whether the firm is dominant in a specific six-digit NAICS code with a particular size standard.

(B) SBA does not contemplate a finding of affiliation where a tribally-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.

* * * * *

(4) * * *

(iii) The individuals responsible for the management and daily operations of a tribally-owned concern cannot manage more than two Program Participants at the same time.

(A) An individual's officer position, membership on the board of directors or position as a tribal leader does not necessarily imply that the individual is responsible for the management and daily operations of a given concern. SBA looks beyond these corporate formalities and examines the totality of the information submitted by the applicant to determine which individual(s) manage the actual day-to-day operations of the applicant concern.

(B) Officers, board members, and/or tribal leaders may control a holding company overseeing several tribally-owned or ANC-owned companies, provided they do not actually control the day-to-day management of more than two current 8(a) BD Program Participant firms.

* * * * *

■ 14. Amend § 124.110 as follows:

■ a. Add a sentence to the end of paragraph (b) introductory text;

■ b. Add paragraphs (b)(1) and (2);

■ c. Revise paragraph (c) introductory text and paragraph (c)(1);

■ d. Revise paragraph (d);

■ e. Redesignate paragraph (g) as paragraph (h); and

■ f. Add a new paragraph (g).

The additions and revisions read as follows:

§ 124.110 Do Native Hawaiian Organizations have any special rules for applying to the 8(a) BD program?

* * * * *

(b) * * * In determining whether an NHO-owned concern has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category, SBA will examine the firm's participation in the relevant six digit NAICS code nationally.

(1) SBA will consider the firm's percentage share of the national market and other relevant factors to determine whether the firm is dominant in a specific six-digit NAICS code with a particular size standard.

(2) SBA does not contemplate a finding of affiliation where an NHO-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.

(c) An NHO must establish that it is economically disadvantaged and that its business activities will principally benefit Native Hawaiians. Once an NHO establishes that it is economically disadvantaged in connection with the application of one NHO-owned firm, it need not reestablish such status in order to have other businesses that it owns certified for 8(a) BD program participation, unless specifically requested to do so by the AA/BD. If a different NHO identifies that it will serve and benefit the same Native Hawaiian community as an NHO that has already established its economic disadvantage status, that NHO need not

establish its economic disadvantage status in connection with an 8(a) BD application of a business concern that it owns, unless specifically requested to do so by the AA/BD.

(1) In order to establish that an NHO is economically disadvantaged, it must demonstrate that it will principally benefit economically disadvantaged Native Hawaiians. To do this, the NHO must provide data showing the economic condition of the Native Hawaiian community that it intends to serve, including:

(i) The number of Native Hawaiians in the community that the NHO intends to serve;

(ii) The present Native Hawaiian unemployment rate of those individuals;

(iii) The per capita income of those Native Hawaiians, excluding judgment awards;

(iv) The percentage of those Native Hawaiians below the poverty level; and

(v) The access to capital of those Native Hawaiians.

* * * * *

(d) An NHO must control the applicant or Participant firm. To establish that it is controlled by an NHO, an applicant or Participant must demonstrate that the NHO controls its board of directors, managing members, managers or managing partners.

(1) The NHO need not possess the technical expertise necessary to run the NHO-owned applicant or Participant firm. The NHO must have managerial experience of the extent and complexity needed to run the concern. Management experience need not be related to the same or similar industry as the primary industry classification of the applicant or Participant.

(2) An individual responsible for the day-to-day management of an NHO-owned firm need not establish personal social and economic disadvantage.

* * * * *

(g) An NHO-owned firm's eligibility for 8(a) BD participation is separate and distinct from the individual eligibility of the NHO's members, directors, or managers.

(1) The eligibility of an NHO-owned concern is not affected by the former 8(a) BD participation of one or more of the NHO's individual members.

(2) In determining whether an NHO is economically disadvantaged, SBA may consider the individual economic status of an NHO member or director even if the member or director previously used his or her disadvantaged status to qualify an individually owned 8(a) applicant or Participant.

* * * * *

■ 15. Amend § 124.111 by adding a sentence to the end of paragraph (c) and by adding paragraphs (c)(1) and (2) to read as follows:

§ 124.111 Do Community Development Corporations (CDCs) have any special rules for applying to the 8(a) BD program?

* * * * *

(c) * * * In determining whether a CDC-owned concern has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category, SBA will examine the firm's participation in the relevant six digit NAICS code nationally.

(1) SBA will consider the firm's percentage share of the national market and other relevant factors to determine whether the firm is dominant in a specific six-digit NAICS code with a particular size standard.

(2) SBA does not contemplate a finding of affiliation where a CDC-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.

* * * * *

■ 16. Amend § 124.112 by designating the text of paragraph (e) as paragraph (e)(1), and adding paragraph (e)(2) to read as follows:

§ 124.112 What criteria must a business meet to remain eligible to participate in the 8(a) BD program?

* * * * *

(e) * * *

(2) SBA may change the primary industry classification contained in a Participant's business plan where the greatest portion of the Participant's total revenues during the Participant's last three completed fiscal years has evolved from one NAICS code to another. As part of its annual review, SBA will consider whether the primary NAICS code contained in a Participant's business plan continues to be appropriate.

(i) Where SBA believes that the primary industry classification contained in a Participant's business plan does not match the Participant's actual revenues over the Participant's most recently completed three fiscal years, SBA may notify the Participant of its intent to change the Participant's primary industry classification and afford the Participant the opportunity to respond.

(ii) A Participant may challenge SBA's intent to change its primary industry classification by demonstrating why it believes the primary industry classification contained in its business plan continues to be appropriate, despite an increase in revenues in a secondary NAICS code beyond those received in its designated primary industry classification. The Participant should identify: All non-federal work that it has performed in its primary NAICS code; any efforts it has made and any plans it has to make to receive contracts to obtain contracts in its primary NAICS code; all contracts that it was awarded that it believes could have been classified under its primary NAICS code, but which a contracting officer assigned another reasonable NAICS code; and any other information that it believes has a bearing on why its primary NAICS code should not be changed despite performing more work in another NAICS code.

(iii) As long as the Participant provides a reasonable explanation as to why the identified primary NAICS code continues to be its primary NAICS code, SBA will not change the Participant's primary NAICS code.

(iv) Where an SBA change in the primary NAICS code of an entity-owned firm results in the entity having two Participants with the same primary NAICS code, the second, newer Participant will not be able to receive any 8(a) contracts in the six-digit NAICS code that is the primary NAICS code of the first, older Participant for a period of time equal to two years after the first Participant leaves the 8(a) BD program.

* * * * *

■ 17. Revise § 124.202 to read as follows:

§ 124.202 How must an application be filed?

An application for 8(a) BD program admission must be filed in an electronic format. An electronic application can be found by going to the 8(a) BD page of SBA's Web site (*http://www.sba.gov*). The SBA district office will provide an applicant with information regarding the 8(a) BD program.

■ 18. Revise § 124.203 to read as follows:

§ 124.203 What must a concern submit to apply to the 8(a) BD program?

Each 8(a) BD applicant concern must submit those forms and attachments required by SBA when applying for admission to the 8(a) BD program. These forms and attachments may include, but not be limited to, financial statements, copies of signed Federal personal and business tax returns, individual and business bank statements, personal history statements, and any additional documents SBA deems necessary to determine eligibility. In all cases, the applicant must provide a signature from each individual claiming social and

economic disadvantage status. The electronic signing protocol will ensure the Agency is able to specifically identify the individual making the representation. The individual(s) upon whom eligibility is based take responsibility for the accuracy of all information submitted on behalf of the applicant.

■ 19. Amend § 124.305 by removing the period at the end of paragraph (h)(1)(ii) and adding in its place ''; or'', adding paragraphs (h)(1)(iii) and (iv), redesignating paragraph (h)(5) as (h)(6) and adding a new paragraph (h)(5).

The additions read as follows:

§ 124.305 What is suspension and how is a Participant suspended from the 8(a) BD program?

* * * * *

(h)(1) * * *

(iii) A Participant has a principal place of business located in a federally declared disaster area and elects to suspend its participation in the 8(a) BD program for a period of up to one year from the date of the disaster declaration to allow the firm to recover from the disaster and take full advantage of the program. A Participant that elects to be suspended may request that the suspension be lifted prior to the end date of the original request; or

(iv) Federal appropriations for one or more federal departments or agencies have lapsed, SBA has previously accepted an offer for a sole source 8(a) award on behalf of the Participant, award is pending, and the Participant elects to suspend its participation in the 8(a) BD program during the lapse in federal appropriations.

* * * * *

(5) Where a Participant is suspended pursuant to (h)(1)(iv) of this section, the Participant must notify SBA when the lapse in appropriation ends so that SBA can immediately lift the suspension. When the suspension is lifted, the length of the suspension will be added to the concern's program term.

* * * * *

■ 20. Amend § 124.501 by revising the first sentence of paragraph (a) and by adding two sentences to the end of paragraph (b) to read as follows:

§ 124.501 What general provisions apply to the award of 8(a) contracts?

(a) Pursuant to section 8(a) of the Small Business Act, SBA is authorized to enter into all types of contracts with other Federal agencies regardless of the place of performance, including contracts to furnish equipment, supplies, services, leased real property, or materials to them or to perform construction work for them, and to contract the performance of these contracts to qualified Participants. * * *

(b) * * * In addition, for multiple award contracts not set aside for the 8(a) BD program, a procuring agency may set aside specific orders to be competed only among eligible 8(a) Participants, regardless of the place of performance. Such an order may be awarded as an 8(a) award where the order was offered to and accepted by SBA as an 8(a) award and the order specifies that the performance of work and/or non-manufacturer rule requirements apply as appropriate.

* * * * *

■ 21. Amend § 124.502 by revising paragraph (c)(9), by removing ''and'' at the end of paragraph (c)(16), by redesignating paragraph (c)(17) as (c)(18), and by adding a new paragraph (c)(17).

The revision and addition read as follows:

§ 124.502 How does an agency offer a procurement to SBA for award through the 8(a) BD program?

* * * * *

(c) * * *

(9) The acquisition history, if any, of the requirement, including specifically whether the requirement is a follow-on requirement, and whether any portion of the contract was previously performed by a small business outside of the 8(a) BD program;

* * * * *

(17) A statement that the necessary justification and approval under the Federal Acquisition Regulation has occurred where a requirement whose estimated contract value exceeds $22,000,000 is offered to SBA as a sole source requirement on behalf of a specific Participant; and

* * * * *

■ 22. Amend § 124.503 by adding two sentences to the end of paragraph (a)(1), by adding one sentence to the end of paragraph (a)(2), and by adding paragraph (g)(4) to read as follows:

§ 124.503 How does SBA accept a procurement for award through the 8(a) BD program?

(a) * * *

(1) * * * As part of its acceptance of a sole source requirement, SBA will determine the eligibility of the Participant identified in the offering letter, using the same analysis set forth in § 124.507(b)(2). Where a procuring agency offers a sole source 8(a) procurement on behalf of a joint venture, SBA will conduct an eligibility review of the lead 8(a) party to the joint venture as part of its acceptance, and will approve the joint venture prior to award pursuant to § 124.513(e).

(2) * * * For a competitive 8(a) procurement, SBA will determine the eligibility of the apparent successful offeror pursuant to § 124.507(b).

* * * * *

(g) * * *

(4) A procuring agency may offer, and SBA may accept, an order issued under a BOA to be awarded through the 8(a) BD program where the BOA itself was not accepted for the 8(a) BD program, but rather was awarded on an unrestricted basis.

* * * * *

§ 124.504 [Amended]

■ 23. Amend § 124.504 by removing the reference to ''§ 124.503(h)'' in paragraph (d)(4) and adding in its place ''§ 124.50(3)(h)(2)''.

■ 24. Amend § 124.506 by removing ''$6,500,000'' in paragraph (a)(2)(ii) and adding in its place ''$7,000,000'', and adding paragraph (b)(5).

The addition reads as follows:

§ 124.506 At what dollar threshold must an 8(a) procurement be competed among eligible Participants?

* * * * *

(b) * * *

(5) An agency may not award an 8(a) sole source contract for an amount exceeding $22,000,000 unless the contracting officer justifies the use of a sole source contract in writing and has obtained the necessary approval under the Federal Acquisition Regulation.

* * * * *

■ 25. Amend § 124.507 by redesignating paragraphs (b)(3) through (5) as paragraphs (b)(4) through (6), respectively, and by adding new paragraph (b)(3) to read as follows:

§ 124.507 What procedures apply to competitive 8(a) procurements?

* * * * *

(b) * * *

(3) Where the apparent successful offeror is a joint venture and SBA has not approved the joint venture prior to receiving notification of the apparent successful offeror, review of the joint venture will be part of the eligibility determination conducted under this paragraph (b). If SBA cannot approve the joint venture within 5 days of receiving a procuring activity's request for an eligibility determination, and the procuring activity does not grant additional time for review, SBA will be unable to verify the eligibility of the joint venture for award.

* * * * *

■ 26. Amend § 124.513 as follows:

■ a. Add paragraph (b)(3);
■ b. Revise paragraphs (c)(2), (c)(6) and (7), (d), and (e)(1);
■ c. Add paragraphs (e)(2)(iii) and (e)(3);
■ d. Redesignate paragraphs (f), (g), (h), and (i) as paragraphs (g), (h), (i) and (k), respectively;
■ e. Add new paragraph (f);
■ f. Revise newly redesignated paragraphs (g) and (i); and
■ g. Add paragraph (j) and (l).

The additions and revisions read as follows:

§ 124.513 Under what circumstances can a joint venture be awarded an 8(a) contract?

* * * * *

(b) * * *

(3) SBA approval of a joint venture agreement pursuant to paragraph (e) of this section does not equate to a formal size determination. As such, despite SBA's approval of a joint venture, the size status of a joint venture that is the apparent successful offeror for a competitive 8(a) contract may be protested pursuant to § 121.1001(a)(2) of this chapter. *See* § 124.517(b).

(c) * * *

(2) Designating an 8(a) Participant as the managing venturer of the joint venture and an employee of an 8(a) Participant as the project manager responsible for performance of the contract. The individual identified as the project manager of the joint venture need not be an employee of the 8(a) Participant at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the 8(a) Participant if the joint venture is the successful offeror. The individual identified as the project manager cannot be employed by the mentor and become an employee of the 8(a) Participant for purposes of performance under the joint venture;

* * * * *

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

* * * * *

(d) *Performance of work.* (1) For any 8(a) contract, including those between a protégé and a mentor authorized by § 124.520, the joint venture must perform the applicable percentage of work required by § 124.510 of this chapter.

(2) The 8(a) partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture.

(i) The work performed by the 8(a) partner(s) to a joint venture must be more than administrative or ministerial functions so that the 8(a) partners gain substantive experience.

(ii) The amount of work done by the partners will be aggregated and the work done by the 8(a) partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by a non-8(a) partner, all work done by the non-8(a) partner and any of its affiliates at any subcontracting tier will be counted.

(e) * * *

(1) SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture. A Participant may submit a joint venture agreement to SBA for approval at any time, whether or not in connection with a specific 8(a) procurement.

(2) * * *

(iii) If a second or third contract to be awarded a joint venture is not an 8(a) contract, the Participant would not have to submit an addendum setting forth contract performance for the non-8(a) contract(s) to SBA for approval.

(3) Where a joint venture has been established and approved by SBA without a corresponding specific 8(a) contract award (including where a joint venture is established in connection with a blanket purchase agreement (BPA), basic agreement (BA), or basic ordering agreement (BOA)), the Participant must submit an addendum to the joint venture agreement, setting forth the performance requirements, to SBA for approval for each of the three 8(a) contracts authorized to be awarded to the joint venture. In the case of a BPA, BA or BOA, each order issued under the agreement would count as a separate contract award, and SBA would need to approve the addendum for each order prior to award of the order to the joint venture.

(f) *Past performance and experience.* When evaluating the past performance and experience of an entity submitting an offer for an 8(a) contract as a joint venture approved by SBA pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

(g) *Contract execution.* Where SBA has approved a joint venture, the procuring activity will execute an 8(a) contract in the name of the joint venture entity or the 8(a) Participant, but in either case will identify the award as one to an 8(a) joint venture or an 8(a) mentor-protégé joint venture, as appropriate.

* * * * *

(i) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(j) *Certification of compliance.* Prior to the performance of any 8(a) contract by a joint venture, the 8(a) BD Participant to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(i) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section;

(ii) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (d) of this section.

(iii) The parties have obtained SBA's approval of the joint venture agreement and any addendum to that agreement and that there have been no modifications to the agreement that SBA has not approved.

* * * * *

(l) *Basis for suspension or debarment.* The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (d) of this section; or

(3) Failure to submit the certification required by paragraph (e) of this section or comply with paragraph (i) of this section.

■ 27. Amend § 124.515 by revising paragraph (a) introductory text and by removing the words ''An 8(a) contract'' in paragraph (a)(1) introductory text and adding in their place the words ''An 8(a) contract or order''.

The revision reads as follows:

§ 124.515 Can a Participant change its ownership or control and continue to perform an 8(a) contract, and can it transfer performance to another firm?

(a) An 8(a) contract (or 8(a) order where the underlying contract is not an 8(a) contract) must be performed by the Participant that initially received it unless a waiver is granted under paragraph (b) of this section.

* * * * *

■ 28. Amend § 124.520 as follows:
■ a. Revise the second sentence of paragraph (a);
■ b. Revise paragraph (b)(1)(i);
■ c. Remove the words ''or non-profit entity'' from the first sentence of paragraph (b) introductory text and from the second sentence of paragraph (b)(2);
■ d. Revise the last sentence of paragraph (b)(2);
■ e. Revise paragraph (b)(3);
■ f. Revise paragraphs (c)(1) and (4);
■ g. Remove paragraph (c)(5);
■ h. Revise paragraph (d)(1)(iii);
■ i. Add paragraph (d)(5);
■ j. Redesignate paragraphs (e)(2) through (5) as paragraphs (e)(3) through (6), respectively;
■ k. Add a new paragraph (e)(2);
■ l. Revise newly designated paragraph (e)(5);
■ m. Add paragraphs (e)(7) and (8); and
■ n. Add paragraph (i).

The revisions and additions read as follows:

§ 124.520 What are the rules governing SBA's 8(a) Mentor-Protégé program?

(a) * * * This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts (either from the mentor to the protégé or from the protégé to the mentor); trade education; and/or assistance in performing prime contracts with the Government through joint venture arrangements. * * *

(b) * * *

(1) * * *

(i) Is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement;

* * * * *

(2) * * * Under no circumstances will a mentor be permitted to have more than three protégés at one time in the aggregate under the mentor-protégé programs authorized by §§ 124.520 and 125.9 of this chapter.

(3) In order to demonstrate that it is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement, a firm seeking to be a mentor may submit to the SBA copies of the federal tax returns it submitted to the IRS, or audited financial statements, including any notes, or in the case of publicly traded concerns, the filings required by the Securities and Exchange Commission (SEC), for the past three years.

* * * * *

(c) * * *

(1) In order to initially qualify as a protégé firm, a concern must:

(i) Qualify as small for the size standard corresponding to its primary NAICS code or identify that it is seeking business development assistance with respect to a secondary NAICS code and qualify as small for the size standard corresponding to that NAICS code; and

(ii) Demonstrate how the business development assistance to be received through its proposed mentor-protégé relationship would advance the goals and objectives set forth in its business plan.

* * * * *

(4) The AA/BD may authorize a Participant to be both a protégé and a mentor at the same time where the Participant can demonstrate that the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship.

(d) * * *

(1) * * *

(iii) Once a protégé firm graduates or otherwise leaves the 8(a) BD program or grows to be other than small for its primary NAICS code, it will not be eligible for any further 8(a) contracting benefits from its 8(a) BD mentor-protégé relationship. Leaving the 8(a) BD program, growing to be other than small for its primary NAICS code, or terminating the mentor-protégé relationship while a protégé is still in the program, does not, however, generally affect contracts previously awarded to a joint venture between the protégé and its mentor. A protégé firm that graduates or otherwise leaves the 8(a) BD program but continues to qualify as a small business may transfer its 8(a) mentor-protégé relationship to a small business mentor-protégé relationship. In order to effectuate such a transfer, a firm must notify SBA of its intent to transfer its 8(a) mentor-protégé relationship to a small business mentor-protégé relationship. The transfer will occur without any application or approval process.

(A) A joint venture between a protégé firm that continues to qualify as small and its mentor may certify its status as small for any Government contract or subcontract so long as the protégé (and/or the joint venture) has not been determined to be other than small for the size standard corresponding to the procurement at issue (or any higher size standard).

(B) Where the protégé firm no longer qualifies as small, the receipts and/or employees of the protégé and mentor would generally be aggregated in determining the size of any joint venture between the mentor and protégé after that date.

(C) Except for contracts with durations of more than five years (including options), a contract awarded to a joint venture between a protégé and a mentor as a small business continues to qualify as an award to small business for the life of that contract and the joint venture remains obligated to continue performance on that contract.

(D) For contracts with durations of more than five years (including options), where size re-certification is required no more than 120 days prior to the end of the fifth year of the contract and no more than 120 days prior to exercising any option thereafter, once the protégé firm no longer qualifies as small for its primary NAICS code, the joint venture must aggregate the receipts/employees of the partners to the joint venture in determining whether it continues to qualify as and can re-certify itself to be a small business under the size standard corresponding to the NAICS code

assigned to that contract. The rules set forth in § 121.404(g)(3) of this chapter apply in such circumstances.

* * * * *

(5) Where appropriate, procuring activities may provide incentives in the contract evaluation process to a firm that will provide significant subcontracting work to its SBA-approved protégé firm.

(e) * * *

(2) A firm seeking SBA's approval to be a protégé must identify any other mentor-protégé relationship it has through another federal agency or SBA and provide a copy of each such mentor-protégé agreement to SBA.

(i) The 8(a) BD mentor-protégé agreement must identify how the assistance to be provided by the proposed mentor is different from assistance provided to the protégé through another mentor-protégé relationship, either with the same or a different mentor.

(ii) A firm seeking SBA's approval to be a protégé may terminate a mentor-protégé relationship it has through another agency and use any not yet provided assistance identified in the other mentor-protégé agreement as part of the assistance that will be provided through the 8(a) BD mentor-protégé relationship. Any assistance that has already been provided through another mentor-protégé relationship cannot be identified as assistance that will be provided through the 8(a) BD mentor-protégé relationship.

* * * * *

(5) SBA will review the mentor-protégé relationship annually during the protégé firm's annual review to determine whether to approve its continuation for another year. Unless rescinded in writing at that time, the mentor-protégé relationship will automatically renew without additional written notice of continuation or extension to the protégé firm. The term of a mentor-protégé agreement may not exceed three years, but may be extended for a second three years. A protégé may have two three-year mentor-protégé agreements with different mentors, and each may be extended an additional three years provided the protégé has received the agreed-upon business development assistance and will continue to receive additional assistance through the extended mentor-protégé agreement.

* * * * *

(7) If control of the mentor changes (through a stock sale or otherwise), the previously approved mentor-protégé relationship may continue provided that, after the change in control, the mentor expresses in writing to SBA that it acknowledges the mentor-protégé agreement and certifies that it will continue to abide by its terms.

(8) SBA may terminate the mentor-protégé agreement at any time if it determines that the protégé is not adequately benefiting from the relationship or that the parties are not complying with any term or condition of the mentor protégé agreement. In the event SBA terminates the relationship, the mentor-protégé joint venture is obligated to complete any previously awarded contracts unless the procuring agency issues a stop work order.

* * * * *

(i) *Results of mentor-protégé relationship.* (1) In order to assess the results of a mentor-protégé relationship upon its completion, the protégé must report to SBA whether it believed the mentor-protégé relationship was beneficial and describe any lasting benefits to the protégé.

(2) Where a protégé does not report the results of a mentor-protégé relationship upon its completion, SBA will not approve a second mentor-protégé relationship either under this section or under § 125.9 of this chapter.

§ 124.604 [Amended]

■ 29. Amend § 124.604 by removing the phrase ''annual review submission'' and adding in its place the phrase ''annual financial statement submission (*see* § 124.602)'' in the first sentence.

§ 124.1002 [Amended]

■ 30. Amend § 124.1002 by removing paragraph (b)(4).

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 31. The authority citation for part 125 is revised to read as follows:

Authority: 15 U.S.C. 632(p), (q); 634(b)(6); 637; 644; 657f; 657r.

■ 32. Amend § 125.2 by revising the third sentence of paragraph (a) introductory text to read as follows:

§ 125.2 What are SBA's and the procuring agency's responsibilities when providing contracting assistance to small businesses?

(a) *General.* * * * Small business concerns must receive any award (including orders, and orders placed against Multiple Award Contracts) or contract, part of any such award or contract, any contract for the sale of Government property, or any contract resulting from a reverse auction, regardless of the place of performance, which SBA and the procuring or disposal agency determine to be in the interest of:

* * * * *

■ 33. Amend § 125.5 by revising the second and third sentences of paragraph (a)(1) to read as follows:

§ 125.5 What is the Certificate of Competency Program?

(a) *General.* (1) * * * A COC is a written instrument issued by SBA to a Government contracting officer, certifying that one or more named small business concerns possess the responsibility to perform a specific Government procurement (or sale) contract, including any contract deriving from a reverse auction. The COC Program is applicable to all Government procurement actions, including Multiple Award Contracts and orders placed against Multiple Award Contracts, where the contracting officer has used any issues of capacity or credit (responsibility) to determine suitability for an award. * * *

* * * * *

§ 125.6 [Amended]

■ 34. Amend § 125.6 by removing ''§ 125.15'' from paragraph (b) introductory text and adding in its place ''§ 125.18'', and by removing ''§ 125.15(b)(3)'' from paragraph (b)(5) and adding in its place ''§ 125.18(b)(3)''.

§§ 125.8 through 125.30 [Redesignated as §§ 125.11 through 125.33]

■ 35. Redesignate §§ 125.8 through 125.30 as §§ 125.11 through 125.33, respectively, and locate them in the subparts as indicated in the following list:

■ i. Section 125.11 in subpart A;

■ ii. Sections 125.12 through 125.16 in subpart B;

■ iii. Sections 125.17 through 125.26 in subpart C;

■ iv. Sections 125.27 through 125.31 in subpart D; and

■ v. Sections 125.32 and 125.33 in subpart E.

■ 36. Add new §§ 125.8, 125.9 and 125.10 to precede subpart A to read as follows:

§ 125.8 What requirements must a joint venture satisfy to submit an offer for a procurement or sale set aside or reserved for small business?

(a) *General.* A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement, subcontract or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, or qualify as small under one of the exceptions to

affiliation set forth in § 121.103(h)(3) of this chapter.

(b) *Contents of joint venture agreement.* (1) A joint venture agreement between two or more entities that individually qualify as small need not be in any specific form or contain any specific conditions in order for the joint venture to qualify as a small business.

(2) Every joint venture agreement to perform a contract set aside or reserved for small business between a protégé small business and its SBA-approved mentor authorized by § 125.9 or § 124.520 of this chapter must contain a provision:

(i) Setting forth the purpose of the joint venture;

(ii) Designating a small business as the managing venturer of the joint venture, and an employee of the small business managing venturer as the project manager responsible for performance of the contract. The individual identified as the project manager of the joint venture need not be an employee of the small business at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the small business if the joint venture is the successful offeror. The individual identified as the project manager cannot be employed by the mentor and become an employee of the small business for purposes of performance under the joint venture;

(iii) Stating that with respect to a separate legal entity joint venture, the small business must own at least 51% of the joint venture entity;

(iv) Stating that the small business must receive profits from the joint venture commensurate with the work performed by the small business, or in the case of a separate legal entity joint venture, commensurate with their ownership interests in the joint venture;

(v) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on a contract set aside or reserved for small business will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(vi) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(vii) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

(viii) Obligating all parties to the joint venture to ensure performance of a contract set aside or reserved for small business and to complete performance despite the withdrawal of any member;

(ix) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the small business managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(x) Requiring that the final original records be retained by the small business managing venturer upon completion of any contract set aside or reserved for small business that was performed by the joint venture;

(xi) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(xii) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(c) *Performance of work.* (1) For any contract set aside or reserved for small business that is to be performed by a joint venture between a small business protégé and its SBA-approved mentor authorized by § 125.9, the joint venture must perform the applicable percentage of work required by § 125.6, and the small business partner to the joint venture must perform at least 40% of the work performed by the joint venture.

(2) The work performed by the small business partner to a joint venture must be more than administrative or ministerial functions so that it gains substantive experience.

(3) The amount of work done by the partners will be aggregated and the work done by the small business protégé partner must be at least 40% of the total done by the partners. In determining the amount of work done by a mentor participating in a joint venture with a small business protégé, all work done by the mentor and any of its affiliates at any subcontracting tier will be counted.

(d) *Certification of compliance.* Prior to the performance of any contract set aside or reserved for small business by a joint venture between a protégé small business and a mentor authorized by § 125.9, the small business partner to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(1) The parties have entered into a joint venture agreement that fully complies with paragraph (b) of this section;

(2) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (c) of this section.

(e) *Past performance and experience.* When evaluating the past performance and experience of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

(f) *Contract execution.* The procuring activity will execute a contract set aside or reserved for small business in the name of the joint venture entity or a small business partner to the joint venture, but in either case will identify the award as one to a small business

joint venture or a small business mentor-protégé joint venture, as appropriate.

(g) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(h) *Performance of work reports.* In connection with any contract set aside or reserved for small business that is awarded to a joint venture between a protégé small business and a mentor authorized by § 125.9, the small business partner must describe how it is meeting or has met the applicable performance of work requirements for each contract set aside or reserved for small business that it performs as a joint venture.

(1) The small business partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how the performance of work requirements are being met for each contract set aside or reserved for small business that is performed during the year.

(2) At the completion of every contract set aside or reserved for small business that is awarded to a joint venture between a protégé small business and a mentor authorized by § 125.9, the small business partner to the joint venture must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (b) of this section.

(i) *Basis for suspension or debarment.* For any joint venture between a protégé small business and a mentor authorized by § 125.9, the Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (b) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (c) of this section; or

(3) Failure to submit the certification required by paragraph (d) of this section or comply with paragraph (g) of this section.

(j) *Compliance with performance of work requirements.* Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

§ 125.9 What are the rules governing SBA's small business mentor-protégé program?

(a) *General.* The small business mentor-protégé program is designed to enhance the capabilities of protégé firms by requiring approved mentors to provide business development assistance to protégé firms and to improve the protégé firms' ability to successfully compete for federal contracts. This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts (either from the mentor to the protégé or from the protégé to the mentor); trade education; and/or assistance in performing prime contracts with the Government through joint venture arrangements. Mentors are encouraged to provide assistance relating to the performance of contracts set aside or reserved for small business so that protégé firms may more fully develop their capabilities.

(b) *Mentors.* Any concern that demonstrates a commitment and the ability to assist small business concerns may act as a mentor and receive benefits as set forth in this section. This includes other than small businesses.

(1) In order to qualify as a mentor, a concern must demonstrate that it:

(i) Is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement;

(ii) Possesses good character;

(iii) Does not appear on the federal list of debarred or suspended contractors; and

(iv) Can impart value to a protégé firm due to lessons learned and practical experience gained or through its knowledge of general business operations and government contracting.

(2) In order to demonstrate that it is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement, a firm seeking to be a mentor may submit to the SBA copies of the federal tax returns it submitted to the IRS, or audited financial statements, including any notes, or in the case of publicly traded concerns, the filings required by the Securities and Exchange Commission (SEC), for the past three years.

(3) Once approved, a mentor must annually certify that it continues to possess good character and a favorable financial position.

(4) Generally, a mentor will have no more than one protégé at a time. However, SBA may authorize a concern to mentor more than one protégé at a time where it can demonstrate that the additional mentor-protégé relationship will not adversely affect the development of either protégé firm (*e.g.*, the second firm may not be a competitor of the first firm). Under no circumstances will a mentor be permitted to have more than three protégés at one time in the aggregate under the mentor-protégé programs authorized by §§ 124.520 and 125.9 of this chapter.

(c) *Protégés.* (1) In order to initially qualify as a protégé firm, a concern must qualify as small for the size standard corresponding to its primary NAICS code or identify that it is seeking business development assistance with respect to a secondary NAICS code and qualify as small for the size standard corresponding to that NAICS code.

(i) A firm may self-certify that it qualifies as small for its primary or identified secondary NAICS code.

(ii) Where a firm is other than small for the size standard corresponding to its primary NAICS code and seeks to qualify as a small business protégé in a secondary NAICS code, the firm must demonstrate how the mentor-protégé relationship is a logical business progression for the firm and will further develop or expand current capabilities. SBA will not approve a mentor-protégé relationship in a secondary NAICS code in which the firm has no prior experience.

(2) A protégé firm may generally have only one mentor at a time. SBA may approve a second mentor for a particular protégé firm where the second relationship will not compete or otherwise conflict with the assistance set forth in the first mentor-protégé relationship and:

(i) The second relationship pertains to an unrelated NAICS code; or

(ii) The protégé firm is seeking to acquire a specific expertise that the first mentor does not possess.

(3) SBA may authorize a small business to be both a protégé and a mentor at the same time where the small business can demonstrate that the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship.

(4) Where appropriate, SBA may examine the Service-Disabled Veteran-Owned Small Business status or Women-Owned Small Business status of a concern seeking to be a protégé that claims such status in any Federal procurement database.

(d) *Benefits.* (1) A protégé and mentor may joint venture as a small business for any government prime contract or subcontract, provided the protégé qualifies as small for the procurement. Such a joint venture may seek any type of small business contract (*i.e.*, small business set-aside, 8(a), HUBZone, SDVO, or WOSB) for which the protégé firm qualifies (*e.g.*, a protégé firm that qualifies as a WOSB could seek a WOSB set-aside as a joint venture with its SBA-approved mentor).

(i) SBA must approve the mentor-protégé agreement before the two firms may submit an offer as a joint venture on a particular government prime contract or subcontract in order for the joint venture to receive the exclusion from affiliation.

(ii) In order to receive the exclusion from affiliation, the joint venture must meet the requirements set forth in § 125.8(b)(2), (c), and (d).

(iii) Once a protégé firm no longer qualifies as a small business for the size standard corresponding to its primary NAICS code, it will not be eligible for any further contracting benefits from its mentor-protégé relationship. However, a change in the protégé's size status does not generally affect contracts previously awarded to a joint venture between the protégé and its mentor.

(A) Except for contracts with durations of more than five years (including options), a contract awarded to a joint venture between a protégé and a mentor as a small business continues to qualify as an award to small business for the life of that contract and the joint venture remains obligated to continue performance on that contract.

(B) For contracts with durations of more than five years (including options), where size re-certification is required under § 121.404(g)(3) of this chapter no more than 120 days prior to the end of the fifth year of the contract and no more than 120 days prior to exercising any option thereafter, once the protégé no longer qualifies as small for the size standard corresponding to its primary NAICS code, the joint venture must aggregate the receipts/employees of the partners to the joint venture in determining whether it continues to qualify as and can re-certify itself to be a small business under the size standard corresponding to the NAICS code assigned to that contract. The rules set forth in § 121.404(g)(3) of this chapter apply in such circumstances.

(2) In order to raise capital, the protégé firm may agree to sell or otherwise convey to the mentor an equity interest of up to 40% in the protégé firm.

(3) Notwithstanding the mentor-protégé relationship, a protégé firm may qualify for other assistance as a small business, including SBA financial assistance.

(4) No determination of affiliation or control may be found between a protégé firm and its mentor based solely on the mentor-protégé agreement or any assistance provided pursuant to the agreement. However, affiliation may be found for other reasons set forth in § 121.103 of this chapter.

(5) Where appropriate, procuring activities may provide incentives in the contract evaluation process to a firm that will provide significant subcontracting work to its SBA-approved protégé firm.

(e) *Written agreement.* (1) The mentor and protégé firms must enter a written agreement setting forth an assessment of the protégé's needs and providing a detailed description and timeline for the delivery of the assistance the mentor commits to provide to address those needs (*e.g.*, management and/or technical assistance, loans and/or equity investments, cooperation on joint venture projects, or subcontracts under prime contracts being performed by the mentor). The mentor-protégé agreement must:

(i) Address how the assistance to be provided through the agreement will help the protégé firm meet its goals as defined in its business plan;

(ii) Establish a single point of contact in the mentor concern who is responsible for managing and implementing the mentor-protégé agreement; and

(iii) Provide that the mentor will provide such assistance to the protégé firm for at least one year.

(2) A firm seeking SBA's approval to be a protégé must identify any other mentor-protégé relationship it has through another federal agency or SBA and provide a copy of each such mentor-protégé agreement to SBA.

(i) The small business mentor-protégé agreement must identify how the assistance to be provided by the proposed mentor is different from assistance provided to the protégé through another mentor-protégé relationship, either with the same or a different mentor.

(ii) A firm seeking SBA's approval to be a protégé may terminate a mentor-protégé relationship it has through another agency and use any not yet provided assistance identified in the other mentor-protégé agreement as part of the assistance that will be provided through the small business mentor-protégé relationship. Any assistance that has already been provided through another mentor-protégé relationship cannot be identified as assistance that will be provided through the small business mentor-protégé relationship.

(3) The written agreement must be approved by the Associate Administrator for Business Development (AA/BD) or his/her designee. The agreement will not be approved if SBA determines that the assistance to be provided is not sufficient to promote any real developmental gains to the protégé, or if SBA determines that the agreement is merely a vehicle to enable the mentor to receive small business contracts.

(4) The agreement must provide that either the protégé or the mentor may terminate the agreement with 30 days advance notice to the other party to the mentor-protégé relationship and to SBA.

(5) SBA will review the mentor-protégé relationship annually to determine whether to approve its continuation for another year. Unless rescinded in writing as a result of the review, the mentor-protégé relationship will automatically renew without additional written notice of continuation or extension to the protégé firm. The term of a mentor-protégé agreement may not exceed three years, but may be extended for a second three years. A protégé may have two three-year mentor-protégé agreements with different mentors, and each may be extended an additional three years provided the protégé has received the agreed-upon business development assistance and will continue to receive additional assistance through the extended mentor-protégé agreement.

(6) SBA must approve all changes to a mentor-protégé agreement in advance, and any changes made to the agreement must be provided in writing. If the parties to the mentor-protégé relationship change the mentor-protégé agreement without prior approval by SBA, SBA shall terminate the mentor-protégé relationship and may also propose suspension or debarment of one or both of the firms pursuant to paragraph (h) of this section where appropriate.

(7) If control of the mentor changes (through a stock sale or otherwise), the previously approved mentor-protégé relationship may continue provided that, after the change in control, the mentor expresses in writing to SBA that it acknowledges the mentor-protégé

agreement and certifies that it will continue to abide by its terms.

(8) SBA may terminate the mentor-protégé agreement at any time if it determines that the protégé is not benefiting from the relationship or that the parties are not complying with any term or condition of the mentor protégé agreement. In the event SBA terminates the relationship, the mentor-protégé joint venture is obligated to complete any previously awarded contracts unless the procuring agency issues a stop work order.

(f) *Decision to decline mentor-protégé relationship.* (1) Where SBA declines to approve a specific mentor-protégé agreement, the protégé may request the AA/BD or designee to reconsider the Agency's initial decline decision by filing a request for reconsideration within 45 calendar days of receiving notice that its mentor-protégé agreement was declined. The protégé may revise the proposed mentor-protégé agreement and provide any additional information and documentation pertinent to overcoming the reason(s) for the initial decline.

(2) SBA will issue a written decision within 45 calendar days of receipt of the protégé's request. SBA may approve the mentor-protégé agreement, deny it on the same grounds as the original decision, or deny it on other grounds.

(3) If SBA declines the mentor-protégé agreement solely on issues not raised in the initial decline, the protégé can ask for reconsideration as if it were an initial decline.

(4) If SBA's final decision is to decline a specific mentor-protégé agreement, the small business concern seeking to be a protégé cannot attempt to enter into another mentor-protégé relationship with the same mentor for a period of 60 calendar days from the date of the final decision. The small business concern may, however, submit another proposed mentor-protégé agreement with a different proposed mentor at any time after the SBA's final decline decision.

(g) *Evaluating the mentor-protégé relationship.* (1) Within 30 days of the anniversary of SBA's approval of the mentor-protégé agreement, the protégé must report to SBA for the preceding year:

(i) All technical and/or management assistance provided by the mentor to the protégé;

(ii) All loans to and/or equity investments made by the mentor in the protégé;

(iii) All subcontracts awarded to the protégé by the mentor and all subcontracts awarded to the mentor by the protégé, and the value of each subcontract;

(iv) All federal contracts awarded to the mentor-protégé relationship as a joint venture (designating each as a small business set-aside, small business reserve, or unrestricted procurement), the value of each contract, and the percentage of the contract performed and the percentage of revenue accruing to each party to the joint venture; and

(v) A narrative describing the success such assistance has had in addressing the developmental needs of the protégé and addressing any problems encountered.

(2) The protégé must report the mentoring services it receives by category and hours.

(3) The protégé must annually certify to SBA whether there has been any change in the terms of the agreement.

(4) SBA will review the protégé's report on the mentor-protégé relationship, and may decide not to approve continuation of the agreement if it finds that the mentor has not provided the assistance set forth in the mentor-protégé agreement or that the assistance has not resulted in any material benefits or developmental gains to the protégé.

(h) *Consequences of not providing assistance set forth in the mentor-protégé agreement.* (1) Where SBA determines that a mentor has not provided to the protégé firm the business development assistance set forth in its mentor-protégé agreement, SBA will notify the mentor of such determination and afford the mentor an opportunity to respond. The mentor must respond within 30 days of the notification, explaining why it has not provided the agreed upon assistance and setting forth a definitive plan as to when it will provide such assistance. If the mentor fails to respond, does not supply adequate reasons for its failure to provide the agreed upon assistance, or does not set forth a definite plan to provide the assistance:

(i) SBA will terminate the mentor-protégé agreement;

(ii) The firm will be ineligible to again act as a mentor for a period of two years from the date SBA terminates the mentor-protégé agreement; and

(iii) SBA may recommend to the relevant procuring agency to issue a stop work order for each federal contract for which the mentor and protégé are performing as a small business joint venture in order to encourage the mentor to comply with its mentor-protégé agreement. Where a protégé firm is able to independently complete performance of any such contract, SBA may recommend to the procuring agency to authorize a substitution of the protégé firm for the joint venture.

(2) SBA may consider a mentor's failure to comply with the terms and conditions of an SBA-approved mentor-protégé agreement as a basis for debarment on the grounds, including but not limited to, that the mentor has not complied with the terms of a public agreement under 2 CFR 180.800(b).

(i) *Results of mentor-protégé relationship.* (1) In order to assess the results of a mentor-protégé relationship upon its completion, the protégé must report to SBA whether it believed the mentor-protégé relationship was beneficial and describe any lasting benefits to the protégé.

(2) Where a protégé does not report the results of a mentor-protégé relationship upon its completion, SBA will not approve a second mentor-protégé relationship either under this section or under § 124.520 of this chapter.

§ 125.10 Mentor-Protégé programs of other agencies.

(a) Except as provided in paragraph (c) of this section, a Federal department or agency may not carry out a mentor-protégé program for small business unless the head of the department or agency submits a plan to the SBA Administrator for the program and the SBA Administrator approves the plan. Before starting a new mentor protégé program, the head of a department or agency must submit a plan to the SBA Administrator. Within one year of the effective date of this section, the head of a department or agency must submit a plan to the SBA for any previously existing mentor-protégé program that the department or agency seeks to continue.

(b) The SBA Administrator will approve or disapprove a plan submitted under paragraph (a) of this section based on whether the proposed program:

(1) Will assist protégés to compete for Federal prime contracts and subcontracts; and

(2) Complies with the provisions set forth in §§ 125.9 and 124.520 of this chapter, as applicable.

(c) Paragraph (a) of this section does not apply to:

(1) Any mentor-protégé program of the Department of Defense;

(2) Any mentoring assistance provided under a Small Business Innovation Research Program or a Small Business Technology Transfer Program; and

(3) A mentor-protégé program operated by a Department or agency on January 2, 2013, for a period of one year after the effective date of this section.

(d) The head of each Federal department or agency carrying out an

agency-specific mentor-protégé program must report annually to SBA:

(1) The participants (both protégé firms and their approved mentors) in its mentor-protégé program. This includes identifying the number of participants that are:

(i) Small business concerns;

(ii) Small business concerns owned and controlled by service-disabled veterans;

(iii) Small business concerns owned and controlled by socially and economically disadvantaged individuals;

(iv) Small business concerns owned and controlled by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, and Community Development Corporations; and

(v) Small business concerns owned and controlled by women;

(2) The assistance provided to small businesses through the program; and

(3) The progress of protégé firms under the program to compete for Federal prime contracts and subcontracts.

■ 37. Amend newly redesignated § 125.18 by revising paragraph (b) to read as follows:

§ 125.18 What requirements must an SDVO SBC meet to submit an offer on a contract?

* * * * *

(b) *Joint ventures.* An SDVO SBC may enter into a joint venture agreement with one or more other SBCs or its SBA-approved mentor for the purpose of performing an SDVO contract.

(1) *Size of concerns to an SDVO SBC joint venture.* (i) A joint venture of at least one SDVO SBC and one or more other business concerns may submit an offer as a small business for a competitive SDVO SBC procurement or sale, or be awarded a sole source SDVO contract, so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement or sale.

(ii) A joint venture between a protégé firm that qualifies as an SDVO SBC and its SBA-approved mentor (*see* §§ 125.9 and 124.520 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the SDVO procurement or sale.

(2) *Contents of joint venture agreement.* Every joint venture agreement to perform an SDVO contract, including those between a protégé firm that qualifies as an SDVO SBC and its SBA-approved mentor authorized by § 124.520 or § 125.9 of this chapter, must contain a provision:

(i) Setting forth the purpose of the joint venture;

(ii) Designating an SDVO SBC as the managing venturer of the joint venture, and an employee of the SDVO SBC managing venturer as the project manager responsible for performance of the contract;

(iii) Stating that with respect to a separate legal entity joint venture, the SDVO SBC must own at least 51% of the joint venture entity;

(iv) Stating that the SDVO SBC must receive profits from the joint venture commensurate with the work performed by the SDVO SBC, or in the case of a separate legal entity joint venture, commensurate with their ownership interests in the joint venture;

(v) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on an SDVO contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(vi) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(vii) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the SDVO small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (b)(3) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the SDVO small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

(viii) Obligating all parties to the joint venture to ensure performance of the SDVO contract and to complete performance despite the withdrawal of any member;

(ix) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the SDVO SBC managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(x) Requiring that the final original records be retained by the SDVO SBC managing venturer upon completion of the SDVO contract performed by the joint venture;

(xi) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(xii) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(3) *Performance of work.* (i) For any SDVO contract, including those between a protégé and a mentor authorized by § 125.9 or § 124.520 of this chapter, the joint venture must perform the applicable percentage of work required by § 125.6.

(ii) The SDVO SBC partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture.

(A) The work performed by the SDVO SBC partner(s) to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience.

(B) The amount of work done by the partners will be aggregated and the work done by the SDVO SBC partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by a non-SDVO SBC partner, all work done by the non-SDVO SBC partner and any of its affiliates at any subcontracting tier will be counted.

(4) *Certification of Compliance.* Prior to the performance of any SDVO contract as a joint venture, the SDVO SBC partner to the joint venture must

submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(i) The parties have entered into a joint venture agreement that fully complies with paragraph (b)(2) of this section;

(ii) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (b)(3) of this section.

(5) *Past performance and experience.* When evaluating the past performance and experience of an entity submitting an offer for an SDVO contract as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

(6) *Contract execution.* The procuring activity will execute an SDVO contract in the name of the joint venture entity or the SDVO SBC, but in either case will identify the award as one to an SDVO joint venture or an SDVO mentor-protégé joint venture, as appropriate.

(7) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(8) *Performance of work reports.* An SDVO SBC partner to a joint venture must describe how it is meeting or has met the applicable performance of work requirements for each SDVO contract it performs as a joint venture.

(i) The SDVO SBC partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements are being met.

(ii) At the completion of every SDVO contract awarded to a joint venture, the SDVO SBC partner to the joint venture must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (b)(2) of this section.

(9) *Basis for suspension or debarment.* The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(i) Failure to enter a joint venture agreement that complies with paragraph (b)(2) of this section;

(ii) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (b)(3) of this section; or

(iii) Failure to submit the certification required by paragraph (b)(4) of this section or comply with paragraph (b)(7) of this section.

(10) Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

§ 125.22 [Amended]

■ 38. Amend newly redesignated § 125.22 by adding the phrase '', regardless of the place of performance,'' in the first sentence of paragraphs (b)(1) and (b)(2)(i) after the words ''for small business concerns'' and before the words ''when there is a reasonable expectation''.

PART 126—HUBZONE PROGRAM

■ 39. The authority citation for part 126 is revised to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644, and 657a; Pub. L. 111–240, 24 Stat. 2504.

■ 40. Amend § 126.306 as follows:
■ a. Revise paragraphs (a) and (b);
■ b. Redesignate paragraphs (c) and (d) as paragraphs (f) and (g), respectively; and
■ c. Add new paragraphs (c), (d) and (e).

The revisions and additions read as follows:

§ 126.306 How will SBA process the certification?

(a) The D/HUB or designee is authorized to approve or decline applications for certification. SBA will receive and review all applications and request supporting documents. SBA must receive all required information, supporting documents, and completed HUBZone representation before it will begin processing a concern's application. SBA will not process incomplete packages. SBA will make its determination within ninety (90) calendar days after receipt of a complete package whenever practicable. The decision of the D/HUB or designee is the final agency decision.

(b) SBA may request additional information or clarification of information contained in an application or document submission at any time.

(c) The burden of proof to demonstrate eligibility is on the applicant concern. If a concern does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may presume that disclosure of the missing information would adversely affect the business concern or demonstrate a lack of eligibility in the area or areas to which the information relates.

(d) The applicant must be eligible as of the date it submitted its application and up until and at the time the D/HUB issues a decision. The decision will be based on the facts set forth in the application, any information received in response to SBA's request for clarification, and any changed circumstances since the date of application.

(e) Any changed circumstance occurring after an applicant has submitted an application will be considered and may constitute grounds for decline. After submitting the application and signed representation, an applicant must notify SBA of any changes that could affect its eligibility. The D/HUB may propose decertification for any HUBZone SBC that failed to inform SBA of any changed circumstances that affected its eligibility for the program during the processing of the application.

* * * * *

■ 41. Amend § 126.600 by revising the introductory text to read as follows:

§ 126.600 What are HUBZone contracts?

HUBZone contracts are contracts awarded to a qualified HUBZone SBC, regardless of the place of performance, through any of the following procurement methods:

* * * * *

■ 42. Revise § 126.615 to read as follows:

§ 126.615 May a large business participate on a HUBZone contract?

Except as provided in § 126.618(d), a large business may not participate as a prime contractor on a HUBZone award, but may participate as a subcontractor to an otherwise qualified HUBZone SBC, subject to the contract performance requirements set forth in § 126.700.

■ 43. Revise § 126.616 to read as follows:

§ 126.616 What requirements must a joint venture satisfy to submit an offer on a HUBZone contract?

(a) *General.* A qualified HUBZone SBC may enter into a joint venture

agreement with one or more other SBCs, or with an approved mentor authorized by § 125.9 of this chapter (or, if also an 8(a) BD Participant, with an approved mentor authorized by § 124.520 of this chapter), for the purpose of submitting an offer for a HUBZone contract. The joint venture itself need not be certified as a qualified HUBZone SBC.

(b) *Size.* (1) A joint venture of at least one qualified HUBZone SBC and one or more other business concerns may submit an offer as a small business for a HUBZone procurement or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement or sale.

(2) A joint venture between a protégé firm and its SBA-approved mentor (*see* § 125.9 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the HUBZone procurement or sale.

(c) *Contents of joint venture agreement.* Every joint venture agreement to perform a HUBZone contract, including those between a protégé firm that is a certified HUBZone SBC and its SBA-approved mentor authorized by § 124.520 or § 125.9 of this chapter, must contain a provision:

(1) Setting forth the purpose of the joint venture;

(2) Designating a HUBZone SBC as the managing venturer of the joint venture, and an employee of the HUBZone SBC managing venturer as the project manager responsible for performance of the contract. The individual identified as the project manager of the joint venture need not be an employee of the HUBZone SBC at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the HUBZone SBC if the joint venture is the successful offeror. The individual identified as the project manager cannot be employed by the mentor and become an employee of the HUBZone SBC for purposes of performance under the joint venture;

(3) Stating that with respect to a separate legal entity joint venture, the HUBZone SBC must own at least 51% of the joint venture entity;

(4) Stating that the HUBZone SBC must receive profits from the joint venture commensurate with the work performed by the HUBZone SBC, or in the case of a separate legal entity joint venture, commensurate with their ownership interests in the joint venture;

(5) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on a HUBZone contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the HUBZone partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the HUBZone partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

(8) Obligating all parties to the joint venture to ensure performance of the HUBZone contract and to complete performance despite the withdrawal of any member;

(9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the HUBZone SBC managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(10) Requiring that the final original records be retained by the HUBZone SBC managing venturer upon completion of the HUBZone contract performed by the joint venture;

(11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(d) *Limitations on subcontracting.* (1) For any HUBZone contract to be performed by a joint venture between a qualified HUBZone SBC and another qualified HUBZone SBC, the aggregate of the qualified HUBZone SBCs to the joint venture, not each concern separately, must perform the applicable percentage of work required by § 125.6 of this chapter.

(2) For any HUBZone contract to be performed by a joint venture between a qualified HUBZone protégé and a small business concern or its SBA-approved mentor authorized by § 125.9 or § 124.520 of this chapter, the joint venture must perform the applicable percentage of work required by § 125.6 of this chapter, and the HUBZone SBC partner to the joint venture must perform at least 40% of the work performed by the joint venture.

(i) The work performed by the HUBZone SBC partner to a joint venture must be more than administrative or ministerial functions so that it gains substantive experience.

(ii) The amount of work done by the partners will be aggregated and the work done by the HUBZone protégé partner must be at least 40% of the total done by the partners. In determining the amount of work done by a mentor participating in a joint venture with a HUBZone qualified protégé, all work done by the mentor and any of its affiliates at any subcontracting tier will be counted.

(e) *Certification of compliance.* Prior to the performance of any HUBZone contract as a joint venture, the HUBZone SBC partner to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(i) The parties have entered into a joint venture agreement that fully

complies with paragraph (c) of this section;

(ii) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (d) of this section.

(f) *Past performance and experience.* When evaluating the past performance and experience of an entity submitting an offer for a HUBZone contract as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

(g) *Contract execution.* The procuring activity will execute a HUBZone contract in the name of the joint venture entity or the HUBZone SBC, but in either case will identify the award as one to a HUBZone joint venture or a HUBZone mentor-protégé joint venture, as appropriate.

(h) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(i) *Performance of work reports.* The HUBZone SBC partner to a joint venture must describe how it is meeting or has met the applicable performance of work requirements for each HUBZone contract it performs as a joint venture.

(1) The HUBZone SBC partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how the performance of work requirements are being met for each HUBZone contract performed during the year.

(2) At the completion of every HUBZone contract awarded to a joint venture, the HUBZone SBC partner to the joint venture must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (c) of this section.

(j) *Basis for suspension or debarment.* The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (d) of this section; or

(3) Failure to submit the certification required by paragraph (e) of this section or comply with paragraph (h) of this section.

(k) Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

■ 44. Revise § 126.618 to read as follows:

§ 126.618 How does a HUBZone SBC's participation in a Mentor-Protégé relationship affect its participation in the HUBZone Program?

(a) A qualified HUBZone SBC may enter into a mentor-protégé relationship under § 125.9 of this chapter (or, if also an 8(a) BD Participant, under § 124.520 of this chapter) or in connection with a mentor-protégé program of another agency, provided that such relationships do not conflict with the underlying HUBZone requirements.

(b) For purposes of determining whether an applicant to the HUBZone Program or a HUBZone SBC qualifies as small under part 121 of this chapter, SBA will not find affiliation between the applicant or qualified HUBZone SBC and the firm that is its mentor in an SBA-approved mentor-protégé relationship (including a mentor that is other than small) on the basis of the mentor-protégé agreement or the assistance provided to the protégé firm under the agreement. SBA will not consider the employees of the mentor in determining whether the applicant or qualified HUBZone SBC meets (or continues to meet) the 35% HUBZone residency requirement or the principal office requirement, or in determining the size of the applicant or qualified HUBZone SBC for any employee-based size standard.

(c) A qualified HUBZone SBC that is a prime contractor on a HUBZone contract may subcontract work to its mentor.

(1) The HUBZone SBC must meet the applicable performance of work requirements set forth in § 125.6(c) of this chapter.

(2) SBA may find affiliation between a prime HUBZone contractor and its mentor subcontractor where the mentor will perform primary and vital requirements of the contract. *See* § 121.103(h)(4) of this chapter.

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

■ 45. The authority citation for part 127 is revised to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), 644 and 657r.

§ 127.500 [Amended]

■ 46. Amend § 127.500 by adding the words ‘‘, regardless of the place of performance’’ to the end of the sentence.

■ 47. Amend § 127.506 as follows:

■ a. Revise the section introductory text and paragraph (a), add an italic subject head to paragraph (c) introductory text, and revise paragraphs (c)(2) and (3);

■ b. Redesignate paragraph (c)(4) as (c)(7) and paragraph (c)(5) as (c)(10) respectively;

■ c. Add new paragraphs (c)(4) through (6);

■ d. Revise newly redesignated paragraphs (c)(7) and (c)(10);

■ e. Add paragraphs (c)(8) and (9) and (c)(11) and (12);

■ f. Revise paragraphs (d), (e), and (f); and

■ g. Add paragraphs (g) through (l).

The revisions and additions read as follows:

§ 127.506 May a joint venture submit an offer on an EDWOSB or WOSB requirement?

A joint venture, including those between a protégé and a mentor under § 125.9 of this chapter (or, if also an 8(a) BD Participant, under § 124.520 of this chapter), may submit an offer on a WOSB Program contract if the joint venture meets all of the following requirements:

(a)(1) A joint venture of at least one WOSB or EDWOSB and one or more other business concerns may submit an offer as a small business for a WOSB Program procurement or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement or sale.

(2) A joint venture between a protégé firm and its SBA-approved mentor (*see* § 125.9 and § 124.520 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the WOSB Program procurement or sale.

* * * * *

(c) *Contents of joint venture agreement.** * *

* * * * *

(2) Designating a WOSB as the managing venturer of the joint venture, and an employee of the WOSB managing venturer as the project manager responsible for performance of the contract. The individual identified as the project manager of the joint venture need not be an employee of the WOSB at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the WOSB if the joint venture is the successful offeror. The individual identified as the project manager cannot be employed by the mentor and become an employee of the WOSB for purposes of performance under the joint venture;

(3) Stating that with respect to a separate legal entity joint venture, the WOSB must own at least 51% of the joint venture entity;

(4) Stating that the WOSB must receive profits from the joint venture commensurate with the work performed by the WOSB, or in the case of a separate legal entity joint venture, commensurate with their ownership interests in the joint venture;

(5) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on a WOSB Program contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the WOSB Program participant(s) in the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the WOSB Program participant(s) in the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

(8) Obligating all parties to the joint venture to ensure performance of the WOSB contract and to complete performance despite the withdrawal of any member;

(9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the WOSB managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(10) Requiring that the final original records be retained by the WOSB managing venturer upon completion of the WOSB Program contract performed by the joint venture;

(11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(d) *Performance of work.* (1) For any WOSB Program contract, the joint venture (including one between a protégé and a mentor authorized by § 125.9 or § 124.520 of this chapter) must perform the applicable percentage of work required by § 125.6 of this chapter.

(2) The WOSB partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture.

(i) The work performed by the WOSB partner(s) to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience.

(ii) The amount of work done by the partners will be aggregated and the work done by the WOSB partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by the non-WOSB partner, all work done by the non-WOSB partner and any of its affiliates at any subcontracting tier will be counted.

(e) *Certification of compliance.* Prior to the performance of any WOSB Program contract as a joint venture, the WOSB Program participant in the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(i) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section;

(ii) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (d) of this section.

(f) *Past performance and experience.* When evaluating the past performance and experience of an entity submitting an offer for a WOSB Program contract as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

(g) *Contract execution.* The procuring activity will execute a WOSB Program contract in the name of the joint venture entity or the WOSB, but in either case will identify the award as one to a WOSB Program joint venture or a WOSB Program mentor-protégé joint venture, as appropriate.

(h) *Submission of joint venture agreement.* The WOSB Program participant must provide a copy of the joint venture agreement to the contracting officer.

(i) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(j) *Performance of work reports.* The WOSB Program participant in the joint venture must describe how it is meeting or has met the applicable performance of work requirements for each WOSB Program contract it performs as a joint venture.

(1) The WOSB partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized

official of each partner to the joint venture, explaining how the performance of work requirements are being met for each WOSB Program contract performed during the year.

(2) At the completion of every WOSB Program contract awarded to a joint venture, the WOSB partner to the joint venture must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (c) of this section.

(k) *Basis for suspension or debarment.* The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (d) of this section; or

(3) Failure to submit the certification required by paragraph (e) or comply with paragraph (i) of this section.

(l) Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

■ 48. The authority citation for part 134 continues to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 637(a), 648(l), 656(i), and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

■ 49. Amend § 134.227 by revising paragraph (c) to read as follows:

§ 134.227 Finality of decisions.

* * * * *

(c) *Reconsideration.* Except as otherwise provided by statute, the applicable program regulations in this chapter, or this part 134, an initial or final decision of the Judge may be reconsidered. Any party in interest, including SBA where SBA did not appear as a party during the proceeding that led to the issuance of the Judge's decision, may request reconsideration by filing with the Judge and serving a petition for reconsideration within 20 days after service of the written decision, upon a clear showing of an error of fact or law material to the decision. The Judge also may reconsider a decision on his or her own initiative.

■ 50. Amend § 134.406 by revising paragraph (b) to read as follows:

§ 134.406 Review of the administrative record.

* * * * *

(b) Except in suspension appeals, the Administrative Law Judge's review is limited to determining whether the Agency's determination is arbitrary, capricious, or contrary to law. As long as the Agency's determination is not arbitrary, capricious or contrary to law, the Administrative Law Judge must uphold it on appeal.

(1) The Administrative Law Judge must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

(2) If the SBA's path of reasoning may reasonably be discerned, the Administrative Law Judge will uphold a decision of less than ideal clarity.

* * * * *

§ 134.501 [Amended]

■ 51. Amend § 134.501 by removing ''§ 125.26'' from paragraph (a) and by adding ''§ 125.29'' in its place.

§ 134.515 [Amended]

■ 52. Amend § 134.515 by removing ''13 CFR 125.28'' from paragraph (a) and by adding ''§ 125.31 of this chapter'' in its place.

Dated: July 1, 2016.

Maria Contreras-Sweet,

Administrator.

[FR Doc. 2016–16399 Filed 7–22–16; 8:45 am]

BILLING CODE 8025–01–P

Proposed Rules

Federal Register
Vol. 84, No. 93
Tuesday, May 14, 2019

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.

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 124 and 127

RIN 3245–AG75

Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business—Certification

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The Small Business Administration (SBA) is proposing to amend its regulations to implement a statutory requirement to certify Women-Owned Small Business Concerns (WOSB) and Economically Disadvantaged Women-Owned Small Business Concerns (EDWOSB) participating in the Women-Owned Small Business Contract Program.

DATES: Comments must be received on or before July 15, 2019.

ADDRESSES: You may submit comments, identified by RIN: 3245–AG75, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *For mail, paper, disk, or CD/ROM submissions:* Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416.
- *Hand Delivery/Courier:* Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416.

SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please submit the information to Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416, or send an email to *brenda.fernandez@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, Washington, DC 20416; (202) 207–7337; *brenda.fernandez@sba.gov.*

SUPPLEMENTARY INFORMATION: The WOSB Federal Contract Program (hereinafter referred to as the ''Program''), set forth in section 8(m) of the Small Business Act, 15 U.S.C. 637(m), authorizes Federal contracting officers to restrict competition to eligible WOSBs or EDWOSBs for Federal contracts in certain industries. Section 825 of the National Defense Authorization Act for Fiscal Year 2015, Public Law 113–291, 128 Stat. 3292 (December 19, 2014) (2015 NDAA), amended the Small Business Act to grant contracting officers the authority to award sole source awards to WOSBs and EDWOSBs and shorten the time period for SBA to conduct a required study to determine the industries in which WOSBs are underrepresented. In addition, section 825 of the 2015 NDAA amended the Small Business Act to create a requirement that a concern be certified as a WOSB or EDWOSB by a Federal agency, a State government, SBA, or a national certifying entity approved by SBA, in order to be awarded a set aside or sole source contract under the authority of section 8(m) of the Small Business Act. 15 U.S.C. 637(m)(2)(E). The certification requirement applies only to participants wishing to compete for set-aside or sole source contracts under the Program. Once this rule is finalized, WOSBs that are not certified will not be eligible to compete on set asides for the Program. Other women-owned small business concerns that do not participate in the Program may continue to self-certify their status, receive contract awards outside the Program as WOSBs, and count toward an agency's goal for awards to WOSBs. For those purposes, contracting officers would be able to accept self-certifications without requiring them to verify any documentation. SBA is proposing to provide certification, to accept certification from certain identified government entities, and to allow certification by SBA-approved third party certifiers. As part of the changes necessary to implement a certification program, SBA is also proposing to amend its regulations with regard to continuing eligibility and program examinations. SBA is also proposing to adjust the economic disadvantage thresholds applicable to determining whether an individual qualifies as economically disadvantaged for participation in the 8(a) Business Development (BD) Program to make them consistent with the thresholds applicable to whether a woman qualifies as economically disadvantaged for EDWOSB status.

On September 14, 2015, SBA published in the **Federal Register** a final rule to implement the sole source authority for WOSBs and EDWOSBs and the revised timeline for SBA to conduct a study to determine the industries in which WOSBs are underrepresented. 80 FR 55019. SBA did not address the certification portion of the 2015 NDAA in this final rule because its implementation is more complicated, could not be accomplished by merely incorporating the statutory language into the regulations, and would have delayed the implementation of the sole source authority unnecessarily. SBA notified the public that because it did not want to delay the implementation of the WOSB sole source authority by combining it with the new certification requirement, SBA decided to implement the certification requirement through a separate rulemaking.

As part of the process to craft the regulations governing the WOSB/EDWOSB certification program, SBA issued an Advance Notice of Proposed Rulemaking (ANPR) on December 18, 2015. 80 FR 78984. The ANPR solicited public comments to assist SBA in drafting a proposed rule to implement a WOSB/EDWOSB certification program. SBA received 122 comments in response to the ANPR. SBA has reviewed all the comments while crafting this proposed rule and received additional input from interested stakeholders.

This proposed rule also proposes changes to § 124.104(c), to make the economic disadvantage requirements for the 8(a) BD program consistent to the economic disadvantage requirements for women-owned firms seeking EDWOSB

status. The proposed change would eliminate the distinction in the 8(a) BD program for initial entry into and continued eligibility for the program. The economic disadvantage criteria for EDWOSBs equate to the continuing eligibility criteria for the 8(a) BD program. This has resulted in the anomaly of a concern applying for EDWOSB and 8(a) BD status simultaneously and being found to be economically disadvantaged for EDWOSB purposes, but denied eligibility for the 8(a) BD program based on not being economically disadvantaged. This proposed rule intends to make economic disadvantage for the 8(a) BD program consistent to that for a woman seeking to qualify as economically disadvantaged for the EDWOSB program. SBA does not believe that it makes sense to allow a woman to qualify as economically disadvantaged for EDWOSB purposes, but to then be declined from 8(a) BD participation for not being economically disadvantaged.

In addition, SBA notes that in September 2017, SBA awarded a contract to conduct a study to assist the Office of Business Development in defining or establishing criteria for determining what constitutes ''economic disadvantage'' for purposes of firms applying to the 8(a) BD program. The results supported a $375,000 adjusted net worth for initial eligibility, as compared to the current $250,000 threshold. The study did not, however, consider differences in economic disadvantage between applying to the 8(a) BD program and continuing in the program once admitted. Because SBA believes that it is important to have the same economic disadvantage criteria for the 8(a) BD program as for the EDWOSB program, to avoid confusion and inconsistency between the programs, SBA considered applying a $375,000 net worth standard to both the 8(a) BD and EDWOSB programs. SBA concluded that the $375,000 net worth standard may not be appropriate as the standard for determining economic disadvantage because it related to entry into the 8(a) BD program as opposed to participation in the free enterprise system as an economically disadvantaged business owner. As such, this rule proposes to adopt the $750,000 net worth continuing eligibility standard for all economic disadvantage determinations in the 8(a) BD program. SBA specifically requests comments on whether the $375,000 net worth standard or the $750,000 net worth standard should be used for both the 8(a) BD and EDWOSB programs. In particular, SBA requests comments on how the different standards would affect small business owners participating in the federal marketplace.

SBA is proposing to amend 13 CFR 127 subpart C to establish the process by which SBA will certify firms as WOSBs or EDWOSBs. Proposed § 127.300(a) would provide that SBA will provide a free electronic application process to all firms seeking to be certified as WOSBs or EDWOSBs. In the pursuit of speed, efficiency, and ease of administrative burden, applicants would apply online through an electronic application process. Electronic applications are much faster to process than paper applications as the information can be sorted and searched for digitally. Electronic applications force all mandatory fields to be completed, thereby eliminating incomplete applications. Moreover, through electronic applications, notifications can be sent to applicants to confirm receipt of their applications, along with any follow-up electronic correspondence, rather than through time-consuming paper mail. Transitioning to purely electronic applications will also reduce transactions costs for the agency, saving taxpayer dollars in the process. Data analysis will also be enhanced as applications move to be only electronic. The ability to process WOSB and EDWOSB certifications in an expedited fashion will further SBA's mission to increase the number of WOSBs that win Federal Government contracts.

SBA is proposing that applicants would have the opportunity to request reconsideration of an initial decline decision, which would be consistent with the 8(a) BD application process. The contract protest mechanism, allowing interested parties to challenge the WOSB/EDWOSB status of an apparent successful offeror, will remain the same with an appeal right and will serve as a means to ensure that concerns awarded a Federal contract based on their WOSB or EDWOSB certifications are eligible for award.

SBA's regulations currently authorize the following WOSB/EDWOSB certifications: (1) Certification by third party national certifying entities approved by SBA, (2) certification by SBA as a Participant in the 8(a) BD program where the concern is owned and controlled by one or more women, and (3) concerns certified as owned and controlled by women and certified as Disadvantaged Business Enterprises (DBEs) by states pursuant to the U.S. Department of Transportation's (DOT's) DBE program. 13 CFR 127.300(d). Although the current program principally relies on self-certification, it also permits SBA to have non-governmental third party certifiers approved by SBA. SBA approved four non-governmental entities for that purpose as an alternative option for WOSB or EDWOSBs. These entities are not restricted from assessing fees for certification. In the ANPR, SBA sought comments on how those certification processes are working, how they can be improved, and how best to incorporate them into the new certification requirements. Almost all of the 122 comments that SBA received mentioned third party certifiers or their process. Overwhelmingly the commenters urged SBA to craft a system that would be as uniform as possible, with applicants not being treated differently depending on whom they chose for certification purposes. Almost every commenter that mentioned the topic also wanted the certification process by SBA to be free for all applicants. Commenters noted that 8(a) BD program applicants and HUBZone program applicants do not pay a fee for certification. Overall, commenters suggested that SBA create a clear, transparent, consistent, and free certification process. Commenters supportive of authorized third party certifiers offered that speed to certification is one attraction that might be worth the cost. SBA also received comments concerning whether a third party certifier could be a for-profit entity. The legislation does not limit participation as a third party certifier to entities that are non-profit, and SBA is not proposing any limitation. The proposed rule would also require any approved third party certifier to notify an applicant of its fees and the ability to apply online with SBA at no cost.

After evaluating the comments, SBA has determined that the new legislation permits a balance of options for the public. SBA has previously determined that the act of certifying a firm as eligible to receive a federal contract is generally an inherently governmental function. However, the 2015 NDAA specifically gives to SBA the authority to use a non-governmental certifying entity approved by SBA which is unique to the WOSB Program and does not affect inherently governmental authorities for approval as required in the 8(a) BD or HUBZone programs. SBA proposes to exercise this authority and will promulgate the requirements that prospective national certifying entities must adhere to in order to be approved.

SBA also proposes to use existing government entities at the Federal and State levels that have valid certification programs which SBA could accept in

lieu of an SBA only process. In addition to those that will apply directly to SBA for WOSB or EDWOSB certification, or through an approved national entity, the proposed rule would authorize SBA to accept certifications that have been issued by SBA, a Federal agency or State authority under the DOT/DBE program. SBA already certifies firms as eligible for its 8(a) BD and HUBZone programs without concerns being charged a fee for applying. The Department of Veterans Affairs (VA) certifies veteran-owned small businesses (VOSBs) and service-disabled veteran-owned small businesses (SDVOSBs) at no cost through its Center for Verification and Evaluation (CVE). Many veterans are also women. This rule proposes that SBA accept certifications by SBA (for the 8(a) BD and HUBZone programs) and VA that a firm is owned and controlled by women for purposes of WOSB/EDWOSB certification. The DOT DBE program has authority for certifying women under its State-run programs. Similarly, SBA proposes to accept these certifications that a firm is owned and controlled by women as well. SBA is therefore proposing to amend § 127.300 by deleting paragraphs (b) through (f) and explaining that the certification process will be handled by SBA and that SBA will accept, under certain conditions, the aforementioned Federal or State third party certifications.

SBA will accept from the VA, VOSB or SDVOSB certification for women veterans, provided that the business concern is 51% owned and controlled by one or more women who are veterans or service-disabled veterans. VA applies SBA's standards of ownership and control under its Center for Verification and Evaluation (CVE) program. Because VA does not determine economic disadvantage, SBA will only accept VA certifications as evidence of ownership and control by women. Women veterans or service-disabled veterans seeking EDWOSB status would have to apply directly to SBA for this certification. In such a case, SBA would accept VA's determination that the firm is owned and controlled by women, but the firm would still have to demonstrate that the women are economically disadvantaged.

Similarly, SBA will accept the DOT/DBE certification for WOSB eligibility. Because the thresholds of economic disadvantage are different between SBA and DOT's DBE program, SBA cannot accept the economic disadvantage determination of a DBE for the EDWOSB certification. Interested parties seeking EDWOSB status will have to apply directly to SBA for this certification.

SBA believes that there may difficulty in processing all the potential applications of those seeking WOSB or EDWOSB certifications in a timely manner. There are currently approximately 10,000 firms in the WOSB repository. SBA's 8(a) Business Development program processes approximately 3,000 applications a year, and SBA's HUBZone program processes approximately 1,500 applications per year. Because the WOSB/EDWOSB program is being designed so that only firms that have been certified are eligible for contracts through the program, SBA expects a large influx of applications as soon as these rules are finalized. If all those firms currently in the repository seek WOSB/EDWOSB certification from SBA immediately, there most likely will be a delay for many firms seeking certification. SBA is requesting comments on possible solutions to this potential bottleneck. One solution that SBA is considering is to adapt a process similar to that previously used by SBA in certifying firms as small disadvantaged businesses (SDBs) when there was an SDB program. Under such an approach, a firm could submit an offer as a WOSB or EDWOSB if it had submitted an application to SBA and had not received a negative determination regarding that application at the time it submits its offer. A concern would be required to notify the procuring agency of this conditional status in its offer. If a concern then becomes the apparent successful offeror on a WOSB/EDWOSB contract, the contracting officer would notify SBA and SBA would prioritize the firm's application and make a determination within 15 days from the date SBA received the contracting officer's notification. Such a timeframe should not be detrimental since it is the same afforded for size and status protests today. SBA specifically requests comments on this alternative and other possible approaches that would help ease the transition from self-certification to a required certification program.

Proposed § 127.301 and § 127.306 would provide guidance on how a concern may apply to the WOSB/EDWOSB Program. Proposed § 127.301 would provide guidance on initial applications, and proposed § 127.306 would address the procedures for denied applications and decertifications. Proposed § 127.305 would provide that WOSB Program applicants will be permitted to request reconsideration, within 30 calendar days of notification of an initial decline decision. In proposed § 127.306, SBA would require a one-year waiting period for a concern to re-apply after a decline or decertification. Currently the 8(a) BD program requires a concern to wait one year to reapply after a denied application. 13 CFR 124.207. SBA will render a final decision within 60 calendar days of a reconsideration request. In response to the SBA ANPR, many commenters requested that SBA adopt an appeal process for denied applications similar to the 8(a) BD development program. Other commenters wanted to emphasize giving concerns an ability to ask SBA to reconsider the application and make changes. SBA's HUBZone certification process does not currently utilize an appeal or reconsideration process. SBA is not proposing to adopt an appeal process similar to the 8(a) BD program for the WOSB Program, but would allow concerns the ability to request reconsideration. SBA believes that the reconsideration process should be sufficient for a firm to understand its deficiencies and come into compliance with the HUBZone eligibility requirements.

Proposed § 127.302 would provide information on how a concern may apply for certification. SBA is proposing to process all applications online. SBA is currently already processing all 8(a) BD program and HUBZone program applications electronically, and this would be an extension of that application process to the WOSB Program. Current participants in the WOSB Program have been using *https://certify.sba.gov* to self-certify for the past year.

Proposed § 127.303(a) would describe the information and documents that must be submitted during the electronic application process. In the ANPR, SBA requested comments on what information and documents should be collected during an application. Most commenters believed that SBA should continue to collect the documents listed in the current version of § 127.300(e). SBA agrees with these comments and while that list is not exhaustive, SBA believes that it is illustrative of the amount and types of documents that SBA will be collecting during the electronic application process. SBA is proposing to maintain the list of required documents on its website, and that the list of required documents ''may include, but is not limited to, corporate records, and business and personal financial records, including copies of signed Federal personal and business tax returns, individual and business bank statements.'' This is similar to the approach of SBA's other programs, in which SBA provides more detail of the documents required on SBA's website as well as part of the application process.

Proposed § 127.303(b) would make clear that SBA may need to request additional documents during the application process in order to confirm eligibility. Proposed § 127.303(c) would state that it is the concern's responsibility to notify SBA of any changes that could affect the firm's eligibility while SBA is reviewing the application. SBA is proposing to add new paragraphs § 127.303(d) and (e) to detail the additional information that concerns reapplying after a denial or decertification are required to submit. The proposed rule provides that concerns reapplying for certification will have to submit information showing what changes have been made to remedy the issues of ineligibility in the initial application.

Proposed § 127.304 would detail how SBA will process applications. WOSB program applicants will have their packages reviewed, similar to the 8(a) BD program, within 15 calendar days for completeness of an application. Concerns will be notified if required information is missing, and that SBA will not process incomplete applications. SBA proposes that it will make its determination within 90 days after a concern submits a complete application. This is consistent with the time frames and policies established for SBA's other certification programs. The 90-day time frame will not begin to run on submitted but incomplete applications. SBA proposes that after a complete application is submitted, SBA could still need additional information from an applicant. Proposed paragraph (c) would provide that it is the applicant's responsibility to demonstrate its eligibility and that SBA could draw adverse inferences when a concern fails to provide documents and information that SBA has requested. Proposed paragraph (d) would provide that a concern must be eligible when it applies, and must maintain its eligibility throughout the time SBA is evaluating its application. Proposed paragraph (e) would provide that any changes in circumstances may be relevant to a concern's eligibility, that a concern has an affirmative duty to notify SBA of any changes, and that SBA may decline to certify a concern that fails to notify SBA of changed circumstances. Proposed paragraphs (f) and (g) would provide that any decision regarding an application will be in writing. Proposed paragraph (f) would also state that it will be SBA's responsibility to update *https://certify.sba.gov* (or any successor system) and the System for Award Management, to indicate the firm has been certified by SBA.

Proposed § 127.305 would authorize a reconsideration process, which would permit a firm found to be ineligible to address deficiencies and change its bylaws, articles of incorporation, or other ownership documents to come into compliance with SBA's ownership and control requirements. As mentioned above, this is consistent with SBA's current application and continuing eligibility process for the 8(a) BD program. The goal of this proposed change is to allow eligible concerns to become certified as quickly as possible, even if there were deficiencies or eligibility issues on their initial applications.

Proposed § 127.306 would provide that concerns may reapply to the program one year after a final decline or decertification decision.

Third Party Certification

SBA is proposing to further amend subpart C of part 127 to establish procedures for Third Party Certification in the context of a required certification program. In proposed § 127.350, SBA is proposing that all Third Party Certifiers (TPCs) must be approved by SBA. Under the proposed rule, an approved TPC need not be a non-profit entity. SBA is also clarifying that a TPC is a non-governmental entity, in contrast to the governmental certifications (8(a), DOT/DBE, VA/CVE) that SBA will accept for WOSB/EDWOSB certification purposes.

SBA is proposing that in order to be certified by a TPC, an applicant must be registered in the System for Award Management (SAM) and must upload all required documents in *certify.gov.* An applicant using a TPC would be required to provide the TPC with access to the documents in *certify.sba.gov.* A firm certified by a TPC would need to upload the written certification from a TPC to *https://certify.sba.gov* (or any successor system). Proposed § 127.352 would provide that SBA will maintain the instructions for becoming a TPC on SBA's website.

Proposed § 127.353(a) would permit TPCs to charge a fee. As noted above, commenters generally favored free certification, but those comments pertained to certification by the Government and other commenters recognized a value to having TPCs in certain instances. SBA notes that any applicant that wishes to have its application for certification processed without a fee would always be able to submit its application to SBA. SBA recognizes that TPCs currently charge a fee to certify WOSBs, and believes that this option should not be eliminated for any applicant seeking the services of a TPC. Further, § 127.353(a)(1) and (2) would provide that all TPCs must notify potential applicants of the free option offered by SBA at the beginning of the application process. In addition, proposed § 127.353(b) would require that the method of the notification must be approved by SBA.

Proposed § 127.354 would provide the certification standards that TPCs must meet. The proposed rule identifies minimum standards that need to be met. As noted above, SBA received suggestions that consistency between certification options offered by various certifiers would be helpful for participants, and help alleviate possible confusion from having multiple certification options. These baseline standards will provide some consistency between various certifiers, ensuring that all certifiers are meeting the same minimum requirements.

Proposed § 127.355 would establish procedures that SBA will utilize to ensure that TPCs are meeting the requirements of subpart D. Specifically, SBA is proposing that it will conduct periodic compliance reviews, and that SBA may revoke its approval of a TPC that is not meeting the requirements.

Proposed § 127.356 would create the process for certification by a TPC. SBA is proposing that concerns submit their applications directly to the TPC, register in SAM, and upload all of the documents to *certify.sba.gov.* The applicant will provide the TPC with access to its documents in *certify.sba.gov.* Once certified, the applicant will upload the approval document to *certify.sba.gov.*

Proposed § 127.357 would address ineligibility determinations made by TPCs. Proposed § 127.357(a) would permit a concern found to be ineligible by a TPC to request reconsideration and a redetermination, at no additional cost to the concern. Proposed § 127.357(a) would also require the TPC to complete the reconsideration process within 60 calendar days. Finally, the proposed rule would prohibit a declined firm from reapplying for WOSB or EDWOSB certification by SBA or a TPC for a one-year period.

SBA is proposing to amend subpart D of part 127 to establish procedures for maintaining a concern's certification as WOSB or EDWOSB and conducting program examinations of WOSB program participants after certification. Proposed § 127.400 would require that concerns recertify their eligibility every three years. SBA proposes that failure to recertify in the time period provided will result in the concern being decertified, and thus removed as a certified WOSB or EDWOSB from the

Dynamic Small Business Search (DSBS) system.

Proposed § 127.401 would establish the ongoing obligations of certified WOSB Program participants. Specifically, this provision would provide that all certified concerns have an affirmative duty to notify SBA of any material changes in writing. Proposed § 127.402 would address the failure of a concern to recertify every three years or to notify SBA of a material change. The proposed language makes clear that such concerns would be decertified.

Proposed § 127.403 pertains to program examinations. Program examinations under the new regulations will serve a similar function as they had previously. However, they will be inherently different with the proposed new SBA certification. Proposed paragraph (a) would establish that an examination is an investigation by SBA to verify the accuracy of any WOSB/EDWOSB certification and to ensure that currently certified concerns continue to meet the eligibility criteria of the WOSB Program. Proposed paragraph (b) would provide that program examinations will be conducted by SBA staff, SBA field staff or others designated by the SBA's Director of Government Contracting (D/GC).

Proposed paragraph § 127.403(c) establishes that the scope of review for examinations is any information that is related to a concern's eligibility. SBA may conduct site visits when appropriate as part of the program examination. Further, proposed paragraph (d) would require that it is the program participant's responsibility to ensure that all required information has been submitted to SBA and that all that information is up to date and accurate. Additionally, this proposed section would provide that all of the required information is considered material by SBA in determining a concern's eligibility and that the information is assumed to be truthful and current.

Proposed § 127.404 would authorize SBA to conduct program examinations at its discretion any time after a concern has submitted an application to be certified. This regulation also clarifies that SBA may initiate an examination of a concern without notification. As noted above, in order to apply to the WOSB program and maintain eligibility a concern must provide SBA with required documents and information. This provision would provide that SBA may review any previously submitted information at any time as part of a program examination. Given that SBA may not need additional information when it begins the examination, it is not necessary to notify concerns that SBA is reviewing material that has already been submitted to SBA. Proposed § 127.405 would make clear that in addition to reviewing material already submitted, SBA may also request additional information when conducting a program examination.

Proposed § 127.406 would authorize SBA to decertify concerns that fail to provide or maintain the required certifications or documents. As noted above, SBA will maintain a list of all the required documents that a concern must provide and keep up-to-date. Concerns that fail to meet this requirement would be proposed for decertification. SBA would also propose decertification for firms that SBA determines no longer meet the eligibility requirements. Concerns would be proposed for decertification pursuant to § 127.406(a). Concerns proposed for decertification would be given 15 calendar days to respond. Proposed § 127.406(a)(3) would be added to establish that SBA will generally not consider new evidence in a response. SBA also proposes to add § 127.406(b) which would state that when a concern is decertified pursuant to this section, the D/GC will issue that decision in writing and will consider all the reasons why the firm was proposed for decertification. Further, this section would provide that SBA may draw adverse inferences when making this eligibility determination. Proposed § 127.406(c) would provide that decertified firms would be able to reapply to the program one year after decertification.

SBA is proposing to remove § 127.505, as the pertinent information in this provision is already detailed in § 121.406(b).

This proposed rule would not change the general procedures concerning WOSB/EDWOSB protests in relation to contract actions. A concern that has been determined ineligible as part of a status protest could continue to appeal that decision pursuant to newly redesignated § 127.605. However, SBA is proposing to amend newly redesignated § 127.604(f)(4) to clarify that firms found to be ineligible would need to reapply rather than request a reexamination. The proposed language also provides a citation to the appropriate regulation for reapplication procedures.

Compliance With Executive Orders 12866, 13563, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612).

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule is a significant regulatory action for the purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act.

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

The U.S. Small Business Administration (SBA) is required by statute to administer the WOSB Federal Contract Program (WOSB Program). The Small Business Act (Act) sets forth the certification criteria for the WOSB Program. Specifically, the Act states that a WOSB or EDWOSB must, ''be certified by a Federal agency, a State government, the Administrator, or a national certifying entity approved by the SBA Administrator, as a small business concern owned and controlled by women.'' 15 U.S.C. 637(m)(2)(E).

The Federal Acquisition Regulation (FAR) and SBA regulations require that in order to be certified as a WOSB or EDWOSB a small business concern must provide documents supporting its WOSB or EDWOSB status to SBA. See 13 CFR 127.300 and FAR 19.1503(b)(3). The specific documents firms are required to provide are outlined in §§ 127.300(d) and (e). The Act also states that the SBA is authorized to conduct eligibility examinations of any certified WOSB or EDWOSB, and to handle protests and appeals related to such certifications. Id. § 637(m)(5)(A) and (5)(B).

Under the current system firms may be certified by third party certifiers, or they may essentially self-certify and upload the required documents to *sba.certify.gov.* In order to award a WOSB set-aside or sole source contract, the contracting officer must document that the contracting officer reviewed the firm's certifications and documentation. 13 CFR 127.503(g); FAR 19.1503(b)(3). The lack of required certification, coupled with the requirement that the contracting officer must verify that documents have been uploaded, may contribute to reluctance to use the program, resulting in the failure to meet the statutory goal of 5% of all prime contract dollars being awarded to

WOSBs. In FY 2017, the government wide WOSB goal of 5% was not met with actual performance at 4.71% ($20.8B). The government has only met the goal once (FY 2015). While the amount of dollars awarded to WOSBs under the set aside program are trending up, they still account for less than 0.016% of dollars awarded to WOSBs. A certification could help entice agencies to set aside more contracts for WOSBs, so that the government can meet the statutory 5% goal.

2. What are the potential benefits and costs of this regulatory action?

The benefit of the proposed regulation is a significant improvement in the confidence of contracting officers to make Federal contract awards to eligible firms. Under the existing system, the burden of eligibility compliance is placed upon the awarding contracting officer. Contracting officers must review the documentation of the apparent successful offeror on a WOSB or EDWOSB contract. Under this proposed rule, the burden is placed upon SBA and/or third party certifiers. All that a contracting officer need do is to verify that the firm is fact a certified WOSB or EDWOSB in SAM. A contracting officer would not have to look at any documentation provided by a firm or prepare any internal memorandum memorializing any review. This will encourage more contracting officers to set aside opportunities for WOSB Program participants as the validation process will be controlled by SBA in both SAM and DSBS. Increased procurement awards to WOSB concerns can further close a gap of under-representation of women in industries where in the aggregate WOSB represent 12 percent of all sales in contrast with male-owned businesses that represent 79% of all sales (per SBA Office of Advocacy Issue Brief Number 13, dated May 31, 2017 *https://www.sba.gov/sites/default/files/advocacy/Womens-Business-Ownership-in-the-US.pdf*).

Another benefit of the proposed regulation is to reduce the cost associated with the time required for completing WOSB certification by replacing the WOSB Program Repository with *Certify.SBA.gov* (''Certify'') in the regulation. It is also anticipated that the proposed WOSB certification methodology and likely increased use of WOSB/EDWOSB set asides may increase program participation levels by approximately 32%. Under the prior WOSB Program Repository, SBA determined that the average time required to complete the process required by the WOSB Program Repository was two hours, whereas the use of Certify results requires only one hour. Across an estimated 12,347 firms, the total cost savings is significant, as discussed below. Another potential benefit is the reduction of time and costs to WOSB firms through the reduction of program participation costs. By successfully leveraging technology, SBA has reduced the total cost of burden hours substantially from $2,533,200 to $967,965.

Based on the calculations below, the total estimated number of respondents (WOSBs and EDWOSBs) for this collection of information varies depending upon the types of certification that a business concern is seeking. For initial certification, the total estimated number of respondents is 9,349. The total number was calculated using the two-year average number of business concerns that have provided information through Certify from March 2016 through February 2018. For annual updates, the total number is 12,347. For examinations and protests, the total number is 130.

Type of certification	Number of respondents	Source
Initial certification	9,349	Average annual number of respondents to Certify between March 2016 and February 2018.
New certifications each year	500	Program participation is expected to remain constant after initial year of certification, with 500 new certifications annually.
Annual updates to certification	11,847	Program participation is expected to remain constant after initial year of certification, with a reduction of 500 participants annually through attrition.
Total annual responses	12,347	Annual new certifications plus annual updates.

Each respondent submits one response at the time of initial certification and one at the time of annual update. Estimated burden hours vary depending upon the type of certification that a WOSB or EDWOSB pursues. SBA conducted a survey among a sample of entities that assist WOSBs and EDWOSBs to provide information through Certify. The majority of those surveyed stated that for initial certifications the estimated time for completion is one hour per submission. For annual updates, because of the need to submit little if any additional information, the estimated burden is 0.5 hour per submission. For examinations and protests, the estimated burden is 0.25, which is much lower because firms have already provided the required documents identified in 13 CFR 127.300(d) and (e) through Certify. It is estimated that the initial certification will involve 9,349 existing participants and 2,998 new respondents in the first year. After the first year, initial certifications are expected for 500 new respondents annually with an additional 11,847 annual certifications for existing participants for a total of 12,347 participants in each succeeding year. The participant level is expected to remain stable at 12,347 participants annually with 500 new respondents and 500 attritions from the program annually. Further, 130 respondents are expected to participate in protests and appeals. The respondent's cost of burden hours for a five year period and average is provided in the following table.

COST OF BURDEN HOURS—5 YEAR COST ESTIMATE AND AVERAGE

Year	Initial—existing 1 hr @ $77.58 per participant	Initial—new participants 1 hr @ $77.58 per participant	Annual updates .5 hr @ $77.58 per participant	Examinations and protests .25 hr @ $77.58 per participant	Annual totals
Number of Program Participants					
1	9,349	2,998	.....	130	12,477
2	.....	500	11,847	130	12,477
3	.....	500	11,847	130	12,477
4	.....	500	11,847	130	12,477
5	.....	500	11,847	130	12,477
Costs					
1	$725,295	$232,585	.....	$2,521	$960,402
2	.....	38,790	$459,545	2,521	500,856
3	.....	38,790	459,545	2,521	500,856
4	.....	38,790	459,545	2,521	500,856
5	.....	38,790	459,545	2,521	500,856
5 Year Total:	.....	.....	.....	.....	2,963,828
Annual Cost Avg	.....	.....	.....	.....	592,766

(a) Respondent's Cost of Burden Hours:

Initial certification—transition of existing participants (one time cost):

Estimated officer's salary = $77.58/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area), which would be equivalent to a senior manager in an average small business firm.)

Total estimated burden: 9,349 × 1 hour × $77.58/hour = $725,295.

Initial certification—new participants (first year cost):

Estimated officer's salary = $77.58/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area), which would be equivalent to a senior manager in an average small business firm.)

Total estimated burden: 2998 × 1 hour × $77.58/hour = $232,585.

Initial certification—new participants (cost for each succeeding year after initial year):

Estimated officer's salary = $77.58/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area), which would be equivalent to a senior manager in an average small business firm.)

Total estimated burden: 500 × 1 hour × $77.58/hour = $38,790.

Annual update:

Estimated officer's salary = $77.58/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area), which would be equivalent to a senior manager in an average small business firm.)

Total estimated burden: 11,847 × .5 hour × $77.58/hour = $459,545.

Examinations and Protests (each year):

Estimated officer's salary = $77.58/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area), which would be equivalent to a senior manager in an average small business firm.)

Total estimated burden: 130 × .25 hour × $77.58/hour = $2,521.

SBA previously stated that the estimated total respondent's cost of burden hours was $2,533,200 annually. By successfully leveraging technology, SBA has reduced the total cost of burden hours substantially from $2,533,200 to $960,402 for the initial year and $500,856 annually in succeeding years, with respective savings of $1,572,798 in the initial year and annual savings in successive years of $2,032,344 and a five year savings of $9,702,174 for WOSB to redirect as revenue generating resources to close the noted revenue disparity with male-owned businesses.

SBA believes that there are no additional capital or start-up costs or operation and maintenance costs and purchases of services costs to respondents as a result of this rule because there should be no cost in setting up or maintaining systems to collect the required information. As stated previously, the information requested should be collected and retained in the ordinary course of business.

3. What are the alternatives to this proposed rule?

The proposed regulations are required to implement specific statutory provisions which require promulgation of implementing regulations. One alternative considered would be to rely solely on third party certifiers to certify WOSBs and EDWOSBs. However, there is a cost to small businesses for third party certifiers. Firms submit the same documentation to third party certifiers that would submit to SBA, but third party certifiers charge on average $380 annually. Consequently, the cost of relying completely on third party certifiers would be $3,552,620.00 a year (9,349 initial applicants × $380). If third party certifiers were used for the anticipated increase to 12,477 annual participants, the cost would be $4,741,260. In addition, SBA maintains that certification for Federal procurement purposes is an inherently governmental function. Consequently, even if SBA utilized third party certifiers for an initial or preliminary review, SBA or a governmental entity would still have to be involved in reviewing those certifications. In addition, there is an intended benefit of certification. The intent is to increase confidence in the eligibility of firms so that contracting officers and activities utilize the sole source authority. Although trending upwards, WOSB/EDWOSB set aside and sole awards only accounted for 3.4% of total dollars awarded to WOSBs in FY 2017. The Federal Government has met the statutory WOSB goal of 5% of total

dollars awarded to WOSBs only once (FY 2015).

Executive Order 13563

As part of its ongoing efforts to engage stakeholders in the development of its regulations, on December 18, 2015, SBA issued an Advance Notice of Proposed Rulemaking in the **Federal Register,** 80 FR 78984. In response to that notice, SBA received 122 comments. SBA has incorporated those comments and suggestions in the proposed regulation to the extent feasible. In addition, SBA shared the proposed rule with the Small Business Procurement Advisory Council and the Federal Acquisition Regulation small business committee. In addition, the agency met with stakeholders.

Executive Order 12988

For purposes of Executive Order 12988, SBA has drafted this proposed rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that 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 layers of government. Therefore, SBA has determined that this proposed rule has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13771

This proposed rule is expected to be an Executive Order 13771 regulatory action. Details on the estimated costs of this proposed rule can be found in the rule's economic analysis.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

In carrying out its statutory mandate to provide oversight of certification related to SBA's WOSB Federal Contract Program, SBA is currently approved to collect information from the WOSB applicants or participants through SBA Form 2413, and for EDWOSB applicants or participants, through SBA Form 2414. (OMB Control Number 3245–0374). This collection of information also requires submission or retention of documents that support the applicant's certification.

SBA has implemented a certification and information collection platform—Certify—that replicates the currently approved information collection. In other words, the information collected through Certify includes eligibility documents previously collected in the WOSB Repository, and information collected on SBA Form 2413 (WOSB) and SBA Form 2414 (EDWOSB). SBA recently revised this information collection to establish that the agency has discontinued these paper forms and will collect the information and supporting documents electronically through Certify. The recent submission made minor changes to add one question to request information on classes of stock for a corporation and eliminated one question that was redundant.

As currently approved this collection of information is submitted by small business applicants or program participants who self-certify or who obtain certification from an SBA approved third-party certifier. SBA has determined that this proposed rule does not add any additional burden to what is already in place for the current documentation required for self-certification.

As discussed above, this rule proposes to fully implement the statutory requirement for small business concerns to be certified by a Federal agency, a State government, SBA, or a national certifying entity approved by SBA, in order to be awarded a set aside or sole source contract under the WOSB program. As a result of these changes, the rule proposes to eliminate the option to self-certify, set the standards for certification by SBA, and clarify the third-party certification requirements. SBA does not anticipate that these changes would impact the content of the information currently collected; however, it would be necessary to propose changes to the instructions, especially as they relate to self-certification, to make it clear that the option is no longer available. SBA does not believe that any required change to the instructions require the agency to resubmit the information collection to OMB for review and approval.

SBA notes that personal financial information reported on SBA Form 413 (Control Number 3245–0188) will also be submitted electronically through Certify by those applicants seeking SBA certification as an EDWOSB. However, applicants using third-party certifiers will continue to use the paper version of Form 413. This rule does not propose to make any changes to that collection. However, if comments on this proposed rule result in revisions to these WOSB/EDWOSB related collections of information, SBA will seek OMB approval, if necessary, before the rule is finalized.

Regulatory Flexibility Act, 5 U.S.C. 601–612

According to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, when an agency issues a rulemaking, it must prepare a regulatory flexibility analysis to address the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines ''small entity'' to include ''small businesses,'' ''small organizations,'' and ''small governmental jurisdictions.'' This proposed rule concerns various aspects of SBA's contracting programs. As such, the rule relates to small business concerns, but would not affect ''small organizations'' or ''small governmental jurisdictions.'' SBA's contracting programs generally apply only to ''business concerns'' as defined by SBA regulations, in other words, to small businesses organized for profit. ''Small organizations'' or ''small governmental jurisdictions'' are non-profits or governmental entities and do not generally qualify as ''business concerns'' within the meaning of SBA's regulations.

As stated in the regulatory impact analysis this rule will impact approximately 9,000–12,000 women-owned small businesses. If adopted in final form, these businesses will have to apply to SBA for certification. However, SBA has proposed to minimize the impact on WOSBs by accepting certifications already received from SBA, through DOT's DBE program, or the VA's CVE program, and by providing firms that have been certified by third party certifiers with a one-year grace period for certification. The costs to WOSBs for certification should be de minimis, because the required documentation already exists: Such as articles of incorporation, bylaws, stock ledgers or certificates, tax records, etc. In addition, this information is already required to be provided either to third party certifiers, governmental certifying entities (*e.g.,* DOT DBE, SBA 8(a) Business Development, VA CVE) or to SBA through Certify. Thus, the Administrator certifies that the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

List of Subjects

13 CFR Part 124

Administrative practice and procedure, Government procurement, Minority businesses, Reporting and recordkeeping requirements, Technical assistance.

13 CFR Part 127

Government contracts, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble, SBA proposes to amend 13 CFR parts 124 and 127 as follows:

PART 124—8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

■ 1. The authority citation for part 124 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644 and Pub. L. 99–661, Pub. L. 100–656, sec.1207, Pub. L. 101–37, Pub. L. 101–574, section 8021, Pub. L. 108–87, and 42 U.S.C. 9815.

■ 2. Amend § 124.104 as follows:
■ a. Remove the first two sentences of paragraph (c)(2) introductory text and add one sentence in their place;
■ b. Remove the first two sentences of paragraph (c)(3)(i) and add one sentence in their place; and
■ c. Revise the first sentence of paragraph (c)(4).

The additions and revision read as follows:

§ 124.104 Who is economically disadvantaged?

* * * * *

(c) * * *

(2) * * * The net worth of an individual claiming disadvantage must be less than $750,000. * * *

(3) * * * (i) SBA will presume that an individual is not economically disadvantaged if his or her adjusted gross income averaged over the three preceding years exceeds $350,000. * * *

(4) * * * An individual will generally not be considered economically disadvantaged if the fair market value of all his or her assets (including his or her primary residence and the value of the applicant/Participant firm) exceeds $6 million. * * *

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

■ 3. The authority citation for part 127 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), 644 and 657r.

■ 4. Revise subpart C to read as follows:

Subpart C—Certification of EDWOSB or WOSB Status

Certification by SBA

Certification by Third Party

Subpart C—Certification of WOSB or EDWOSB Status

Certification by SBA

§ 127.300 How is a concern certified as an WOSB or EDWOSB?

(a) *WOSB certification.* (1) A concern may apply to SBA for WOSB certification. There is no cost to apply to SBA for certification. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. SBA, in its discretion, may rely solely upon the information submitted to establish eligibility, may request additional information, or may verify the information before making a determination. SBA may draw an adverse inference and deny the certification where the concern fails to cooperate with SBA or submit information requested by SBA.

(2) A concern may submit evidence to SBA that it is a women-owned concern that is a certified 8(a) Participant, certified by the Department of Veterans Affairs (VA) CVE as a Service-Disabled Veteran Owned Business or Veteran-Owned Business, or certified as a Disadvantaged Business Enterprise (DBE) by a state agency authorized by the Department of Transportation (DOT); or

(3) A concern may submit evidence that it has been certified as a WOSB by an approved Third Party Certifier in accordance with this subpart.

(b) *EDWOSB certification.* (1) A concern may apply to SBA for EDWOSB certification. There is no cost to apply to SBA for certification. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. SBA, in its discretion, may rely solely upon the information submitted to establish eligibility, may request additional information, or may verify the information before making a determination. SBA may draw an adverse inference and deny the certification where the concern fails to cooperate with SBA or submit information requested by SBA.

(2) A women-owned business that is a certified 8(a) Participant qualifies as an EDWOSB;

(3) Firms certified by the VA or under DOT's DBE program as women-owned business concerns will be deemed to be owned and controlled by women, but must apply to SBA to demonstrate their economic disadvantage in order to be certified as EDWOSBs; or

(4) A concern may submit evidence that it has been certified as an EDWOSB by a third party certifier under this subpart.

(c) *SBA notification and designation.* If SBA determines that the concern is a qualified WOSB or EDWOSB, it will issue a letter of certification and designate the firm as a certified WOSB or EDWOSB on the Dynamic Small Business Search (DSBS) system, or successor system.

§ 127.301 When may a concern apply to SBA for certification?

A concern may apply for WOSB or EDWOSB certification and submit the required information whenever it can represent that it meets the eligibility requirements, subject to the restrictions of § 127.306. All representations and supporting information contained in the application must be complete and accurate as of the date of submission. The application must be signed by an officer of the concern who is authorized to represent the concern.

§ 127.302 Where can a concern apply for certification from SBA?

A concern seeking certification as a WOSB or EDWOSB may apply to SBA

for certification via *https://certify.sba.gov* or any successor system. Certification pages must be validated electronically or signed by a person authorized to represent the concern.

§ 127.303 What must a concern submit to SBA?

(a) To be certified by SBA as a WOSB or EDWOSB, a concern must provide documents and information demonstrating that it meets the requirements set forth in part 127 subpart B. SBA maintains a list of the minimum required documents that can be found at *https://certify.sba.gov.* A firm may submit additional documents and information to support its eligibility. The required documents must be provided to SBA during the application process electronically. This may include, but is not limited to, corporate records, business and personal financial records, including copies of signed Federal personal and business tax returns, and individual and business bank statements.

(b) In addition to the minimum required documents, SBA may request additional information from applicants in order to verify eligibility.

(c) After submitting the application, an applicant must notify SBA of any changes that could affect its eligibility.

(d) If a concern was decertified or previously denied certification, it must include with its application for certification a full explanation of why it was decertified or denied certification, and what, if any, changes have been made. If SBA is not satisfied with the explanation provided, SBA may decline to certify the concern.

(e) If the concern was decertified for failure to notify SBA of a material change affecting its eligibility pursuant to § 127.401, it must include with its application for certification a full explanation of why it failed to notify SBA of the material change. If SBA is not satisfied with the explanation provided, SBA may decline to certify the concern.

§ 127.304 How will SBA process the application for certification?

(a) The SBA's Director of Government Contracting (D/GC) or designee is authorized to approve or decline applications for certification. SBA must receive all required information and supporting documents before it will begin processing a concern's application. SBA will not process incomplete applications. SBA will advise each applicant within 15 calendar days after the receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or clarification is required to complete the application. SBA will make its determination within ninety (90) calendar days after receipt of a complete package, whenever practicable.

(b) SBA may request additional information or clarification of information contained in an application or document submission at any time.

(c) The burden of proof to demonstrate eligibility is on the applicant concern. If a concern does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may presume that disclosure of the missing information would adversely affect the business concern's eligibility or demonstrate a lack of eligibility in the area or areas to which the information relates.

(d) The applicant must be eligible as of the date it submitted its application and up until the time the D/GC issues a decision. The decision will be based on the facts contained in the application, any information received in response to SBA's request for clarification, and any changed circumstances since the date of application.

(e) Any changed circumstances occurring after an applicant has submitted an application will be considered and may constitute grounds for decline. After submitting the application and signed representation, an applicant must notify SBA of any changes that could affect its eligibility. The D/GC may propose decertification for any EDWOSB or WOSB that fails to inform SBA of any changed circumstances that affected its eligibility for the program during the processing of the application.

(f) If SBA approves the application, SBA will send a written notice to the concern and update *https://certify.sba.gov* or any successor system, and update DSBS and the System for Award Management (or any successor systems) to indicate the firm has been certified by SBA.

(g) A decision to deny eligibility must be in writing and state the specific reasons for denial.

(h) A copy of the decision letter will be sent to the electronic mail address provided with the application. SBA will consider any decision sent to this electronic mail address provided to have been received by the applicant firm.

(i) The decision of SBA to decline certification is the final Agency decision, unless the applicant seeks reconsideration pursuant to § 127.305.

§ 127.305 Can an applicant ask SBA to reconsider SBA's initial decision to decline its application?

(a) A concern whose application is declined may request that SBA reconsider its decision by filing a request for reconsideration at *https://certify.sba.gov,* or any successor system, within 30 calendar days of the date of SBA's decision.

(b) At the time of its request for reconsideration, the applicant must provide any additional information and documentation pertinent to overcoming the reason(s) for the initial decline, whether or not available at the time of initial application, including information and documentation regarding changed circumstances.

(c) SBA will issue a written decision within 60 calendar days of SBA's receipt of the applicant's request for reconsideration. SBA may approve the application, deny it on the same grounds as the original decision, or deny it on other grounds. If denied, the D/GC will explain why the applicant is not eligible for admission to the EDWOSB or WOSB program and give specific reasons for the decline.

(d) If SBA declines the application solely on issues not raised in the initial decline, the applicant can ask for reconsideration as if it were an initial decline.

(e) The decision of SBA to decline certification is the final Agency decision.

§ 127.306 May declined or decertified concerns seek recertification at a later date?

A concern that SBA has declined or decertified may seek certification after one year from the date of decline or decertification if it believes that it has overcome all of the reasons for decline or decertification and is currently eligible. A concern found to be ineligible during a WOSB/EDWOSB status protest is precluded from applying for certification for one year from the date of the final agency decision (the D/GC's decision if no appeal is filed or the decision of SBA's Office of Hearings and Appeals (OHA) where an appeal is filed pursuant to § 127.605.

Certification by Third Party

§ 127. 350 What is a third party certifier?

A third party certifier is a non-governmental entity that SBA may approve to certify that an applicant firm is qualified for the WOSB or EDWOSB contracting program. A third party certifier may be a for-profit or non-profit entity. The list of SBA-approved third

party certifiers may be found on SBA's website at *sba.gov*.

§ 127.351 What third party certifications may a concern use as evidence of its status as a qualified EDWOSB or WOSB?

In order for SBA to accept a third party certification that a concern qualifies as a WOSB or EDWOSB, the concern must have a current, valid certification from an entity designated as an SBA-approved certifier. The third party certification must be submitted to SBA through *https://certify.sba.gov* (or a successor system).

§ 127.352 What is the process for becoming a third party certifier?

SBA will periodically hold open solicitations. All entities that believe they meet the criteria to act as a third party certifier will be free to respond to the solicitation. SBA will review the submissions, and if SBA determines that an entity has demonstrated it meets SBA criteria, SBA will enter into an agreement and designate the entity as an approved third party certifier.

§ 127.353 May third party certifiers charge a fee?

(a) Third party certifiers may charge a reasonable fee, but must notify applicants first, in writing, that SBA offers certification for free.

(b) The method of notification and the language that will be used for this notification must be approved by SBA. The third party certifier may not change its method or the language without SBA approval.

§ 127.354 What are the minimum required certification standards for a third party certifier?

(a) All third party certifiers must enter into written agreements with SBA. This agreement will detail the requirements that the third party certifier must meet. SBA may terminate the agreement if SBA subsequently determines that the entity's certification process does not comply with SBA-approved certification standards or is not based on the same program eligibility requirements as set forth in subpart B of this part or conducts itself in a manner contrary to SBA's values.

(b) Third party certifiers' certification process must comply with SBA-approved certification standards and track the WOSB or EDWOSB eligibility requirements set forth in subpart B of this part.

(c) In order for SBA to enter into an agreement with a third party certifier, the entity must establish the following:

(1) It will render fair and impartial WOSB/EDWOSB Federal Contract Program eligibility determinations;

(2) It will provide the approved applicant a valid certificate for entering into the SBA electronic platform, and will retain documents used to determine eligibility for a period of six (6) years to support SBA's responsibility to conduct a status protest, eligibility examination, agency investigation or audit of the third party determinations;

(3) Its certification process will require applicant concerns to register in SAM (or any successor system) and submit sufficient information as determined by SBA to enable it to determine whether the concern qualifies as a WOSB. This information must include documentation demonstrating whether the concern is:

(i) A small business concern under the SBA size standard corresponding to the concern's primary industry, as defined in 13 CFR 121.107;

(ii) At least 51 percent owned and controlled by one or more women who are United States citizens; and

(4) It will not decline to accept a concern's application for WOSB/EDWOSB certification on the basis of race, color, national origin, religion, age, disability, sexual orientation, marital or family status, or political affiliation.

§ 127.355 How will SBA ensure that approved third party certifiers are meeting the requirements?

(a) SBA will require third party certifiers to submit quarterly reports to SBA. These reports will contain information including the number of applications received, number of applications approved and denied, and other information that SBA determines may be helpful for ensuring that third party certifiers are meeting their obligations or information or data that may be useful for improving the program.

(b) SBA will conduct periodic compliance reviews of third party certifiers to ensure that they are properly applying SBA's WOSB/EDWOSB requirements and certifying firms in accordance with those requirements.

(1) SBA will conduct a compliance review on at least one third party certifier per year and will ensure that every third party certifier undergoes a full compliance review every three years.

(2) At the conclusion of each compliance review SBA will provide the third party certifier with a written report detailing SBA's findings with regard to the third party certifier's compliance with SBA's requirements. The report will include recommendations for possible improvements, and detailed explanations for any deficiencies identified by SBA.

(c) If SBA determines that a third party certifier is not meeting the requirements, SBA may revoke the approval of that third party certifier.

§ 127.356 How does a concern obtain certification from an approved certifier?

(a) A concern that seeks WOSB or EDWOSB certification from an SBA-approved third party certifier must submit its application directly to the approved certifier in accordance with the specific application procedures of the particular certifier.

(b) The concern must register in the System for Award Management (SAM), or any successor system.

(c) The approved certifier must ensure that all documents used to determine that a firm is approved for certification are uploaded in *https://certify.sba.gov* or any successor system.

§ 127.357 What happens if a firm is found not eligible by a third party certifier?

(a) The concern may request, at no additional cost to the applicant, a redetermination within 30 calendar days from the third party certifier that initially declined its application and cannot represent itself as a qualified WOSB or EDWOSB unless and until it receives a determination of eligibility.

(b) The third party certifier must complete the redetermination within 60 calendar days of request. If the applicant is declined, the third party certifier shall notify SBA.

(c) The concern must wait one year to request a reexamination from either SBA or a third party certifier.

(d) The concern may not seek certification from any other third party certifier during this waiting period.

■ 5. Revise subpart D to read as follows:

Subpart D—Maintaining WOSB and EDWOSB Status and Eligibility Examinations

Sec.

Subpart D—Maintaining WOSB and EDWOSB Status and Eligibility Examinations

§ 127.400 How does a concern maintain its WOSB or EDWOSB certification?

(a) A certified WOSB or EDWOSB must recertify every three years to SBA that it continues to meet all of the WOSB and EDWOSB eligibility requirements. Concerns wishing to remain in the program without any interruption must recertify their continued eligibility to SBA within 30 calendar days before the third anniversary date of their initial certification and each subsequent three-year period. Failure to do so will result in the concern being decertified. The process for completing the recertification can be found on SBA's website at *https://certify.sba.gov* (or successor system).

(b) A concern certified by a third party certifier prior to the effective date of SBA's certification may maintain that status for three years from the date of its certification or most recent recertification by the third party certifier.

§ 127.401 What are an EDWOSB's and WOSB's ongoing obligations to SBA?

Once certified, a WOSB or EDWOSB must immediately notify SBA of any material changes that could affect its eligibility. Material change includes, but is not limited to, a change in the ownership, business structure, or management. The notification must be in writing, and must be uploaded into the firm's profile with SBA. The method for notifying SBA can be found on *https://certify.sba.gov.* A concern's failure to notify SBA of such a material change may result in decertification and removal from SAM and DSBS (or any successor system) as a designated certified WOSB/EDWOSB concern. In addition, SBA may seek the imposition of penalties under § 127.700.

§ 127.402 What happens if a concern fails to recertify?

If a WOSB or EDWOSB fails to recertify its status on *https://certify.sba.gov* (or successor system) pursuant to § 127.400 or SBA determines that a concern has not notified SBA of a change that could affect its WOSB or EDWOSB eligibility, SBA will decertify the concern from the program. In the case of a concern failing to recertify its status as a WOSB or EDWOSB, SBA will decertify the firm from the program on the day after the third anniversary date of initial certification or recertification. SBA will issue a written notice explaining why the concern has been decertified. This decertification will be SBA's final decision and may not be appealed.

§ 127.403 What is a program examination, who will conduct it, and what will SBA examine?

(a) A program examination is an investigation by SBA officials, which verifies the accuracy of any certification of a concern issued by a third party certifier or other Federal or State agency or in connection with a WOSB or EDWOSB contract. Thus, examiners may verify that the concern currently meets the program's eligibility requirements, and that it met such requirements at the time of its application for certification, its most recent recertification, or its certification in connection with a WOSB or EDWOSB contract.

(b) Examiners may review any information related to the concern's eligibility requirements. SBA may also conduct site visits.

(c) It is the responsibility of program participants to ensure the information provided to SBA is kept up to date and is accurate. SBA considers all required information and documents material to a concern's eligibility, and assumes that all information and documentation submitted are up to date and accurate unless SBA has information that indicates otherwise.

§ 127.404 When may SBA conduct program examinations?

SBA may conduct a program examination at any time after a concern has been certified as a WOSB or EDWOSB.

§ 127.405 May SBA require additional information from a WOSB or EDWOSB during a program examination?

At the discretion of the D/GC, SBA has the right to require that a WOSB or EDWOSB submit additional information as part of the certification process, or at any time thereafter. SBA may draw an adverse inference from the failure of a concern to cooperate with a program examination or provide requested information.

§ 127.406 What happens if SBA determines that the concern is no longer eligible for the program?

If SBA believes that a concern does not meet the program eligibility requirements, the concern has not provided or maintained all the required certifications and documentation, or the concern has failed to notify SBA of a material change, SBA will propose the concern for decertification from the program.

(a) *Proposed Decertification.* The D/GC or designee will notify the concern in writing that it has been proposed for decertification. This notice will state the reasons why SBA has proposed decertification, and that the WOSB or EDWOSB must respond to each of the reasons set forth.

(1) The WOSB or EDWOSB must respond in writing to a proposed decertification within 20 calendar days from the date of the proposed decertification.

(2) If the initial certification was done by a third party, SBA will also notify the third party certifier of the proposed decertification in writing.

(b) *Decertification.* The D/GC or designee will consider the reasons for proposed decertification and the concern's response before making a written decision whether to decertify. The D/GC may draw an adverse inference where a concern fails to cooperate with SBA or provide the information requested. The D/GC's decision is the final Agency decision.

(c) *Reapplication.* A concern decertified pursuant to this section may reapply to the program pursuant to § 127.306.

§ 127.505 [Removed and reserved]

■ 6. Remove and reserve § 127.505.

§ 127.602 [Amended]

■ 7. Amend § 127.602 by removing the last sentence.

§ 127.603 [Amended]

■ 8. Amend § 127.603 by removing the second to last sentence in paragraph (d).

■ 9. Revise § 127.604(f)(4) to read as follows:

§ 127.604 How will SBA process an EDWOSB or WOSB status protest?

* * * * *

(f) * * *

(4) A concern that has been found to be ineligible will be decertified from the program and may not submit an offer as a WOSB or EDWOSB on another procurement until it is recertified. A concern may be recertified by reapplying to the program pursuant to § 127.306.

Christopher M. Pilkerton,

Acting Administrator.

[FR Doc. 2019–09684 Filed 5–13–19; 8:45 am]

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G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175. This action only applies to state and local monitoring agencies operating NCore monitoring sites in Core Based Statistical Areas of 1,000,000 people or more. No tribal governments will be subject to the PAMS monitoring requirements. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard.

List of Subjects in 40 CFR Part 58

Ambient air monitoring, Ozone, Photochemical Assessment Monitoring Stations, Precursor monitoring.

Dated: May 23, 2019.

Andrew R. Wheeler,

Administrator.

For the reasons stated in the preamble, the Environmental Protection Agency proposes to amend part 58 of title 40, chapter I, of the Code of Federal Regulations as follows:

PART 58—AMBIENT AIR QUALITY SURVEILLANCE

■ 1. The authority citation for part 58 continues to read as follows:

Authority: 42 U.S.C. 7403, 7405, 7410, 7414, 7601, 7611, 7614, and 7619.

■ 2. Section 58.13 is amended by revising paragraph (h) to read as follows:

§ 58.13 Monitoring network completion.

* * * * *

(h) The Photochemical Assessment Monitoring sites required under 40 CFR part 58 Appendix D, section 5(a) must be physically established and operating under all of the requirements of this part, including the requirements of appendix A, C, D, and E of this part, no later than June 1, 2021.

* * * * *

[FR Doc. 2019–11406 Filed 5–30–19; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 232, and 252

[Docket DARS–2019–0025]

RIN 0750–AK25

Defense Federal Acquisition Regulation Supplement: Prompt Payments of Small Business Contractors (DFARS Case 2018–D068)

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 implement a section of the National Defense Authorization Act for Fiscal Year 2019 that provides for accelerated payments to small business contractors and subcontractors.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before July 30, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018–D068, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for ''DFARS Case 2018–D068.'' Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2018–D068'' on any attached documents.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2018–D068 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Jennifer D. Johnson, OUSD(A–S)DPC/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: Ms. Jennifer D. Johnson, telephone 571–372–6100.

SUPPLEMENTARY INFORMATION:

I. Background

This rule proposes to revise the DFARS to implement section 852 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Section 852 provides for accelerated payments to small business contractors and to small business subcontractors by accelerating payments to their prime contractors. Specifically, section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date for small business contractors, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. For contractors that subcontract with small businesses, section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date, with a goal of 15 days after receipt of a proper invoice, if: (1) A specific payment date is not established by contract, and (2) the contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

The requirements of section 852 are similar to current DoD policy and practice regarding payments to small business contractors and subcontractors. DFARS 232.903 states DoD's policy of assisting small businesses by paying them as quickly as possible after receipt of invoices and proper documentation, and before normal payment due dates established in the contract. In practice, the Defense Financial Accounting Service (DFAS) currently provides accelerated payments to nearly all DoD contractors, as permitted by law.

II. Discussion and Analysis

This rule proposes to amend DFARS parts 212, 232, and 252 to implement section 852 of the NDAA for FY 2019. In part 232, this rule proposes to add section 232.009, Providing accelerated payments to small business subcontractors, to address compliance with section 852. The clause at Federal Acquisition Regulation (FAR) 52.232–40, Providing Accelerated Payments to Small Business Subcontractors, already includes most of the requirements of section 852. Therefore, DoD will continue to use the FAR clause, in order to avoid unnecessary duplication. However, this rule proposes to add a new contract clause at DFARS 252.232–7XXX, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration. In accordance with section 852, this new clause prohibits contractors from requiring any further consideration from, or charging fees to, their small business subcontractors when making accelerated payments under FAR 52.232–40. The rule proposes to add this new clause to the list at section 212.301, Solicitation provisions and contract clauses for the acquisition of commercial items.

III. Expected Impact of the Proposed Rule

Current DoD policy, as stated in DFARS 232.903, is to pay small business contractors as quickly as possible after receipt of invoices and proper documentation. This rule proposes to specify that DoD will provide payment as quickly as possible, to the fullest extent permitted by law, with a goal of 15 days after receipt of proper invoices and documentation, and before normal payment due dates. For items that ordinarily require payment in less than 15 days (*e.g.,* perishable food), DoD will provide payment as quickly as possible after receipt of proper invoices and documentation, and before the normal payment due date.

With few exceptions, DoD will provide accelerated payments to small business contractors and to other contractors that agree to provide accelerated payments to their small business subcontractors without further consideration or fees. DoD will not be able to provide accelerated payments if such payments put DoD at risk of a violation of law.

DoD estimates that 40,282 contractors (including 30,498 small businesses) will receive accelerated payments each year, based on data obtained from the Federal Procurement Data System and input from subject matter experts. Specifically, DoD awarded contracts to an average of 40,689 unique entities (including 30,806 small businesses) each year from FY 2016 through FY 2018. Subject matter experts estimated that DoD would not provide accelerated payments to approximately 1 percent (407, including 308 small businesses) of these contractors because such payments would put DoD at risk of a violation of law. Therefore, approximately 40,282 contractors (including 30,498 small businesses) per year would receive accelerated payments.

The clause at FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors, currently requires contractors to provide accelerated payments to their small business subcontractors when the Government provides accelerated payments to the contractors. DoD contracting officers are required to include this clause in DoD contracts. As a result, DoD contractors should already be providing accelerated payments to small business subcontractors.

In accordance with section 852 of the NDAA for FY 2019, this rule proposes to prohibit contractors from requiring any further consideration from, or charging fees to, their small business subcontractors when making accelerated payments. This prohibition will be communicated to contractors in a new contract clause at DFARS 252.232–7XXX, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration. This prohibition would benefit small business subcontractors who have been required to provide consideration or pay fees to the prime contractor in order to receive accelerated payments. Any costs for prime contractors to implement the prohibition on fees and consideration are expected to be de minimis since DoD expects that only a small number of contractors have required such consideration or fees from their small business subcontractors.

It is not possible for DoD to estimate the number of small business subcontractors who have been required to provide consideration or pay fees for accelerated payments from prime contractors, nor is it possible to estimate the dollar value of the consideration provided or fees paid. The lack of available data makes it difficult to predict the impact of the proposed rule. Depending on the extent to which small business subcontractors have been required to provide consideration or pay fees to receive accelerated payments, the proposed prohibition could result in cost savings. DoD invites public comment regarding the number of small businesses required to provide such consideration or fees to prime contractors, the basis for such estimates, and the cost impact of the consideration or fees.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

DoD intends to apply the requirements of section 852 of the NDAA for FY 2019 to contracts at or below the simplified acquisition threshold (SAT) and to contracts for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items.

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. 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 Principal Director, Defense Pricing and Contracting (DPC), 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.

Given that the requirements of section 852 of the NDAA for FY 2019 were enacted to provide accelerated payments to small business contractors and subcontractors, and since approximately 96 percent of DoD contracts are valued at or below the SAT, DoD intends to determine that it is in the best interest of the Federal Government to apply the rule to contracts at or below the SAT. An exception for contracts at or below the SAT would exclude contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

10 U.S.C. 2375 governs the applicability of laws to DoD contracts and subcontracts for the acquisition of commercial items, including COTS items, and is intended to limit the applicability of laws to contracts and subcontracts for the acquisition of

commercial items, including COTS items. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) 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. Due to delegations of authority from USD(A&S), the Principal Director, DPC, is the appropriate authority to make this determination.

Given that the requirements of section 852 of the NDAA for FY 2019 were enacted to provide accelerated payments to small business contractors and subcontractors, and since more than half of DoD's contractors are small businesses providing commercial items, including COTS items, DoD intends to determine that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, including COTS items, as defined at FAR 2.101. An exception for contracts for the acquisition of commercial items, including COTS items, would exclude the contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

V. 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.

VI. Executive Order 13771

This rule is not expected to be subject to the requirements of E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VII. Regulatory Flexibility Act

DoD expects that this proposed rule may 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.* Therefore, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement section 852 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date for small business contractors, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. For contractors that subcontract with small businesses, section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date, with a goal of 15 days after receipt of a proper invoice, if—(1) a specific payment date is not established by contract and (2) the contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

The objective of the rule is to provide accelerated payments to small business contractors and subcontractors. The legal basis is section 852 of the NDAA for FY 2019.

According to data obtained from the Federal Procurement Data System, DoD awarded contracts to an average of 30,806 unique small entities each year from FY 2016 through FY 2018. DoD estimates that it may not be possible to provide accelerated payments to approximately 308 small contractors (1%) because such payments would put DoD at risk of a violation of law. Therefore, approximately 30,498 small contractors per year would receive accelerated payments.

This rule does not impose any new reporting, recordkeeping or other compliance requirements for small entities.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives that would accomplish the stated objectives of the applicable statute.

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 2018–D068), in correspondence.

VIII. 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 212, 232, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 232, and 252 are proposed to be amended as follows:

■ 1. The authority citations for 48 CFR part 212, 232, and 252 continue to read as follows:

Authority: 41 U.S.C. 1303 ad 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 212.301 by adding paragraph (f)(xiii)(G) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(xiii) * * *

(G) Use the clause at 252.232–7XXX, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, as prescribed in 232.009–2(2).

* * * * *

PART 232—CONTRACT FINANCING

■ 3. Add sections 232.009, 232.009–1, and 232.009–2 to read as follows:

232.009 Providing accelerated payments to small business subcontractors.

232.009–1 General.

Section 852 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) requires DoD to provide accelerated payments to small business contractors and subcontractors, to the fullest extent permitted by law, with a goal of 15 days.

232.009–2 Contract clause.

Use the clause at 252.232–7XXX, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, that include the clause at FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors.

Subpart 232.9—Prompt Payment

■ 4. Revise section 232.903 to read as follows:

232.903 Responsibilities.

In accordance with section 852 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232), DoD shall assist small business concerns by providing payment as quickly as possible, to the fullest extent permitted by law, with a goal of 15 days after receipt of proper invoices and all required documentation, including acceptance, and before normal payment due dates established in the contract (see 232.906(a)).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Add section 252.232–7XXX to read as follows:

252.232–7XXX Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration.

As prescribed in 232.009–2, use the following clause:

ACCELERATING PAYMENTS TO SMALL BUSINESS SUBCONTRACTORS—PROHIBITION ON FEES AND CONSIDERATION (DATE)

(a) In accordance with section 852 of Public Law 115–232, the contractor shall not require any further consideration from or charge fees to the small business subcontractor when making accelerated payments to subcontractors under the clause at FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors.

(b) Include the substance of this clause, including this paragraph (b), in all subcontracts with small business concerns, including those for the acquisition of commercial items.

(End of clause)

[FR Doc. 2019–11309 Filed 5–30–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 244

[Docket DARS–2019–0024]

RIN 0750–AJ48

Defense Federal Acquisition Regulation Supplement: Contractor Purchasing System Review Threshold (DFARS Case 2017–D038)

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 establish a DoD contractor purchasing system review dollar threshold that provides a regulatory basis for allowing DoD personnel to support other essential priorities and missions of greater contractual risk, while reducing regulatory impact on contractors.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before July 30, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2017–D038, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for ''DFARS Case 2017–D038.'' Select ''Comment Now'' and follow the instructions to submit a comment. Please include your name, company name (if any), and ''DFARS Case 2017–D038'' on any attached document.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2017–D038 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Kimberly Bass, OUSD(A&S)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Instructions: 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: Kimberly Bass, telephone 571–372–6174.

SUPPLEMENTARY INFORMATION:

I. Background

This proposed rule implements a recommendation from the Defense Contract Management Agency (DCMA) to raise the contractor purchasing system review (CPSR) threshold at Federal Acquisition Regulation 44.302(a) from $25 million to $50 million. Currently, FAR 44.302(a) requires the administrative contracting officer (ACO) to determine whether a contractor's sales to the Government are expected to exceed $25 million during the next 12 months and, if so, perform a review to determine if a CPSR is needed. The ACO uses this dollar threshold in conjunction with the surveillance criteria cited at FAR 44.302(a), *i.e.,* contractor past performance, and the volume, complexity, and dollar value of subcontracts. DCMA performs the preponderance of DoD CPSRs. Competitively awarded firm-fixed-price and competitively awarded fixed-price with economic price adjustment contracts and sales of commercial items pursuant to Part 12 are excluded from this requirement.

FAR 44.302(a) specifically authorizes the head of the agency responsible for contract administration to raise or lower the $25 million CPSR threshold if it is considered to be in the Government's best interest. The dollar threshold of $25 million cited at FAR 44.302(a) has been unchanged since 1996. In 2016, the DCMA CPSR Group conducted an analysis to determine if raising the CPSR threshold would be beneficial. Based on the Group's findings, it was determined that adjusting the threshold upward to $50 million would appropriately account for inflation, reduce burden on small contractors, and allow a more efficient and effective use of CSPR resources to review larger contractors where more taxpayer dollars are at risk.

II. Discussion and Analysis

This rule proposes to amend DFARS 244.302, Requirements, to establish within the DFARS a DoD CPSR dollar threshold of $50 million. With this threshold in place, it is estimated that DCMA ACOs can reduce the number of contractor reviews by approximately 20 percent, while reducing by only 2% the value of contract dollars covered by CSPRs. Thus, the Government will be adequately protected by the $50 million threshold.

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 or impact any existing provisions or clauses. The rule merely increases the DoD dollar threshold for conducting CPSRs to $50 million.

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

■ i. Remove ''and, if possible and practicable, the original copyright registration number;''
■ ii. Add ''or the original copyright registration number'' after ''the title'';
■ iii. Add '', or both, if possible and practicable,'' after ''the work'';
■ c. In paragraph (d), add ''or by reputable courier service delivered'' after ''by first class mail sent'' and add '', or by means of electronic transmission (such as email) if the grantee expressly consents to accept service in this manner'' after ''grantee or successor in title''.
■ d. In paragraph (e)(1), add ''preparing, serving, or seeking to record'' after ''Harmless errors in'' and add ''or that do not materially affect, in the Office's discretion, the Office's ability to record the notice'' after ''whichever applies,'';
■ e. In paragraph (e)(2), remove ''or registration number'';
■ f. In paragraph (f)(1)(ii)(A), remove ''will'' from the first sentence and add in its place ''may'', remove ''will'' from the second sentence and add in its place ''may'', and add ''on or'' after ''the date of recordation is''; and
■ g. In paragraph (f)(3), remove ''all of the elements required for recordation, including the prescribed fee and, if required, the statement of service, have been'' and add in its place ''the notice of termination is''.

Dated: June 1, 2020.

Regan A. Smith,

General Counsel and Associate Register of Copyrights.

[FR Doc. 2020–12038 Filed 6–2–20; 8:45 am]

BILLING CODE 1410–30–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19, 42, and 52

[FAR Case 2019–004, Docket No. FAR–2019–0030, Sequence No. 1]

RIN 9000–AN87

Federal Acquisition Regulation: Good Faith in Small Business Subcontracting

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2017, which requires examples of failure to make good faith efforts to comply with a small business subcontracting plan.

DATES: Interested parties should submit written comments at the address shown below on or before August 3, 2020 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2019–004 to *https://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FAR Case 2019–004''. Select the link ''Comment Now'' that corresponds with FAR Case 2019–004. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2019–004'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite FAR Case 2019–004 in all correspondence related to this case. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Malissa Jones, Procurement Analyst, at (703)605–2815, or by email at *malissa.jones@gsa.gov,* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAR Case 2019–004.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the FAR to implement section 1821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (15 U.S.C 637 note, Pub. L. 114–328). Section 1821 requires the Small Business Administration (SBA) to amend its regulations to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. SBA issued a rule at 84 FR 65647, November 29, 2019, to implement section 1821 of the NDAA for FY 2017. In its rule, SBA amends 13 CFR 125.3(d)(3) to provide guidance on evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan and a list of examples of activities reflective of a failure to make a good faith effort.

Additionally, SBA revised 13 CFR 125.3(c)(1)(iv) to require that prime contractors with commercial subcontracting plans include indirect costs in their subcontracting goals. Other than small business concerns that have a commercial subcontracting plan report on performance through a summary subcontract report (SSR). SBA's regulations currently require that contractors using a commercial subcontracting plan must include indirect costs in their SSRs, but do not require these contractors to include indirect costs in their subcontracting goals, which leads to inconsistencies when comparing the data reported in the SSR to the goals in the commercial subcontracting plan.

Small business subcontracting plans are required from large prime contractors when a contract is expected to exceed $700,000 ($1.5 million for construction) and has subcontracting possibilities. FAR 19.704 lists the elements of the plan, which include the contractor's goals for subcontracting to small business concerns and a description of the efforts the contractor will make to ensure that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts. Failure to make a good faith effort to comply with the plan may result in the assessment of liquidated damages per FAR 52.219–16, Liquidated Damages—Subcontracting Plan.

II. Discussion and Analysis

The proposed changes to the FAR are summarized in the following paragraphs.

A. Inclusion of Indirect Costs in Commercial Plans

Section 19.704, Subcontracting plan requirements, and the clause at 52.219–9, Small Business Subcontracting Plan, are amended to require that all indirect costs, with certain exceptions, are included in commercial plans and SSRs.

B. Compliance With the Subcontracting Plan

Section 19.705–7, Liquidated damages, is renamed ''Compliance with the subcontracting plan'' and is reorganized, with paragraph headings

added to make this section easier to read and understand. This section includes examples of a good faith effort, and examples of a failure to make a good faith effort to comply with the subcontracting plan, including SBA's examples at 13 CFR 125.3(d). References to the examples in 19.705–7 are added in other sections in subparts 19.7 and 42.15. A reference to SBA's examples at 13 CFR 125.3(d), now located at FAR 19.705–7, is added in the clause at 52.219–16.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule proposes to implement a statutory requirement to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. Because section 8(d) of the Small Business Act (15 U.S.C. 637(d)) requires subcontracting plans only for acquisitions valued above $700,000 ($1.5 million for construction contracts), the requirements of section 1821 of the NDAA for FY 2017 (15 U.S.C 637 note, Pub. L. 114–328) would not apply to contracts at or below the SAT. The FAR Council intends to apply the requirements of section 1821 to contracts for the acquisition of commercial items. Revisions to the clauses at FAR 52.219–9 and 52.219–16 are proposed by this rule. Discussion of these preliminary determinations is set forth below. The FAR Council will consider public feedback before making a final determination on the scope of the final rule.

A. Applicability to Contracts for the Acquisition of Commercial Items

Pursuant to 41 U.S.C. 1906, acquisitions of commercial items (other than acquisitions of COTS items, which are addressed in 41 U.S.C. 1907) are exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1906 and states that the law applies to acquisitions of commercial items; or (iii) the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to the acquisition of commercial items.

The purpose of this rule is to implement section 1821 of the NDAA for FY 2017 and SBA's implementing regulations. Section 1821 requires SBA to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. Both the FAR and SBA's regulations require contractors with small business subcontracting plans, including commercial plans, to make a good faith effort to comply with the plans. SBA's rule did not exempt the acquisition of commercial items.

Section 1821 furthers the Administration's goal of supporting small business. It advances the interests of small business subcontractors by promoting good faith efforts by large prime contractors to find and use small business concerns as subcontractors, thereby providing valuable opportunities for small business concerns.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of this rule to the acquisition of commercial items.

B. Applicability to Contracts for the Acquisition of COTS Items

Pursuant to 41 U.S.C. 1907, acquisitions of COTS items will be exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1907 and states that the law applies to acquisitions of COTS items; (iii) concerns authorities or responsibilities under the Small Business Act (15 U.S.C. 644) or bid protest procedures developed under the authority of 31 U.S.C. 3551 *et seq.,* 10 U.S.C. 2305(e) and (f), or 41 U.S.C. 3706 and 3707; or (iv) the Administrator for Federal Procurement Policy makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to the acquisition of COTS items.

The purpose of this rule is to implement section 1821 of the NDAA for FY 2017 and SBA's implementing regulations. Section 1821 requires SBA to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. Both the FAR and SBA's regulations require contractors with small business subcontracting plans, including commercial plans, to make a good faith effort to comply with the plans. SBA's rule did not exempt the acquisition of COTS items.

Section 1821 furthers the Administration's goal of supporting small business. It advances the interests of small business subcontractors by promoting good faith efforts by large prime contractors to find and use small business concerns as subcontractors, thereby providing valuable opportunities for small business concerns.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of this rule to the acquisition of COTS items.

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. Executive Order 13771

This proposed rule is not expected to be subject to E.O. 13771, Reducing Regulation and controlling Regulatory Costs, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA do 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 (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the FAR to implement section 1821 of the NDAA for FY 2017 (Pub. L. 114–328). Section 1821 amends the Small Business Act (15 U.S.C 637 note), to require SBA to provide examples of activities that would be considered a failure to make a good faith effort to comply with the goals and other elements in small business subcontracting plans. Additionally, SBA clarified in its regulations that large prime contractors with commercial subcontracting plans must

include indirect costs in the commercial subcontracting plan goals.

The objective of this proposed rule is to implement section 1821 of the NDAA for FY 2017 and SBA's implementing regulations, which provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. SBA has amended 13 CFR 125.3(d)(3) to provide guidance on evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan and a list of examples of activities reflective of a failure to make a good faith effort.

Additionally, SBA has revised 13 CFR 125.3(c)(1)(iv) to require that large prime contractors with commercial subcontracting plans include indirect costs in the commercial subcontracting plan goals. Large prime contractors that have a commercial subcontracting plan report on performance through a SSR in the Electronic Subcontracting Reporting System (eSRS). SBA's regulations and the FAR currently require that a contractor using a commercial subcontracting plan include indirect costs in its SSR. However, these regulations do not require contractors to include indirect costs in their commercial subcontracting plan goals, which leads to inconsistencies when comparing the data reported in the SSR to the goals in the commercial subcontracting plan.

This rule may have a positive economic impact on any small business entity that wishes to participate in Federal procurement as a subcontractor. By providing examples of a failure to make a good faith effort to comply with small business subcontracting plans, contracting officers can determine more easily whether large prime contractors have made a good faith effort to comply with their subcontracting plans and hold large prime contractors accountable for failing to make a good faith effort to comply with their subcontracting plans. More diligence in developing and meeting subcontracting goals on the part of large prime contractors could have a positive impact of giving small business concerns more opportunity to subcontract on Federal contracts. Data from the Federal Procurement Data System indicate that in FY 2018 there were 2,397 entities with 15,758 awards that required small business subcontracting plans. According to the Federal Funding Accountability and Transparency Act Subaward Reporting System (FSRS), there are 19,596 unique entities who are subcontractors. Approximately 80 percent of the entities registered in the System for Award Management are small entities. Therefore, we estimate that 80 percent (15,677) of the subcontractors in FSRS are small entities. These small entities may benefit from this rule.

This proposed rule will require a large prime contractor with a commercial subcontracting plan to include indirect costs in its subcontracting goals. The benefit of requiring that indirect costs be included in subcontracting goals in commercial subcontracting plans is that it will increase the small business subcontracting goal and thus increase the amount of funds the prime contractor will subcontract to small business concerns, providing more opportunities for subcontract awards to small business concerns.

This proposed rule does not include any new reporting, recordkeeping or other compliance requirements for small entities.

This proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches that would accomplish the stated objectives of the applicable statute.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the SBA. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA 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 comments separately and should cite 5 U.S.C. 610 (FAR case 2019–004) in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies to this rule; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0007, Subcontracting Plans.

List of Subjects in 48 CFR Parts 19, 42, and 52

Government procurement.

William F. Clark,

Director, Office of Government-Wide Acquisition Policy, Office of Acquisition Policy, Office of Government-Wide Policy.

Therefore, for the reasons listed in the preamble, DoD, GSA, and NASA are proposing to amend 48 CFR parts 19, 42, and 52 to read as follows:

■ 1. The authority citation for 48 CFR parts 19, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 19—SMALL BUSINESS PROGRAMS

■ 2. Amend section 19.704 by—

■ a. Removing from paragraph (a)(6) ''subcontracting goals'' and adding ''subcontracting goals (for commercial plans, see paragraph (d) of this section)'' in its place;

■ b. Revising the introductory text of paragraph (d); and

■ c. Removing from paragraph (d)(4) ''one SSR'' and adding ''one SSR that includes all indirect costs, except as described in paragraph (d) of this section,'' in its place.

The revision reads as follows:

19.704 Subcontracting plan requirements.

* * * * *

(d) A commercial plan (as defined in 19.701) is the preferred type of subcontracting plan for contractors furnishing commercial items. The subcontracting goals established for a commercial plan shall include all indirect costs with the exception of those such as the following: Employee salaries and benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; original equipment manufacturer relationships during warranty periods (negotiated up front with the product); utilities and other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions. Once a contractor's commercial plan has been approved, the Government shall not require another subcontracting plan from the same contractor while the plan remains in effect, as long as the product or service being provided by the contractor continues to meet the definition of a commercial item. The contractor shall—

* * * * *

19.705–4 [Amended]

■ 3. Amend section 19.705–4 by removing from paragraph (c), in the fourth sentence, ''faith effort'' and adding ''faith effort (see 19.705–7)''.

■ 4. Amend section 19.705–6 by revising paragraphs (g)(1), (h), and (i) to read as follows:

19.705–6 Postaward responsibilities of the contracting officer.

* * * * *

(g) * * *

(1) Assess whether the prime contractor made a good faith effort to comply with its small business subcontracting plan. See 19.705–7(b) for more information on the determination of good faith effort.

* * * * *

(h) Initiate action to assess liquidated damages in accordance with 19.705–7 upon a recommendation by the administrative contracting officer, if one is assigned, or receipt of other reliable evidence to indicate that assessing liquidated damages is warranted.

(i) Take action to enforce the terms of the contract upon receipt of a notice from the contract administration office under 19.706(f).

* * * * *

■ 5. Amend section 19.705–7 by—

■ a. Revising the section heading;

■ b. Adding a paragraph heading to paragraph (a);

■ c. Removing from paragraph (a) ''small disadvantaged business'' and adding ''small disadvantaged business,'' in its place;

■ d. Revising paragraphs (b), (c), (d), and (e);

■ e. Adding a paragraph heading to the introductory text of paragraph (f);

■ f. Removing paragraph (g); and

■ g. Redesignating paragraph (h) as paragraph (f)(5).

The revisions and additions read as follows:

19.705–7 Compliance with the subcontracting plan.

(a) *General.* * * *

(b) *Determination of good faith effort.* (1) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a contracting officer must look to the totality of the contractor's actions, consistent with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good faith effort (see 19.701). For example, notwithstanding a contractor's diligent effort to identify and solicit offers from any of the small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, factors such as unavailability of anticipated sources or unreasonable prices may frustrate achievement of the contractor's subcontracting goals. The contracting officer may consider any of the following, though not all inclusive, to be indicators of a good faith effort:

(i) Breaking out work to be subcontracted into economically feasible units, as appropriate, to facilitate small business participation.

(ii) Conducting market research to identify potential small business subcontractors through all reasonable means, such as searching SAM, posting notices or solicitations on SBA's SUBNet, participating in business matchmaking events, and attending preproposal conferences.

(iii) Soliciting small business concerns as early in the acquisition process as practicable to allow them sufficient time to submit a timely offer for the subcontract.

(iv) Providing interested small businesses with adequate and timely information about plans, specifications, and requirements for performance of the prime contract to assist them in submitting a timely offer for the subcontract.

(v) Negotiating in good faith with interested small businesses.

(vi) Directing small businesses that need additional assistance to SBA.

(vii) Assisting interested small businesses in obtaining bonding, lines of credit, required insurance, necessary equipment, supplies, materials, or services.

(viii) Utilizing the available services of small business associations; local, state, and Federal small business assistance offices; and other organizations.

(ix) Participating in a formal mentor-protégé program with one or more small-business protégés that results in developmental assistance to the protégés.

(x) Although failing to meet the subcontracting goal in one socioeconomic category, exceeding the goal by an equal or greater amount in one or more of the other categories.

(xi) Fulfilling all of the requirements of the subcontracting plan.

(2) When considered in the context of the contractor's total effort in accordance with its plan, the contracting officer may consider any of the following, though not all inclusive, to be indicators of a failure to make a good faith effort:

(i) Failure to attempt through market research to identify, contact, solicit, or consider for contract award small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concerns, through all reasonable means including outreach, industry days, or the use of Federal systems such as SBA's Dynamic Small Business Search or SUBNet systems.

(ii) Failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan.

(iii) Failure to submit an acceptable ISR, or the SSR, using the eSRS, or as provided in agency regulations, by the report due dates specified in 52.219–9, Small Business Subcontracting Plan.

(iv) Failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan including subcontracting flowdown requirements.

(v) Adoption of company policies or documented procedures that have as their objectives the frustration of the objectives of the plan.

(vi) Failure to pay small business subcontractors in accordance with the terms of the contract with the prime contractor;

(vii) Failure to correct substantiated findings from Federal subcontracting compliance reviews or participate in subcontracting plan management training offered by the Government;

(viii) Failure to provide the contracting officer with a written explanation if the contractor fails to acquire articles, equipment, supplies, services, or materials or obtain the performance of construction work as described in 19.704(a)(12).

(ix) Falsifying records of subcontract awards to small business concerns.

(c) *Documentation of good faith effort.* If, at completion of the basic contract or any option, or in the case of a commercial plan, at the close of the fiscal year for which the plan is applicable, a contractor has failed to comply with the requirements of its subcontracting plan, which includes meeting its subcontracting goals, the contracting officer shall review all available information for an indication that the contractor has not made a good faith effort to comply with the plan. If no such indication is found, the contracting officer shall document the file accordingly.

(d) *Notice of failure to make a good faith effort.* If the contracting officer decides in accordance with paragraph (b) of this section that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall give the contractor written notice in accordance with 52.219–16, Liquidated Damages—Subcontracting Plan, specifying the material breach, which may be included in the contractor's past performance information, advising the contractor of the possibility that the contractor may have to pay to the Government liquidated damages, and providing a period of 15 working days (or longer period as necessary) within which to respond. The notice shall give the contractor an opportunity to demonstrate what good faith efforts have been made before the contracting officer issues the final decision, and shall further state that failure of the contractor to respond may be taken as an admission that no valid explanation exists.

(e) *Payment of liquidated damages.* (1) If, after consideration of all the pertinent data, the contracting officer finds that the contractor failed to make

a good faith effort to comply with its subcontracting plan, the contracting officer shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The contracting officer's final decision shall state that the contractor has the right to appeal under the clause in the contract entitled Disputes. Calculations and procedures shall be in accordance with 52.219–16, Liquidated Damages—Subcontracting Plan.

(2) The amount of damages attributable to the contractor's failure to comply shall be an amount equal to the actual dollar amount by which the contractor failed to achieve each subcontracting goal. For calculations for commercial plans see paragraph (f) of this section.

(3) Liquidated damages shall be in addition to any other remedies that the Government may have.

(f) *Commercial plans.* * * *

19.706 [Amended]

■ 6. Amend section 19.706 by removing from paragraph (f) ''subcontracting plan'' and adding ''subcontracting plan (see 19.705–7(b) for more information on the determination of good faith effort)''.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 7. Amend section 42.1501 by redesignating paragraphs (a)(5) thru (a)(7) as paragraphs (a)(6) thru (a)(8) and adding new paragraph (a)(5) to read as follows:

42.1501 General.

(a) * * *

(5) Complying with the requirements of the small business subcontracting plan (see 19.705–7(b));

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Amend section 52.212–5 by revising the date of the clause and paragraphs (b)(17)(i), (b)(17)(v), and (b)(20) to read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (DATE)

* * * * *

(b) * * *

__(17)(i) 52.219–9, Small Business Subcontracting Plan (DATE) (15 U.S.C. 637(d)(4)).

* * * * *

__(v) Alternate IV (DATE) of 52.219–9.

* * * * *

__(20) 52.219–16, Liquidated Damages—Subcontracting Plan (DATE) (15 U.S.C. 637(d)(4)(F)(i)).

* * * * *

■ 9. Amend section 52.219–9 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (d)(2)(i) ''subcontracts'' and adding ''subcontracts, including all indirect costs except as described in paragraph (g) of this clause,'' in its place;

■ c. Adding a new fifth sentence to paragraph (g);

■ d. Amending alternate IV by revising the date of the clause and paragraph (d)(2)(i).

The revisions and additions read as follows:

52.219–9 Small Business Subcontracting Plan.

* * * * *

Small Business Subcontracting Plan (DATE)

* * * * *

(g) * * * A Contractor authorized to use a commercial subcontracting plan shall include in its subcontracting goals and in its SSR all indirect costs, with the exception of those such as the following: Employee salaries and benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; original equipment manufacturer relationships during warranty periods (negotiated up front with the product); utilities and other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions. * * *

* * * * *

Alternate IV (DATE). * * *

(d) * * *

(2) * * *

(i) Total dollars planned to be subcontracted for an individual subcontracting plan; or the Offeror's total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for a commercial plan, including all indirect costs, with the exception of those such as the following: Employee salaries and benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; original equipment manufacturer relationships during warranty periods (negotiated up front with the product); utilities and other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions;

* * * * *

■ 10. Amend 52.219–16 by revising the date of the clause and removing from paragraph (b) ''plan, established'' and adding ''plan (see 19.705–7), established'' in its place.

The revision reads as follows:

52.219–16 Liquidated Damages—Subcontracting Plan.

* * * * *

Liquidated Damages—Subcontracting Plan (DATE)

* * * * *

[FR Doc. 2020–10511 Filed 6–2–20; 8:45 am]

BILLING CODE 6820–EP–P

impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the rule is not creating any new requirements for contractors or changing any existing policies and practices. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 815 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114–92), which repeals and replaces section 845 of the NDAA for FY 1994 (Pub. L. 103–160; 10 U.S.C. 2371 note) with 10 U.S.C. 2371b.

The objective of this proposed rule is to clarify for contracting officers the criteria that must be met to award, without competition, a follow-on production contract associated with a prototype project transaction agreement.

DoD does not collect data on the number of follow-on production contracts that are awarded annually and associated with a prototype project transaction agreement made under the authority of 10 U.S.C. 2371b; therefore, DoD is unable to estimate the number of small entities that will be impacted by this rule. However, DoD does not expect small business entities to be significantly impacted by this rule, because the rule does not change any existing processes or impose any additional burdens. Instead, the rule simply clarifies instructions to contracting officers on the criteria that must be met in order to award an associated follow-on production contract without using competitive procedures.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives available to meet the objectives of the statutes.

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 2019–D031) in correspondence.

VII. 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 Part 206

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 206 is proposed to be amended as follows:

PART 206—COMPETITION REQUIREMENTS

■ 1. The authority citation for 48 CFR part 206 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 C chapter 1.

■ 2. Amend section 206.001 by revising paragraph (S–70) to read as follows:

206.001 Applicability.

* * * * *

(S–70) Also excepted from the competition requirements of FAR part 6 are follow-on production contracts for products developed pursuant to the ''other transactions'' authority of 10 U.S.C. 2371b for prototype projects when—

(1) The other transaction agreement includes provisions for a follow-on production contract;

(2) The follow-on contract will be awarded to the participants in the other transaction for the prototype project;

(3) Competitive procedures are used for the selection of parties for participation in the transaction;

(4) The participants in the transaction successfully completes the prototype or sub-prototype project provided for in the transaction; and

(5)(i) There is a written determination that—

(A) The requirements of 10 U.S.C. 2371b(d) are met; and

(B) The use of the authority of 10 U.S.C. 2371b is essential to promoting the success of the prototype project; and

(ii)(A) For actions in excess of $100 million, but not in excess of $500 million including all options, the determination is executed by the senior procurement executive; and

(B) For actions in excess of $500 million including all options, the determination is—

(*1*) Executed by the Under Secretary of Defense for Research and Engineering or the Under Secretary of Defense for Acquisition and Sustainment; and

(*2*) Provided to the congressional defense committees at least 30 days prior to contract award.

[FR Doc. 2019–20555 Filed 9–25–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 210, 212, 215, and 234

[Docket DARS–2019–0050]

RIN 0750–AK65

Defense Federal Acquisition Regulation Supplement: Market Research and Value Analysis for the Determination of Price Reasonableness (DFARS Case 2019–D027)

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 implement several sections of the National Defense Authorization Act for Fiscal Year 2017 to address how contracting officers may require the offeror to submit relevant information to support market research for price analysis and allow an offeror to submit information relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before November 25, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2019–D027, using any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by entering ''DFARS Case 2019–D027'' under the heading ''Enter keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''DFARS Case 2019–D027.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please ''DFARS Case 2019–D027'' on any attached documents.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2019–D027 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD(A&S)DPC/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: Ms. Amy G. Williams, telephone 571–372–6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement sections 871 and 872 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328). Section 871 modifies 10 U.S.C. 2377, Preference for acquisition of commercial items, to address how contracting officers may require the offeror to submit relevant information to support market research for price analysis for the acquisition of commercial items. Section 872 modifies 10 U.S.C. 2379, Requirement for determination by Secretary of Defense and notification to Congress before procurement of major weapon systems as commercial items, to allow an offeror to submit information or analysis relating to the value of a commercial item.

II. Discussion and Analysis

This proposed rule implements the requirements of section 871 at DFARS 212.209(a), which addresses the determination of price reasonableness when acquiring commercial items. The focus of this requirement is that agencies shall conduct market research to support the determination of price reasonableness for commercial items. The rule proposes to add the reference to 10 U.S.C. 2377 and directs contracting officers to use: The information submitted under DFARS 234.7002(d) when acquiring major weapon systems as commercial items in accordance with 10 U.S.C. 2379; or, in the case of other items, other relevant information as described in DFARS 212.209.

This proposed rule implements the requirements of section 872 in DFARS subpart 234.70, which addresses the acquisition of major weapon systems as commercial items. DFARS 234.7002(d) addresses the relevant information necessary to make a determination of price reasonableness. To implement section 872, this rule proposes a new paragraph (d)(5) at DFARS 234.7002, which does not impose a requirement, but allows an offeror to submit information or analysis relating to the value of a commercial item, to aid in the determination of the reasonableness of the price of such item. A contracting officer may consider such information or analysis in addition to the information submitted pursuant to other paragraphs in DFARS 234.7002(d). To assist in understanding value analysis, a definition of ''value analysis'' is added at DFARS 234.7001. A cross-reference is also added at DFARS 210.001.

This rule does not impose additional requirements on offerors. The information required is consistent with the existing requirement at DFARS 215.404–1(b)(iii)(D), which requires an offeror to submit other relevant information that can serve as the basis for determining the reasonableness of price. The DFARS provision 252.215–7010, Requirements for Certified Cost or Pricing Data and Data other Than Certified Cost or Pricing Data, is the existing mechanism for obtaining the minimum information necessary to permit a determination that the proposed price is fair and reasonable, to include the requirements of DFARS 215.404–1(b).

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 propose to add or modify any provisions or clauses or the prescriptions for any provisions or clauses.

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. Executive Order 13771

This rule is not expected to be an E.O. 13771 regulatory action, because this rule is not significant under E.O. 12866.

VI. 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 performed and is summarized as follows:

This proposed rule is issued in order to implement sections 871 and 872 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328).

The objective of this rule is to address the use of market research and value analysis to support the determination of price reasonableness when acquiring commercial items. The legal basis of the rule is sections 871 and 872 of the NDAA for FY 2017.

Based on data from the Federal Procurement Data System, DoD awarded 38,000 new commercial contracts to 16,429 small entities in FY 2018. There are an additional unknown number of small entities that submitted offers and did not receive awards (estimated at several thousand).

This rule does not impose any new reporting, recordkeeping, or other compliance requirements on small entities. DFARS 252.215–7010, Requirements for Certified Cost or Pricing Data, and Data Other Than Certified Cost or Pricing Data, already requires offerors to provide information necessary to determine that the price is fair and reasonable. Offerors are allowed, but not required, to submit information or analysis relating to the value of a commercial item for consideration by the contracting officer in determining price reasonableness.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD did not identify any significant alternatives that would minimize or reduce the significant economic impact, because there is no significant impact on small entities.

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 2019–D027), in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any new 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) or impact any existing information collection requirements.

List of Subjects in 48 CFR Parts 210, 212, 215 and 234

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 210, 212, 215, and 234 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 210, 212, and 234 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 210—MARKET RESEARCH

■ 2. Amend section 210.001 by adding paragraph (a)(iii) to read as follows:

210.001 Policy.

(a) * * *

(iii) Use market research, where appropriate, to inform price reasonableness determinations (see 212.209 and 234.7002).

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 3. Amend section 212.209 by—

■ a. Revising paragraph (a); and

■ b. In paragraph (b), removing ''market research pursuant to paragraph (a) of this section,'' and adding ''market research'' in its place.

The revision reads as follows:

212.209 Determination of price reasonableness.

(a) In accordance with 10 U.S.C. 2377(d), agencies shall conduct or obtain market research to support the determination of the reasonableness of price for commercial items contained in any bid or offer submitted in response to an agency solicitation. To the extent necessary to support such market research, the contracting officer for the solicitation—

(1) In the case of major weapon systems items acquired under 10 U.S.C. 2379, shall use information submitted under 234.7002(d); and

(2) In the case of other items, may require the offeror to submit other relevant information as described in this section.

* * * * *

PART 215—CONTRACTING BY NEGOTIATION

■ 4. Amend section 215.403–3 by adding paragraph (c) to read as follows:

215.403–3 Requiring data other than certified cost or pricing data.

* * * * *

(c) *Commercial items.* For determination of price reasonableness of major weapon systems acquired as commercial items, see 234.7002(d).

PART 234—MAJOR SYSTEMS ACQUISITION

■ 5. Revise section 234.7001 to read as follows:

234.7001 Definitions.

As used in this subpart—

Major weapon system means a weapon system acquired pursuant to a major defense acquisition program.

Value analysis means a systematic and objective evaluation of the function of a product and its related costs, whose purpose is to ensure optimum value.

■ 6. Amend section 234.7002 by—

■ a. Revising the paragraph (d) introductory text; and

■ b. Adding a new paragraph (d)(5).

The revision and addition read as follows:

234.7002 Policy.

* * * * *

(d) *Relevant information.* This section implements 10 U.S.C. 2379. See also DFARS 212.209(a).

* * * * *

(5) An offeror may submit information or analysis relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item. Value analysis is used to understand what features or characteristics of a given product or service, or offered terms and conditions warrant consideration as having legitimate value to the Government. A contracting officer may consider such information or analysis in addition to the information submitted pursuant to paragraphs (d)(1) and (d)(2) of this section. For additional guidance on use of value analysis see PGI 234.7002(d)(5).

[FR Doc. 2019–20558 Filed 9–25–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 622 and 635

RIN 0648–BI61

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Atlantic Highly Migratory Species; Coral and Coral Reefs of the Gulf of Mexico; Amendment 9

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

ACTION: Notification of availability (NOA); request for comments.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) has submitted Amendment 9 to the Fishery Management Plan (FMP) for the Coral and Coral Reefs of the Gulf of Mexico (Amendment 9) to the FMP for review, approval, and implementation by NMFS. Amendment 9, if approved by the Secretary of Commerce, and an associated framework action to the FMP would establish new habitat areas of particular concern (HAPCs), some of which include a prohibition of the deployment of bottom-tending gear, and modify current fishing regulations in the Gulf of Mexico (Gulf). The purpose of Amendment 9 and the framework action is to protect coral essential fish habitat in the Gulf.

DATES: Written comments on Amendment 9 must be received by November 25, 2019.

ADDRESSES: You may submit comments on Amendment 9 identified by ''NOAA–NMFS–2017–0146'' by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2017-0146,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Lauren Waters, NMFS Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

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).

Electronic copies of Amendment 9 and the framework action may be obtained from *www.regulations.gov* or the Southeast Regional Office website at *https://www.fisheries.noaa.gov/action/amendment-9-coral-habitat-areas-considered-management-gulf-mexico.* Amendment 9 includes an

List of Subjects in 48 CFR Parts 232 and 252

Government procurement.

Jennifer Lee Hawes,
Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 232 and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 232 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 232—CONTRACT FINANCING

■ 2. Amend section 232.412–70 by—

■ a. Removing paragraph (b);

■ b. Redesignating paragraph (c) as (b); and

■ c. In the newly redesignated paragraph (b), removing ''(See subpart 219.71)'' and adding ''(see subpart 219.71)'' in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 252.232–7000 by—

■ a. Removing the clause date of ''(DEC 1991)'' and adding ''(DATE)'' in its place;

■ b. In paragraph (b), removing ''(*insert the name of the contractor*)'' and adding ''*[insert the name of the Contractor]*'' in its place;

■ c. Adding paragraph (c).

The addition reads as follows:

252.232–7000 Advance payment pool.

* * * * *

(c) When a letter of credit has not been issued to the Contractor in conjunction with the contract, payment will be by a dual payee Treasury check made payable to the Contractor or the disbursing office in the Advance Payment Pool Agreement and will be forwarded to that disbursing office for appropriate disposition.

* * * * *

252.232–700 [Removed and Reserved]

■ 4. Remove and reserve section 252.232–7001.

252.232–7005 [Amended]

■ 5. Amend section 252.232–7005 in the introductory text by removing ''232.412–70(c)'' and adding ''232.412–70(b)'' in its place.

[FR Doc. 2019–23803 Filed 10–30–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 249 and 252

[Docket DARS–2019–0060]

RIN 0750–AK56

Defense Federal Acquisition Regulation Supplement: Modification of DFARS Clause ''Notification of Anticipated Contract Termination or Reduction'' (DFARS Case 2019–D019)

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 update legal and DFARS citations in an existing DFARS clause, conform the clause text to the current DFARS convention regarding the use of dollar thresholds in contract clauses, and remove clause text that is no longer needed to implement the underlying statutory language.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before December 30, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2019–D019, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for ''DFARS Case 2018–D019.'' Select ''Comment Now'' and follow the instructions to submit a comment. Please include ''DFARS Case 2019–D019'' on any attached documents.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2019–D019 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Carrie Moore, OUSD(A&S)DPC/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: Ms. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

Within the DFARS, statutory acquisition-related dollar thresholds that are subject to inflation adjustment under 41 U.S.C. 1908 are identified in the applicable DFARS policy section. Any clause that relies on such a threshold will reference the threshold in the applicable DFARS policy section, instead of citing the actual dollar value. This drafting convention ensures that inflation adjustments of statutory acquisition-related thresholds apply to existing contracts and subcontracts in effect on the date of the adjustment.

To conform to this drafting convention, this rule proposes to modify the DFARS subpart 249.70 to add the pertinent dollar thresholds of 10 U.S.C. 2501 note, Notice to Contractors and Employees Upon Proposed Termination or Substantial Reduction in Major Defense Programs, and modify DFARS clause 252.249–7002, Notification of Anticipated Contract Termination or Reduction, to add references to the statutory thresholds cited at DFARS subpart 249.70.

In addition, DFARS clause 252.249–7002 advises contractors of the benefits that may be available to affected employees through the Job Training Partnership Act (29 U.S.C. 1661 and 1662; Pub. L. 97–300). The Job Training and Partnership Act was repealed and superseded by the Workforce Investment Partnership Act (29 U.S.C. chapter 30; Pub. L. 105–220), which was later repealed and superseded by the Workforce Innovation and Opportunity Act (29 U.S.C. chapter 32; Pub. L. 113–128). This rule proposes to modify DFARS clause 252.249–7002 to reflect the current statute associated with the 10 U.S.C. 2501 note and make other conforming changes.

II. Discussion and Analysis

DFARS clause 252.249–7002 is included in all contracts under a major defense program and implements the requirements of 10 U.S.C. 2501 note. The 10 U.S.C. 2501 note requires contractors, upon receiving notice of contract termination or a substantial reduction in funding resulting from an appropriations act, to provide notice of the anticipated termination or substantial reduction to first-tier subcontractors with a subcontract of $700,000 or more, and flow down the notification to lower-tier subcontractors with a subcontract of $150,000 or more. To implement the dollar thresholds of the 10 U.S.C. 2501 note in accordance with the current DFARS drafting convention, the rule adds the relevant dollar thresholds in DFARS 249.7003,

and updates the clause text to refer to the thresholds added to DFARS 249.7003.

This rule also proposes to amend the DFARS clause to cite the Workforce Innovation and Opportunity Act, which is the current statute under which employee employment and training opportunities apply, and to conform the clause with the current requirements of 10 U.S.C. 2501 note. Public Law 103–160 amended 10 U.S.C. 2501 note to specify which services under title 29 of the U.S.C. an employee could be eligible for, depending on whether the termination or reduction will or will not result in plant closure or mass layoffs. This specification of available services based on results of the notification was removed from 10 U.S.C. 2501 note by Public Law 105–277; therefore, this rule removes this delineation from the DFARS clause. In addition, the thresholds for the subcontractor notification requirements is revised to state ''exceeds'' in lieu of ''equals or exceeds'' to align with the statute.

The revision of this DFARS clause implements a recommendation from the DoD Regulatory Reform Task Force. On February 24, 2017, the President signed Executive Order (E.O.) 13777, ''Enforcing the Regulatory Reform Agenda,'' which established a Federal policy ''to alleviate unnecessary regulatory burdens'' on the American people. In accordance with E.O. 13777, DoD established a Regulatory Reform Task Force to review and validate DoD regulations, including the DFARS. A public notice of the establishment of the DFARS Subgroup to the DoD Regulatory Reform Task Force, for the purpose of reviewing DFARS provisions and clauses, was published in the **Federal Register** at 82 FR 35741 on August 1, 2017, and requested public input. One public comment was received on this clause. Subsequently, the DoD Task Force reviewed the requirements of DFARS clause 252.249–7002 and determined that the clause should be modified. A summary of the comment received and the response to the respondent is provided as follows:

Comment: The respondent advised that the clause imposes administrative burden on contractors and is difficult to manage at the multi-tier level.

Response: The clause is necessary to implement the requirements of 10 U.S.C. 2501 note, which identifies notification responsibilities for DoD, as well as certain DoD contractors and their subcontractors, when funding levels in an appropriation act may result in the termination or substantial reduction of funding for contracts under a major defense program. The clause ensures contractors and subcontractors comply with the law and are aware of the benefits potentially available to their employees that are adversely affected by the termination or reduction in funds.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This proposed rule does not create any new provisions or clauses. The rule simply updates legal and DFARS citations in the clause and removes unnecessary information. This rule does not change the applicability of the affected clause, which does not apply to contracts valued at or below the SAT, or for commercial or COTS items.

IV. Executive Orders 12866 and 13563

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. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. 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.,* because the rule is not creating any new requirements for contractors or changing any existing policies and practices. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to modify the text of DFARS clause 252.249–7002, Notification of Anticipated Contract Termination or Reduction, to: (1) Update legal and DFARS citations in the clause; (2) remove text that is no longer necessary to implement 10 U.S.C. 2501 note; and (3) conform the clause text to the current DFARS convention for referencing dollar thresholds in a clause. The update of legal and DFARS citations is pursuant to action taken by the DoD Regulatory Reform Task Force under Executive Order 13777, Enforcing the Regulatory Reform Agenda.

The objective of this proposed rule is to provide current information to contractors and maintain consistency within the DFARS clause text.

DoD does not collect data on the number of small businesses that have been awarded contracts under a major defense programs and have also received notice of contract termination or a substantial reduction in funding resulting from an appropriations act. Due to the complexity and magnitude of major defense program contracts, the prime contracts are generally awarded to major contractors, and not to small entities. Senior DoD program acquisition officials estimate that such notification of the termination or substantial reduction in a major defense program does not occur, on the average, more than once or twice per year. However, this rule is not expected to have a significant impact on small business entities, as it does not impose any new requirements or change any existing requirements for small business entities.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. This rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known alternatives to the rule that will meet the stated objectives of the statutes or minimize the impact on of the rule on small entities.

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 2019–D019) in correspondence.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however, the changes to DFARS 252.249–7002 do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 0704–0533, titled: DFARS Subpart 249—Termination of Contracts.

List of Subjects in 48 CFR Parts 249 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 249 and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 249 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 249—TERMINATION OF CONTRACTS

■ 2. Amend section 249.7003 by—

■ a. In paragraph (a), removing ''Section 824'' and ''Job Training Partnership Act (29 U.S.C. 1661 and 1662)'' and adding ''section 824'' and ''Workforce Innovation and Opportunity Act (29 U.S.C. Chapter 32) (Pub. L. 113–128)'' respectively, in their places;

■ b. In paragraph (b) introductory text, removing ''to:'' and adding ''to—'' in its place;

■ c. In paragraph (b)(1), removing ''act.'' And adding ''act; and'' in its place;

■ d. Revising paragraph (c).

The revision reads as follows:

249.7003 Notification of anticipated contract terminations or reductions.

* * * * *

(c) When subcontracts have been issued, the prime contractor is responsible for—

(1) Providing notice of the termination or substantial reduction in funding to all first-tier subcontractors with a subcontract valued equal to or greater than $700,000; and

(2) Requiring that each subcontractor—

(i) Provide such notice to each of its subcontractors for subcontracts valued greater than $150,000; and

(ii) Impose a similar notice and flowdown requirement in subcontracts valued greater than $150,000 at all tiers.

■ 3. Add section 249.7004 to read as follows:

249.7004 Contract clause.

Use the clause at 252.249–7002, Notification of Anticipated Contract Termination or Reduction, in all contracts under a major defense program.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 252.249–7002 by—

■ a. In the introductory text, removing ''249.7003(c)'' and adding ''249.7004'' in its place;

■ b. Removing the clause date ''(MAY 2019)'' and adding ''(DATE)'' in its place;

■ c. Revising paragraph (b);

■ d. Redesignating the paragraph (c) introductory text and paragraphs (c)(1) through (c)(4) as paragraph (c)(1) and paragraphs (c)(1)(i) through (c)(1)(iv), respectively.

■ e. Revising newly redesignated paragraph (c)(1)(iii);

■ f. Adding paragraph (c)(2);

■ g. In paragraph (d)(1), removing ''225.870–4(c)(2)(i)(A)(*1*) and adding ''249.7003(c)(1)'' in its place;

■ h. Revising paragraphs (d)(2)(i) and (d)(2)(ii); and

■ i. Removing paragraph (e).

The revisions and additions read as follows:

252.249–7002 Notification of Anticipated Contract Termination or Reduction.

* * * * *

(b) *Scope.* This clause implements section 1372 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103–160) and section 824 of the National Defense Authorization Act for Fiscal Year 1997 (Pub. L. 104–201), which are intended to help establish benefit eligibility under the Workforce Innovation and Opportunity Act (29 U.S.C. chapter 32) (Pub. L. 113–128) for employees of DoD contractors and subcontractors adversely affected by contract terminations or substantial reductions under major defense programs.

(c) * * *

(1) * * *

(iii) The State or entity designated by the State to carry out rapid response activities described in section 134(a)(2)(A)(i) of the Workforce Innovation and Opportunity Act (29 U.S.C. 3174(a)(2)(A)(i)); and

* * * * *

(2) The notice provided an employee under paragraph (c) of this clause shall have the same effect as a notice of termination to the employee for the purposes of determining whether such employee is eligible for training, adjustment assistance, and employment services under section Workforce Innovation and Opportunity Act (29 U.S.C. chapter 3101) (Pub. L. 113–128).

(d) * * *

(2) * * *

(i) Provide notice to each of its subcontractors with a subcontract that exceeds the threshold specified in DFARS 249.7003(c)(2)(i) at the time of the notice; and

(ii) Impose a similar notice and flowdown requirement to subcontractors with subcontracts that exceed the threshold specified in DFARS 249.7003(c)(2)(ii) at the time of the notice.

* * * * *

[FR Doc. 2019–23807 Filed 10–30–19; 8:45 am]

BILLING CODE 5001–06–P

Federal Register
Vol. 85, No. 56
Monday, March 23, 2020

Presidential Documents

Title 3—

The President

Executive Order 13909 of March 18, 2020

Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID–19

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (50 U.S.C. 4501 *et seq.*) (the ''Act''), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Policy and Findings.* On March 13, 2020, I declared a national emergency recognizing the threat that the novel (new) coronavirus known as SARS–CoV–2 poses to our national security. In recognizing the public health risk, I noted that on March 11, 2020, the World Health Organization announced that the outbreak of COVID–19 (the disease caused by SARS–CoV–2) can be characterized as a pandemic. I also noted that while the Federal Government, along with State and local governments, have taken preventive and proactive measures to slow the spread of the virus and to treat those affected, the spread of COVID–19 within our Nation's communities threatens to strain our Nation's healthcare system. To ensure that our healthcare system is able to surge capacity and capability to respond to the spread of COVID–19, it is critical that all health and medical resources needed to respond to the spread of COVID–19 are properly distributed to the Nation's healthcare system and others that need them most at this time.

Accordingly, I find that health and medical resources needed to respond to the spread of COVID–19, including personal protective equipment and ventilators, meet the criteria specified in section 101(b) of the Act (50 U.S.C. 4511(b)). Under the delegation of authority provided in this order, the Secretary of Health and Human Services may identify additional specific health and medical resources that meet the criteria of section 101(b).

Sec. 2. *Priorities and Allocation of Medical Resources.*

(a) Notwithstanding Executive Order 13603 of March 16, 2012 (National Defense Resource Preparedness), the authority of the President conferred by section 101 of the Act to require performance of contracts or orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense, and to implement the Act in subchapter III of chapter 55 of title 50, United States Code, is delegated to the Secretary of Health and Human Services with respect to all health and medical resources needed to respond to the spread of COVID–19 within the United States.

(b) The Secretary of Health and Human Services may use the authority under section 101 of the Act to determine, in consultation with the Secretary of Commerce and the heads of other executive departments and agencies as appropriate, the proper nationwide priorities and allocation of all health and medical resources, including controlling the distribution of such materials (including applicable services) in the civilian market, for responding to the spread of COVID–19 within the United States.

(c) The Secretary of Health and Human Services shall issue such orders and adopt and revise appropriate rules and regulations as may be necessary to implement this order.

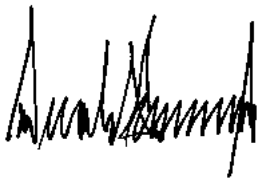
Sec. 3. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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



THE WHITE HOUSE,
March 18, 2020.

[FR Doc. 2020–06161
Filed 3–20–20; 8:45 am]
Billing code 3295–F0–P

Presidential Documents

Executive Order 13910 of March 23, 2020

Preventing Hoarding of Health and Medical Resources To Respond to the Spread of COVID–19

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (50 U.S.C. 4501 *et seq.*) (the ''Act''), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Policy.* In Proclamation 9994 of March 13, 2020 (Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak), I declared a national emergency recognizing the threat that the novel (new) coronavirus known as SARS–CoV–2 poses to our Nation's healthcare systems. In recognizing the public health risk, I noted that on March 11, 2020, the World Health Organization announced that the outbreak of COVID–19 (the disease caused by SARS–CoV–2) can be characterized as a pandemic. I also noted that while the Federal Government, along with State and local governments, have taken preventive and proactive measures to slow the spread of the virus and to treat those affected, the spread of COVID–19 within our Nation's communities threatens to strain our Nation's healthcare systems. To further deal with this threat, on March 18, 2020, I issued Executive Order 13909 (Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID–19), in which I delegated to the Secretary of Health and Human Services (Secretary) the prioritization and allocation authority under section 101 of the Act with respect to health and medical resources needed to respond to the spread of COVID–19.

To ensure that our Nation's healthcare systems are able to surge capacity and capability to respond to the spread of COVID–19, it is the policy of the United States that health and medical resources needed to respond to the spread of COVID–19, such as personal protective equipment and sanitizing and disinfecting products, are not hoarded. Accordingly, I am delegating to the Secretary my authority under section 102 of the Act (50 U.S.C. 4512) to prevent hoarding of health and medical resources necessary to respond to the spread of COVID–19 within the United States. I am also delegating to the Secretary my authority under the Act to implement any restrictions on hoarding, including my authority under section 705 of the Act (50 U.S.C. 4555) to gather information, such as information about how supplies of such resources are distributed throughout the Nation.

Sec. 2. *Delegation of Authority to Prevent Hoarding.*

(a) The Secretary is delegated the following:

(i) the authority of the President conferred by section 102 of the Act to prevent hoarding of health and medical resources necessary to respond to the spread of COVID–19 within the United States, including the authority to prescribe conditions with respect to the accumulation of such resources, and to designate any material as a scarce material, or as a material the supply of which would be threatened by persons accumulating the material either in excess of reasonable demands of business, personal, or home consumption, or for the purpose of resale at prices in excess of prevailing market prices; and

(ii) the authority of the President to implement the Act contained in subchapter III of chapter 55 of title 50, United States Code (50 U.S.C. 4554, 4555, 4556, and 4560).

(b) In exercising the authority delegated under this section, the Secretary shall consult the Administrator of the Federal Emergency Management Agency.

(c) The Secretary shall adopt and revise appropriate rules and regulations as may be necessary to implement this order.

Sec. 3. *Secretarial Duty Concerning Notices of Withdrawal of Designation.* The Secretary shall periodically consider whether the designations made pursuant to section 2 of this order remain necessary. Upon finding that the need for such designation of material is no longer necessary, the Secretary shall promptly publish a notice of withdrawal of the designation in the *Federal Register*, and in such other manner as the Secretary deems appropriate.

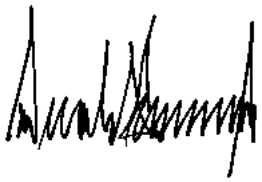
Sec. 4. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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



THE WHITE HOUSE,
March 23, 2020.

[FR Doc. 2020–06478
Filed 3–25–20; 8:45 am]
Billing code 3295–F0–P

responsibilities between the Federal Government and Indian Tribes, as specified in Executive Order (65 FR 67249, November 9, 2000).

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined under Executive Order 12866, and it does not address environmental health or safety risks disproportionately affecting children.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution, or use and because this action is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

In addition, since this action does not involve any technical standards, NTTAA section 12(d), 15 U.S.C. 272 note, does not apply to this action.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898 (59 FR 7629, February 16, 1994).

List of Subjects in 40 CFR Part 721

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: March 5, 2020.

Tala Henry,

Deputy Director, Office of Pollution Prevention and Toxics.

Therefore, it is proposed that 40 CFR part 721 be amended as follows:

PART 721—[AMENDED]

■ 1. The authority citation for part 721 continues to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c).

§ 721.11193 [Removed]

■ 2. Remove § 721.11193.

[FR Doc. 2020–06442 Filed 3–31–20; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 19, 36, 43, and 52

[FAR Case 2018–020; Docket No. FAR–2018–0020, Sequence No. 1]

RIN 9000–AN78

Federal Acquisition Regulation: Construction Contract Administration

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which requires agencies to provide a notice along with the solicitation to prospective bidders and offerors regarding definitization of requests for an equitable adjustment related to change orders under construction contracts.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before June 1, 2020 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2018–020 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* comments via the Federal eRulemaking portal by searching for ''FAR Case 2018–020''. Select the link ''Comment Now'' that corresponds with FAR Case 2018–020. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2018–020'' on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, 2nd Floor, ATTN: Lois Mandell, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR Case 2018–020, in all correspondence related to this case. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential 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: Ms. Camara Francis, Procurement Analyst, at 202–550–0935, or by email at *camara.francis@gsa.gov,* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAR Case 2018–020.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the FAR to implement section 855 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232, 15 U.S.C. 644(w)). Section 855 requires Federal agencies to provide a notice, along with solicitations for construction contracts anticipated to be awarded to small businesses, to prospective offerors including information about the agency's policies or practices in complying with FAR requirements related to the timely definitization of requests for equitable adjustment on construction contracts. The notice must include data regarding the time it took the agency to definitize requests for equitable adjustment on construction contracts for the three-year period preceding the issuance of the notice.

II. Discussion and Analysis

The proposed changes to the FAR are summarized in the following paragraphs.

A. *Solicitation notice regarding administration of change orders for construction.* New text is proposed in FAR part 36, Construction and Architect-Engineer Contracts, subpart 36.5, Contract Clauses, to add coverage of the requirement for a new solicitation notice to be included in solicitations for construction. Specifically, new section 36.524, Notice to offerors regarding administration of change orders for construction, contains the prescription for the use of new solicitation provision 52.236–XX, Notice Regarding Administration of Change Orders for Construction. New section 36.524 also includes guidance for contracting officers regarding the information to be inserted in the provision. This new solicitation provision, which is proposed to be added in FAR part 52, Solicitation Provisions and Contract Clauses, will provide a standardized way for contracting officers to provide the notice required by section 855 of the NDAA for FY 2019.

Additional coverage related to the requirement for the new solicitation notice is proposed in FAR part 43, Contract Modifications, subpart 43.2, Change Orders. A new paragraph is proposed for section 43.204, Administration, to instruct contracting offices and contract administration offices to use a specific Federal system to collect data on the time required to definitize unpriced change orders for construction contracts. The data will be used in new solicitation provision 52.236–XX.

In FAR part 12, Acquisition of Commercial Items, subpart 12.5, Applicability of Certain Laws to the Acquisition of Commercial Items and Commercially Available Off-The-Shelf Items, a new paragraph is added to note that 15 U.S.C. 644(w), Solicitation Notice Regarding Administration of Change Orders for Construction, is not applicable to Executive agency contracts for the acquisition of commercial items.

B. *Cross reference to coverage of new solicitation notice.*

Section 19.502, Setting aside acquisitions, is amended to add a cross reference to the new section 36.524.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule proposes to implement a statutory requirement for Federal agencies to provide a notice, along with solicitations for construction contracts anticipated to be awarded to small businesses, to prospective offerors regarding agency policies or practices, and agency past performance, in complying with FAR requirements related to the timely definitization of requests for equitable adjustments resulting from change orders under construction contracts. The Federal Acquisition Regulatory Council (FAR Council) intends to apply the new provision 52.236–XX, Notice Regarding Administration of Change Orders for Construction, to contracts at or below the simplified acquisition threshold (SAT), but does not intend to apply the new provision to contracts for the acquisition of commercial items including COTS items.

A. *Applicability to Contracts at or below the SAT.* Pursuant to 41 U.S.C. 1905, a provision of law is not applicable to acquisitions at or below the SAT unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1905 and states that the law applies to acquisitions at or below the SAT; or (iii) 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. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions at or below the SAT.

The purpose of this rule is to implement section 855 of the NDAA for FY 2019. Section 855 requires Federal agencies to provide a notice, along with solicitations for construction contracts anticipated to be awarded to small businesses, to prospective offerors regarding agency policies or practices, and agency past performance, in complying with FAR requirements related to the timely definitization of requests for equitable adjustments resulting from change orders under construction contracts. Section 855 is silent on the applicability of these requirements for acquisitions at or below the SAT and does not independently provide for criminal or civil penalties; nor does it include terms making express reference to 41 U.S.C. 1905 and its application to acquisitions at or below the SAT. Therefore, it does not apply to acquisitions at or below the SAT unless the FAR Council makes a written determination as provided at 41 U.S.C. 1905.

Application of section 855 to acquisitions at or below the SAT will maximize the number of small entities who would benefit from the information to be provided regarding definitization of requests for equitable adjustment resulting from change orders under construction contracts. Approximately one third of construction contracts awarded in FY 2016 through FY 2018 were valued at or below the SAT. Not applying this rule to acquisitions at or below the SAT would exclude acquisitions intended to be covered by section 855.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of the rule to acquisitions at or below the SAT.

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. governs the applicability of laws to 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 FAR Council and the Administrator for Federal Procurement Policy have not made such determination, therefore this rule does not apply to commercial items.

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. Executive Order 13771

This proposed rule is not subject to E.O. 13771, Reducing Regulation and controlling Regulatory Costs, because this rule is not expected to be a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this change 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 (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement section 855 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019, which requires Federal agencies to provide a notice, along with solicitations for construction contracts anticipated to be awarded to small businesses, to prospective offerors regarding agency policies or practices in complying with FAR requirements related to the timely definitization of requests for equitable adjustment on construction contracts. The notice must include information on the

agency's policies or practices on definitizing equitable adjustments on construction contracts and data on the amount of time it took the agency to definitize requests for equitable adjustment on construction contracts during the three-year period preceding the issuance of the notice.

The objective of this proposed rule is to provide contractors with information about an agency's past performance in definitizing equitable adjustments under construction contract change orders as required by section 855 of the NDAA for FY 2019.

This rule is primarily aimed at Federal agencies, requiring them to provide a notice of their past performance on definitizing equitable adjustments for construction contracts. The notice will provide potential small business offerors with information that may be useful to them as they prepare, or decide whether to prepare and submit, a proposal in response to an agency's solicitation for construction. For example, if an agency has a poor history of definitizing equitable adjustments, potential small business offerors may reconsider whether to submit a proposal in response to that agency's solicitation. Alternately, when preparing their proposals, small business offerors may consider the additional costs that could be incurred if it is likely they will experience delays in the definitization of equitable adjustments.

An analysis of the Federal Procurement Data System (FPDS) reveals that an average of 2,340 unique entities per year were awarded construction contracts during FY 2016, 2017, and 2018. Of those, 1,872 were small entities. The number of construction contracts awarded in FY 2016, 2017, and 2018 averaged 4,488 per year, of which 3,355 were awarded to small entities. Additionally, during these same years, an average of 3,939 construction-related task orders were awarded each year to approximately 1,069 unique entities; 3,254 of those task orders were awarded to 851 small entities. On average, over FY 2016, 2017, and 2018, 6,503 modifications were issued each year to approximately 1,582 entities for change orders or definitization of change orders under construction contracts. Of those, approximately 3,803 modifications were issued to 1,147 small entities.

This proposed rule does not include any new reporting, recordkeeping or other compliance requirements for small entities.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches that would accomplish the stated objectives of the applicable statute.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the SBA. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA 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 comments separately and should cite 5 U.S.C. 610 (FAR case 2018–020) in correspondence.

VII. 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 12, 19, 36, 43, and 52

Government procurement.

William F. Clark,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR part(s) 12, 19, 36, 43, and 52 as set forth below:

■ 1. The authority citation for 48 CFR part(s) 12, 19, 36, 43, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 12.503 by adding paragraph (a)(10) to read as follows:

12.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.

(a) * * *

(10) 15 U.S.C. 644(w), Solicitation Notice Regarding Administration of Change Orders for Construction (see 36.524).

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

■ 3. Add section 19.502–11 to read as follows:

19.502–11 Solicitation notice regarding administration of change orders for construction.

See 36.524 for the requirement to provide a notice to offerors regarding definitization of requests for equitable adjustment for change orders under construction contracts.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

■ 4. Revise subpart 36.5 heading to read as follows:

Subpart 36.5—Solicitation Provisions and Contract Clauses

* * * * *

■ 5. Revise section 36.500 to read as follows:

36.500 Scope of subpart.

(a) This subpart prescribes provisions and clauses for insertion in solicitations and contracts for—

(1) Construction; and

(2) Dismantling, demolition, or removal of improvements contracts.

(b) Provisions and clauses prescribed elsewhere in the Federal Acquisition Regulation (FAR) shall also be used in such solicitations and contracts when the conditions specified in the prescriptions for the provisions and clauses are applicable.

■ 6. Add section 36.524 to read as follows:

36.524 Notice to offerors regarding administration of change orders for construction.

(a) The contracting officer shall insert the provision at 52.236–XX, Notice Regarding Administration of Change Orders for Construction, in solicitations for construction that are set aside, or will be awarded on a sole-source basis, pursuant to part 19. This provision does not apply to the acquisition of commercial items using part 12 procedures.

(b) The contracting officer shall complete the fill-ins to provide—

(1) Information to offerors about the agency's policies or procedures in complying with requirements relating to timely definitization of requests for equitable adjustment for change orders for construction; and

(2) Data for the prior 3 fiscal years, available at [*website to be determined*], regarding the time required to definitize requests for equitable adjustment for change orders for construction (see 43.204). Prior to August 13, 2021, if fewer than 3 fiscal years of data are available, provide data for the number of fiscal years that are available.

PART 43—CONTRACT MODIFICATIONS

■ 7. Amend section 43.204 by redesignating paragraph (b)(3) as paragraph (b)(3)(i), and adding paragraph (b)(3)(ii) to read as follows:

* * * * *

43.204 Administration.

* * * * *

(b) * * *

(3) * * *

(ii) Contracting offices and contract administration offices, as appropriate,

shall use [*website to be determined*] to record and maintain data regarding the time required to definitize requests for equitable adjustment associated with unpriced change orders for construction. The contracting officer shall ensure the data is entered into [*website to be determined*] promptly.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Add section 52.236–XX to read as follows:

52.236–XX Notice Regarding Administration of Change Orders for Construction.

As prescribed in 36.524, insert the following provision:

Notice Regarding Administration of Change Orders for Construction (DATE)

(a) As required by 15 U.S.C. 644(w), this provision provides information relating to the definitization of requests for equitable adjustment for change orders under construction contracts.

(b) Federal Acquisition Regulation (FAR) 43.204 provides policy and guidance relating to definitization of requests for equitable adjustment resulting from change orders for contracts, including those for construction. In addition to FAR 43.204, the agency issuing this solicitation has established the following policies or procedures that apply to definitization of requests for equitable adjustment for change orders under construction contracts: _. *[Contracting officer insert description of applicable policies or procedures, or address of a publicly accessible website containing this information. If no applicable policies or procedures exist, insert ''None.'']*

(c) Information on the agency's past performance in definitizing requests for equitable adjustment associated with change orders for construction for fiscal year(s) _ *[Contracting Officer insert the prior fiscal years, up to 3, for which information is available]* is available at _ *[Contracting Officer insert address of publicly accessible website containing this information]* or in the following table:

Time to definitize after receipt of request for equitable adjustment for construction	Number of requests for equitable adjustment definitized for construction
30 days or less	
31 to 60 days	
61 to 90 days	
91 to 180 days	
181 to 365 days	
366 or more days	
After completion of contract performance via a contract modification addressing all undefinitized requests for equitable adjustment received during contract performance.	

[Contracting Officer insert number of requests for equitable adjustment definitized in each category.]

(End of provision)

[FR Doc. 2020–05866 Filed 3–31–20; 8:45 am]

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Federal Register
Vol. 85, No. 63
Wednesday, April 1, 2020

Presidential Documents

Title 3—

The President

Executive Order 13911 of March 27, 2020

Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources To Respond to the Spread of COVID–19

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (50 U.S.C. 4501 *et seq.*) (the ''Act''), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Policy.* In Proclamation 9994 of March 13, 2020 (Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak), I declared a national emergency recognizing the threat that the novel (new) coronavirus known as SARS–CoV–2 poses to our Nation's healthcare systems. In recognizing the public health risk, I noted that on March 11, 2020, the World Health Organization announced that the outbreak of COVID–19 (the disease caused by SARS–CoV–2) can be characterized as a pandemic. I also noted that while the Federal Government, along with State and local governments, have taken preventive and proactive measures to slow the spread of the virus and to treat those affected, the spread of COVID–19 within our Nation's communities threatens to strain our Nation's healthcare systems.

To deal with this threat, on March 18, 2020, I issued Executive Order 13909 (Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID–19), in which I delegated to the Secretary of Health and Human Services the prioritization and allocation authority under section 101 of the Act with respect to health and medical resources needed to respond to the spread of COVID–19. And on March 23, 2020, I issued Executive Order 13910 (Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID–19), in which I delegated to the Secretary of Health and Human Services the authority under section 102 of the Act to combat hoarding and price gouging with respect to such resources.

To ensure that our healthcare systems are able to surge capacity and capability to respond to the spread of COVID–19, it is the policy of the United States to expand domestic production of health and medical resources needed to respond to the spread of COVID–19, including personal protective equipment and ventilators. Accordingly, I am delegating authority under title III of the Act to guarantee loans by private institutions, make loans, make provision for purchases and commitments to purchase, and take additional actions to create, maintain, protect, expand, and restore domestic industrial base capabilities to produce such resources. To enable greater cooperation among private businesses in expanding production of and distributing such resources, I am also delegating my authority under section 708(c) and (d) of the Act (50 U.S.C. 4558(c), (d)) to provide for the making of voluntary agreements and plans of action by the private sector.

Sec. 2. *Delegation of Authority Under Title III of the Act.* (a) Notwithstanding Executive Order 13603 of March 16, 2012 (National Defense Resources Preparedness), the Secretary of Health and Human Services and the Secretary of Homeland Security are each delegated, with respect to responding to the spread of COVID–19 within the United States, the authority of the President conferred by sections 301, 302, and 303 of the Act (50 U.S.C. 4531, 4532, and 4533), and the authority to implement the Act in subchapter

III of chapter 55 of title 50, United States Code (50 U.S.C. 4554, 4555, 4556, and 4560).

(b) The Secretary of Health and Human Services and the Secretary of Homeland Security may each use the authority under sections 301, 302, and 303 of the Act, in consultation with the Secretary of Defense and the heads of other executive departments and agencies as he deems appropriate, to respond to the spread of COVID–19.

(c) To provide additional authority to respond to the national emergency I declared in Proclamation 9994, the requirements of section 301(a)(2), section 301(d)(1)(A), and section 303(a)(1) through (a)(6) of the Act are waived during the period of that national emergency.

(d) To provide additional authority to respond to the national emergency I declared in Proclamation 9994, the Secretary of Health and Human Services and the Secretary of Homeland Security are each authorized to submit for my approval under section 302(d)(2)(B) of the Act a proposed determination that any specific loan is necessary to avert an industrial resource or critical technology shortfall that would severely impair national defense capability.

(e) Before exercising the authority delegated under this section with respect to health or medical resources, the Secretary of Homeland Security shall consult with the Secretary of Health and Human Services.

Sec. 3. *Delegation of Authority Under Title VII of the Act.* (a) Notwithstanding Executive Order 13603, the Secretary of Health and Human Services and the Secretary of Homeland Security are each delegated, with respect to responding to the spread of COVID–19 within the United States, the authority of the President conferred by section 708(c)(1) and (d) of the Act. The Secretary of Health and Human Services shall provide to the Secretary of Homeland Security notice of any use of such delegated authority.

(b) The delegation made in this section is made upon the condition that the Secretary of Health and Human Services or the Secretary of Homeland Security consult with the Attorney General and with the Federal Trade Commission, and obtain the prior approval of the Attorney General, after consultation by the Attorney General with the Federal Trade Commission, as required by section 708(c)(2) of the Act, except when such consultation is waived under subsection (c) of section 3 of this order and section 708(c)(3) of the Act.

(c) The Secretary of Health and Human Services and the Secretary of Homeland Security are each authorized to submit for my approval under section 708(c)(3) of the Act any proposed determination that any specific voluntary agreement or plan of action is necessary to meet national defense requirements resulting from an event that degrades or destroys critical infrastructure.

(d) Before exercising the authority delegated under this section with respect to health or medical resources, the Secretary of Homeland Security shall consult with the Secretary of Health and Human Services.

Sec. 4. *Additional Delegations.* (a) Notwithstanding Executive Order 13603, the Secretary of Health and Human Services and the Secretary of Homeland Security are each delegated, with respect to responding to the spread of COVID–19 within the United States, the authority of the President conferred by section 107 of the Act (50 U.S.C. 4517).

(b) In addition to the delegations of authority in Executive Order 13909 and Executive Order 13910, the authority of the President conferred by sections 101 and 102 of the Act (50 U.S.C. 4511, 4512) is delegated to the Secretary of Homeland Security with respect to health and medical resources needed to respond to the spread of COVID–19 within the United States.

(c) The Secretary of Homeland Security may use the authority under section 101 of the Act to determine, in consultation with the heads of

other executive departments and agencies as appropriate, the proper nationwide priorities and allocation of health and medical resources, including by controlling the distribution of such materials (including applicable services) in the civilian market, for responding to the spread of COVID–19 within the United States.

(d) Before exercising the authority under section 102 of the Act, the Secretary of Homeland Security shall consult with the Secretary of Health and Human Services.

(e) The Secretary of Homeland Security shall periodically consider whether the designations made by him under section 102 of the Act pursuant to section 4(b) of this order remain necessary. Upon finding that such designation of material is no longer necessary, the Secretary of Homeland Security shall promptly publish a notice of withdrawal of the designation in the *Federal Register,* and in such other manner as he deems appropriate.

Sec. 5. *Implementing Rules and Regulations.* The Secretary of Health and Human Services and the Secretary of Homeland Security shall each adopt and revise appropriate rules and regulations as may be necessary to implement this order.

Sec. 6. *Policy Coordination.* The Assistant to the President for Trade and Manufacturing Policy shall serve as National Defense Production Act Policy Coordinator.

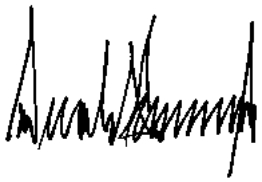
Sec. 7. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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



THE WHITE HOUSE,
March 27, 2020.

[FR Doc. 2020–06969
Filed 3–31–20; 11:15 am]
Billing code 3295–F0–P

U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The Department of Defense is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to modify the text of DFARS clause 252.204–7002, Payment for Subline Items Not Separately Priced, to simplify and conform the clause text to current Government contract line item structure terminology.

The objective of this rule is to clarify the intent of the clause for contractors, when submitting invoices under contracts that contain items that are not separately priced. The modification of this DFARS clause supports a recommendation from the DoD Regulatory Reform Task Force. No public comments were received in response to the initial regulatory flexibility analysis.

Based on an average of data for fiscal year 2016 through 2018 from the Federal Procurement Data System and Electronic Document Access, DoD awards approximately 12,435 contracts annually that includes the DFARS clause 252.204–7002. Of the 12,435 awards, approximately 4,924 contracts (40%) are awarded to 1,564 unique small business entities. Based on the available data and the objective of the rule, DoD does not anticipate that this proposed rule will significantly impact small business entities. This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. This 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 stated objectives.

VI. 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 204 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 204 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

■ 2. Amend section 204.7104–1:

■ a. In paragraph (b)(3)(iii), by removing ''subsection'' and adding ''section'' in its place; and

■ b. By revising paragraph (b)(3)(iv).

The revision reads as follows:

204.7104–1 Criteria for establishing.

* * * * *

(b) * * *

(3) * * *

(iv) When the price for items not separately priced is included in the price of another contract line or subline item, it may be necessary to withhold payment on the priced contract line or subline item until the included line or subline items that are not separately priced have been delivered. See the clause at 252.204–7002, Payment for Contract Line or Subline Items Not Separately Priced.

■ 3. Revise section 204.7109 to read as follows:

204.7109 Contract clauses.

(a) Use the clause at 252.204–7002, Payment for Contract Line or Subline Items Not Separately Priced, in solicitations and contracts when the price for items not separately priced is included in the price of another contract line or subline item.

(b) Use the clause at 252.204–7006, Billing Instructions, in solicitations and contracts if Section G includes—

(1) Any of the standard payment instructions at PGI 204.7108(b)(2); or

(2) Other payment instructions, in accordance with PGI 204.7108(d)(12), that require contractor identification of the contract line item(s) on the payment request.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Revise section 252.204–7002 to read as follows:

252.204–7002 Payment for Contract Line or Subline Items Not Separately Priced.

As prescribed in 204.7109(a), use the following clause:

Payment for Contract Line or Subline Items Not Separately Priced (APR 2020)

(a) If the schedule in this contract contains any contract line or subline items identified as not separately priced (NSP), it means that the unit price for the NSP line or subline item is included in the unit price of another, related line or subline item.

(b) The Contractor shall not invoice the Government for an item that includes in its price an NSP item until—

(1) The Contractor has also delivered the NSP item included in the price of the item being invoiced; and

(2) The Government has accepted the NSP item.

(c) This clause does not apply to technical data.

(End of clause)

252.204–7006 [Amended]

■ 5. Amend section 252.204–7006 introductory text by removing ''204.7109'' and adding ''204.7109(b)'' in its place.

[FR Doc. 2020–06726 Filed 4–7–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 232, and 252

[Docket DARS–2019–0025]

RIN 0750–AK25

Defense Federal Acquisition Regulation Supplement: Prompt Payments of Small Business Contractors (DFARS Case 2018–D068)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2019 that provides for accelerated payments to small business contractors and subcontractors.

DATES: Effective April 8, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, telephone 571–372–6100.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 84 FR 25225 on May 31, 2019, to implement section 852 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Section 852 provides for accelerated payments to DoD contractors that are small businesses and to small business subcontractors by accelerating payments to their prime contractors. Thirteen respondents submitted public comments 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 those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

This final rule adds a definition of ''accelerated payment'' to the clause at DFARS 252.232–7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration. The definition specifies that accelerated payments are made as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Most respondents expressed support for the proposed rule.

Response: DoD acknowledges the respondents' support.

2. Timely Payments to Small Business Subcontractors

Comment: One respondent expressed overall support for the proposed rule if the rule ensures all large business prime contractors are required to pay their subcontractors within 15 days of receiving an invoice from their small business subcontractors, regardless of whether the prime has been paid by the Federal Government. Another respondent suggested an authority to enforce, and a forum to address, grievances for payments from the Government that are past due.

Response: This final rule incorporates the statutory language of section 852 of the NDAA for FY 2019, as implemented via 10 U.S.C. 2307, which establishes the 15-day timeframe as a goal, rather than a firm deadline. The rule provides for prime contractors to make accelerated payments to small business subcontractors after receipt of payment from the Government because a prime contractor who subcontracts with small businesses could be a small business itself. Federal Acquisition Regulation (FAR) subpart 32.9 implements the statutory requirements concerning required documentation for invoice and acceptance, the establishment of payment due dates, and the payment of late payment interest penalties after the due date established under the Prompt Payment Act (*e.g.,* 30 days). DoD payment offices must adhere to these requirements and make payments as quickly as possible, to the fullest extent permitted by law.

Concerning the respondent's suggestion regarding a forum to address late payments, as prescribed in 5 CFR 1315.18, questions concerning delinquent payments should be directed to the designated agency office, or the office responsible for issuing the payment if different from the designated agency office. Questions about disagreements over payment amount or timing should be directed to the contracting officer for resolution. Small business concerns may obtain additional assistance on payment issues by contacting the agency's Office of Small Business Programs.

3. Interest Penalties for Late Payments to Subcontractors

Comment: One respondent suggested that the rule could be improved by also imposing an interest penalty on all small business invoices submitted to the prime contractor that are not paid within 15 days of receipt. Another respondent recommended an authority for the Government to pay interest penalties to both contractors when invoices are past due.

Response: Section 852 does not provide for interest penalties to be paid by the prime contractor for late payments to a subcontractor. Therefore, this final rule does not impose interest penalties beyond those implemented in FAR subpart 32.9 under the Prompt Payment Act. The subcontract between the prime contractor and the subcontractor is a business arrangement between two private parties, and therefore Prompt Payment Act interest penalties do not apply.

4. 15-Day Payment Goal

Comment: Two respondents expressed a preference for the proposed rule to mandate prompt payment instead of making it a goal, however, they commended the DoD proposal to revise the DFARS to implement section 852 of the NDAA for FY 2019 to pay small businesses within 15 days, rather than the current 30-day standard. It is viewed as an important first step for DoD small business contractors. Two other respondents stated that FAR 52.232–40 does not provide for the 15-day payment goal ''to the fullest extent permitted by law,'' which creates a conflict with the specific 15-day goal that section 852 directs DoD to adopt. One of the respondents recommends a new DFARS prescription and contract clause to supplement FAR 52.232–40 be added that provides for the 15-day payment goal ''to the fullest extent permitted by law.'' The respondent supports the revision to DFARS 232.903 to comport with the provisions of section 852 with respect to small business prime contractors.

Response: DoD recognizes the respondents' preference to mandate payment within 15 days instead of making it a goal; and agrees that the goal is an important step for small business contractors working with the DoD. DoD also affirms support for the revision to DFARS 232.903 to implement the provisions of section 852.

Regarding a conflict with the FAR, this final DFARS rule provides details to supplement, rather than conflict with, the requirements of FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors. The rule relies on the FAR clause and the DFARS clause at 252.232–7017, used together in a contract, to communicate to prime contractors the requirements concerning accelerated payments. See section III of this preamble for a more detailed explanation of how the clauses are used together. DoD agrees that it is important to clarify what constitutes an accelerated payment from a prime contractor to a small business subcontractor in the context of this DFARS rule. Therefore, the final rule revises the clause at DFARS 252.232–7017 to define ''accelerated payment'' as a payment made to a small business subcontractor as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.

5. Clarifications

a. Small Business Subcontractors

Comment: One respondent suggested that the definition of small business subcontractors be clarified for the purposes of accelerated payments as those that are directly supporting or charged to a DoD contract in which the prime contractor is receiving accelerated payments (*i.e.,* not those supporting indirect, commercial, or foreign efforts by the prime contractor).

Response: This final rule does not provide a definition of ''small business subcontractor.'' This term is defined at FAR 2.101. The definition provided in the FAR applies to the DFARS, including this rule.

b. Section Heading for DFARS 232.009

Comment: One respondent suggested that the heading to DFARS 232.009 be changed to read ''Providing accelerated payments to small business contractors and small business subcontractors'' because DFARS 232.009–1 adds coverage for both small business and small business subcontractors. In addition, the respondent suggested that the term ''small business primes'' in

both DFARS 232.009 and DFARS 232.009–1 would be clearer than ''small business contractor''.

Response: The final rule does not include the respondent's suggested edits. Revising the heading of DFARS 232.009 as suggested would create a disconnect with the title of the new contract clause prescribed in this section. In addition, DFARS 232.009 is numbered to correspond to FAR 32.009, which addresses the same subject matter. This drafting convention allows contracting officers to locate more easily coverage of similar topics in the FAR and DFARS. It is not necessary to add ''prime contractors'' to the heading because, in the FAR and DFARS, the term ''contractor'' means the prime contractor.

6. Governmentwide Application of the Rule

Comment: One respondent stated that section 852 addresses two types of accelerated payments, but noted both are applicable to DoD only. The first type addresses payments to small business prime contractors; the second type addresses payments to any DoD prime contractor that subcontracts with small businesses. The respondent indicated a preference for both types of accelerated payments to be made applicable governmentwide. The respondent also stated that, at a minimum, the rule should acknowledge the governmentwide application of making accelerated payments to small business prime contractors, as provided for in FAR clause 52.232–25, Prompt Payment.

Response: DoD affirms the respondent's statement that section 852 of the NDAA for FY 2019 applies to DoD only. As such, this final DFARS rule will be applicable to DoD only. DoD notes, however, that FAR Case 2020–007, Accelerated Payments Applicable to Contracts with Certain Small Business Concerns, is in process to implement section 873 of the NDAA for FY 2020, which modifies 31 U.S.C. 3903(a) to require accelerated payments for small business prime contractors and prime contractors that subcontract with small business concerns.

7. Definition of ''small business''

Comment: One respondent expressed concern that the rule could be improved by defining what constitutes a small business.

Response: The FAR defines ''small business concern'' in subpart 2.1, Definitions. The definition of ''small business concern'' in the FAR applies throughout the DFARS, including to this rule.

8. Estimate of Fees Paid by Small Business Subcontractors

Comment: One respondent commented on DoD's inability to estimate the number of small business subcontractors who have been required to pay fees or provide consideration in return for accelerated payments from prime contractors, or the dollar value of these fees or consideration. The respondent asked if it was feasible to survey a sample of subcontractors to DoD prime contractors regarding the average fees paid to the prime contractors, and use that data to estimate fees paid by subcontractors to DoD prime contractors in general. The respondent also asked if the contractors could be sorted by size (*i.e.,* small, medium, and large), with an average fee for each size contractor, to find a weighted average number of contractors and fee.

Response: Resources are not available for a survey such as the respondent suggested. DoD does not have any data on which to base an estimate of the number of subcontractors required to pay fees or provide consideration to the prime contractor in return for accelerated payments, or the dollar value of the fees or consideration. Public comments did not provide insight into whether small business subcontractors had been required to pay fees or provide consideration for accelerated payments, or the dollar value of such fees or consideration.

9. Initial Regulatory Flexibility Analysis

Comment: One respondent expressed concern that the initial regulatory flexibility analysis prepared for the proposed rule lacked adequate information to allow small businesses to determine the impact of the rule.

Response: See section VII. of this preamble.

C. Other Changes

This final rule adds a reference to the statute (10 U.S.C. 2307(a) to the instruction at DFARS 212.301(f)(xiii)(G) for use of the clause at DFARS 252.232–7017 in commercial item acquisitions. In the contract clause, this final rule adds a new paragraph (a) to provide a definition for ''Accelerated payment'' also adds the paragraph heading of ''Subcontracts'' to paragraph (c).

III. Expected Impact of the Rule

Current DoD policy, as stated in DFARS 232.903, is to pay small business contractors as quickly as possible after receipt of invoices and proper documentation. This rule specifies that DoD will provide payment as quickly as possible, to the fullest extent permitted by law, with a goal of 15 days after receipt of proper invoices and documentation, and before normal payment due dates. For items that ordinarily require payment in less than 15 days (*e.g.,* perishable food), DoD will provide payment as quickly as possible after receipt of proper invoices and documentation, and before the normal payment due date.

With few exceptions, DoD will provide accelerated payments to small business contractors and to prime contractors that agree to provide accelerated payments to their small business subcontractors without further consideration or fees. DoD will not be able to provide accelerated payments to prime contractors if such payments would result in a violation of the Antideficiency Act. An example would be a lapse in appropriated funds.

This final DFARS rule relies on a FAR clause and a DFARS clause, used together in a contract, to—

(1) Communicate to the prime contractor the requirement to provide accelerated payments to small business subcontractors; and

(2) Obtain the prime contractor's agreement, by signature of the contract, to provide accelerated payments without requiring further consideration from, or charging fees to, the small business subcontractor.

DoD contracting officers do not use the DFARS in isolation; they use the DFARS together with the FAR. The FAR currently requires contracting officers to insert the clause at FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors, in solicitations and contracts. This final DFARS rule will require DoD contracting officers to insert the new DFARS clause 252.232–7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, in solicitations and contracts that include FAR 52.232–40. This means both clauses will be included in DoD contracts.

The FAR clause and the DFARS clause will work together to require accelerated payments to small business subcontractors when DoD provides accelerated payments to the prime contractor. FAR 52.232–40 currently requires prime contractors to provide accelerated payments to their small business subcontractors when the Government provides accelerated payments to the prime contractors. DFARS clause 252.232–7017 defines ''accelerated payment'' as ''a payment made to a small business subcontractor as quickly as possible, with a goal of 15 days or less after receipt of payment

from the Government or receipt of a proper invoice from the subcontractor, whichever is later.'' By using both clauses together in a contract, this final DFARS rule requires a prime contractor who receives an accelerated payment from the Government to pay its small business subcontractors as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.

DoD estimates that 40,282 contractors (including 30,498 small businesses) will receive accelerated payments each year, based on data obtained from the Federal Procurement Data System (FPDS) and input from subject matter experts from the Defense Finance and Accounting Services and the Office of the Under Secretary of Defense (Comptroller). Specifically, DoD awarded contracts to an average of 40,689 unique entities (including 30,806 small businesses) each year from FY 2016 through FY 2018. Subject matter experts estimated that DoD would not provide accelerated payments to approximately 1 percent of these contractors (407, including 308 small businesses) because such payments could result in a violation of the Antideficiency Act (*e.g.,* during a lapse in appropriated funds). Therefore, approximately 40,282 contractors (including 30,498 small businesses) per year would receive accelerated payments.

DoD estimates that there were approximately 9,483 small business subcontractors on DoD prime contracts in FY 2018, based on data from *USASpending.gov* cross-referenced with size representations for DoD contracts. DoD further estimates that approximately 1 percent (95) small business subcontractors may not receive accelerated payments because DoD was not able to provide accelerated payments to the prime contractor (see the previous paragraph).

This rule prohibits contractors from requiring any further consideration from, or charging fees to, their small business subcontractors when making accelerated payments. This prohibition would benefit small business subcontractors who have been required to provide consideration or pay fees to the prime contractor in order to receive accelerated payments. Any costs for prime contractors to implement the prohibition on fees and consideration are expected to be de minimis since DoD expects that only a small number of contractors have required such consideration or fees from their small business subcontractors.

As noted in a preceding paragraph, DoD estimates there were approximately 9,483 small business subcontractors on DoD prime contracts in FY 2018. It is not possible for DoD to estimate how many of these small business subcontractors may have been required to provide consideration or pay fees to the prime contractor in order to receive accelerated payments, nor is it possible to estimate the dollar value of the consideration provided or fees paid. Despite a request for comments on this specific topic, DoD received no information from the public that would inform these estimates. If any small business subcontractors have been required to provide consideration or pay fees in return for accelerated payments, the prohibition on such consideration or fees could result in cost savings. However, if no small business subcontractors have been required to provide consideration or pay fees, there would be no cost savings as a result of this rule.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule applies the requirements of section 852 of the NDAA for FY 2019 to contracts at or below the simplified acquisition threshold (SAT) and to contracts for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. 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 Principal Director, Defense Pricing and Contracting (DPC), 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.

Given that the requirements of section 852 of the NDAA for FY 2019 were enacted to provide accelerated payments to small business contractors and subcontractors, and since approximately 96 percent of DoD contracts are valued at or below the SAT, DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts at or below the SAT. An exception for contracts at or below the SAT would exclude contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

10 U.S.C. 2375 governs the applicability of laws to DoD contracts and subcontracts for the acquisition of commercial items, including COTS items, and is intended to limit the applicability of laws to contracts and subcontracts for the acquisition of commercial items, including COTS items. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) 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. Due to delegations of authority from USD(A&S), the Principal Director, DPC, is the appropriate authority to make this determination.

Given that the requirements of section 852 of the NDAA for FY 2019 were enacted to provide accelerated payments to small business contractors and subcontractors, and since more than half of DoD's contractors are small businesses providing commercial items, including COTS items, DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, including COTS items, as defined at FAR 2.101. An exception for contracts for the acquisition of commercial items, including COTS items, would exclude the contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

V. 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.

VI. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VII. 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 is necessary in order to amend the DFARS to implement section 852 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Section 852 provides for accelerated payments to DoD contractors that are small businesses and to small business subcontractors by accelerating payments to their prime contractors. Specifically, section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date for small business contractors, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. For contractors that subcontract with small businesses, section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date, with a goal of 15 days after receipt of a proper invoice, if—

(a) A specific payment date is not established by contract; and

(b) The contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

The objective of the rule is to implement section 852 by providing accelerated payments to small business contractors and to small business subcontractors via accelerated payments to prime contractors.

DoD received comments from the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, which are summarized below:

(a) *Number of subcontractors required to pay fees:* DoD did not provide the number of small business subcontractors who have been required to provide consideration or pay fees in return for accelerated payments from prime contractors.

(b) *Conclusion regarding cost savings:* DoD concludes, without sound data, that the rule could result in cost savings because of the proposed prohibition on fees and consideration in return for accelerated payments.

(c) *Conflict with FAR:* The rule conflicts with FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors, which does not require payment within 15 days.

(d) *Reason for not accelerating payment:* According to DoD, subject matter experts have estimated that DoD would not provide accelerated payments to approximately 1 percent of contractors because such payments would put DoD at risk of a violation of law. DoD did not qualify these individuals as subject matter experts or provide the bases or assumptions that support their conclusions. DoD did not provide small businesses with information on what would constitute a violation of law that would result in DoD not providing accelerated payments to small businesses.

(e) *Action plan when payments are not accelerated:* The rule does not provide a sound action plan for small businesses who may be denied the legal right to accelerated payments.

DoD provides the following responses, including changes made to the final rule as a result of the comments:

(a) *Number of subcontractors required to pay fees:* DoD has no data on which to base an estimate of the number of small business subcontractors who have been required to pay fees or provide consideration to prime contractors in return for accelerated payments. In the proposed rule, DoD requested public comment on the topic of consideration or fees in return for accelerated payments. However, none of the public comments addressed this topic. Therefore, in the final rule DoD has provided a rough estimate of the number of small business subcontractors on DoD contracts. DoD estimates there were approximately 9,483 small business subcontractors on DoD contracts in FY 2018.

(b) *Conclusion regarding cost savings:* The conclusion that the rule could result in cost savings was based on a reasonable assumption that, if a small business was required to pay a fee in return for accelerated payments, and the rule prohibits that fee, then the small business will not be required to pay the fee in the future. If no small businesses have been required to pay a fee, then there would be no cost savings as a result of this rule. In the final rule, DoD has made this clarification in section III of the preamble for this final rule.

(c) *Conflict with FAR:* The rule provides details to supplement, rather than conflict with, the requirements of FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors. DoD agrees that it is important to clarify what constitutes an accelerated payment from a prime contractor to a small business subcontractor in the context of this DFARS rule. Therefore, the final rule revises the clause at DFARS 252.232–7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, to clarify that ''accelerated payment'' means ''a payment made to a small business subcontractor as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.'' See paragraph (e) for an explanation of how the FAR clause and the DFARS clause will be used together to provide for accelerated payments to small business subcontractors.

(d) *Reason for not accelerating payment:* The estimate that 1 percent of contractors would not receive accelerated payments was based on DoD's expectation that this would be a rare occurrence. DoD's subject matter experts from the Defense Finance and Accounting Service and the Office of the Under Secretary of Defense (Comptroller) have provided clarification on the circumstances that could result in DoD not providing accelerated payments to small businesses. DoD would not be able to provide accelerated payments if such payments would result in a violation of the Antideficiency Act. An example would be a lapse in appropriated funds. DoD has made this clarification in section III of the preamble for this final rule.

(e) *Action plan when payments are not accelerated:* DoD's interpretation of section 852 of the NDAA for FY 2019 is that section 852 does not create a right to accelerated payments. It requires DoD, to the fullest extent permitted by law, to pay contractors on an accelerated basis, with a goal of 15 days. It also requires the prime contractor's agreement to provide accelerated payments without requiring further consideration from, or charging fees to, the small business subcontractor. As with any issue or concern related to payments, small businesses may seek assistance from the Office of Small Business Programs for DoD or for the DoD component that awarded the prime

contract. This final DFARS rule relies on a FAR clause and a DFARS clause used together in a contract to—

(i) Communicate to the prime contractor the requirement to provide accelerated payments to small business subcontractors; and

(ii) Obtain the prime contractor's agreement, by signature of the contract, to provide accelerated payments without requiring further consideration from, or charging fees to, the small business subcontractor.

DoD contracting officers use the FAR and DFARS together to award contracts, not one or the other in isolation. The FAR currently requires contracting officers to insert FAR 52.232–40 in solicitations and contracts. This final rule will require contracting officers to insert the new DFARS clause 252.232–7017 in solicitations and contracts that include FAR 52.232–40. This means both clauses will exist in DoD contracts and will work together to require accelerated payments to small business subcontractors when DoD provides accelerated payments to the prime contractor. FAR 52.232–40 currently requires prime contractors to make accelerated payments to their small business subcontractors upon receipt of accelerated payments from the Government. DFARS clause 252.232–7017 defines accelerated payment as ''a payment made to a small business subcontractor as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.'' By using both clauses together, this final DFARS rule requires a prime contractor who receives an accelerated payment from the Government to pay its small business subcontractors as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.

This rule applies to small businesses that are DoD prime contractors. According to data obtained from the Federal Procurement Data System, DoD awarded contracts to an average of 30,806 unique small entities each year from FY 2016 through FY 2018. DoD estimates that it may not be possible to provide accelerated payments to approximately 308 small business contractors (1 percent) because such payments would put DoD at risk of a violation of the Antideficiency Act (*e.g.,* during a lapse in appropriated funds). Therefore, approximately 30,498 small contractors per year would receive accelerated payments.

This rule also applies to small businesses that are subcontractors on DoD prime contracts. DoD estimates that there were approximately 9,483 small business subcontractors on DoD prime contracts in FY 2018, based on data from www.*USASpending.gov* cross-referenced with size representations for DoD contracts. DoD estimates that approximately 95 small business subcontractors (1 percent) may not receive accelerated payments because DoD was not able to provide accelerated payments to the prime contractor. With regard to the impact of the prohibition on fees or other consideration in return for accelerated payments, it is not possible for DoD to estimate how many of these small business subcontractors may have been required to provide consideration or pay fees to the prime contractor in order to receive accelerated payments.

This rule does not impose any new reporting, recordkeeping, or other compliance requirements for small entities.

There are no known, significant alternatives that would accomplish the objectives of the applicable statute.

VIII. 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 212, 232, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 232, and 252 are amended as follows:

■ 1. The authority citations for 48 CFR part 212, 232, and 252 continue to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 212.301 by adding paragraph (f)(xiii)(G) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(xiii) * * *

(G) Use the clause at 252.232–7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, as prescribed in 232.009–2(2), to comply with 10 U.S.C. 2307(a).

* * * * *

PART 232—CONTRACT FINANCING

■ 3. Add sections 232.009, 232–009–1, and 232.009–2 to read as follows:

232.009 Providing accelerated payments to small business subcontractors.

232.009–1 General.

Section 852 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) requires DoD to provide accelerated payments to small business contractors and subcontractors, to the fullest extent permitted by law, with a goal of 15 days.

232.009–2 Contract clause.

Use the clause at 252.232–7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, that include the clause at FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors.

■ 4. Revise section 232.903 to read as follows:

232.903 Responsibilities.

In accordance with section 852 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232), DoD shall assist small business concerns by providing payment as quickly as possible, to the fullest extent permitted by law, with a goal of 15 days after receipt of proper invoices and all required documentation, including acceptance, and before normal payment due dates established in the contract (see 232.906(a)).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Add section 252.232–7017 to read as follows:

252.232–7017 Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration.

As prescribed in 232.009–2, use the following clause:

Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration (APR 2020)

(a) *Definition. Accelerated payment,* as used in this clause, means a payment made to a small business subcontractor as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.

(b) In accordance with section 852 of Public Law 115–232, the Contractor shall not require any further consideration from or charge fees to the small business subcontractor when making accelerated payments, as defined in paragraph (a) of this clause, to subcontractors under the clause at FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors.

(c) *Subcontracts.* Include the substance of this clause, including this paragraph (c), in all subcontracts with small business concerns, including those for the acquisition of commercial items.

(End of clause)

[FR Doc. 2020–06727 Filed 4–7–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 229 and 252

[Docket DARS–2019–0036]

RIN 0750–AK13

Defense Federal Acquisition Regulation Supplement: Modification of DFARS Clause ''Tax Relief'' (DFARS Case 2018–D049)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to modify the text of an existing DFARS clause to include the text of another DFARS clause on the same subject, in an effort to streamline contract terms and conditions for contractors, pursuant to action taken by the Regulatory Reform Task Force.

DATES: Effective April 8, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 84 FR 48512 on September 13, 2019, to modify DFARS clause 252.229–7001, Tax Relief, to incorporate the information included in DFARS clause 252.229–7000, Invoices Exclusive of Taxes or Duties. Combining these clauses results in DFARS clause 252.229–7000 being removed from the DFARS. The rule implements a recommendation of the DoD Regulatory Reform Task Force established under Executive Order (E.O.) 13777, ''Enforcing the Regulatory Reform Agenda.''

No public comments were received in response to the proposed rule. No changes from the proposed rule are made in the final rule.

II. 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 create any new provisions or clauses. The rule combines two clauses into a single clause and does not change the applicability of the affected clauses.

III. Executive Orders 12866 and 13563

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 20, 1993. This rule is not a major rule as defined at 5 U.S.C. 804.

IV. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

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:

DoD is amending DFARS clause 252.229–7001, Tax Relief, to incorporate the information included in DFARS clause 252.229–7000, Invoices Exclusive of Taxes or Duties. Combining these clauses will result in DFARS clause 252.229–7000 being removed from the DFARS. The objective of this rule is to streamline DoD contract terms and conditions and contractor responsibilities pertaining to foreign taxes and duties. The modification of these DFARS clauses supports a recommendation from the DoD Regulatory Reform Task Force under E.O. 13771.

No public comments were received in response to the initial regulatory flexibility analysis.

This rule is combines two existing clauses that address the same topic into a single comprehensive clause. These clauses apply to solicitations and contracts awarded to a foreign concern for contract performance in a foreign country.

This rule is not expected to impact small business entities because this rule only applies to foreign entities. The Small Business Administration (SBA) identifies a ''small business'' as a ''a business entity organized for profit, with a place of business located in the United States, and which operated primarily within the United States or which makes a significant contribution to the U.S. economy through the payment of taxes or use of American products, materials, or labor'' (13 CFR 121.102(a)). This rule only applies to foreign contractors, which do not meet the SBA definition of ''small business'' entities.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. This 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 stated objectives. This rule is not expected to have a significant economic impact on small entities.

VI. 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 229 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 229 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 229 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 229—TAXES

229.402–1 [Removed]

■ 2. Remove section 229.402–1.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.229–7000 [Removed and Reserved]

■ 3. Remove and reserve section 252.229–7000.

225.7703–2 [Amended]

■ 12. Amend section 225.7703–2 by—
■ a. In paragraph (b)(2)(i) by removing ''$93 million'' and adding ''$100 million'' in its place; and
■ b. In paragraph (b)(2)(ii) introductory text by removing ''Director, Defense Procurement and Acquisition Policy'' and adding ''Principal Director, Defense Pricing and Contracting'' in its place and by removing ''$93 million'' and adding ''$100 million'' in its place.

PART 228—BONDS AND INSURANCE

228.102–1 [Amended]

■ 13. Amend section 228.102–1, in the introductory text and paragraph (1), by removing ''$35,000'' and adding ''$40,000'' in its place in both places.

PART 236—CONSTRUCTION AND ARCHITECT–ENGINEER CONTRACTS

236.303–1 [Amended]

■ 14. Amend section 236.303–1 in paragraph (a)(4)(i) introductory text and (a)(4)(ii) by removing ''$4 million'' and adding ''$4.5 million'' in its place in both places.

PART 237—SERVICE CONTRACTING

237.170–2 [Amended]

■ 15. Amend section 237.170–2 in paragraphs (a)(1) and (2) by removing ''$93 million'' and adding ''$100 million'' in its place in both places.

PART 246—QUALITY ASSURANCE

■ 16. Amend section 246.402 introductory text by removing ''$300,000'' and adding ''$350,000'' in its place.

PART 250—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

250.102–1 [Amended]

■ 17. Amend section 250.102–1 in paragraph (b) by removing ''$70,000'' and adding ''$75,000'' in its place.

250.102–1–70 [Amended]

■ 18. Amend section 250.102–1–70 in paragraph (b)(1) by removing ''$70,000'' and adding ''$75,000'' in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.225–7003 [Amended]

■ 19. Amend section 252.225–7003 by—
■ a. Removing the clause date ''(OCT 2015)'' and adding ''(DATE)'' in its place; and
■ b. In paragraph (b)(1), removing ''$13.5 million'' and adding ''$15 million'' in its place; and
■ c. In paragraph (b)(2)(i) removing ''$700,000'' and adding ''$750,000'' in its place.

[FR Doc. 2020–06733 Filed 4–7–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 232, and 252

[Docket DARS–2019–0047]

RIN 0750–AJ52

Defense Federal Acquisition Regulation Supplement: Expediting Contract Closeout (DFARS Case 2017–D042)

AGENCY: Defense Acquisition Regulation System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement to provide for expedited contract closeout through a waiver by the contractor and the Government of entitlement to any residual dollar amounts that are due to either party at the time of final contract closeout. The changes are necessary to establish an expedited contract closeout agreement that will save administrative costs for both the contractor and the Government.

DATES: Comments on the proposed rule should be submitted in writing using one of the methods shown in **ADDRESSES** on or before June 8, 2020, to be considered in the formation of a final rule.

ADDRESSES: Submit comments in response to DFARS CASE 2017–D042 by any of the following methods:

- *Regulations.gov: http://www.regulation.gov.* Submit comments via Federal Rulemaking portal by entering ''DFARS Case 2017–D042'' under the heading ''Enter keyword of ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''DFARS Case 2017–D042.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''DFARS Case 2017–D042'' on your attached document.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2017–D042 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Kimberly Bass, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulation.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: Ms. Kimberly Bass, telephone 571–372–6174.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to add a new DFARS contract clause that allows for an expedited contract closeout agreement between the contractor and the Government that will save administrative costs for both the contractor and the Government. The clause will be used when the contracting officer intends to expedite the contract closeout process by having the contractor and the Government waive entitlement to any residual dollar amounts up to $1,000 at the time of final contract closeout. The objective of the rule is to reduce the amount of time and money expended on reconciling small dollar residual dollar amounts in order to close out contracts.

II. Discussion and Analysis

The proposed DFARS clause 252.204–70XX, Expediting Contract Closeout, provides an agreement by the Government and contractor to waive any entitlement that otherwise might accrue to either party in any amount of $1,000 or less at the time of final contract closeout. The new clause will be prescribed at DFARS 204.804–70 for use in solicitations and contracts, including those under FAR part 12 procedures for acquisition of commercial items, when the contracting officer intends to expedite contract closeout through such a waiver.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule proposes to create a new clause DFARS 252.204–70XX, Expediting Contract Closeout. DoD plans to apply this clause to solicitations and contracts for the acquisition of commercial items, including commercially available off-the-shelf items, and to acquisitions valued at or below the simplified

acquisition threshold. These categories of acquisitions are those most likely to benefit from expedited contract closeout.

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, or reducing costs, or 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. Executive Order 13771

This rule is not expected to be subject to E.O. 13771, because this rule is not a significant regulatory action.

VI. 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.* An initial regulatory flexibility analysis (IRFA) has been performed and is summarized as follows:

The Department of Defense (DoD) proposes amending the Defense Federal Acquisition Regulation Supplement (DFARS) to add a new contract clause 252.204–70XX, Expediting Contract Closeout, to expedite contract closeout on contracts with a residual dollar amount of $1,000 or less at the time of final closeout.

The objective of the proposed clause is to facilitate expedited contract closeout and avoid excessive administrative costs for both the contractor and the Government to reconcile relatively small residual dollar amounts in order to close out a contract.

The proposed rule will apply to small entities that have been or will be awarded contracts, including those under FAR part 12 procedures for the acquisition of commercial items. DoD is unable to estimate the total number of small entities that have DoD contracts with a residual amount of $1,000 or less; however, the Defense Contract Management Agency (DCMA) was able to provide information on contracts administered by DCMA. According to data available in Mechanization of Contract Administration Services/Shared Data Warehouse as of June 2019, there were 11,831 flexibly-priced contracts with residual dollar amounts of $1,000 or less, of which 3,507 contracts were awarded to small entities. The average residual amount on these contracts was $70.

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).

The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known, significant, alternative approaches to the proposed rule that would meet the requirements of the proposed rule.

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 2017–D042), in correspondence.

VIII. 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 204, 212, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204, 212, and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 204, 212, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

■ 2. Add section 204.804–70 to read as follows:

204.804–70 Contract clause.

Use the clause at 252.204–70XX, Expediting Contract Closeout, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, when the contracting officer intends to expedite contract closeout through the waiver of entitlement to any residual dollar amounts by the contractor and the Government at the time of final contract closeout.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 3. Amend section 212.301 by adding paragraph (f)(ii)(K) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) * * *

(ii) * * *

(K) Use the clause at 252.204–70XX, Expediting Contract Closeout, as prescribed in 204.804–70.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Add section 252.204–70XX to read as follows:

252.204–70XX Expediting contract closeout.

As prescribed in 204.804–70, use the following clause:

Expediting Contract Closeout (DATE)

(a) Both the Government and the Contractor agree to waive any entitlement that otherwise might accrue to either party in any residual dollar amount of $1,000 or less at the time of final contract closeout.

(b) A residual dollar amount includes all money owed to either party at the end of the contract and as a result of the contract, excluding amounts connected in any way with taxation or a violation of law or regulation.

(c) For purposes of determining residual dollar amounts, offsets (for example across multiple contracts or orders) may be considered to the extent permitted by law.

(End of clause)

[FR Doc. 2020–06724 Filed 4–7–20; 8:45 am]

BILLING CODE 5001–06–P

Compliance With Executive Orders 12866, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

E.O. 12866 and E.O. 13563

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

This rule is necessary to implement Sections 1102 and 1106 of the CARES Act in order to provide economic relief to small businesses nationwide adversely impacted under the COVID–19 Emergency Declaration. We anticipate that this rule will result in substantial benefits to small businesses, their employees, and the communities they serve. However, we lack data to estimate the effects of this rule.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will impose recordkeeping or reporting requirements under the Paperwork Reduction Act (''PRA''). SBA has obtained emergency approval under OMB Control Number 3245–0407 for the information collection (IC) required to implement the program described above. This IC consists of Form 2483 (Paycheck Protection Program Application Form), SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty), and SBA Form 3506 (CARES Act Section 1102 Lender Agreement), and SBA Form 3507 (CARES Act Section 1102 Lender Agreement—Non-Bank and Non-Insured Depository Institution Lender). The collection is approved for use until September 30, 2020.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are ''small entities.'' Similarly, for purposes of the RFA, individual persons are not small entities.

The requirement to conduct a regulatory impact analysis does not apply if the head of the agency ''certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, ''along with a statement providing the factual basis for such certification.'' If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b).

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. Small Business Administration's Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Ac. Ch.1. p.9.* Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Authority: 15 U.S.C. 636(a)(36); Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136, Section 1114.

Jovita Carranza,

Administrator.

[FR Doc. 2020–07672 Filed 4–10–20; 4:15 pm]

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

[Docket No. SBA–2020–0019]

RIN 3245–AH35

Business Loan Program Temporary Changes; Paycheck Protection Program

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: Elsewhere in this issue of the **Federal Register**, the U.S. Small Business Administration (SBA) is publishing an interim final rule (the Initial Rule) announcing the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). Section 1102 of the Act temporarily adds a new program, titled the ''Paycheck Protection Program,'' to the SBA's 7(a) Loan Program. Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. The Paycheck Protection Program and loan forgiveness are intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). This interim final rule supplements the Initial Rule with additional guidance regarding the application of certain affiliate rules applicable to SBA's implementation of sections 1102 and 1106 of the Act and requests public comment.

DATES:

Effective date: This interim final rule is effective April 15, 2020.

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment Date: Comments must be received on or before May 15, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0019 through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please send an email to *ppp-ifr@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency.

Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the ''Paycheck Protection Program.'' Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. On April 2, 2020, SBA issued an interim final rule (the Initial Rule) announcing the implementation of sections 1102 and 1106 of the Act. A more detailed discussion of sections 1102 and 1106 of the Act is found in section III of the Initial Rule.

This interim final rule supplements the Initial Rule with additional guidance regarding the application of certain affiliate rules applicable to SBA's implementation of sections 1102 and 1106 of the Act and requests public comment.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act (5 U.S.C. 553(b)(3)(B)). Specifically, small businesses need to be informed on how to apply for a loan and the terms of the loan under section 1102 of the Act as soon as possible because the last day to apply for and receive a loan is June 30, 2020. The immediate effective date of this interim final rule will benefit small businesses so that they can immediately apply for the loan with a better understanding of loan terms and conditions. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title 1 of the Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule. These comments must be submitted on or before May 15, 2020. The SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Affiliate Rules for Paycheck Protection Program

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the Paycheck Protection Program (PPP). Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness. Additional information about the PPP is available in the Initial Rule.

1. Affiliation Rules Generally

Are affiliates considered together for purposes of determining eligibility?

In most cases, a borrower will be considered together with its affiliates for purposes of determining eligibility for the PPP.[1] Under SBA rules, entities may be considered affiliates based on factors including stock ownership, overlapping management,[2] and identity of interest. 13 CFR 121.301.

How do SBA's affiliation rules affect my eligibility and apply to me under the PPP?

An entity generally is eligible for the PPP if it, combined with its affiliates, is a small business as defined in section 3 of the Small Business Act (15 U.S.C. 632), or (1) has 500 or fewer employees whose principal place of residence is in the United States or is a business that operates in a certain industry and meets applicable SBA employee-based size standards for that industry, and (2) is a

[1] Section 7(a)(36)(D)(iv) of the Small Business Act (15 U.S.C. 636(a)(36)(D)(iv), as added by the Act, waives the affiliation rules contained in § 121.103 for (1) any business concern with not more than 500 employees that, as of the date on which the loan is disbursed, is assigned a North American Industry Classification System code beginning with 72; (2) any business concern operating as a franchise that is assigned a franchise identifier code by the Administration; and (3) any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681). This interim final rule has no effect on these statutory waivers, which remain in full force and effect. As a result, the affiliation rules contained in section 121.301 also do not apply to these types of entities.

[2] In order to help potential borrowers identify other businesses with which they may be deemed to be affiliated under the common management standard, the Borrower Application Form, SBA Form 2483, released on April 2, 2020, requires applicants to list other businesses with which they have common management. The information supplied by the applicant in response to that information request should be used by applicants as they assess whether they have affiliates that should be included in their number of employees reported on SBA Form 2483.

tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, a Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, or any other business concern. Prior to the Act, the nonprofit organizations listed above were not eligible for SBA Business Loan Programs under section 7(a) of the Small Business Act; only for-profit small business concerns were eligible. The Act made such nonprofit organizations not only eligible for the PPP, but also subjected them to SBA's affiliation rules. Specifically, section 1102 of the Act provides that the provisions applicable to affiliations under 13 CFR 121.103 apply with respect to nonprofit organizations and veterans organizations in the same manner as with respect to small business concerns. However, the detailed affiliation standards contained in § 121.103 currently do not apply to PPP borrowers, because § 121.103(a)(8) provides that applicants in SBA's Business Loan Programs (which include the PPP) are subject to the affiliation rule contained in 13 CFR 121.301.

2. Faith-Based Organizations

This rule exempts otherwise qualified faith-based organizations from the SBA's affiliation rules, including those set forth in 13 CFR part 121, where the application of the affiliation rules would substantially burden those organizations' religious exercise. This exemption is required, or at a minimum authorized, by the Religious Freedom Restoration Act (RFRA) (Pub. L. 103–141), which provides that the ''[g]overnment shall not substantially burden a person's exercise of religion'' unless the government can ''demonstrate[] that application of the burden'' to the person is both ''in furtherance of a compelling governmental interest'' and ''the least restrictive means of furthering that compelling governmental interest.'' 42 U.S.C. 2000bb–1.

A substantial burden under RFRA includes both government action that compels a person to violate his sincere religious beliefs or suffer a penalty, *see, e.g., Burwell* v. *Hobby Lobby Stores, Inc.,* 573 U.S. 682, 726 (2014), and the imposition of a substantial burden through ''indirect'' measures. *Thomas* v. *Review Bd. of Ind. Emp. Sec. Div.,* 450 U.S. 707, 717–18 (1981). Notably, the government imposes a substantial burden on religious exercise when it ''conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief.'' *Id.* at 718. For example, in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), a State denied the plaintiff unemployment benefits because she would not work on Saturday, the Sabbath of her faith. *Id.* at 400–01. Even though no ''sanctions directly compel[led]'' her to work on Saturday, the Supreme Court held that the State's denial of benefits ''puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship.'' *Id.* at 404. As the Court observed, the State's framework ''forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.'' *Id.* Consistent with these precedents, RFRA explicitly contemplates that ''the denial of government funding, benefits, or exemptions'' may violate its protections. 42 U.S.C. 2000bb–4.

SBA is aware of the existence of faith-based organizations that would qualify for relief under the CARES Act but for their affiliation with other entities as an aspect of their religious practice. Supreme Court precedent has long recognized that the organizational structure of faith-based entities may itself be a matter of significant religious concern and that faith-based organizations are therefore guaranteed the ''power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'' *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.,* 344 U.S. 94, 116 (1952). Moreover, an assessment of the extent to which questions concerning religious polity rest upon theological or other religious foundations presents particular difficulties, for the First Amendment ''forbids civil courts'' from ''the interpretation of particular church doctrines and the importance of those doctrines to the religion.'' *Presbyterian Church* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church,* 393 U.S. 440, 450 (1969). A number of faith-based organizations understand their affiliation with other religious entities as a part of their exercise of religion, as a mandate given the ''hierarchical or connectional'' structure of their church, *Jones* v. *Wolf,* 443 U.S. 595, 597 (1979), or as an expression of their sincere religious belief. *Cf.* 1 W. Cole Durham & Robert Smith, Religious Organizations and the Law section 8.19 (Westlaw rev. ed. 2017) (''Religious organizations, such as parishes or mission centers, normally tend to choose the civil-property-holding structures that most closely mirror their own ecclesiology or polity.''). Either affiliation decision falls within the definition of ''religious exercise'' that applies to RFRA, which ''includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'' *See* 42 U.S.C. 2000cc–5(7)(A); 2000bb–2(4) (''the term 'exercise of religion' means religious exercise, as defined in section 2000cc–5 of this title'').

As applied to these faith-based organizations, the affiliation rules would impose a substantial burden. The affiliation rules would deny an important benefit (participation in a program for which they would otherwise be eligible under the CARES Act) because of the exercise of sincere religious belief (affiliation with other religious entities).

The Administrator has also concluded that she does not have a compelling interest in denying emergency assistance to faith-based organizations that are facing the same economic hardship to which the CARES Act responded and who would be eligible for PPP but for their faith-based organizational and associational decisions. This conclusion is reinforced by the fact that the affiliation rules already contain numerous exemptions, *see generally* 13 CFR 121.103(b), ranging from ''[b]usiness concerns owned and controlled by Indian Tribes, Alaska Native Corporations, [and] Native Hawaiian Organizations,'' *id.* § 121.103(b)(2)(i) to ''member shareholders of a small agricultural cooperative.'' *Id.* § 121.103(b)(7). In light of these exemptions, it is difficult to maintain that denying relief to these faith-based organizations is necessary to further a compelling government interest, let alone the least restrictive means of doing so. *See Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 547 (1993) (''[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.'') (cleaned up); *Gonzales* v. *O Centro Espirita Beneficiente Uniao do Vegetal,* 546 U.S. 418, 433 (2006) (applying same principle under RFRA). SBA accordingly must exempt faith-based organizations that would otherwise be disqualified from the PPP based on features of those organizations' affiliations that are a matter of sincere religious exercise as defined in 42 U.S.C. 2000bb–2.

This action is also supported by 15 U.S.C. 634(b)(6), which authorizes the Administrator to ''make such rules and regulations as he deems necessary to

carry out the authority vested in him by or pursuant to this chapter.'' As relevant here, the CARES Act expanded eligibility for the covered loans during the covered period for nonprofit organizations that employ not more than 500 employees or, if applicable, the size standard in number of employees established by the Administrator for the industry in which the nonprofit organization operates. 15 U.S.C. 636(a)(36)(D)(i). That expansion posed unique concerns for the Administrator, who is tasked with applying the ''provisions applicable to affiliations under section 121.103 of title 13, Code of Federal Regulations, or any successor thereto, . . . with respect to a nonprofit organization and a veterans organizations in the same manner as with respect to a small business concern.'' *Id.* 636(a)(36)(D)(vi). Although these rules may easily be applied to faith-based organizations in many cases, their application to certain faith-based organizations presents significant challenges, in particular because of the large number of faith-based organizations who would now be eligible for the PPP but for their religious exercise.

As discussed above, carrying the affiliation rules over to all faith-based organizations without modification would raise concerns under RFRA. Moreover, application of the affiliation rules, which, for example, provide for assessment of whether one faith-based organization ''controls or has the power to control'' another organization, 13 CFR 121.103(a)(1), could involve SBA in questions of church governance concerning ''the allocation of power within a (hierarchical) church so as to decide . . . religious law (governing church polity),'' in violation of the First Amendment. *Serbian E. Orthodox Diocese for the U.S.A. & Canada* v. *Milivojevich,* 426 U.S. 696, 709 (1979) (internal quotation marks omitted)). Finally, affiliation rules developed in the context of for-profit enterprises present significant administrative difficulties where faith-based organizations are concerned. For example, ''the notion of corporate subsidiarity or affiliation in civil law is entirely foreign to the polity of religious organizations,'' and there is a significant risk that civil authorities will ''mischaracterize or misinterpret the polity of a religious body.'' 1 W. Cole Durham & Robert Smith, Religious Organizations and the Law sections 8.19, 8.21 (discussing examples of judicial mischaracterizations). Consistent with these concerns, it is also notable that other areas of federal law approach issues analogous to affiliation differently for religious organizations. *See, e.g.,* 26 U.S.C. 512 (b)(12).

For these reasons, in addition to the RFRA mandate, the Administrator has determined that it is appropriate to exercise the authority granted under 15 U.S.C. 634(b)(6) to exempt from application of SBA's affiliation rules faith-based organizations that would otherwise be disqualified from participation in PPP because of affiliations that are a part of their religious exercise.

Accordingly, the SBA's affiliation rules, including those set forth in 13 CFR part 121, do not apply to the relationship of any church, convention or association of churches, or other faith-based organization or entity to any other person, group, organization, or entity that is based on a sincere religious teaching or belief or otherwise constitutes a part of the exercise of religion. This includes any relationship to a parent or subsidiary and other applicable aspects of organizational structure or form. A faith-based organization seeking loans under this program may rely on a reasonable, good faith interpretation in determining whether its relationship to any other person, group, organization, or entity is exempt from the affiliation rules under this provision, and SBA will not assess, and will not require participating lenders to assess, the reasonableness of the faith-based organization's determination.

3. Additional Information

SBA may provide further guidance, if needed, through SBA notices and a program guide which will be posted on SBA's website at *www.sba.gov.*

Questions on the Paycheck Protection Program 7(a) Loans may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

Compliance With Executive Orders 12866, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will impose recordkeeping or reporting requirements under the Paperwork Reduction Act (''PRA''). SBA has obtained emergency approval under OMB Control Number 3245–0407 for the information collection (IC) required to implement the program described above. This IC consists of Form 2483 (Paycheck Protection Program Application Form) and SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty) SBA Form 3506 (CARES Act Section 1102 Lender Agreement), and SBA Form 3507 (CARES Act Section 1102 Lender Agreement—Non-Bank and Non-Insured Depository Institution Lender). The collection is approved for use until October 31, 2020.

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business

Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are ''small entities.'' Similarly, for purposes of the RFA, individual persons are not small entities.

The requirement to conduct a regulatory impact analysis does not apply if the head of the agency ''certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, ''along with a statement providing the factual basis for such certification.'' If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b).

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Ac. Ch.1. p.9.* Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Authority delegations (Government agencies), Intergovernmental relations, Investigations, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Small Business Administration amends 13 CFR part 121 as set forth below:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for part 121 is revised to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(a)(36), 662, and 694a(9); Pub. L. 116–136, Section 1114.

■ 2. Amend § 121.103 by adding paragraph (b)(10) to read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(b) * * *

(10)(i) The relationship of a faith-based organization to another organization is not considered an affiliation with the other organization under this subpart if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion. In addition, the eligibility criteria set forth in 15 U.S.C. 636(a)(36)(D) are satisfied for any faith-based organization having not more than 500 employees (including individuals employed on a full-time, part-time, or other basis) that pays Federal payroll taxes using its own Internal Revenue Service Employer Identification Number (EIN) or that would support a deduction under the second sentence of 26 U.S.C. 512(b)(12) if the organization generated unrelated business taxable income. For purposes of this paragraph (b)(10), the term ''faith-based organization'' includes, but is not limited to, any organization associated with a church or convention or association of churches within the meaning of 26 U.S.C. 414(e)(3)(D). The term ''organization'' has the meaning given in 26 U.S.C. 414(m)(6)(A). The terms ''church'' and ''convention or association of churches'' have the same meaning that they have in 26 U.S.C. 414.

(ii) No specific process or filing is necessary to claim the benefit of the exemption in paragraph (b)(10)(i) of this section. In applying for a loan under the Paycheck Protection Program (PPP), a faith-based organization may make all necessary certifications with respect to common ownership or management or other eligibility criteria based upon affiliation, if the organization would be an eligible borrower but for application of SBA affiliation rules and if the organization falls within the terms of the exemption described in paragraph (b)(10)(i) of this section. If a faith-based organization indicates any relationship that may pertain to affiliation, such as ownership of, ownership by, or common management with any other organization, on or in connection with a loan application, and if the faith-based organization applying for a loan falls within the terms of the exemption described in paragraph (b)(10)(i) of this section with respect to that relationship, the faith-based organization may indicate on a separate sheet that it is entitled to the exemption. That sheet may be identified as addendum A, and no further listing of the other organization or description of the relationship to that organization is required. See appendix A to this part for a sample ''Addendum A'', but the format need not be used as long as the substance is the same.

* * * * *

■ 3. Add appendix A to part 121 to read as follows:

Appendix A to Part 121—Paycheck Protection Program Sample Addendum A

[Sample]

ADDENDUM A

✓ The Applicant claims an exemption from all SBA affiliation rules applicable to Paycheck Protection Program loan eligibility because the Applicant has made a reasonable, good faith determination that the Applicant qualifies for a religious exemption under 13 CFR 121.103(b)(10), which says that ''[t]he relationship of a faith-based organization to another organization is not considered an affiliation with the other organization . . . if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion.''

Jovita Carranza,

Administrator.

[FR Doc. 2020–07673 Filed 4–10–20; 4:15 pm]

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may seek clarification of or guidance on complying with competitive bidding rules and procedures, reporting requirements, and the FCC's auction bidding system. An FCC Auctions Hotline provides access to Commission staff for information about the auction process and procedures. The FCC Auctions Technical Support Hotline is another resource which provides technical assistance to applicants, including small entities, on issues such as access to or navigation within the electronic FCC Form 175 and use of the FCC's auction bidding system. Small entities may also use the web-based, interactive online tutorial produced by Commission staff to familiarize themselves with auction procedures, filing requirements, bidding procedures, and other matters related to an auction.

103. The Commission also makes various databases and other sources of information, including the Auctions program websites and copies of Commission decisions, available to the public without charge, providing a low-cost mechanism for small entities to conduct research prior to and throughout the auction. Prior to and at the close of Auction 107, the Commission will post public notices on the Auctions website, which articulate the procedures and deadlines for the auction. The Commission makes this information easily accessible and without charge to benefit all Auction 107 applicants, including small entities, thereby lowering their administrative costs to comply with the Commission's competitive bidding rules.

104. Prior to the start of bidding, eligible bidders are given an opportunity to become familiar with auction procedures and the bidding system by participating in a mock auction. Further, the Commission intends to conduct Auction 107 electronically over the internet using its web-based auction system that eliminates the need for bidders to be physically present in a specific location. Qualified bidders also have the option to place bids by telephone. These mechanisms are made available to facilitate participation in Auction 107 by all eligible bidders and may result in significant cost savings for small business entities that use these alternatives. Moreover, the adoption of bidding procedures in advance of the auction, consistent with statutory directive, is designed to ensure that the auction will be administered predictably and fairly for all participants, including small entities.

105. For Auction 107, the Commission proposes a $25 million cap on the total amount of bidding credits that may be awarded to an eligible small business and a $10 million cap on the total amount of bidding credits that may be awarded to a rural service provider. In addition, the Commission propose a $10 million cap on the overall amount of bidding credits that any winning small business bidder may apply to winning licenses in markets with a population of 500,000 or less. Based on the technical characteristics of the 3.7–3.98 band and the Commission's analysis of past auction data, the Commission anticipates that its proposed caps will allow the majority of small businesses to take full advantage of the bidding credit program, thereby lowering the relative costs of participation for small businesses.

106. The proposed procedures for the conduct of Auction 107 constitute the more specific implementation of the competitive bidding rules contemplated by Parts 1 and 30 of the Commission's rules, the *3.7 GHz Report and Order,* and relevant competitive bidding orders, and are fully consistent therewith.

107. *Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules.* None.

108. *Ex Parte Rules.* This proceeding has been designated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making oral *ex parte* presentations must file a copy of any written presentations or memoranda summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine Period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to the Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Commission rule 1.1206(b). In proceedings governed by Commission rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Federal Communications Commission.

Cecilia Sigmund,

Federal Register Liaison Officer.

[FR Doc. 2020–06451 Filed 4–24–20; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5 and 7

[FAR Case 2019–003; Docket No. FAR–2019–0029, Sequence No. 1]

RIN 9000–AN86

Federal Acquisition Regulation: Consolidation and Substantial Bundling

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016, which requires providing public notices of determinations for substantial bundling and consolidation of contract requirements.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before June 26, 2020 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2019–003 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by

entering ''FAR Case 2019–003''. Select the link ''Comment Now'' that corresponds with FAR Case 2019–003. Follow the instructions provided on the screen. Please include your name, company name (if any), and ''FAR Case 2019–003'' on your attached document.

- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR Case 2019–003 in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential 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. Kevin Funk, Procurement Analyst, at 202–357–5805 or via email at *kevin.funk@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite ''FAR Case 2019–003''.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the FAR to implement section 863 of the NDAA for FY 2016 (Pub. L. 114–92, codified at 15 U.S.C. 644(e)(3) and 15 U.S.C. 657q(c)(2)) and SBA's implementing regulations. Section 863 requires public notification of an agency's determination to substantially bundle or consolidate contract requirements.

Specifically, publication of a notice is required when the head of a contracting agency determines that an acquisition plan for a procurement involves substantial bundling of contract requirements. The head of the contracting agency must publish a notice on a public website that such determination has been made not later than 7 days after making the determination. Any solicitation for a procurement related to the acquisition plan may not be published earlier than 7 days after such notice is published. A justification for the determination must be published with the solicitation. The justification must address the specific benefits anticipated, any alternative approaches, impediments to participation by small business concerns as prime contractors, and actions designed to maximize participation of small business concerns as subcontractors. See 15 U.S.C. 644(e)(3)(A) through (C) for a list of the requirements.

Section 863 also requires publication of a notice when the senior procurement executive (SPE) or chief acquisition officer (CAO) makes a determination that an acquisition strategy involving consolidation of contract requirements is necessary and justified under 15 U.S.C. 657q(c)(2)(A). The SPE or CAO must publish a notice on a public website that such determination has been made not later than 7 days after making the determination. Any solicitation for a procurement related to the acquisition strategy may not be published earlier than 7 days after such notice is published. A justification for the determination must be published with the solicitation. The justification must include the information in 15 U.S.C. 657q(c)(1)(A) through (E).

SBA published a rule to implement section 863 on November 29, 2019, at 84 FR 65647. SBA's implementation is very similar to the statutory language.

II. Discussion and Analysis

The proposed changes to the FAR are summarized in the following paragraphs.

A. Notification of Substantial Bundling

At FAR 7.107–5, Notifications, a requirement is added for publication of a notification of substantial bundling on the Governmentwide point of entry (GPE). Any solicitation for a procurement may not be published earlier than 7 days after a notice is published concerning a determination that the procurement involves substantial bundling of contract requirements. The head of the agency must also publish in the GPE the rationale for substantial bundling with the publication of the solicitation. The rationale must address the information required at 7.107–4(b), such as the specific benefits anticipated, any alternative approaches, impediments to participation by small business concerns as prime contractors, and actions designed to maximize participation of small business concerns as subcontractors. A reference to the notification requirement at FAR 7.107–5 is added to FAR 5.205, Special situations.

B. Notification of Consolidation

At 7.107–5, Notifications, a requirement is added for the SPE or CAO to publish a notice on the GPE that a determination has been made that a consolidation of contract requirements is necessary and justified. The SPE or CAO must also publish the determination that consolidation is necessary and justified with the publication of the solicitation. A reference to the notification requirement at FAR 7.107–5 is added to FAR 5.205, Special situations.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule proposes to implement a statutory requirement for Federal agencies to provide notifications to the public on consolidation and substantial bundling of contract requirements. No solicitation provisions or contract clauses are being created or revised in this proposed rule.

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. Executive Order 13771

This proposed rule is not expected to be subject to E.O. 13771, Reducing Regulation and controlling Regulatory Costs, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

The change may 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.* The Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement section 863 of the National Defense Authorization Act for 2016 (Pub. L. 114–92, codified at 15 U.S.C. 644(e)(3) and 15 U.S.C. 657q(c)(2)) and the

Small Business Administration (SBA) implementing regulations. Section 863 requires that, if the head of a contracting agency determines that an acquisition plan involves a substantial bundling of contract requirements, the head of the agency shall publish a notice of such determination on a public website within 7 days of making such determination. Additionally, section 863 requires, upon determining that a consolidation of contract requirements is necessary and justified, the senior procurement executive (SPE) or chief acquisition officer (CAO) shall publish a notice on a public website that such determination has been made and that an agency may not issue the solicitation any earlier than 7 days after publication of such notice. The SPE or CAO must also publish the justification along with the solicitation.

The objective of this rule is to implement section 863 of the NDAA for FY 2016 and SBA's implementing regulations. The legal basis for the rule is section 863 of the NDAA for FY 2016.

This rule may have a positive economic impact on any small entity that is interested in participating in Federal procurement. By posting justifications and notices of upcoming procurements which are planned to be substantially bundled or consolidated, small business concerns are made aware of potential subcontracting opportunities and possibilities for participating in joint ventures or small business teaming arrangements, which will help small businesses increase their competitiveness. The System for Award Management (SAM) shows 315,655 entities which are small business concerns under at least one North American Industry Classification System code.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities.

This proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches that would accomplish the stated objectives of the applicable statute.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the SBA. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA 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 comments separately and should cite 5 U.S.C. 610 (FAR case 2019–003) in correspondence.

VII. Paperwork Reduction Act

This 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 5 and 7

Government procurement.

William F. Clark,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR part(s) 5 and 7, as set forth below:

■ 1. The authority citation for 48 CFR part(s) 5 and 7 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 5—PUBLICIZING CONTRACT ACTIONS

■ 2. Amend section 5.205 by revising paragraph (g) to read as follows:

5.205 Special Situations.

* * * * *

(g) *Notifications to the public regarding consolidation, bundling, or substantial bundling.* (1) For the requirement to publish a notification of consolidation or substantial bundling of contract requirements, see 7.107–5(c) and (d).

(2) The agency is encouraged to provide notification of the rationale for any bundled requirement to the GPE before issuing the solicitation of any bundled requirement (see 7.107–5(b)).

PART 7—ACQUISITION PLANNING

7.105 [Amended]

■ 3. Amend section 7.105 by removing from paragraph (b)(16) ''GPE'' and adding ''Governmentwide point of entry (GPE)'' in its place.

7.107–1 [Amended]

■ 4. Amend section 7.107–1 by removing from paragraph (a) ''7.107–3 and 7.107–4'' and adding ''7.107–3, 7.107–4, and 7.107–5'' in its place.

7.107–2 [Amended]

■ 5. Amend section 7.107–2 by:

■ a. In paragraph (a) introductory text removing the words ''procurement executive'' and ''acquisition officer'' and adding in their place ''procurement executive (SPE)'' and ''acquisition officer (CAO)'', respectively;

■ b. In from paragraph (b) removing the words ''senior procurement executive or chief acquisition officer'' and ''subsection'' and adding in their place ''SPE or CAO'' and ''section'', respectively;

■ c. In from paragraph (d)(3) removing the words ''senior procurement executive or chief acquisition officer'' and adding in their place ''SPE or CAO'';

■ d. In paragraph (e)(1) introductory text removing the word ''subsection'' wherever it appears and adding in its place ''section'';

■ e. In paragraph (e)(1)(i) removing the word ''subsection'' and adding in its place the word ''section''; and

■ f. In paragraph (e)(2)(i) removing the words ''senior procurement executive'' and adding in their place ''SPE''.

■ 6. Amend section 7.107–5 by:

■ a. Revising paragraph (b);

■ b. Redesignating paragraphs (c) and (d) as paragraphs (e) and (g), and adding new paragraphs (c), (d), and (f); and

■ c. In newly redesignated paragraph (g) removing the words ''*Public notification*'' and adding in their place ''*Notification to public*''.

The revision and additions read as follows:

7.107–5 Notifications.

* * * * *

(b) *Notification to public of rationale for bundled requirement.* The agency is encouraged to provide notification of the rationale for any bundled requirement to the GPE, before issuance of the solicitation (see 5.201).

(c) *Notification to public of consolidation of contract requirements.* The SPE or CAO shall publish in the GPE—

(1) A notice that the agency has determined a consolidation of contract requirements is necessary and justified (see 7.107–2) no later than 7 days after making the determination; the solicitation may not be publicized prior to 7 days after publication of the notice of the determination; and

(2) The determination that consolidation is necessary and justified with the publication of the solicitation. See 7.107–2 for the required content of the determination.

(d) *Notification to public of substantial bundling of contract requirements.* The head of the agency shall publish in the GPE—

(1) A notice that the agency has determined that a procurement involves substantial bundling (see 7.107–4) no later than 7 days after such determination has been made; the solicitation may not be publicized prior to 7 days after publication of the notice of the determination; and

(2) The rationale for substantial bundling with the publication of the solicitation. The rationale is the

information required for inclusion in the acquisition strategy at 7.107–4(b).

* * * * *

(f) *Annual notification to public of rationale for bundled requirements.* The agency shall publish on its website a list and rationale for any bundled requirement for which the agency solicited offers or issued an award. The notification shall be made annually within 30 days of the agency's data certification regarding the validity and verification of data entered in the Federal Procurement Data System to the Office of Federal Procurement Policy (see 4.604).

* * * * *

[FR Doc. 2020–08005 Filed 4–24–20; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2019–0080; FXES11130900000C2–189–FF09E42000]

RIN 1018–BD82

Endangered and Threatened Wildlife and Plants; Removing Arenaria cumberlandensis (Cumberland Sandwort) From the Federal List of Endangered and Threatened Plants

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to remove Cumberland sandwort (*Arenaria cumberlandensis*) from the Federal List of Endangered and Threatened Plants (List). We also announce the availability of a draft post-delisting monitoring (PDM) plan for the Cumberland sandwort. We seek information, data, and comments from the public on this proposed rule and on the associated draft PDM plan. If this proposal is finalized, the Cumberland sandwort will be removed from the List.

DATES: We will accept comments received or postmarked on or before June 26, 2020. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by June 11, 2020.

ADDRESSES: You may submit comments on this proposed rule and draft PDM plan by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–R4–ES–2019–0080, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R4–ES–2019–0080; U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see *Public Comments,* below, for more information).

Document availability: The proposed rule, draft PDM plan, and supporting documents are available at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2019–0080.

FOR FURTHER INFORMATION CONTACT: Lee Andrews, Field Supervisor, U.S. Fish and Wildlife Service, Tennessee Ecological Services Field Office, 446 Neal Street, Cookeville, Tennessee, 38501; telephone (931) 528–6481. Individuals who use a telecommunications device for the deaf (TDD), may call the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act of 1973, as amended (Act), we are required to conduct a review of all listed species at least once every 5 years (5-year review) to review their status and determine whether they should be classified differently or removed from listed status. In our 2013 5-year review for the Cumberland sandwort, we recommended reclassifying the species from endangered to threatened. We initiated another 5-year review for the species on May 7, 2018 (83 FR 20093), and determined the species met the criteria for delisting. Therefore, we are publishing this proposed rule to delist the species.

What this document does. This document proposes to remove the Cumberland sandwort from the List. It also announces the availability of a draft PDM plan for the Cumberland sandwort. This determination is based on a thorough review of the best available scientific and commercial data, which indicate that the Cumberland sandwort has recovered and no longer meets the definition of an endangered or a threatened species under the Act. Our review shows that threats to the species identified at the time of listing (*i.e.,* timber harvesting, trampling from recreational uses, and digging for archaeological artifacts) have been reduced to the point that they no longer threaten the species, and the Cumberland sandwort has increased in abundance and range. Our review also indicates that potential effects of projected climate change are not expected to cause the species to become endangered in the foreseeable future.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of one or more of the five factors described in section 4(a)(1) of the Act. We must consider the same factors in removing a species from the List (delisting) in determining whether a species meets the definition of an endangered species or a threatened species.

Here, we have determined that the Cumberland sandwort may be considered for delisting based on recovery. In the rule listing the Cumberland sandwort (53 FR 23745, June 23, 1988), the primary threats identified for the species were the destruction and modification of habitat (Factor A) due to trampling by recreational users of the rockhouse and bluff habitats where the species occurs, trampling and soil disturbance from looting of archeological artifacts (*i.e.,* relic digging), and timber harvesting in or adjacent to occupied sites. While some habitats occupied by Cumberland sandwort are exposed to these potential stressors, many are protected from these activities, and available data support the determination that the species is more resilient to these threats than was assumed at the time of listing. The listing rule also discussed limited distribution and small population size (Factor E), along with inadequate regulatory mechanisms for preventing habitat destruction (Factor D), as factors contributing to the species' endangerment. However, our review of the status of and listing factors for the Cumberland sandwort indicated: (1) An increase in the number of occurrences of the species within its geographically restricted range and increased abundance in some occurrences; (2) resiliency to existing and potential threats; (3) the protection of 66 extant occurrences located on Federal and State conservation lands by regulations

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60–1

RIN 1250–AA09

Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule.

SUMMARY: The U.S. Department of Labor's (DOL's) Office of Federal Contract Compliance Programs (OFCCP) publishes this final rule to clarify the scope and application of the religious exemption. These clarifications to the religious exemption will help organizations with federal government contracts and subcontracts and federally assisted construction contracts and subcontracts better understand their obligations.

DATES: *Effective Date:* These regulations are effective January 8, 2021.

FOR FURTHER INFORMATION CONTACT: Tina Williams, Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C–3325, Washington, DC 20210. Telephone: (202) 693–0104 (voice) or (202) 693–1337 (TTY).

SUPPLEMENTARY INFORMATION:

I. Executive Summary

On August 15, 2019, OFCCP issued a notice of proposed rulemaking (NPRM) to clarify the scope and application of Executive Order 11246's (E.O. 11246) religious exemption consistent with recent legal developments. 84 FR 41677. During the 30-day public comment period, OFCCP received 109,726 comments on the proposed rule.[1] This total included over 90,000 comments generated by organized comment-writing efforts. Comments came from individuals and from a wide variety of organizations, including religious organizations, universities, civil rights and advocacy organizations, contractor associations, legal organizations, labor organizations, and members of Congress. Comments addressed all aspects of the NPRM. OFCCP appreciates the public's robust participation in this rulemaking, and the agency has revised certain aspects of this regulation in response to commenters' concerns.

As stated in the NPRM, on July 2, 1964, President Lyndon B. Johnson signed the landmark Civil Rights Act of 1964. *See* Public Law 88–352, 78 Stat. 241. This legislation prohibited discrimination on various grounds in many of the most important aspects of civic life. Its Title VII extended these protections to employment opportunity, prohibiting discrimination on the basis of race, color, religion, sex, or national origin. In Title VII, Congress also provided a critical accommodation for religious employers. Congress permitted religious employers to take religion into account for employees performing religious activities: ''This title shall not apply . . . to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities . . . .'' Public Law 88–352, 702(a), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. 2000e–1(a)). Congress provided a similar exemption for religious educational institutions. *See id.* § 703(e)(2), 78 Stat. at 256 (codified at 42 U.S.C. 2000e–2(e)(2)).

Title VII's protections for religious organizations were expanded by Congress in 1972 into their current form. Congress added a broad definition of ''religion'': ''The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.'' Equal Employment Opportunity Act of 1972, Public Law 92–261, 2(7), 86 Stat. 103 (codified at 42 U.S.C. 2000e(j)). Congress also added educational institutions to the list of those eligible for section 702's exemption. In addition, Congress broadened the scope of the section 702 exemption to cover not just religious activities, but all activities of a religious organization: ''This title [VII] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.'' *Id.* § 3, 86 Stat. at 104 (codified at 42 U.S.C. § 2000e–1(a)). The Supreme Court unanimously upheld this expansion of the religious exemption to all activities of religious organizations against an Establishment Clause challenge. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos,* 483 U.S. 327, 330 (1987).[2]

One year after President Johnson signed the Civil Rights Act, he signed E.O. 11246, requiring equal employment opportunity in federal government contracting. The order mandated that all government contracts include a provision stating that ''[t]he contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.'' Exec. Order No. 11246, § 202, 30 FR 12319, 12320 (Sept. 28, 1965). Two years later, President Johnson expressly acknowledged Title VII of the Civil Rights Act when expanding E.O. 11246 to prohibit, as does Title VII, discrimination on the bases of sex and religion. *See* Exec. Order No. 11375, § 3, 32 FR 14303–04 (Oct. 17, 1967). In 1978, the responsibilities for enforcing E.O. 11246 were consolidated in DOL. *See* Exec. Order No. 12086, 43 FR 46501 (Oct. 5, 1978). In its implementing regulations, DOL imported Title VII's exemption for religious educational institutions. *See* 43 FR 49240, 49243 (Oct. 20, 1978) (now codified at 41 CFR 60–1.5(a)(6)); *cf.* 42 U.S.C. 2000e–2(e)(2). In 2002, President George W. Bush amended E.O. 11246 by expressly importing Title VII's exemption for religious organizations, which likewise has since been implemented by DOL's regulations. *See* Exec. Order No. 13279, § 4, 67 FR 77143 (Dec. 16, 2002) (adding E.O. 11246 § 202(c)); 68 FR 56392 (Sept. 30, 2003) (codified at 41 CFR 60–1.5(a)(5)); *cf.* 42 U.S.C. 2000e–1(a).

Because the exemption administered by OFCCP springs directly from the Title VII exemption, it should be given a parallel interpretation, consistent with the Supreme Court's repeated counsel that the decision to borrow statutory text in a new statute is a ''strong indication that the two statutes should be interpreted pari passu.'' *Northcross* v. *Bd. of Educ. of Memphis City Sch.,* 412 U.S. 427, 428 (1973) (per curiam). OFCCP thus generally interprets the nondiscrimination provisions of E.O. 11246 consistent with the principles of Title VII. Because OFCCP regulates federal contractors rather than private employers generally, OFCCP must apply Title VII principles in a manner that

[1] Of the 109,726 comments, 35 comments were inadvertently posted on *Regulations.gov* before redactions were made. The posted comments were withdrawn, redacted, and then reposted. When the comments were reposted, the number of comments on *Regulations.gov* increased to 109,761.

[2] Justice White wrote the majority opinion for five justices. Justices O'Connor, Blackmun, and Brennan (with Justice Marshall joining) wrote opinions concurring in the judgment.

best fit its unique field of regulation, including when applying the religious exemption.

With that said, there has been some variation among federal courts of appeals in interpreting the scope and application of the Title VII religious exemption, and many of the relevant Title VII court opinions predate Supreme Court decisions and executive orders that shed light on the proper interpretation. The purpose of this final rule is to clarify the contours of the E.O. 11246 religious exemption and the related obligations of federal contractors and subcontractors to ensure that OFCCP respects religious employers' free exercise rights, protects workers from prohibited discrimination, and defends the values of a pluralistic society. *See, e.g., Bostock* v. *Clayton Cnty.,* 140 S. Ct. 1731, 1754 (2020) (''[T]he promise of the free exercise of religion . . . lies at the heart of our pluralistic society.''). This rule is intended to correct any misperception that religious organizations are disfavored in government contracting by setting forth appropriate protections for their autonomy to hire employees who will further their religious missions, thereby providing clarity that may expand the eligible pool of federal contractors and subcontractors.

Recent Supreme Court decisions have addressed the freedoms and antidiscrimination protections that must be afforded religion-exercising organizations and individuals under the U.S. Constitution and federal law. *See, e.g., Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1731 (2018) (holding the government violates the Free Exercise Clause of the First Amendment when its decisions are based on hostility to religion or a religious viewpoint); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012, 2022 (2017) (holding the government violates the Free Exercise Clause of the First Amendment when it decides to exclude an entity from a generally available public benefit because of its religious character, unless that decision withstands the strictest scrutiny); *Burwell* v. *Hobby Lobby Stores, Inc.,* 573 U.S. 682, 719 (2014) (holding the Religious Freedom Restoration Act applies to federal regulation of the activities of for-profit closely held corporations); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC,* 565 U.S. 171, 196 (2012) (holding the ministerial exception, grounded in the Establishment and Free Exercise clauses of the First Amendment, bars an employment-discrimination suit brought on behalf of a minister against the religious school for which she worked). Recent executive orders have done the same. *See* Exec. Order No. 13831, 83 FR 20 715 (May 8, 2018); Exec. Order No. 13798, 82 FR 21 675 (May 9, 2017). Additional decisions from the Supreme Court, issued after the NPRM, have likewise extended Title VII's protections while affirming the importance of religious freedom. *See Bostock,* 140 S. Ct. at 1754 (holding Title VII's prohibition on discrimination because of sex prohibits ''fir[ing] an individual merely for being gay or transgender''); *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania,* 140 S. Ct. 2367, 2379–84 (2020) (holding the Departments of Labor, Health and Human Services, and the Treasury had authority to promulgate religious and conscience exemptions from the Affordable Care Act's contraceptive mandate); *Espinoza* v. *Mont. Dep't of Revenue,* 140 S. Ct. 2246 (2020) (a state ''cannot disqualify some private schools [from a subsidy program] solely because they are religious'' without violating the Free Exercise clause); and *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru,* 140 S. Ct. 2049, 2069 (2020) (holding the ministerial exception applies ''[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith''). These decisions are discussed in the final rule's analysis as appropriate and applicable.

In this final rule, OFCCP has sought to follow the principles articulated by these recent decisions and orders, and has interpreted older federal appellate-level case law in light of them as applicable. OFCCP has chosen a path consistent with the Supreme Court's religion and Title VII jurisprudence as well as what OFCCP views to be the more persuasive reasoning of the federal courts of appeals in these areas of the law.

A. Title VII and the EEOC Generally

Some commenters on the NPRM agreed that OFCCP's proposal was appropriately consistent with Title VII principles. For example, a faith-based advocacy organization commented that the religious employer exemption in federal contracting regulations is modeled on Title VII, and should therefore be understood ''in the strong way'' the Title VII exemptions have traditionally been understood.

Other commenters asserted that OFCCP's proposal was inconsistent with Title VII overall. Some of these commenters stated that the proposal's interpretation of the exemption was contrary to congressional intent. For example, an affirmative action professionals association commented that Congress has repeatedly declined to extend the Title VII exemption to government-funded entities. A lesbian, gay, bisexual, and transgender (LGBT) rights advocacy organization commented that, at the time Title VII was enacted, Congress could not have envisioned that religious organizations that would qualify for the Title VII exemption would also seek to contract with the federal government, ''let alone be given a broad right to discriminate based on religion while accepting federal funding.''

In a related vein, OFCCP also received comments objecting generally to the provision of a religious exemption for federal contractors or specifically to OFCCP's proposal. Most of these commenters characterized the religious exemption as taxpayer- or government-funded discrimination that was contrary to the purpose of E.O. 11246. For example, an affirmative action professionals association commented that ''[t]he Federal Government should not be in the business of funding employment discrimination'' and emphasized that religious organizations should not expect to maintain autonomy and independence from the government when they solicit and accept government contracts. An international labor organization submitted a similar comment, stating that organizations that choose to accept government funding through government contracts should not be allowed to conduct what it described as discrimination against qualified job applicants and employees.

Relatedly, a public policy research and advocacy organization commented that no one should be disqualified from a taxpayer-funded job because they are the ''wrong'' religion or do not adhere to any religion. A technology company commented that the proposal conflicted with the spirit of nondiscrimination law. A group of U.S. Senators commented: ''The government cannot use religious exemptions as a pretext to permit discrimination against or harm others.''

Some religious organizations were among the commenters that opposed the provision of a religious exemption for federal contractors. One religious organization commented that, in line with its commitment to religious freedom, it opposed granting government contracts to organizations that, in its words, discriminate against qualified individuals based on their practices and beliefs. One religious organization commented that barring people from taxpayer-funded jobs based on their faith violates principles of equality and meritocracy. Another faith-

based organization cited First Amendment separation of church and state principles, and commented that, while some religious organizations hire staff based on religion, accommodations for religious hiring should not be applied broadly in the federal contracts context, as federal contracts are not provided to advance religious ends. Other commenters stated that the proposal's expansion of the exemption was contrary to Title VII case law or principles. For example, an international labor organization commented that, in its view, the proposed rule mischaracterized federal case law in order to transform provisions designed to protect workers from religious discrimination into exemptions that would allow federally funded employers to discriminate against workers for religious reasons.

Some commenters stated that the proposal was inconsistent with the interpretation of Title VII by the EEOC, the agency primarily responsible for enforcing Title VII. A group of state attorneys general commented that OFCCP should not undermine the EEOC's efforts, ''as would occur under the Proposed Rule, which takes positions contrary to the EEOC.'' The state attorneys general asserted that the proposal would not increase clarity because it would create two separate legal standards for federal contractors and OFCCP staff—one under Title VII and one under E.O. 11246. A contractor association asserted that ''federal contractors could face the Hobson's choice of determining whether compliance with an OFCCP regulation will result in liability under Title VII.'' Other commenters stated that the overall proposal departed from OFCCP's prior interpretation, which they asserted had been consistent with the EEOC's interpretation of Title VII prior to August 2018, when OFCCP issued Directive 2018–03, concerning the religious exemption in section 204(c) of E.O. 11246. For example, a public policy research and advocacy organization asserted that, until August 2018, the Department consistently interpreted the E.O. 11246 religious exemption narrowly to permit preferences for coreligionists by certain religious organizations, and applied the ''motivating factor'' test to evaluate claims of discrimination.

OFCCP agrees with the comments stating that the rule will provide necessary clarity for contractors and potential contractors about the scope of the E.O. 11246 religious exemption. Regarding comments that a religious exemption protecting government contractors is contrary to congressional intent or that such an exemption is misplaced in the government contracting context, that question is not at issue in this rulemaking. The religious exemption was added to E.O. 11246 almost twenty years ago, and OFCCP's implementing regulations are nearly as old. The existence of the exemption itself is not at issue in this rulemaking.

Regarding comments that the rule deviates from the EEOC's interpretation of the Title VII religious exemption or creates two separate standards, OFCCP believes these concerns are unfounded. This rule is restricted to the application of the religious exemption. The vast majority of contractors and their employees, as well as OFCCP's enforcement program, will be unaffected by this rule. As for the religious exemption specifically, OFCCP has followed the Title VII case law it finds most persuasive, especially in light of the principles of religious equality and autonomy reinforced by recent executive orders and Supreme Court decisions. OFCCP has also adapted Title VII principles to ensure a proper fit in the government contracting context. OFCCP's specific choices in this regard and how they compare to the EEOC's stated views are explained more fully in the section-by-section discussion and a section at the end of this preamble. OFCCP has also made some revisions to align this rule even more closely with Title VII. But even assuming any variation with the EEOC as to the exemption, this rule does not create a ''Hobson's choice'' for government contractors. The exemption, to describe it most broadly, is an optional accommodation for religious organizations, not a requirement mandating compliance. In the rare, hypothetical instance where a contractor would be entitled to the E.O. 11246 exemption but not the Title VII exemption, the contractor would not face conflicting liability regardless of its choice: Rather, it would face potential liability under one enforcement scheme rather than two. OFCCP acknowledges that it is often helpful to regulated parties for regulators to try to harmonize their approaches when enforcing related legal requirements. OFCCP believes its approach here is consistent with Title VII and religious-accommodation principles, adapted appropriately to its own regulatory context and the government contracting community.

OFCCP also is not concerned about this rule purportedly decreasing clarity by creating two standards for additional reasons. For one, it was not a concern primarily raised by commenters who may qualify for the E.O. 11246 religious exemption. Those commenters—the ones who would actually need to negotiate the purportedly two different standards—were by and large supportive of the rule and did not raise this concern. For another, OFCCP believes that this rule, which incorporates many recent Supreme Court decisions and other case law and is in accord with recent Executive Orders and guidance from the Department of Justice, offers clarity as compared to less recent guidance from EEOC that does not incorporate these more recent developments.

B. The Relevance of Recent Supreme Court Cases

Commenters both supported and opposed OFCCP's acknowledgement of recent Supreme Court cases granting antidiscrimination protections for persons bringing religious claims in a variety of contexts. These cases included *Hobby Lobby, Trinity Lutheran,* and *Masterpiece Cakeshop.* Supreme Court decisions in employment and religion cases issued after the proposed rule's publication are addressed elsewhere in the preamble as appropriate.

Some commenters expressed support for OFCCP's interpretations of these Supreme Court cases and their application to the proposal in general. For example, a group of members of the U.S. House of Representatives noted approvingly that the proposed rule was consistent with these cases, each of which ''came with the cost'' of religious Americans shouldering the material, emotional, and spiritual burdens associated with litigating issues related to their faith. Discussing *Masterpiece Cakeshop,* a religious public policy women's organization commented that the Supreme Court in that case acknowledged ''the blatant, systematic government bias'' against the owner of Masterpiece Cakeshop for refusing to participate in a same-sex wedding ceremony, noting that the owner continues to be harassed for his faith ''to this day.'' The commenter stated that this and other such cases prove that further clarification regarding existing First Amendment protections are necessary. Addressing *Trinity Lutheran,* a religious public policy advocacy organization asserted that the Supreme Court in that case made clear that Trinity Lutheran Church's status as a church did not prevent it from participating on an equal playing field with secular organizations in seeking government grants. The commenter continued that OFCCP's proposed rule simply reaffirmed a principle the

Supreme Court had held to be consistent with the First Amendment.

Other commenters criticized OFCCP's reliance on these Supreme Court cases. Many of these commenters stated that the cases were inapplicable because they did not involve federal contractors. For example, a secular humanist advocacy organization criticized the proposed rule for its reliance on case law unrelated to employment discrimination laws or the text of E.O. 11246. Many of the commenters stated that the cases cited, if interpreted properly, did not provide support for OFCCP's proposal. For example, a labor union commented that the decisions cited did not authorize ''the expansive view that the Proposed Rule seeks to support.'' A group of U.S. Senators commented: ''The Court has long held federally-funded employers cannot use religion to discriminate. Each of the cases cited in the proposed rule are consistent with that approach.''

Many of the commenters who criticized OFCCP's discussion of *Masterpiece Cakeshop* pointed to this sentence from the Court's opinion: ''While . . . religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.'' 138 S. Ct. at 1727. A labor union asserted that *Masterpiece Cakeshop* was irrelevant in the ''entirely secular'' context of federal contracting, and argued that the Establishment Clause dictates that federal contracting must be entirely secular. A transgender civil rights organization commented that, in the proposed rule, OFCCP did not suggest that its existing requirements or prior conduct reflect the sort of hostility to religious beliefs that the Court was concerned with in *Masterpiece Cakeshop,* and noted that, on the contrary, ''EEO requirements for federal contractors fall squarely within the 'general rule' stated by the Court.'' A group of state attorneys general commented that, if anything, *Masterpiece Cakeshop* stands for the proposition that overly broad religious objections to civil rights laws of general applicability are inappropriate.

Commenters also criticized OFCCP's discussion of *Trinity Lutheran.* Many of these commenters read the decision narrowly—as holding that ''the state violated the First Amendment by denying a public benefit to an otherwise eligible recipient solely on account of its religious status,'' as one contractor association described it—and asserted that the decision was therefore inapplicable to OFCCP's proposal. Some of these commenters pointed to a footnote in the Court's opinion limiting it to ''express discrimination based on religious identity with respect to playground resurfacing.'' *Trinity Lutheran,* 137 S. Ct. at 2024 n.3. Many commenters stated that there are legally significant distinctions between government grant programs and government contracts. A labor union argued, regarding the Supreme Court's decision, that it would have been perfectly lawful for the government to deny grants to religious applicants who restricted access to their playgrounds on the basis of sexual orientation, for example. The union also asserted that ''Federal contracting is not a generally available public benefit, but a reticulated system for the funding and delivery of governmental functions and services by private parties.'' A religious organization commented that *Trinity Lutheran* did not address whether a religious institution can discriminate with public funds, and stressed that the government's interest in prohibiting discrimination in taxpayer-funded jobs is ''of the highest order.'' A group of state attorneys general commented that the Court's decision drew a careful distinction between situations where a benefit is denied to an entity based solely that entity's religious identity and situations involving neutral and generally applicable laws that restrict an entity's actions. The group asserted that E.O. 11246's anti-discrimination provisions are directed toward the latter. An LGBT rights advocacy organization commented that, because the decision involved a religious grant applicant that had agreed to abide by certain nondiscrimination provisions, its holding was inapplicable in the federal contracting context where funding is awarded on a competitive basis, as well as in situations where the contractor has no intention of complying with governing nondiscrimination rules.

Some commenters similarly criticized OFCCP's discussion of *Hobby Lobby.* Many of these commenters quoted or paraphrased the following paragraph from the Supreme Court's decision:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. . . . Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

Hobby Lobby, 573 U.S. at 733. For example, a city public advocate argued that the *Hobby Lobby* decision affirmed that securing equal access to workplace participation is a compelling interest. A civil liberties and human rights legal advocacy organization commented that the Court in *Hobby Lobby* expressly declined to promulgate a rule authorizing for-profit corporations that willingly enter into contracts with the federal government to discriminate against workers ''because of who they are.'' A contractor organization commented that it is ''not at all clear'' that *Hobby Lobby* supports the idea that religious rights override any other legal rights, given that the decision concerns only the availability of government programs.

Finally, some commenters criticized OFCCP's discussion of *Hosanna-Tabor.* Many of these commenters pointed out that this case applied the (constitutionally grounded) ministerial exception developed by courts and not the (statutory) Title VII religious exemption enacted by Congress. Some commenters expressed doubt that the ministerial exception was applicable to federal contractors. For example, a transgender legal professional organization commented that, though the ministerial exception bars ministers from pursuing employment discrimination cases, most federal contractors are unlikely to employ ministers or others who ''preach or teach the faith.'' Other commenters expressed concern that OFCCP intended to broaden the scope of the religious exemption to mimic the ministerial exception and asserted that *Hosanna-Tabor* did not support such an expansion. For example, a labor union commented that the decision could not be read to extend the ministerial exception to lay people employed by religious institutions, or to private for-profit businesses whose owners may also hold religious beliefs.

OFCCP believes the critical comments here are misplaced because OFCCP did not acknowledge these Supreme Court cases for the propositions that commenters said the agency did. OFCCP acknowledged in the NPRM that these Supreme Court cases did not specifically address government contracting. And indeed, with the exception of *Hosanna-Tabor,* they did not specifically address employment law, Title VII, or E.O. 11246. Rather, OFCCP noted the recent Supreme Court cases for the general and commonsense propositions that the government must

be careful when its actions may infringe private persons' religious beliefs and that it certainly cannot target religious persons for disfavor. These principles are not new, but these recent cases show that those principles remain vital. That is especially important when government at times has been callous in its treatment of religious persons.[3] Those general themes of caution, permissible accommodation, and equality for religious persons have informed the policy approach in this rule. Where specific holdings or language in these Supreme Court decisions—and additional Supreme Court decisions issued since—suggest answers to specific aspects of this rule, they are noted in the section-by-section analysis. Comments on those more specific issues are addressed there as well.

C. Clarity and Need for the Rule

The NPRM noted that prior to its publication, some religious organizations provided feedback to OFCCP that they were reluctant to participate as federal contractors because of uncertainty regarding the scope of the religious exemption contained in section 204(c) of E.O. 11246 and codified in OFCCP's regulations. The NPRM also noted that while ''only a subset of contractors and would-be contractors may wish to seek this exemption, the Supreme Court, Congress, and the President have each affirmed the importance of protecting religious liberty for those organizations who wish to exercise it.'' 84 FR at 41679. The NPRM also noted throughout OFCCP's desire to provide clarity in this area of regulation.

OFCCP received numerous comments addressing the need for the proposed rule. Some commenters stated that the proposal was necessary to ensure that religious entities could contract with the federal government without compromising their religious identities or missions. Many of these commenters noted the important services provided by religious organizations. For example, a religious school association encouraged the federal government to protect religious staffing ''in all forms of federal funding,'' asserting that doing so would enable religious organizations to expand the critical services they provide. A religious liberties legal organization likewise commented that religious organizations are often uniquely equipped to respond to the needs of the communities they serve and predicted that the proposal would allow religious contractors to better ''order[ ] their affairs.'' A religious convention commission approved of the rule on the basis that the government should not be in the business of judging theology or privileging certain religious beliefs over others.

A few commenters expressed support for the proposal specifically because they believed it would exempt religious organizations from the prohibitions on discrimination based on sexual orientation and gender identity that were added when E.O. 11246 was amended by Executive Order 13672 (E.O. 13672). 79 FR 42971 (July 23, 2014). For example, a faith-based advocacy organization praised OFCCP for ''the important positive precedent that will be set by the proposed strong protection of the religious staffing freedom in the context of the requirement of no sexual-orientation or gender-identity employment discrimination in federal contracting.'' An evangelical chaplains' advocacy organization commented that ''E.O. 13672 . . . prohibited military chaplains from selecting religious support contractors who did not affirm sexual orientation, same-sex marriage and gender identity'' in violation of these chaplains' free exercise rights.

Some commenters agreed with OFCCP's observation that religious organizations have been reluctant to provide the government with goods or services as federal contractors because of the lack of clarity or perceived narrowness of the E.O. 11246 religious exemption. One individual commenter who identified himself as a legal adviser to federal contractors noted that imposing ''pass through'' contracting obligations on subcontractors can be challenging, as religious subcontractors often fear that complying with federal anti-discrimination laws will require them to compromise their religious integrity. Two other commenters offered examples or evidence of religious organizations' reluctance to participate in other contexts, such as federal grants. A religious medical organization cited a survey suggesting that many individuals working in faith-based organizations (FBOs) overseas feel that the government is not inclined to work with FBOs, and called for outreach programs to correct this perception.

A religious legal organization referenced an audit of the Department of Justice's Office of Justice Programs (OJP) which revealed that, though religious organizations were interested in participating in many programs, ''the percentage of OJP funds distributed to religious organizations to help the public through these programs was abysmally small—0.0025%.'' The organization cited the concern of religious organizations that their right to hire members of their faith would be eroded as one of the reasons for this discrepancy.

Many commenters expressed skepticism that religious organizations have been reluctant to participate as federal contractors because of the lack of clarity or perceived narrowness of the religious exemption. Most of these commenters stated that OFCCP had provided no evidence to support its claim. For example, a legal think tank commented that the proposal was ''a regulation in search of a problem,'' and criticized OFCCP for failing to provide data regarding the number of religious organizations reluctant to enter into federal contracts, the number of contractors that have invoked the Section 204(c) exemption in the past, and the number of contractors expected to avail themselves of the ''expanded exemption'' in the proposed rule. A labor union commented: ''[T]here is no evidence that the current, settled interpretation of the E.O. 11246 religious exemption has deterred organizations from submitting competitive bids for federal contracts or prevented them from obtaining such contracts. At best, the Proposed Rule is an unjustified rulemaking solution in search of a problem.''

A few commenters stated that the proposal was unnecessary given the applicability of Title VII case law. For example, a contractor association commented that the extent to which religious employers can condition employment on religion has been addressed by a long line of Title VII cases, rendering an executive rulemaking on this topic unnecessary. Some commenters cited evidence that federal contracts are being awarded to faith-based organizations. For example, a group of state attorneys general cited the 2016 congressional testimony of Oklahoma Representative Steve Russell, who explained that more than 2,000 federal government contracts were being awarded to religious organizations and contractors per year. As examples of faith-based organizations that were awarded contracts in the previous year, the state attorneys general listed the following:

Army World Service Office ($27.5 million), Mercy Hospital Springfield ($14.4 million), Young Women's Christian Association of Greater Los Angeles California ($10.2 million), City of Faith Prison Ministries ($5.2 million), Riverside Christian Ministries, Inc. ($2.7 million), Jewish Child and Family

[3] *See, e.g., Nat'l Inst. of Family & Life Advocates* v. *Becerra,* 138 S. Ct. 2361, 2368 (2018); *Masterpiece Cakeshop,* 138 S. Ct. at 1729–30; *Holt* v. *Hobbs,* 574 U.S. 352, 359 (2015).

Services ($2.1 million), Catholic Charities, various affiliates (over $1 million in sum total), to name a few.[4]

In addition, several commenters cited a report from a progressive policy institute noting that some religious organizations continue to be federal contractors despite their objections to a lack of an expanded religious exemption in E.O. 13672.

Some commenters expressed skepticism that the proposal would encourage participation in federal contracting because, they asserted, the rule as proposed would increase rather than reduce confusion. For example, a contractor association commented that OFCCP's proposal would create more confusion than clarity for federal contractors. An atheist civil liberties organization echoed this concern, commenting that the proposal would increase confusion because, in its view, the proposed rule deviated from decades of Title VII law. Other commenters stated that the proposal would have negative effects because of increased uncertainty about or expansion of the exemption. These commenters stated that the proposal would undercut other entities' enforcement of nondiscrimination obligations, increase EEOC enforcement actions, increase contractors' noncompliance, and strain OFCCP's resources. For example, a group of state attorneys general commented that, given the prevalence of workplace discrimination, expanding E.O. 11246's religious organization exemption to lessen OFCCP's oversight could result in employers claiming the exemption in bad faith when faced with charges of discrimination. The state attorneys general commented that the proposed rule had the potential to strain OFCCP's limited resources due to employers requesting determinations of whether they are exempt, and challenging the applicability of OFCCP enforcement actions already underway.

OFCCP appreciates the comments supporting its view that clarity regarding the exemption would be useful, and notes their accounts of religious organizations that are hesitant to participate as government contractors, as well as their evidence of a perception among faith-based organizations that the federal government could do more to demonstrate that it will select the best organizations for its partners, whether faith-based or not. Given certain statements by these commenters regarding discrimination on the basis of sexual orientation or gender identity, OFCCP repeats here as it did many times in the NPRM that the religious exemption does not permit discrimination on the basis of other protected categories. The section-by-section analysis of *Particular religion* addresses the application of the religious exemption and other legal requirements to E.O. 11246's other protections including those pertaining to sexual orientation and gender identity, and the application of the Religious Freedom Restoration Act (RFRA) in certain situations.

Regarding comments that the rule is unnecessary because religious organizations are not presently deterred from contracting with the government, OFCCP believes that clarifying the law for current contractors is a valuable goal in itself, regardless of whether more religious organizations would participate as federal contractors or subcontractors. The disputes among commenters over the proper interpretation of the Title VII case law suggests as well that the guidance provided by this rule would be valuable to the contracting community. And in fact, as just noted, other commenters offered evidence that faith-based organizations have indeed been reluctant to contract with the federal government because of the lack of certainty about the religious exemption. The fact that some faith-based organizations have been willing to enter into federal contracts or subcontracts does not mean that other faith-based organizations have not been reluctant to do so. Admittedly, OFCCP cannot perfectly ascertain how many religious organizations are government contractors, or would like to become such, and how those numbers compare to the whole of the contracting pool. But neither does OFCCP find persuasive commenters' assertions that faith-based organizations are already well-represented among government contractors, when those assertions are based on examples showing contracting awards to them totaling only tens of millions, when the federal government expended $926.5 billion on contractual services in fiscal year 2019[5] and, according to one estimate, faith-based organizations account for hundreds of billions of dollars of economic activity annually in the United States.[6] OFCCP disagrees that the rule will introduce confusion. OFCCP anticipates this rule will have no effect on the vast majority of contractors or the agency's regulation of them, since they do not and would not claim the religious exemption. As commenters noted, religious organizations do not appear to be a large portion of federal contractors. While this rule may add clarity that encourages more religious organizations to seek to become federal contractors and subcontractors, OFCCP does not believe the increase will greatly influence the composition or behavior of the contractor pool that it regulates. The exemption is a helpful accommodation for this small minority of religious organizations that may seek its protection. For them specifically, the rule is intended to bring clarity. For instance, as explained below, this rule provides a clear three-part test for determining whether an entity can qualify for the exemption. Contrary to the assertions of some commenters, and as described more fully below, Title VII case law offers differing tests on a jurisdiction-by-jurisdiction basis, and some of those tests provide little guidance at all. As another example, this rule provides a clear approach to determining when a religious employer is appropriately taking action on the basis of an employee's particular religion, another area where the case law is not uniform.

OFCCP also disagrees that this rule will impede the agency's enforcement efforts. OFCCP promulgates this rule from a position of familiarity with its own enforcement resources, priorities, and budget. For the reasons just stated above, OFCCP does not see this rule as significantly affecting the vast majority of its work. OFCCP also does not anticipate a flood of employers claiming the exemption in bad faith when faced with discrimination claims. That has not been the experience under the Title VII exemption thus far: The number of reported cases involving the exemption since 1964 are in the dozens, not the thousands. And in those cases, the employer may or may not have succeeded in claiming the exemption or defending against a discrimination claim, but in nearly all the employer did not appear to invoke the exemption nefariously, in bad faith. OFCCP is also optimistic given the federal government's experience under the RFRA. This law provides generous accommodation for religious claims and

[4] The commenter cited *USASPENDING.GOV*, *https://www.usaspending.gov/#/recipient.*

[5] *See* USA Spending, Spending Explorer (select Object Class, Fiscal Year 2019), *https://www.usaspending.gov/#/explorer/object_class.*

[6] *See* Brian J. Grim and Melissa E. Grim, ''The Socio-economic Contribution of Religion to American Society: An Empirical Analysis,'' *Interdisciplinary Journal of Research on Religion,* vol. 12 (2016), article 3, p. 10, 25, (describing revenues of faith-based charities, congregations, healthcare networks, educational institutions, and other organizations), *www.religjournal.com/pdf/ijrr12003.pdf.*

strict boundaries for the federal government, yet neither the courts nor OFCCP have been inundated with claims.[7]

OFCCP appreciates all comments received, and for the reasons stated believes that proceeding with a final rule clarifying the religious exemption is warranted. For the small minority of current and potential federal contractors and subcontractors interested in the exemption, this will help them understand its scope and requirements and may encourage a broader pool of organizations to compete for government contracts, which will inure to the government's benefit. For the vast majority of contractors, OFCCP does not expect this rule to affect their operations or OFCCP's monitoring and enforcement.

This final rule is an Executive Order 13771 (E.O. 13771) deregulatory action because it is expected to reduce compliance costs and potentially the cost of litigation for regulated entities. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA determined that this rule is not a ''major rule,'' as defined by 5 U.S.C. 804(2). Details on the estimated costs of this rule can be found in the economic analysis below.

II. Section-by-Section Analysis

The NPRM proposed five new definitions to clarify key terms used in OFCCP's religious exemption: *Exercise of religion; Particular religion; Religion; Religious corporation, association, educational institution, or society;* and *Sincere.* The regulatory codification of the underlying exemption itself—which is not at issue in this rulemaking—is found at 41 CFR 60–1.5(a)(5). The new definitions were proposed to be placed with the rest of the regulations' generally applicable definitions at 41 CFR 60–1.3. The NPRM also proposed adding a rule of construction to § 60–1.5 to provide the maximum legally permissible protection of religious exercise.

This final rule retains the same basic structure as the NPRM, with a few changes. First, there have been some modifications to some of the definitions, and one proposed definition, for *Exercise of religion,* is not included in the final rule, as explained below. Second, this final rule adds several illustrative examples within the definition of *Religious corporation, association, educational institution, or society* to better illustrate which organizations qualify for the religious exemption. Third, this final rule adds a severability clause.

A. Section 60–1.3 Definitions

The definitions added to § 60–1.3 are interrelated, so they are discussed below in a particular order. This order is different from that presented in the NPRM. The change in order is not substantive. The change is intended only to make the rule as a whole easier to understand.

1. Definition of Religion

OFCCP's proposed definition of *Religion* provided that the term is not limited to religious belief but also includes all aspects of religious observance and practice. The proposed definition was identical to the first part of the definition of ''religion'' in Title VII: ''The term 'religion' includes all aspects of religious observance and practice, as well as belief . . . .'' 42 U.S.C. 2000e(j). The proposed definition omitted the second portion of the Title VII definition, which refers to an employer's accommodation of an employee's religious observance or practice, because that would have been redundant with OFCCP's existing regulations. OFCCP's regulations at 41 CFR part 60–50, Guidelines on Discrimination Because of Religion or National Origin, contain robust religious protections for employees, including accommodation language substantially the same as that in the portion of the Title VII definition omitted here. *Compare* 42 U.S.C. 2000e(j), *with* 41 CFR 60–50.3. Those provisions continue to govern contractors' obligations to accommodate employees' and potential employees' religious observance and practice.

The proposed definition of *Religion* is used by other agencies. It is identical to the definition used by the Department of Justice in grant regulations implementing section 815(c) of the Justice System Improvement Act of 1979. *See* 28 CFR 42.202(m). The Small Business Administration has used the same definition as well in its grant regulations. *See* 13 CFR 113.2(c).

Some commenters generally supported the proposed definition, noting that it is legally sound, as it tracks the Title VII definition and provides broad protection for religious entities. Commenters also noted that the definition is sensible and will aid contractors in understanding the exemption.

Other commenters argued that importing the definition from Title VII is inappropriate because the context of Title VII is protection of an employee's individual religious beliefs in the workplace, not those of the employer. A legal professional organization raised the concern that this definition is overbroad as applied to the employer, particularly where it could allow a government-funded employer to make faith-based employment decisions beyond those currently allowed under Title VII and E.O. 11246. Commenters also objected to the omission of the second part of the Title VII definition, arguing that the weighing of the burden that an employee's request for religious accommodations places on an employer is an important limitation on Congress's intent to accommodate religion in the workplace. Commenters stated that, in their view, an employee's requested accommodations may impose no more than a *de minimis* burden on the employer. Commenters argued that OFCCP's proposed definition is broader than Congress intended in that it does not consider the burden the employer's assertion of the religious exemption would impose on employees, thus allowing religious employers to take adverse actions against employees based on religious belief no matter the hardship it causes them. Some commenters argued that partially importing the Title VII definition would ''muddy the waters'' rather than provide clarity.

Other commenters requested clarification on the proposed definition of *Religion.* Specifically, some commenters proposed that the final rule clarify that ''observance and practice'' includes refraining from certain activities. Another commenter noted that the proposed rule did not explain the extent to which it might displace employees' right to reasonable accommodation of their religious beliefs and practices if such accommodation conflicts with the contractor's religion.

For the reasons described above and in the NPRM, and considering the comments received, OFCCP is finalizing the proposed definition of *Religion* without modification. No change is needed to make clear that inaction or omission can be a form of ''observance and practice.'' *See, e.g., Emp't Div., Dep't of Human Res. of Or.* v. *Smith,* 494 U.S. 872, 877 (1990) (holding the ''exercise'' of religion protected by the First Amendment ''involves not only belief and profession but the performance of (or abstention from) physical acts''); *see also Espinoza,* 140

[7] *See* 42 U.S.C. 2000bb(a)(5) (''[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior government interests.''); *Holt,* 574 U.S. at 368 (rejecting the argument that the only workable rule is one of no exceptions); *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal,* 546 U.S. 418, 436 (2006) (rejecting ''slippery-slope argument'' that RFRA-mandated exceptions would become unworkable).

S. Ct. at 2277 (Gorsuch, J., concurring) (''The right to be religious without the right to do religious things would hardly amount to a right at all.'').

OFCCP disagrees with commenters who argued that the definition of *Religion* is overbroad and would permit contractors to make faith-based employment decisions beyond those permitted by law. The definition is the same as that used in other federal regulations and the same as that used in Title VII when read in conjunction with the rest of OFCCP's regulations. The definition must also be construed in harmony with those regulations, the requirements of which remain in force just as strongly as before this regulation's promulgation.

OFCCP also disagrees that it should import the second half of Title VII's definition of *religion* into its general list of definitions in § 60–1.3. OFCCP's regulations in part 60–50 governing protection of employees' religion and national origin already contain this language and remain in force, and employers must continue to comply with them. The definition of *Religion* added to § 60–1.3 is intended to apply generally, to both employers and employees.

Regarding comments about burden on employees' exercise of religion, OFCCP looks to the functioning of the religious exemption. E.O. 11246, like Title VII, requires employers to accommodate employees' religious practices to a prescribed extent. But the religious exemption is precisely that: An exemption that relieves ''religious organizations from Title VII's [or E.O. 11246's] prohibition against discrimination in employment on the basis of religion.'' *Amos,* 483 U.S. at 329. That logically includes a lesser exemption from the duty to accommodate religious practice. While religious organizations can accommodate employees' religious practices, and in many instances may find that desirable, under the exemption, they are not required to do so. *See Kennedy* v. *St. Joseph's Ministries, Inc.,* 657 F.3d 189, 194 (4th Cir. 2011).

2. Definition of Religious Corporation, Association, Educational Institution, or Society

One of the primary objectives of this rulemaking is to clarify the conditions of eligibility for the religious exemption. Thus the NRPM proposed a definition of *Religious corporation, association, educational institution, or society.* This term is used in E.O. 11246 section 204(c) and 41 CFR 60–1.5(a)(5), and it is the same term used in the Title VII religious exemption at 42 U.S.C. 2000e–1(a). The definition as proposed would apply to a corporation, association, educational institution, society, school, college, university, or institution of learning.[8]

As explained in the NPRM, clarity on this topic is essential because federal courts of appeals have used a confusing variety of tests, and the tests themselves often involve unclear or constitutionally suspect criteria. The NPRM favored, with some modifications, the test used by the U.S. Court of Appeals for the Ninth Circuit in *Spencer* v. *World Vision, Inc.,* 633 F.3d 723 (9th Cir. 2011) (per curiam). This was for several reasons, including because the *World Vision* test generally prevents invasive inquiries into matters of faith, the uncertainty and subjectivity of a multifactor balancing test, and the inherently difficult and constitutionally suspect exercise of measuring the quantum of an organization's religiosity. *See* 84 FR 41681–84.

The controlling per curiam opinion in *World Vision* offered a four-pronged test for determining an entity's qualification for the religious exemption:

> an entity is eligible for the . . . exemption, at least, if it is [1] organized for a religious purpose, [2] is engaged primarily in carrying out that religious purpose, [3] holds itself out to the public as an entity for carrying out that religious purpose, and [4] does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.

World Vision, 633 F.3d at 724 (per curiam).

This four-pronged test reflects the overlap of agreement between the two judges in the majority, Judges O'Scannlain and Kleinfeld, who also each wrote separate concurrences that laid out their own preferred tests. Both judges agreed on the first two prongs, that the entity be organized for a religious purpose[9] and hold itself out to the public as carrying out that religious purpose. The third and fourth prongs reflect Judge Kleinfeld's view. *See id.* at 748 (Kleinfeld, J., concurring). Regarding the third prong, Judge O'Scannlain would have employed a broader formulation, requiring that the employer engage ''in activity consistent with, and in furtherance of, those [founding] religious purposes.'' *Id.* at 734 (O'Scannlain, J., concurring). As to the fourth prong, Judge Kleinfeld restricted the exemption to organizations that charge little or nothing for their goods or services, regardless of their formal incorporation as a nonprofit organization. *See id.* at 745–47 (Kleinfeld, J., concurring). Judge O'Scannlain would have broadened the fourth prong (in most instances) by requiring nonprofit status, including nonprofit organizations that charge market rates for their goods or services. *See id.* at 734 (O'Scannlain, J., concurring).

The NPRM proposed to follow a modified *World Vision* test. The NPRM proposed adopting the first two prongs of the per curiam opinion. The NPRM favored Judge O'Scannlain's formulation of the second prong given the significant constitutional difficulties that accompany determining whether an organization is ''primarily'' religious. The NPRM also proposed to revise Judge O'Scannlain's phraseology, that the entity be engaged ''in activity'' consistent with those religious purposes, with the requirement that the entity be engaged ''in exercise of religion'' consistent with a religious purpose. No material change was intended by this adjustment; it was meant to capture in succinct regulatory text Judge O'Scannlain's lengthy discussion that the kind of activity contemplated under this prong is religious exercise. *See* 84 FR at 41683; *see also World Vision,* 633 F.3d at 737–38 (O'Scannlain, J., concurring). Finally, the NPRM proposed not to adopt the fourth prong of the test, on grounds that a no-charging rule would exclude many bona fide religious organizations, especially in the government contracting context, and that an absolute bar on for-profit organizations was tenuous given other court decisions and the Supreme Court's more recent decision in *Hobby Lobby. See* 84 FR at

[8] The words ''school, college, university, or institution of learning'' also appear in 41 CFR 60–1.5(a)(6), the exemption for religious educational organizations. They were included in the definition to make clear that the definition's listing of ''educational institution'' includes schools, colleges, universities, and institutions of learning. Depending on the facts, an educational organization may qualify under the § 60–1.5(a)(5) exemption, the § 60–1.5(a)(6) exemption, both, or neither. The inclusion of educational organizations is maintained in the final rule.

[9] To be precise, Judge O'Scannlain's formulation was that the entity be ''organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents).'' *World Vision,* 633 F.3d at 734 (O'Scannlain, J., concurring). Judge Kleinfeld noted that some people organize in religious bodies ''with no corporate apparatus'' and expressed concerns about the exemption being defeated by an ''[a]bsence of corporate papers.'' *Id.* at 745 (Kleinfeld, J., concurring). Judge Kleinfeld wrote that this ''narrowness problem may be repairable by a tweak in the test,'' *id.,* which may be why the per curiam opinion does not include Judge O'Scannlain's parenthetical referring to Articles of Incorporation. The difference is slight—a ''tweak.'' OFCCP's approach to this first factor, including the necessary evidence to satisfy it, is discussed below in this preamble.

41684. The proposed rule could also be viewed as essentially following Judge O'Scannlain's concurrence save for his requirement that the entity be nonprofit to qualify for the exemption.

In response to comments and a subsequent reevaluation of *World Vision* and other case law, OFCCP is revising the proposed regulatory text in this final rule. The final rule's test can be viewed as generally adopting Judge O'Scannlain's concurrence in *World Vision,* including by adopting a fourth prong. Satisfaction of this test will be sufficient to qualify for the exemption, and OFCCP believes that this is the means by which most organizations interested in the exemption will qualify. However, OFCCP acknowledges that in certain rare circumstances, an organization might not satisfy the non-profit prong of the *World Vision* test yet still present strong evidence that it possesses a substantial religious purpose. Thus the regulatory text includes an alternative means of satisfying the fourth prong: When an organization does not operate on a not-for-profit basis, it must present ''other strong evidence that it possesses a substantial religious purpose.'' The final rule also adds several examples to illustrate how the test will be applied. The final rule also adds a clarifying provision regarding the meaning of ''consistent with and in furtherance of'' a religious purpose, a phrase used in one of the test's prongs. The Department does not anticipate many for-profit organizations claiming the exemption, and as explained through the examples and their accompanying discussion, it may be quite difficult for such organizations to do so.

This section of the preamble addresses this topic as well as other comments regarding OFCCP's proposed definition of *Religious corporation, association, educational institution, or society.* OFCCP believes its definition is reasonable in light of Title VII and Supreme Court case law and that it will contribute to one of OFCCP's primary goals in this rulemaking, which is to increase economy and efficiency in government contracting by providing for a broader pool of government contractors and subcontractors. Issues specific to the EEOC's view on this matter are also discussed below and later in a separate part of this preamble.

a. The Selection of *World Vision* as the Basis for the Religious Organization Test

OFCCP received numerous public comments on its proposed definition, including comments on OFCCP's discussion of the shortcomings in some Title VII case law. Some commenters agreed that OFCCP should reject non-*World Vision* tests based on these shortcomings. For example, a religious legal organization commented that the proposed test ''eliminates the subjectivity inherent in the *LeBoon* tests. It further eliminates the Establishment Clause violation present when a court determines whether an organization is 'religious enough,' and it also prevents inter-religion discrimination.''

Some commenters who supported OFCCP's proposed definition commented that it provided important clarification that would be helpful to religious organizations in meeting their missions. For example, a religious school association commented that the proposal is especially important considering that local control and leadership are central to many of its participating schools' beliefs. A religious charities organization commented that the proposed definition would help it advance its mission of providing essential services to people in need—a mission rooted in its religious convictions.

Other commenters disagreed with OFCCP's characterization of the existing religious employer tests in Title VII case law. For example, a legal professional organization noted that courts have generally agreed that the following factors are relevant in deciding whether an organization qualifies for the religious exemption: (1) The purpose or mission of the organization; (2) the ownership, affiliation, or source of financial support of the organization; (3) requirements placed upon staff and members of the organization; and (4) the extent of religious practices in or the religious nature of products and services offered by the organization.

Other commenters opposed the proposed definition because they viewed it as too broad and unsupported by Title VII case law. For example, an organization that advocates separation of church and state asserted that the definition in the proposed rule has not been proposed or used by any federal court and represents an attempt by OFCCP to vastly expand the scope of the existing narrow exemption. A labor organization likewise commented that, in its view, the definition in the proposed rule is contrary to law and does not reflect the Title VII definition.

Some commenters objected generally to OFCCP's selection or modification of the *World Vision* test. For example, one contractor association commented that the proposed rule removes critical limits on the standard set forth by Judge O'Scannlain. Another contractor association emphasized that *World Vision* involved the removal of two employees by a religious organization based on the employees' failure to adhere to the organization's religious views. Therefore, according to the association, the *World Vision* test should not apply to for-profit organizations holding themselves out as religiously motivated. A group of U.S. Senators criticized the proposal not only for adopting the test set forth in the concurrence, but also for modifying part of that test.

A legal think tank asserted that OFCCP appeared to have created its own test, designed to qualify more types of contractors for the exemption. This commenter went on to say that the ''exceedingly more expansive criteria'' proposed by OFCCP are untethered to Title VII case law and not in line with the ''measured'' exemption required by the Establishment Clause, quoting *Cutter* v. *Wilkinson,* 544 U.S. 709, 722 (2005) (''Our decisions indicate that an accommodation [of religious observances] must be measured so that it does not override other significant interests.'').

As explained in the NPRM, OFCCP believes that a *LeBoon*-type test invites subjectivity and uncertainty. *See LeBoon* v. *Lancaster Jewish Cmty. Ctr. Ass'n,* 503 F.3d 217 (3d Cir. 2007). That is problematic in any circumstance, but especially so in the context of government contracting, where parties' obligations should be as clear as possible. OFCCP also declines to attempt to write a definition that purports to synthesize all the Title VII case law on this subject. OFCCP is doubtful that such a task could be done, especially given Judge O'Scannlain's observation (with which Judge Kleinfeld agreed) that several factors used by other courts are constitutionally suspect, including, contrary to the commenter's suggestion above, an assessment of the religious nature of an organization's products and services. *See World Vision,* 633 F.3d at 730–32 (O'Scannlain, J., concurring); *id.* at 741 (Kleinfeld, J., concurring). OFCCP's approach in the final rule, like *World Vision,* instead requires consideration of a discrete set of factors that can be reliably ascertained in each case.

OFCCP acknowledges that the definition it is promulgating here modifies the *World Vision* test in some respects, or alternatively can be viewed as following Judge O'Scannlain's concurrence with one addition. OFCCP describes those modifications in more detail below along with its reasons for making them, including the need to provide clarity to contractors and enforcement staff. OFCCP disputes the

relevance of commenters' assertions that these modifications are being made for the purpose of qualifying more organizations for the exemption. OFCCP acknowledges that the modifications may allow marginally more organizations to qualify for the exemption and that the final rule is intended to increase the pool of federal contractors. But, as described herein, OFCCP believes the test adopted by this final rule is appropriately measured and serves the purpose of qualifying only genuinely religious organizations for the exemption.

b. OFCCP's Application of the Definition Generally

The NPRM proposed how OFCCP would apply the factors in its proposed test for religious organizations. The NPRM stated ''that it would be inappropriate and constitutionally suspect for OFCCP to contradict a claim, found to be sincere, that a particular activity or purpose has religious meaning''; that ''all the factors . . . are determined with reference to the contractor's own sincerely held view of its religious purposes and the religious meaning (or not) of its practices''; and that the proposed three-factor test would be exclusive ''stand-alone components and not factors guiding an ultimate inquiry into whether an organizations is 'primarily religious' or secular as a whole.'' 84 FR at 41682–83.

The NPRM proposed this approach for several reasons. The NPRM relied on *World Vision's* concerns about courts' substituting their own judgment for what has religious meaning when the question is disputed: ''The very act of making that determination . . . runs counter to the 'core of the constitutional guarantee against religious establishment.' '' *World Vision,* 633 F.3d at 731 (O'Scannlain, J., concurring) (quoting *New York* v. *Cathedral Acad.,* 434 U.S. 125, 133 (1977)). ''[I]nquiry into . . . religious views . . . is not only unnecessary but also offensive. It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs.'' *Id.* (alterations in original) (quoting *Mitchell* v. *Helms,* 530 U.S. 793, 828 (2000) (plurality opinion) (internal quotation marks omitted)). Further, such inquiries could lead to discrimination among religions. *See id.* at 732 & n.8. The NPRM also drew on Supreme Court and Title VII case law showing the constitutional and practical difficulties of determining whether a particular religious belief is ''central'' to one's faith or whether an organization is ''primarily'' religious. *See* 84 FR at 41682–83.

Commenters expressed a variety of views on the NPRM's proposed approach. Some were supportive. For instance, a religious legal organization commented that Judge O'Scannlain's test requires little judicial '''trolling' through'' an organization's religious beliefs, because it is based exclusively on information the organization makes public. Relatedly, the same commenter observed that OFCCP staff can easily and consistently apply the test, with positive implications for the rule of law. Other commenters objected generally to OFCCP's description of how it would determine whether a contractor had met the test. For example, a civil liberties organization expressed concern that OFCCP would not enforce baseline evidentiary standards in determining whether an entity meets the test's factors. A contractor association commented that the modified *World Vision* test ''is unclear on its face and problematic in application.'' A transgender civil rights organization commented that the test relies on ill-defined criteria that must be measured from the perspective of the employer.

Many of the commenters who opposed the proposed definition expressed concern that it would have negative consequences. For example, a legal professional association asserted that the proposal would allow even nominally religious entities to discriminate on the basis of religion in hiring, potentially exposing them to legal liability under federal and state law despite their ability to retain their status as federal contractors. A group of state attorneys general stated that OFCCP's proposed test represents a sharp departure from precedent and thus would be difficult for OFCCP staff and adjudicators to apply. The attorneys general also commented that the test would likely cause non-compliance by increasing legal uncertainty about which organizations qualify.

Other commenters requested clarity. Regarding the NPRM's statement that the three factors would be standalone provisions rather than factors guiding an ultimate ''primarily religious'' inquiry, a contractor association commented that, in its view, the statement was unclear and did not lend credence to OFCCP's assertion that the test would be easy to apply or likely to be consistent in application. The commenter asked for clarification as to how OFCCP would apply the factors of the test as standalone factors, rather than as factors leading to the ultimate determination whether the contractor is primarily religious or secular. The commenter sought explanation from OFCCP as to how it could easily conduct the required analysis when even the courts struggle to do so. The commenter requested more specific examples of how the proposed test will apply and asked that the contractor community be consulted before a test is adopted.

OFCCP appreciates these comments and has re-reviewed *World Vision* and other relevant case law in light of them. *World Vision* and its antecedent cases in the Ninth Circuit, as well as *LeBoon* in the Third Circuit, begin from the premise that the religious exemption should cover only organizations that are, in fact, primarily religious. But courts have labored over how to operationalize that requirement into a set of factors that can be applied neutrally, objectively, and with minimal constitutional entanglement. *See World Vision,* 633 F.3d at 729 (O'Scannlain, J., concurring) (''Though our precedent provides us with the fundamental question—whether the general picture of World Vision is primarily religious—we must assess the manner in which we are to answer that question in the case at hand.''); *LeBoon,* 503 F.3d at 226. That does not mean that courts have dispensed with an organization's need to present evidence in order to claim the exemption. Rather, it means that the evidence required must be of a kind that courts are competent to evaluate and that avoids entanglement. *See World Vision,* 633 F.3d at 730–33 (O'Scannlain, J., concurring); *cf. NLRB* v. *Catholic Bishop of Chi.,* 440 U.S. 490, 502 & n.10 (1979); *id.* at 507–08 (appendix). Indeed, one of the purposes of Congress's expansion of the Title VII religious exemption to cover all of an employer's activities, rather than simply its religious activities, was to avoid difficult line-drawing between religious and secular activities and the interference with religious organizations that could result. *See Amos,* 483 U.S. at 336. In OFCCP's view, *World Vision* generally, and Judge O'Scannlain's concurrence in particular, has done the best job of formulating a test that meets the competing and delicately balanced goals of giving the exemption only its proper reach while employing useable and constitutionally proper inquiries.

With that in mind, OFCCP clarifies here its general approach to applying the exemption, addresses the particular evidence needed for each factor, and adds to the regulatory text examples with accompanying explanation to further illustrate its approach. First, OFCCP acknowledges the need to clarify and revise its statement that the factors are ''stand-alone components and not factors guiding an ultimate inquiry'' in order to make clear the agency's intent. 84 FR at 41683. OFCCP agrees with

commenters that the aim of any test in this context is to determine whether the organization qualifies as a religious organization, and that any components are intended to guide or define that ultimate inquiry. The NPRM's statement was intended to mean that OFCCP would apply the proposed three factors as the exclusive elements for ascertaining whether an organization qualifies for the religious exemption, rather than as mere considerations to be weighed along with other facts and circumstances.

OFCCP affirms that approach here as the predominant path by which organizations are anticipated to qualify for the exemption. This approach is consistent with *World Vision.* The per curiam opinion and both concurrences provided slightly different factors, but in each instance the factors were presented as sufficient to determine an organization's entitlement to the exemption. *See World Vision,* 633 F.3d at 724 (per curiam) (holding ''an entity is eligible for the . . . exemption, *at least,* if it'' meets four factors (emphasis added)); *id.* at 734 (O'Scannlain, J., concurring) (holding ''a nonprofit entity qualifies for the . . . exemption if it establishes that it'' satisfies three factors (footnote omitted)); *id.* at 748 (Kleinfeld, J., concurring) (''To determine whether an entity is a 'religious corporation, association, or society,' determine whether it [satisfies the four factors].'').

Second, the *World Vision*-derived test promulgated here is not a subjective one. OFCCP shares commenters' concern about contractors attempting to claim the exemption with little evidence other than their own testimony that theirs is a religious organization. (Though OFCCP is also skeptical that many contractors would attempt to do so. As noted above, bad-faith claims to the Title VII exemption have been rare.) The *World Vision* factors have been selected because they provide objective criteria for determining an organization's religious status without the need for intrusive religious inquiries. *See id.* at 733 (O'Scannlain, J., concurring) (holding where religious activities or purposes are ''hotly contested, . . . we should stay our hand and rely on considerations that do not require us to engage in constitutionally precarious inquiries''). The *World Vision* factors are similar to a test used in the National Labor Relations Act context, which similarly ''avoids . . . constitutional infirmities'' while providing ''some assurance that the institutions availing themselves of the *Catholic Bishop* exemption are *bona fide* religious institutions.'' *Univ. of Great Falls* v. *NLRB,* 278 F.3d 1335, 1344 (D.C. Cir. 2002); *see also Duquesne Univ. of the Holy Spirit* v. *NLRB,* 947 F.3d 824, 831 (D.C. Cir. 2020).

It is true that in applying the *World Vision* factors, OFCCP will not substitute its own judgment for a contractor's view—found to be sincere—that a particular activity, purpose, or belief has religious meaning. For instance, OFCCP would not contradict a drug-rehabilitation center's view, found to be sincere, that its work is a religious healing ministry by stating that its work is merely secular healthcare delivery. *See Amos,* 483 U.S. at 344 (Brennan, J., concurring) (finding religious organizations ''often regard the provision of [community] services as a means of fulfilling religious duty''); *cf. World Vision,* 633 F.3d at 745 (Kleinfeld, J., concurring) (''Religious missionaries and Peace Corps volunteers both perform humanitarian work, but only the latter is secular.''). Any other course would risk severe constitutional difficulties. ''The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment . . . .'' *New York* v. *Cathedral Acad.,* 434 U.S. 125, 133 (1977). But a contractor must prove its sincerity, which is a question of fact to be proved or disproved in the same manner as any other question of fact. And questions about religious characterization apply to only some aspects of the test. For instance, whether an organization operates on a nonprofit basis is a factual determination to which religious characterizations have little if any relevance. Similarly, as clarified in this final rule, an organization's holding itself out as religious requires an objective evidentiary showing. Finally, OFCCP does not defer to any contractor's assessment that it is entitled to the exemption itself. Whether an organization is a religious corporation, association, educational institution, or society under E.O. 11246 is a legal determination based on whether the organization satisfies the relevant factors.

OFCCP next addresses specific issues related to each factor, including the evidence necessary to satisfy each factor.

c. The First Factor: The Organization's Religious Purpose

As stated in the NPRM, to qualify for the religious exemption, a contractor must be organized for a religious purpose, meaning that it was conceived with a self-identified religious purpose. This need not be the contractor's only purpose. *Cf. Universidad Cent. de Bayamon* v. *NLRB,* 793 F.2d 383, 401 (1st Cir. 1985) (finding no NLRB jurisdiction when, among other things, an educational institution's mission had ''admittedly religious functions but whose predominant higher education mission is to provide . . . students with a secular education''). A religious purpose can be shown by articles of incorporation or other founding documents, but that is not the only type of evidence that can be used. *See World Vision,* 633 F.3d at 736 (O'Scannlain, J., concurring); *id.* at 745 (Kleinfeld, J., concurring) (noting that some religious entities have ''no corporate apparatus''). And finally, ''the decision whether an organization is 'religious' for purposes of the exemption cannot be based on its conformity to some preconceived notion of what a religious organization should do, but must be measured with reference to the particular religion identified by the organization.'' *Id.* at 735–36 (O'Scannlain, J., concurring) (quoting *LeBoon,* 503 F.3d at 226–27).

Some commenters objected that this factor, as described in the NPRM and summarized above, was too relaxed or that OFCCP was proposing to accept insufficient evidence. Many of these commenters stated that the proposal was inconsistent with Judge O'Scannlain's requirement of demonstrating religious purpose through ''Articles of Incorporation or similar foundational documents.'' *Id.* at 734. For example, a labor union asserted that OFCCP's implementation of this factor would be ''more lax than Judge O'Scannlain's concurrence.'' A contractor association stated that the test was vague and overly simple. An individual commenter requested more guidance as to what types of evidence OFCCP would accept to prove a contractor's organization for a religious purpose. An organization that advocates separation of church and state commented that an organization that fails to document a religious purpose in any of its foundational documents was likely not organized for a religious purpose.

OFCCP appreciates these comments and is revising its approach in response. OFCCP agrees that additional clarity is needed here and that this factor should require documentary evidence of an organization's religious purpose in its foundational documents. Judge O'Scannlain's concurrence examined World Vision's Articles of Incorporation, bylaws, core values, and mission statement. *See id.* at 736. An organization may have other foundational documents, such as a statement of faith, company code of conduct, business policies, or other

governance documents demonstrating a religious purpose. No one particular document is necessary. For instance, some federal contractors may be unincorporated proprietorships or partnerships and thus not have formal corporate-formation documents. But the organization must be able to show a religious purpose in documents that are central to the organization's identity and purpose. OFCCP believes this requirement for documentary evidence will reduce uncertainty, provide objective means for the agency to confirm an organization's satisfaction of this factor of the test, and help contractors better understand the kind of showing they will need to make to satisfy this factor.

OFCCP emphasizes that it will not challenge a sincere claim characterizing a document's statements as religious in the contractor's view. *See id.* at 735–36. But OFCCP will rarely be able to find a claim of religious purpose to be sincere where the documents themselves are no different from standard corporate documents or where an organization adds a religious purpose to its documents after it becomes aware of potential discrimination liability or government scrutiny, including through an OFCCP compliance review. Sincerity is a factual determination, so each case where sincerity is at issue will turn on its own particular circumstances.[10]

d. The Second Factor: Engages in Activity Consistent With, and in Furtherance of, Its Religious Purpose

Second, the contractor must engage in activity consistent with, and in furtherance of, its religious purpose. Here too, ''religious purpose'' means religious as ''measured with reference to the particular religion identified by the contractor.'' *Id.* This factor is adopted from Judge O'Scannlain's *World Vision* concurrence rather than the per curiam opinion. *Cf. id.* at 734. The regulatory text of the final rule has been slightly revised from the proposed language to more closely reflect Judge O'Scannlain's formulation. This factor is now the second factor in the test rather than the third. No material change is intended. This factor also now states that the organization must exercise religion consistent with, and in furtherance of, ''its'' religious purpose, rather than ''a'' religious purpose. OFCCP does not view this change as significant, since a religious organization is quite unlikely to further a religious purpose other than its own.

As explained in the NPRM, OFCCP proposed not to follow the *World Vision* per curiam opinion's formulation of this factor for both practical and legal reasons. The per curiam opinion would require a contractor to be ''engaged *primarily* in carrying out [its] religious purpose.'' *Id.* at 724 (per curiam) (emphasis added). But such a formulation would invite OFCCP to balance things that cannot be balanced consistently and leave contractors without the kind of clarity that ought to prevail in contractual relations. Further, the Supreme Court and lower courts have cautioned against drawing lines between religious activity or belief that is ''central'' or ''primary'' and religious activity or belief that is not. *See* 84 FR at 41682, 41683.

Also as explained in the NPRM, OFCCP proposed to use the phrase ''engages in exercise of religion'' rather than Judge O'Scannlain's phrase, ''engages in activity.'' *See World Vision,* 633 F.3d at 734 (O'Scannlain, J., concurring) (''engaged in activity consistent with, and in furtherance of, those religious purposes''). No material change was intended by this adjustment; it was meant to capture in succinct regulatory text Judge O'Scannlain's lengthy discussion that the kind of activity contemplated under this prong is religious exercise. *See* 84 FR at 41683; *see also World Vision,* 633 F.3d at 737–38.

OFCCP received many comments on this aspect of the NPRM. A religious organization asked OFCCP to clarify that ''consistent'' as used in the third factor does not mean that OFCCP will be assessing ''the coherence or consistency of the contractor's religious beliefs, *see Thomas* v. *Review Bd.,* 450 U.S. 707 (1981) (forbidding such an inquiry), but only [making] a determination that the contractor is engaged in activity reflecting a religious, as opposed to a secular, purpose.'' OFCCP confirms that its intent in including this element is to determine whether the contractor's exercise of religion is consistent with its religious purpose, not to test the internal consistency of a contractor's religious beliefs. To make this point as clear as possible, OFCCP has added regulatory text explaining that ''[w]hether an organization's engagement in activity is consistent with, and in furtherance of, its religious purpose is determined by reference to the organization's own sincere understanding of its religious tenets.''

As with other factors, some commenters asserted that this factor, as described in the NPRM and summarized above, was too relaxed or that OFCCP was proposing to accept insufficient evidence. Many of these commenters stated that the incorporation of ''exercise of religion'' as defined in RFRA into this factor further loosened the standard. For example, a group of state attorneys general asserted that incorporation of the RFRA standard revealed confusion on the part of OFCCP as to the fundamental difference between the religious organization exemption and RFRA. The state attorneys general stated that the religious organization exemption is triggered only when an organization's exercise of religion is so significant that the organization's overall identity becomes religious and criticized the proposed rule for focusing instead on whether an organization engages in exercises of religion generally. A civil liberties organization characterized the preamble as mistakenly stating that inquiry into the religious nature of entities' actions is impermissible. A labor union commented that this aspect of OFCCP's proposal could lead businesses to feign religiosity solely for the purpose of cloaking discriminatory activity.

Some commenters also criticized the exclusion from OFCCP's proposed test of the requirement that a contractor be ''primarily religious,'' or ''engaged primarily in carrying out that religious purpose.'' Some of these comments stated that OFCCP did not persuasively explain why it was excluding this element from the definition. A contractor association commented that Title VII's religious organization exception has traditionally been limited to institutions whose ''purpose and character are primarily religious,'' and that OFCCP has no basis to depart from this principle. An anti-bigotry religious organization commented that OFCCP should consider all relevant circumstances in determining whether a contractor is indeed religious, as OFCCP proposed to do for *Sincere* (that is, taking into account all relevant facts). The organization commented that the Supreme Court in *Hosanna-Tabor* reviewed the employee's religious and secular functions, undermining OFCCP's claim that it cannot engage in a similar type of balancing.

OFCCP disagrees with the idea that this factor, either as proposed or as adopted in the final rule, confuses the religious exemption with RFRA. An organization that exercises religion under RFRA may not satisfy this factor of the test, yet even if it did, that alone would not satisfy the other factors of the test necessary to claim the E.O. 11246 religious exemption. Further, as will be discussed shortly, OFCCP has revised this prong to adhere to Judge

[10] As noted in the proposed rule, *see* 84 FR at 41685, sincerity is often not at issue.

O'Scannlain's formulation, which should alleviate any confusion regarding RFRA.[11]

OFCCP agrees with commenters that activity consistent with the contractor's religious purpose must be a substantial aspect of the contractor's operations. Insofar as the NPRM could be read to suggest that a one-time or de minimis amount of religious activity would be sufficient, OFCCP clarifies that understanding here. The need for a material amount of religious activity flows from the text used in the regulation, that the entity ''*engage in* religious activity.'' To engage is ''[t]o employ or involve oneself; to take part in; to embark on,'' Black's Law Dictionary (11th ed. 2019), or to ''involve oneself or become occupied; participate,'' American Heritage Dictionary (5th ed. 2020). It suggests more than occasional or half-hearted efforts. The case law further illustrates that there must be a significant level of religious activity. For instance, World Vision easily satisfied that requirement since activity consistent with its religious purpose was ''essentially all World Vision appears to do.'' *World Vision,* 633 F.3d at 737–38 (O'Scannlain, J., concurring). The examples added to the final regulatory text also help illustrate the religious activity needed to qualify for the exemption.

OFCCP disagrees with commenters to the extent they argue that an organization must engage solely in religious activity (and explains below that such an inquiry would be difficult and constitutionally imprudent). When an organization engages in other, secular, activities, that alone does not diminish its ability to satisfy this factor of the test. *See LeBoon,* 503 F.3d at 229; *cf. Univ. of Great Falls,* 278 F.3d at 1342. This is made clear by the text of the religious exemption. The Title VII exemption was expanded in 1972 (and that expanded language is used in E.O. 11246) to cover religious organizations' employees engaged in any of the organization's activities, rather than only employees engaged in the organization's religious activities. Thus the exemption contemplates that religious organizations will engage in activities that are not religious, and it makes clear that religious organizations do not forfeit the exemption simply because they do.

OFCCP also disagrees with commenters who argued that the organization's religious activity under this factor must be shown to ''constitute a comprehensive religious identity.'' That is simply a rephrasing of the ultimate inquiry underlying the *World Vision* test. This factor has a crucial role to play in that inquiry, but it should not be mistaken for the whole of it. One of the most useful aspects of the *World Vision* test is that it provides a step-by-step framework for assessing an organization's religious nature, including this factor, rather than leaving the inquiry an open-ended assessment in which a religious organization is simply known when it is seen. *Cf. Jacobellis* v. *State of Ohio,* 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Regarding comments that applying Judge O'Scannlain's concurrence rather than a ''primarily engaged'' factor is an unjustified departure from Title VII jurisprudence or reflects an overly prophylactic view of religious inquiry, OFCCP respectfully disagrees. OFCCP's position requires being mindful of the distinction between the test's underlying inquiry and the factors used to ascertain the answer to that inquiry. The test's underlying inquiry is whether an organization's ''purpose and character are primarily religious.'' *See, e.g., World Vision,* 633 F.3d at 726 (O'Scannlain, J., concurring). But *World Vision* operationalized that inquiry into four factors. Thus any constitutional or practical problems regarding the inquiry's ''primarily religious'' formulation are academic because OFCCP will be answering the inquiry by means of applying the factors. That is one of the reasons why OFCCP prefers the *World Vision* test to other formulations.

When it comes to those four factors, however, the *World Vision* per curiam opinion carried forward a ''primarily'' inquiry in two of the factors: The organization must be ''engaged primarily in carrying out [its] religious purpose'' and must ''not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.'' *Id.* at 724 (per curiam). Judge O'Scannlain's well-reasoned concurrence used an alternative formulation that avoids the ''primarily'' questions. OFCCP believes the better choice is to adopt the concurrence. The main problem with determining whether an organization is ''primarily'' engaged in its religious purpose—as opposed to substantially or materially or genuinely engaged in its religious purpose—is not that it requires a determination that the organization is engaged in significant religious activity, something that can be ascertained easily enough, but rather that it requires *comparison* between the amount of religious and secular activity at an organization. In essence, the organization must engage in a greater quantum of religious activity than secular activity, though without specifying whether the ratio must be 51:49, 70:30, or 99:1. However, any attempt to so compare religious and secular activity leads to additional problems: Some activities do not clearly fall on one side of the line or the other, and a court's or an agency's attempts to determine on which side of the line those activities fall can lead to constitutionally intrusive inquiries. *See, e.g., Cathedral Acad.,* 434 U.S. at 133 (observing the ''excessive state involvement in religious affairs'' that may result from litigation over ''what does or does not have religious meaning''). Moreover, even when all activities are properly categorized, it is unclear what weight each should have. *See, e.g., Univ. of Great Falls,* 278 F.3d at 1343 (observing that a test that requires ascertaining an entity's ''substantial religious character'' or lack thereof ''boils down to 'is it *sufficiently* religious?'''). OFCCP avoids these problems by adopting Judge O'Scannlain's formulation of this prong.

OFCCP agrees with commenters that some courts have nonetheless undertaken the task of comparing secular and religious activity when examining the religious exemption. *See LeBoon,* 503 F.3d 217; *Kamehameha Sch.,* 990 F.2d 458; *Boydston* v. *Mercy Hosp. Ardmore, Inc.,* No. CIV–18–444–G, 2020 WL 1448112 (W.D. Okla. Mar. 25, 2020). OFCCP disagrees that it also must do so when Judge O'Scannlain's concurrence provides a viable alternative. That alternative is especially attractive to OFCCP as an enforcement agency and as a regulator of government contractors. In both instances a factor that offers more clarity than another gives better notice to contractors, better guidance to field staff, and crisper lines to the bargain between the two parties.

e. The Third Factor: Holding Itself Out as Religious

Third, the contractor must hold itself out to the public as carrying out a religious purpose. Again here, and as explained in the NPRM, ''religious purpose'' ''must be measured with reference to the particular religion identified by the contractor.'' *World Vision,* 633 F.3d at 736 (O'Scannlain, J., concurring). The NPRM proposed that a contractor could satisfy this requirement in a variety of ways, including by evidence of a religious purpose on its website, publications, advertisements, letterhead, or other public-facing

[11] Because of this change, the phrase ''exercises religion'' no longer appears in this prong. Thus, as explained later in this preamble, the definition for *Exercise of religion* is no longer needed and has been removed from the final rule.

materials, or by affirming a religious purpose in response to inquiries from a member of the public or a government entity. *See* 84 FR at 41683.

Again, some commenters stated that this factor, as described in the NRPM and summarized above, was too relaxed or that OFCCP was proposing to accept insufficient evidence. Many of these commenters criticized OFCCP's proposal for allowing a contractor to meet this requirement by declaring its religious purpose in response to an inquiry from a government entity such as OFCCP itself. Commenters asserted that, as a result, almost any employer could designate itself a religious organization. Commenters also stated that taxpayers, employees, and applicants therefore would not necessarily have notice that the religious exemption could be applied. Commenters stated that this factor would thus not serve as the ''market check'' that Judge O'Scannlain envisioned. *World Vision,* 633 F.3d at 735 (O'Scannlain, J., concurring) (quoting *Univ. of Great Falls,* 278 F.3d at 1344). A group of state attorneys general, for example, criticized OFCCP's proposal for purportedly relaxing Judge O'Scannlain's '' 'market check' that would come from requiring an organization to hold itself out to the public as religious,'' which ''could come at a cost in terms of broader public support.'' One contractor association remarked that, under the proposed rule, a federal contractor could satisfy this factor simply by responding to an OFCCP inquiry, whereas World Vision had always identified itself as a Christian organization, requiring its descriptor statement on all its communications. Another contractor association commented: ''Making such a showing [for example, in response to an inquiry] is very easy and may or may not actually align with actual corporate purpose.''

OFCCP appreciates these comments and, here too, is clarifying its approach in response. OFCCP agrees that a contractor could not satisfy this factor simply by affirming a religious purpose in response to one public or government inquiry, if that was all the contractor could put forward as evidence. More would be needed to show that the public was on notice of the organization's religious nature.

How much more is a factual question that cannot be defined with complete specificity, but the case law provides some guideposts. World Vision easily satisfied this requirement: Its logo was a stylized cross; religious artwork and texts were displayed throughout its campus; its communications guidelines required references to its Christian identity in all external communications; and its employment guidelines expressly required subscription to particular Christian beliefs. *See id.* at 738–40. Very recently, a district court held that a Catholic hospital and its affiliates satisfied the requirement when they held ''themselves out to the public as sectarian through their display of religious symbols in their facilities and through their sectarian mission statement and values statements displayed on [their] public website.'' *Boydston,* 2020 WL 1448112, at *5. In the analogous NLRA context, a university satisfied the test when, ''in its course catalogue, mission statement, student bulletin, and other public documents, it unquestionably holds itself out to students, faculty, and the broader community as providing an education that, although primarily secular, is presented in an overtly religious, Catholic environment.'' *Univ. of Great Falls,* 278 F.3d at 1345. The university also filled its campus, classrooms, and offices ''with Catholic icons, not merely as art, but it claims as an expression of faith.'' *Id.*

In short, a contractor satisfies this requirement when the contractor makes it reasonably clear to the public that it has a religious purpose. As noted in the NPRM, evidence of a religious purpose can come from the contractor's website, publications, advertisements, letterhead, or other public-facing materials, and in statements to members of the public. Evidence can also include religiously inspired logos, mottos, or the like; and religious art, texts, music, or other displays of religion in the workplace. Statements to the government in the ordinary course of business, such as corporate documents or tax filings, can also be probative. Such statements should be distinguished from statements to the government made in the course of an investigation or litigation in which the contractor's religious purpose is at issue. No one piece of evidence is required or, most likely, sufficient. But together the evidence must show that the contractor is presenting itself to the outside world as religious.

f. The Fourth Factor: Operating on a Not-for-Profit Basis

OFCCP proposed not to adopt the fourth factor set out in *World Vision:* That the entity seeking exemption ''not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.'' 633 F.3d at 724 (per curiam). The NPRM proposed this course for several reasons: Many religious entities may operate discount retail stores or otherwise engage in the marketplace; [12] religiously oriented hospitals, senior-living facilities, and hospices may engage in substantial and frequent financial exchanges; [13] the religious exemption in E.O. 11246 pertains to government contracting, an economic activity in which most participants are for-profit entities; [14] other courts have not considered dispositive an organization's for-profit or nonprofit status, or the volume or amount of its financial transactions; *Amos* left open the question of whether for-profit organizations could qualify for the exemption; and the Supreme Court's more recent decision in *Hobby Lobby,* which held that for-profit organizations can exercise religion, counseled against an absolute prohibition on allowing for-profit organizations to qualify for the exemption.

OFCCP received a wide variety of comments on this aspect of the NPRM. Some commenters agreed with OFCCP's reasons for declining to require that a contractor ''not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.'' For example, a religious liberties organization commented that federal contractors typically engage in substantial exchanges of goods and services, and therefore religious organizations would be categorically denied the section 204(c) exemption if they became federal contractors. Other commenters opposed the exclusion of the requirement that a contractor ''not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.'' A group of U.S. Senators commented that the existence of a financial motive constitutes strong evidence that the exercise of religion is not the objective of the entity. Some of these commenters stated that OFCCP did not persuasively explain why it was excluding this element from the definition.

OFCCP declines to restrict the exemption to those religious entities that charge little or nothing for their services. *Contra World Vision,* 633 F.3d at 724 (per curiam); *id.* at 747 (Kleinfeld, J., concurring). First, E.O. 11246 governs federal contractors, not grantees. Contractors by definition charge for

[12] *See* Brian J. Grim and Melissa E. Grim, ''The Socio-economic Contribution of Religion to American Society: An Empirical Analysis,'' Interdisciplinary Journal of Research on Religion, vol. 12 (2016), article 3, pp. 10, 24, *http://www.religjournal.com/pdf/ijrr12003.pdf.*

[13] *See id.* at 7.

[14] *See* General Service Administration, System for Award Management, Advanced Search—Entity (listing 410,021 active for-profit entities and 99,781 nonprofit and/or other-not-for-profit entities), *sam.gov/SAM/pages/public/searchRecords/advancedEMRSearch.jsf* (last accessed Oct. 2, 2020).

their goods and services, even if they are nonprofits. E.O. 11246's religious exemption would be a virtual nullity were it restricted to contractors that do not charge. Second, OFCCP agrees with Judge O'Scannlain that nonprofit status is a sufficiently reliable proxy for religious identity,[15] without the need to restrict this factor further to only those organizations that do not charge. Judge O'Scannlain explained that nonprofit status, and its restrictions on monetary gain, is reliable evidence that the organization has religious aims rather than purely pecuniary ones, *see id.* at 734–35 (O'Scannlain, J., concurring), and OFCCP agrees. Plus, the narrower formulation would exclude many bona fide religious organizations, like certain hospitals and care facilities, that engage in substantial and frequent market transactions, including by charging sums to beneficiaries of their goods and services. And while religious educational institutions have their own particular exemption, it would seem odd to think that their charging for books, tuitions, and dormitories would call into question their religious status. Third, one of the reasons OFCCP is promulgating this rule is to encourage broader participation in government contracting and subcontracting. Restrictions that would unduly restrict the exemption's availability could affect the size of the pool, to the detriment of the government's interests in a competitive and diverse field of potential contractors.

OFCCP also received many comments on its proposal to remove the requirement that organizations be nonprofit to qualify for the exemption. As mentioned above, OFCCP has substantially revised this aspect of the rule in response to commenters' concerns. Some commenters agreed with the proposal that it was not necessary for a contractor to ''be nonprofit.'' For example, a religious civil rights organization commended the proposal for affirming that the owners of for-profit entities do not have to forfeit their religious convictions. Those commenters agreed with OFCCP's explanation that *Hobby Lobby* counsels against a stark distinction between nonprofit and for-profit corporations. For example, a religious legal organization commented: ''[A]s the Supreme Court noted in *Hobby Lobby,* a for-profit corporation substantially engaged in an exchange of goods and services can exercise religion.''

[15] In the next few paragraphs, this preamble explains further why and how OFCCP is limiting the exemption to nonprofit organizations in most circumstances.

Other commenters opposed the proposal not to make nonprofit status a determinative factor. For example, an anti-bigotry religious organization emphasized that Judge O'Scannlain's concurrence in *World Vision* focused on whether the employer's purpose is non-pecuniary, while Judge Kleinfeld's analysis focused on whether the employer provided services at no cost or for a nominal fee. The organization criticized the proposed rule for rejecting both factors. Commenters asserted that OFCCP's proposal not to make nonprofit status a determinative factor would unacceptably broaden the exemption. A religious organization asserted that the proposed rule would allow for-profit corporations to exploit faith in order to justify discrimination, and that the spirit of religious institutions would be diminished if houses of worship were placed in the same category as for-profit institutions.

Some commenters stated that the proposal would allow discrimination by contractors that should not be entitled to the religious exemption. A labor organization commented that even for-profit companies, whose primary purpose is, by definition, to make a profit, could protect themselves from discrimination claims by claiming to have a religious purpose.

Some commenters stated that the proposed removal of the nonprofit requirement was inconsistent with Title VII case law interpreting the same term, including Judge O'Scannlain's own test. Many of these commenters stated that OFCCP had not cited any Title VII cases in which a court had found a for-profit entity to qualify for the religious exemption. For example, a contractor association commented that Judge O'Scannlain considered non-profit status to be an ''especially significant'' consideration, which was consistent with the reasoning in numerous Title VII cases. Some commenters stated that the proposed removal of the nonprofit requirement was inconsistent with guidance from the EEOC or was a reversal of OFCCP's previous position. Many of these commenters stated that OFCCP gave inadequate reasons for the deviation. For example, a group of state attorneys general commented that the proposed reversal was not justified by the executive branch's contracting authority, which ''must be exercised within the boundaries of Title VII's prohibitions.'' A contractor association commented that omitting a legal requirement because it could be difficult to apply does not align with OFCCP's stated commitment to follow the rule of law and to apply Title VII principles.

Some commenters specifically objected to OFCCP's reliance on *Hobby Lobby* as justifying or requiring the proposed removal of the nonprofit status factor. Most of these commenters stated that *Hobby Lobby* was inapplicable because it centered not on the Title VII religious exemption but on RFRA, specifically on that statute's definition of ''person.'' For example, a civil liberties organization commented that the Supreme Court in *Hobby Lobby* focused its analysis on the definition of the word ''person'' in RFRA and offered no insight into the definition or scope of the phrase ''religious corporation'' in the religious exemption context. A gender equality advocacy organization commented that RFRA goes far beyond what is constitutionally required by subjecting any laws burdening religious exercise to strict scrutiny and, thus, the question of RFRA's application should not dictate a company's eligibility for a Title VII religious exemption.

Some commenters also stated that *Hobby Lobby* has not been applied in subsequent Title VII religious exemption cases. These commenters typically cited *Garcia* v. *Salvation Army,* 918 F.3d 997 (9th Cir. 2019). In that case, the Ninth Circuit found that the Salvation Army satisfied the requirement that it ''not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts'' both because it is a nonprofit (Judge O'Scannlain's approach) and because it gives away or charges only nominal fees for its services (Judge Kleinfeld's approach). *Id.* at 1004.

In addition to distinguishing *Hobby Lobby* on the ground that it addressed RFRA and not the Title VII religious exemption, commenters also stated that key limitations present in *Hobby Lobby* were not reflected in OFCCP's proposal. In particular, they stated, *Hobby Lobby* held that only *closely held* for-profit corporations could invoke RFRA, but OFCCP's proposal included no such limitation, and the Court in *Hobby Lobby* considered harms an exemption would impose on third parties, but OFCCP did not consider third-party harms the commenters believed the proposal would cause. Commenters also stated that *Hobby Lobby* did not address government contractors. For example, a women's rights advocacy organization commented that, while *Hobby Lobby* dealt with a general requirement on all non-grandfathered insurance plans, the proposed rule deals with businesses that willingly enter contracts with the federal government. According to the organization, ''[a]n entity does not have

a right to a contract that it is unwilling to perform.''

In consideration of these comments, OFCCP is revising the definition of *Religious corporation, association, educational institution, or society* in the final rule. OFCCP recognizes that, as Judge O'Scannlain observed, nonprofit status is ''strong evidence'' that an organization has a nonpecuniary purpose. *World Vision,* 633 F.3d at 734–35 (O'Scannlain, J., concurring); *see also Amos,* 483 U.S. at 344 (1987) (Brennan, J., concurring). Nonprofit status also allows a determination of religious purpose to be made objectively and without engaging in a more searching inquiry. With that said, OFCCP recognizes that, in certain rare circumstances, an organization might be for-profit yet still be fairly considered a religious rather than secular organization.

Thus the final rule adds a fourth requirement: That the contractor either ''(A) operates on a not-for-profit basis; or (B) presents other strong evidence that it possesses a substantial religious purpose.'' Paragraph (A) has been written in a manner that covers federal contractors that do not have formal tax-exempt status under 26 U.S.C. 501(c)(3) but operate in substantial compliance with 501(c)(3)'s requirements. *See World Vision,* 633 F.3d at 745 (Kleinfeld, J., concurring) (noting the need for a small adjustment to the test to cover small groups that do not formally incorporate). Paragraph (A) meets the goals of certainty and clarity in contracting for what OFCCP believes will be the vast majority of contractors interested in the exemption. Paragraph (B) is a helpful contingency for situations where a contractor may not satisfy this prong of the test but in all fairness should be considered a qualifying religious organization. This alternative test is consistent with *World Vision* and the more recent Ninth Circuit case highlighted by commenters, *Salvation Army,* 918 F.3d 997. *World Vision's* brief per curiam opinion stated that an organization is eligible for the exemption ''*at least*'' when it meets the four factors. 633 F.3d at 724 (per curiam) (emphasis added). Judge O'Scannlain's opinion stated that other factors may be relevant in other cases. *See id.* at 729–30 (O'Scannlain, J., concurring). In *Salvation Army,* the court applied an ''all significant religious and secular characteristics'' standard as well as noted that the Salvation Army satisfied the *World Vision* test. *See Salvation Army,* 918 F.3d at 1003–04.

In his *World Vision* concurrence, Judge O'Scannlain described nonprofit status as ''especially significant'' because of its evidentiary value. He wrote that nonprofit status ''bolsters a claim that [an organization's] purpose is nonpecuniary,'' ''provides strong evidence that its purpose is purely nonpecuniary,'' ''makes colorable a claim that it is not purely secular in orientation,'' and ''bolster[s] a 'contention that an entity is not operated simply in order to generate revenues . . . , but that the activities themselves are infused with a religious purpose.' '' *World Vision,* 633 F.3d at 734–35 (O'Scannlain, J., concurring) (quoting *Amos,* 483 U.S. at 344 (Brennan, J., concurring)).[16] OFCCP agrees with these observations, which is why it has adopted nonprofit status as a sufficient means for satisfying this factor of the test.

There may be rare situations, however, where an organization is legally constituted as a for-profit enterprise yet infused with religious purpose. In those situations, the organization would need to come forward with strong evidence that its goals are religious rather than pecuniary—evidence comparable in probative weight to nonprofit status. OFCCP has added examples within the regulatory definition of *Religious corporation, association, educational institution, or society* to illustrate some of these rare instances, including a contractor that provides chaplaincy services to the military and a kosher caterer that supplies meals for federal events. OFCCP doubts that an entity that is not closely held could ever satisfy this requirement, especially since such an entity would have multiple and disparate shareholders. *See Hobby Lobby,* 573 U.S. at 717 (''[T]he idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.''). OFCCP likewise doubts that an entity could qualify if it predominantly provides undifferentiated marketplace goods or services that are not associated with an expressly religious purpose or a charitable, educational, humanitarian, or other eleemosynary purpose.

OFCCP has also modified the NPRM's definition of *Religious corporation, association, educational institution, or society* to reflect these considerations. Unlike the proposed rule, which stated only that a religious organization need not be nonprofit, the final rule now requires that the organization, if for-profit, present ''other strong evidence that it possesses a substantial religious purpose.'' This formulation attempts to synthesize the various statements in *World Vision* and *Amos* as to the quantum of religious purpose an organization must have, and recognizes their reasoning that nonprofit status serves as a valuable evidentiary proxy for religious purpose. Thus the final rule requires a for-profit organization to put forward strong evidence to demonstrate that it does indeed have a substantial religious commitment rather than serve solely as a vehicle to facilitate profit-making or other secular ends. This formulation recognizes that an organization may have more than one purpose, but its religious one must be substantial. It would not be enough, for instance, that an organization feature a scriptural quote in marketing materials or make a brief reference to religious values on its ''About Us'' web page. The examples in the regulatory text may be instructive to readers on this point.

This new regulatory text is also consistent with *Hobby Lobby's* observation that a corporation need not choose absolutely between financial objectives and other objectives:

> While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. . . . If for-profit corporations may pursue such worthy objectives [as supporting charitable causes, environmental measures, or working conditions beyond those required by law], there is no apparent reason why they may not further religious objectives as well.

Hobby Lobby Stores, 573 U.S. at 711. OFCCP believes that the approach promulgated here, which has been modified from that in the NPRM, is consistent with Title VII case law. Again, *World Vision* set out a four-factor test that, if satisfied, is sufficient for organizations to qualify for the exemption. But as *Salvation Army* and other cases show, there are other ways to qualify for the exemption. *See Salvation Army,* 918 F.3d 997; *EEOC* v. *Townley Eng'g & Mfg. Co.,* 859 F.2d 610 (9th Cir. 1988). In these other cases, nonprofit or for-profit status has been treated as an important factor, but not as dispositive. That is similar to this final rule's approach.

For the same reason, OFCCP disagrees that its approach is an unjustified change in agency position. Until this rulemaking, OFCCP had not set forth the specific factors it would use to decide which organizations qualify for E.O. 11246's religious exemption; rather, in

[16] These varying statements span the range from ''not purely secular'' to ''purely nonpecuniary.'' OFCCP's regulatory text attempts to strike a balance down the middle, using the phrase ''possesses a substantial religious purpose.''

withdrawn subregulatory guidance OFCCP stated that it would follow EEOC and court interpretations of Title VII and apply an all-facts-and-circumstances test. To the extent that withdrawn statement could be considered the position of the agency, for the reasons stated in this preamble, OFCCP now believes such a test is too indeterminate and involves potential legal infirmities, and that a more-defined test will give better clarity to contractors and foster a broader pool of potential contractors and subcontractors. It is certainly true, as commenters asserted, that OFCCP's general position is to follow Title VII principles when interpreting E.O. 11246. For the reasons stated in this preamble OFCCP believes its approach is consistent with Title VII principles and Supreme Court case law, and better furthers the goals of this rulemaking. The minor differences between the EEOC's approach to determining which organizations can claim the exemption and OFCCP's definition of *Religious corporation, association, educational institution, or society* are addressed later in this preamble.

OFCCP also disagrees with commenters who argued that *Hobby Lobby* is irrelevant to this issue. Certainly *Hobby Lobby* was not a Title VII case. But *Hobby Lobby's* holding that for-profit corporations qualify as ''persons'' who can exercise religion under RFRA is hard to square with a rule that a for-profit entity can never be a religious organization eligible for E.O. 11246's religious exemption. And much of its reasoning has broader implications. The Supreme Court observed that furthering the religious freedom of corporations, whether for-profit or nonprofit, furthers individual religious freedom. *See Hobby Lobby,* 573 U.S. at 707. The Supreme Court found no reason to distinguish between for-profit sole proprietorships—which had brought Free Exercise claims before the Supreme Court in earlier cases—and for-profit closely held corporations. *See id.* at 709–10. And as just stated, the Supreme Court noted that every U.S. jurisdiction permits corporations to be formed ''for *any lawful purpose* or business,'' *id.* at 711 (internal quotation marks omitted), including a religious one, *see id.* at 710–11.

OFCCP is required to give some consideration to that language in formulating its own test here. If for-profit corporations can exercise religion and further religious objectives as well as pecuniary ones, then OFCCP should consider carefully whether they should be categorically excluded from qualification as religious organizations under the religious exemption. *Hobby Lobby* does not demand a result one way or the other on that issue, but OFCCP has found the case to be an important data point in support of its approach here.

Regarding commenters' concerns that a removal of the nonprofit requirement would unacceptably broaden the exemption, OFCCP has revised the regulatory text as described above. OFCCP does not anticipate many for-profit organizations seeking to qualify for the exemption, and those that do will need to satisfy the other three prongs—which themselves contain significant evidentiary requirements—plus provide strong evidence of their religious nature. OFCCP believes this test will ensure that only bona fide religious organizations will qualify.

Finally, regarding comments about so-called third-party harms, OFCCP recognizes that *Cutter* v. *Wilkinson* stated that government must adequately account for accommodations' burdens on others. 544 U.S. 709, 720 (2005). OFCCP believes it has adequately accounted for any burdens on others that this rule may cause, and on balance believes that the vindication of the law's religious protections, the need for clarity in this area of contracting, and the potential expansion of the government's contracting pool justify any burdens on third parties. *See infra* section III.B.5.

Further, under controlling Supreme Court precedent, the Establishment Clause allows accommodations that remove a burden of government rules from religious organizations, reduce the chilling on religious conduct, or reduce government entanglement. *See Amos,* 483 U.S. at 334–39. Any third party burdens that might result from such accommodations are attributable to the organization that benefits from the accommodation, not to the government, and, as a result, do not violate the Establishment Clause. *Id.* at 337 n.15. In the *Sherbert* line of Free Exercise Clause cases that later became the basis of RFRA, dissents and concurrences routinely pointed to such burdens on third parties but did not persuade the majorities of any Establishment Clause violation.[17]

The Supreme Court has applied this principle to allow accommodations that litigants claimed caused significant third-party harms. For example, the Supreme Court upheld the Title VII exemption for religious employers—discussed in Section 8—despite the alleged significant harms of expressly permitting discrimination against employees on the basis of religion. *See Tex. Monthly,* 489 U.S. 1, 18 n.8 (1989) (citing *Amos*). This is consistent with *Hobby Lobby,* which expressly held that a burden lawfully may be removed from a religious organization even if it allows such a religious objector to withhold a benefit from third parties. *Hobby Lobby,* 573 U.S. at 729 n.37 (''Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals.''). Ultimately, government action that removes such a benefit merely leaves the third party in the same position in which it would have been had government not regulated the religious objector in the first place. Otherwise, any accommodation could be framed as burdening a third party. That would ''render[ ] RFRA meaningless.'' *Hobby Lobby,* 573 U.S. at 729 n.37. ''[F]or example, the Government could decide that all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets), or it could decide that all restaurants must remain open on Saturdays to give employees an opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants).'' *Id.; see also* Attorney General's Memorandum, Principle 15, 82 FR at 49670.

Finally, OFCCP views these comments as addressed more to the religious exemption itself, which is not at issue here, than to this rule. Congress decided in enacting Title VII, and the President decided in amending E.O. 11246, that preserving the integrity of religious organizations merited an exemption from the religious-neutrality requirements that would otherwise apply to their employees. OFCCP does not and could not question those judgments. Further, insofar as commenters argued that the test expands the number of contractors that might qualify for the exemption, that fact alone does not show any third-party harm. Indeed, among the rule's intended purposes is expanding the pool of

[17] *See, e.g., Thomas,* 450 U.S. at 723 n.1 (Rehnquist, J., dissenting) (citing several burdens on the system and other beneficiaries, including that ''[w]e could surely expect the State's limited funds allotted for unemployment insurance to be quickly depleted''); *Wisconsin* v. *Yoder,* 406 U.S. 205, 240 (1972 (White, J., concurring) (outlining the state's legitimate interest in educating Amish children, especially ones that leave their community but finding the evidence of harm insufficient); *Yoder,* 406 U.S. at 245 (Douglas, J., dissenting) (arguing that the decision ''imperiled'' the ''future'' of the Amish children, not their parents).

contractors while avoiding religious entanglement. No contractor is compelled to seek the exemption, and no contractor so exempted is compelled by receipt of the exemption to take any particular employment action. *See Amos,* 337 n.15. To the contrary, the Title VII case law confirms that religious employers have flexibility to accommodate employees' religious preferences if they so choose. *See Kennedy,* 657 F.3d at 194. Additionally, OFCCP discusses below, regarding the scope of the exemption, how this rule interacts with other protected classes and the proper balance between employers' and employees' freedoms and rights. OFCCP believes it has provided an accommodation that reasonably addresses these interests.

g. Other Features

The final rule retains two proposed non-determinative features in the definition of *Religious corporation, association, educational institution, or society.* Those are the statements that the organization ''may or may not'' ''have a mosque, church, synagogue, temple, or other house of worship'' or ''be supported by, be affiliated with, identify with, or be composed of individuals sharing, any single religion, sect, denomination, or other religious tradition.'' With regard to these features, some commenters expressed support, and other commenters expressed opposition. For example, one religious education association commented, in support of the absence of a requirement that the contractor ''[h]ave a mosque, church, synagogue, temple, or other house of worship'' that religious schools that are controlled by a body of religious leaders directly connected to the school are no less ''controlled by a religious organization'' than are schools controlled by hierarchical religious denominations. OFCCP continues to believe that requiring these features could lead the agency to discriminate among religions, which could violate the First Amendment's Establishment Clause. *See World Vision,* 633 F.3d at 732 & n.9 (O'Scannlain, J., concurring). For these reasons and the reasons described in the preamble to the proposed rule, *see* 84 FR at 41684, OFCCP agrees with the commenters who stated that it is appropriate not to require that contractors have these features to be deemed religious.

3. Definition of Exercise of Religion

OFCCP proposed to define *Exercise of religion* as the term is defined for purposes of RFRA. RFRA, in 42 U.S.C. 2000bb–2(4), defines ''exercise of religion'' to mean ''religious exercise'' as defined in the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc–5(7). RLUIPA, in turn, defines ''religious exercise'' as including ''any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'' This definition is well-established and prevents problematic inquiries into the ''centrality'' of a religious practice, which are discussed later in this preamble. However, the phrase ''exercise of religion'' in the proposed rule appeared only as part of the proposed definition of *Religious corporation, association, educational institution, or society.* That definition has been changed to adhere more closely to Judge O'Scannlain's concurrence in *World Vision,* and the words ''exercise of religion'' no longer appear in that prong of the definition. Thus there is no need for regulatory text to define them. With that said, OFCCP will look to general principles of First Amendment law and the RFRA–RLUIPA definition of ''exercise of religion'' when assessing whether an organization is engaging ''in activity consistent with, and in furtherance of,'' its religious purpose, and when assessing whether its employment action has a religious basis. Therefore, OFCCP addresses below the comments received on the proposed definition of *Exercise of religion.*

Several commenters generally approved of the definition for the reasons stated in the NPRM, while others generally opposed the proposed definition. Those generally opposed asserted that RFRA was not a relevant authority given that it is a different statute, that the borrowed provision was vague and did not provide clarity but rather represented an attempt to ''create new law,'' and that the breadth of the definition did not provide ''guardrails for the manner in which employers can require their employees to adhere to certain principles.'' Others commenters raised more specific issues. A group of state attorneys' general noted that the broad definition of religious exercise in RFRA is moderated by its substantial burden requirement, which the proposed definition did not include. Others noted issues with the term in the context of the ''engages in'' language directly preceding it; some believed the two in tandem were vague and overbroad, while one commenter sought specific guidance in the final rule that ''religious speech'' could be an exercise of religion.

OFCCP has considered these comments and continues to believe that the RFRA–RLUIPA definition of ''exercise of religion'' is relevant in this context, although, for the reasons stated above, there is no need for the final rule to define the term. RFRA and RLUIPA are well-established laws regarding religious freedom that are broadly applicable, and they provide a familiar framework that will assist OFCCP in assessing both whether a contractor is engaging ''in activity consistent with, and in furtherance of,'' its religious purpose and whether its employment action has a religious basis.

4. Definition of Sincere

The principles discussed above with regard to the definition of *Exercise of religion* are incorporated in the definition of *Sincere* that OFCCP proposed. In line with court precedent and OFCCP's principles, the critical inquiry for OFCCP is whether a particular employment decision was in fact a sincere exercise of religion. Consistent with that inquiry, and for the reasons explained above, the final rule's definition of *Particular religion* specifies that the religious tenets the contractor applies to its employees must be ''sincere.'' OFCCP, like courts, ''merely asks whether a sincerely held religious belief actually motivated the institution's actions.'' *Geary* v. *Visitation of Blessed Virgin Mary Parish Sch.,* 7 F.3d 324, 330 (3d Cir. 1993). The religious organization's burden ''to explain is considerably lighter than in a non-religious employer case,'' since the organization, ''at most, is called upon to explain the application of its own doctrines.'' *Id.* ''Such an explanation is no more onerous than is the initial burden of any institution in any First Amendment litigation to advance and explain a sincerely held religious belief as the basis of a defense or claim.'' *Id.; see United States* v. *Seeger,* 380 U.S. 163, 185 (1965) (holding whether a belief is ''truly held'' is ''a question of fact''). The sincerity of religious exercise is often undisputed or stipulated. *See, e.g., Hobby Lobby,* 573 U.S. at 717 (''The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.''); *Holt,* 574 U.S. at 361 (''Here, the religious exercise at issue is the growing of a beard, which petitioner believes is a dictate of his religious faith, and the Department does not dispute the sincerity of petitioner's belief.'').

Further, as the Supreme Court has repeatedly counseled, ''religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'' *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 531 (1993) (quoting *Thomas,*

450 U.S. at 714) (internal quotation marks omitted); *see also, e.g., United States* v. *Ballard,* 322 U.S. 78, 86 (1944) (''[People] may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.''). To merit protection, religious beliefs must simply be ''sincerely held.'' *E.g., Frazee* v. *Ill. Dep't of Emp't Sec.,* 489 U.S. 829, 834 (1989); *Seeger,* 380 U.S. at 185. Courts have appropriately relied on the ''sincerely held'' standard when evaluating religious discrimination claims in the Title VII context. *See, e.g., Davis* v. *Fort Bend Cnty.,* 765 F.3d 480, 485 (5th Cir. 2014); *Philbrook* v. *Ansonia Bd. of Educ.,* 757 F.2d 476, 481–82 (2d Cir. 1985); *Redmond* v. *GAF Corp.,* 574 F.2d 897, 901 n.12 (7th Cir. 1978). In such cases, a court must ''vigilantly separate the issue of sincerity from the factfinder's perception of the religious nature of the [employee's] beliefs.'' *EEOC* v. *Union Independiente de la Autoridad de Acueductos y Alcantarillados,* 279 F.3d 49, 57 (1st Cir. 2002) (alteration in original) (quoting *Patrick* v. *LeFevre,* 745 F.2d 153, 157 (2d Cir. 1984)) (internal quotation marks omitted).

Some commenters opposed requiring only that exercise of religion be ''sincere,'' which they characterized as broadening the exemption. They warned that this expands exercise of religion beyond its current meaning and that sincerity cannot be reasonably applied. For example, a labor union stated that ''sincerity'' is not a concept that can sensibly be applied to organizations, much less to for-profit businesses that would be included in the scope of the religious exemption under the Proposed Rule. A group of state attorneys general commented that, by requiring only sincerity, OFCCP ''seeks to expand RFRA's already broad definition of 'exercise of religion.''' An individual commenter wrote that the proposal would grant large for-profit government contractors a hiring exemption as long as they could articulate any strongly held belief.

Other commenters expressed support for a sincerity test. For example, a religious liberties legal organization wrote: ''Attempts to use religion to hide discriminatory intent are generally not successful.'' OFCCP agrees with these commenters. Other commenters also expressed general support for the proposed definition, stating that it will help ensure that important protections against discrimination remain in place while at the same time preventing government overreach and protecting religious practice. For instance, the same religious liberties legal organization commented that legal precedent regarding sincerity and the compelling government interest in preventing discrimination will survive without excessive government involvement.

Many other commenters opposed the proposed, arguing that it would not require entities to be internally consistent in applying their self-proclaimed religious tenets to various groups. For instance, a group of U.S. Senators asserted that the proposed definition ''does not require consistency in the application of policy based upon religious tenets'' such that an entity opposed to body modification, for instance, could ignore tenets regarding tattoos but fire a transgender worker for seeking health care without triggering scrutiny. An LGBT rights advocacy organization echoed this concern. Some commenters also opposed OFCCP's statement that ''the sincerity of religious exercise is often undisputed or stipulated'' because, they stated, it raised concerns regarding the depth of OFCCP's inquiry under the proposed definition. A state civil rights organization commented, for instance, that this portion of the preamble seemed to signal that OFCCP will not inquire about sincerity, despite the fact that whether a belief is sincerely held can only be determined by weighing the strength of evidence. Likewise, an organization that advocates separation of church and state commented that the preamble's discussion, particularly its ''equivocal views'' on policies aimed at determining the sincerity of an adverse employment action, creates uncertainty as to whether OFCCP will actually weigh factors intended to determine sincerity. An LGBT rights advocacy organization expressed substantially identical concerns.

As noted in the NPRM, in assessing sincerity, OFCCP will take into account all relevant facts, including whether the contractor had a preexisting basis for its employment policy and whether the policy has been applied consistently to comparable persons, although absolute uniformity is not required. *See Kennedy,* 657 F.3d at 194 (noting that the Title VII religious exemption permits religious organizations to ''consider some attempt at compromise''); *LeBoon,* 503 F.3d at 229 (''[R]eligious organizations need not adhere absolutely to the strictest tenets of their faiths to qualify for Section 702 protection.''); *see also Killinger* v. *Samford Univ.,* 113 F.3d 196, 199–200 (11th Cir. 1997). But despite commenters' focus on the need for ''internal consistency'' in religious organizations' doctrine—such as a rule that if tattoos are permitted, transgender medical procedures must be as well—rather than consistency across similarly situated employees, OFCCP cannot assess the ''relative severity of [religious] offenses'' or otherwise weigh doctrinal matters, for that would ''violate the First Amendment.'' *Curay-Cramer* v. *Ursuline Acad. of Wilmington, Del., Inc.,* 450 F.3d 130, 139 (3d Cir. 2006).

OFCCP will also evaluate any evidence that indicates an insincere sham, such as acting ''in a manner inconsistent with that belief'' or ''evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.'' *Philbrook,* 757 F.2d at 482 (quoting *Int'l Soc'y for Krishna Consciousness, Inc.* v. *Barber,* 650 F.2d 430, 441 (2d Cir. 1981)) (internal quotation marks omitted); *cf., e.g., Hobby Lobby,* 573 U.S. at 717 n.28 (''To qualify for RFRA's protection, an asserted belief must be 'sincere'; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.''); *United States* v. *Quaintance,* 608 F.3d 717, 724 (10th Cir. 2010) (Gorsuch, J.) (''[T]he record contains additional, overwhelming contrary evidence that the [defendants] were running a commercial marijuana business with a religious front . . . .''). OFCCP's application of the religious exemption is described in more detail below.

Despite these assurances, several commenters who opposed the proposed definition said that it is vague or unworkable in practice. For instance, a group of state attorneys general expressed concern that the definition may increase confusion among contractors seeking to claim religious exemptions because the question of how a for-profit organization can demonstrate the sincerity of its religious beliefs is largely untested. Thus, according to the attorneys general, contractors will have to contend with a high level of uncertainty in addition to their obligations under Title VII. A religious legal organization that otherwise supported the proposed rule highlighted the fact that the proposed definition of *sincere* is ''simply what courts determine 'when ascertaining the sincerity of a party's religious exercise or belief.''' The commenter expressed skepticism that courts could arrive at a concise and uniform test for the meaning of the term without more specific guidance from OFCCP.

OFCCP disagrees that ascertaining the sincerity of an organization's religious exercise, even a for-profit one, will foster confusion or that it presents insurmountable practical difficulties. Religious sincerity is a familiar and

well-developed legal principle. It has been applied in regards to a religious organization's decisions under the Title VII religious exemption. *See, e.g., Little* v. *Wuerl,* 929 F.2d 944, 946 (3d Cir. 1991) (''Little does not challenge the sincerity of the Parish's asserted religious doctrine.''). And the Supreme Court rejected a similar argument ''that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere 'beliefs' of a corporation.'' *Hobby Lobby,* 573 U.S. at 717. Here, as there, questions of corporate religious beliefs are likely to arise only for closely held corporations, and ''[s]tate corporate law provides a ready means for resolving any conflicts . . . .'' *Id.* at 718.

OFCCP also acknowledges the constitutional and prudential limitations on its inquiry that may come into play when religious matters are involved. OFCCP will not compare religious doctrines or practices in evaluating sincerity. *See, e.g., Curay-Cramer,* 450 F.3d at 139 (''[A]ssess[ing] the relative severity of [religious] offenses . . . would violate the First Amendment.''); *Hall* v. *Baptist Mem'l Health Care Corp.,* 215 F.3d 618, 626 (6th Cir. 2000) (''[T]he First Amendment does not permit federal courts to dictate to religious institutions how to carry out their religious missions or how to enforce their religious practices.''). Nor will OFCCP require contractors to adhere to strict, uniform procedures to demonstrate sincerity. *See Kennedy,* 657 F.3d at 194; *LeBoon,* 503 F.3d at 229. And where ''it is impossible to avoid inquiry into a religious employer's religious mission or the plausibility of its religious justification for an employment decision,'' then OFCCP will apply the E.O. 11246 religious exemption. *Curay-Cramer,* 450 F.3d at 141.

Some commenters objected to OFCCP's stated commitment to applying the ministerial exception. For instance, a city public advocate observed that OFCCP's claim that it will evaluate any factors that indicate insincerity is undermined by the proposed rule's commitment to the ministerial exception. Nevertheless, OFCCP respects and must apply the ministerial exception. The ministerial exception is an application of the Establishment and Free Exercise clauses of the First Amendment. *See Our Lady of Guadalupe,* 140 S. Ct. at 2060; *Hosanna-Tabor,* 565 U.S. at 189–90 (finding that the ministerial exception bars ''an employment discrimination suit brought on behalf of a minister'' and observing that the exception ''is not limited to the head of a religious congregation,'' nor subject to ''a rigid formula for deciding when an employee qualifies as a minister'').

For the reasons described above and in the NPRM, and considering the comments received, OFCCP finalizes the proposed definition without modification.

5. Definition of Particular Religion

In the NPRM, OFCCP proposed to define *Particular religion* to clarify that the religious exemption allows religious contractors not only to prefer in employment individuals who share their religion, but also to condition employment on acceptance of or adherence to religious tenets as understood by the employing contractor. The NPRM explained that this definition flows directly from the broad definition of *Religion,* discussed above, to include all aspects of religious belief, observance, and practice as understood by the employer, which would clarify past statements from OFCCP suggesting that the exemption was restricted solely to hiring coreligionists. The NPRM stated that the proposed definition was consistent with Title VII case law as well as Supreme Court case law holding that the government burdens religious exercise when it conditions benefits on the surrender of religious identity.

The NPRM noted that the religious exemption does not permit religious employers to discriminate on other protected bases. The NPRM described how courts have used a variety of approaches and doctrines to distinguish claims of religious discrimination from other claims of discrimination while avoiding entangling inquiries under the First Amendment, and that OFCCP proposed to do the same. *See* 84 FR at 41679–81.

In a later part of the NPRM describing the proposed terms *Exercise of religion* and *Sincere,* OFCCP gave additional detail on its proposed approach for applying the religious exemption. The NPRM noted that sincerity is the ''touchstone'' of religious exercise and that OFCCP would take into account all relevant facts when determining whether a sincere religious belief actually motivated an employment decision. The NRPM also proposed applying a but-for standard of causation when evaluating claims of discrimination by religious organizations based on protected characteristics other than religion. *See* 84 FR at 41684–85.

OFCCP received comments on all these aspects of its proposal. In response to the comments, the agency has made some adjustments in its explanation regarding how it views and will apply this definition. These include changing to a motivating factor standard of causation and providing additional clarification, particularly on the interaction of the religious exemption with other protected categories, including the importance of RFRA. As to the regulatory text, the word ''sincere'' has been inserted into the phrase ''acceptance of or adherence to *sincere* religious tenets as understood by the employer as a condition of employment,'' to make clear both the requirement of sincerity and, by reference to the definition of *Sincere,* how sincerity is tested. Otherwise the definition is being finalized as proposed.

Insofar as OFCCP's view expressed here and in the proposed rule is a change from its prior position as to the definition of *Particular religion* under the exemption and the permissible practices of contractors and subcontractors who qualify as religious organizations, OFCCP believes the change is justified for all the reasons stated in the proposed rule and directly below. A broader view of the religious exemption is also consistent with one of OFCCP's primary goals in this rulemaking, which is to increase economy and efficiency in government contracting by providing for a broader pool of government contractors and subcontractors. Issues specific to the EEOC's view on this matter are discussed further in a separate part of this preamble.

a. Burdens on Religious Organizations in Contracting

As described in the NPRM, OFCCP's approach here is consistent with Supreme Court decisions emphasizing that ''condition[ing] the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties.'' *Trinity Lutheran,* 137 S. Ct. at 2022 (alterations omitted) (quoting *McDaniel* v. *Paty,* 435 U.S. 618, 626 (1978) (plurality opinion)). These decisions naturally extend to include the right to compete on a level playing field for federal government contracts. *See id.* (holding the government burdens religious exercise when it so conditions ''a benefit or privilege,'' ''eligibility for office,'' ''a gratuitous benefit,'' or the ability ''to compete with secular organizations for a grant'' (quoted sources omitted)); *accord* E.O. 13831 § 1 (''The executive branch wants faith-based and community organizations, to the fullest opportunity permitted by

law, to compete on a level playing field for . . . contracts . . . and other Federal funding opportunities.'').

A few commenters praised OFCCP's reliance on *Trinity Lutheran* to establish the principle that benefits cannot be conditioned on surrendering religious status. For example, a religious public policy women's organization stated that no one should be forced to abandon their faith when operating their business or participating in government programs. Similarly, a religious liberty legal organization commented that religious contractors should be allowed to serve on equal terms as all other contractors, without having to compromise their faith-based identities.

A few commenters stated that *Trinity Lutheran* and other Supreme Court cases discussed in the preamble to the NPRM do not support or require the proposed definition. For example, an organization that advocates separation of church and state commented that religious organizations are already eligible to compete for government contracts, which is all that is required by *Trinity Lutheran.* In addition, a religious organization commented that ''the rule violates the Establishment Clause of the First Amendment by funding positions which require specific religious beliefs and customs.'' OFCCP believes, however, that its interpretation of the scope of the religious exemption is consistent with the principles of religious freedom articulated in *Trinity Lutheran* and other Supreme Court cases.

First, restricting religious organizations' ability to employ those aligned with their mission burdens their religious exercise, even when those employees do not engage in expressly religious activity. As the Supreme Court recognized in *Amos,* the religious exemption's protection for all activities of religious organizations alleviates the burden of government interference with those religious organizations' missions. *See Amos,* 483 U.S. at 336. And as the Department of Justice's Office of Legal Counsel has concluded:

> [T]he Court's opinion in *Amos,* together with Justice Brennan's concurring opinion in the case, indicates that prohibiting religious organizations from hiring only coreligionists can ' ''impose a significant burden on their exercise of religion, even as applied to employees in programs that must, by law, refrain from specifically religious activities.' '' The .'' Mem. for Brett Kavanaugh, Assoc. Counsel to the Pres., from Sheldon T. Bradshaw, Deputy Ass't Att'y Gen., Office of Legal Counsel further explained:, *Re: Section 1994A (Charitable Choice) of H.R. 7, The Community Solutions Act* at 4 (June 25, 2001) . . . . Many religious organizations and associations engage in extensive social welfare and charitable activities, such as operating soup kitchens and day care centers or providing aid to the poor and the homeless. Even where the content of such activities is secular—in the sense that it does not include religious teaching, proselytizing, prayer or ritual—the religious organization's performance of such functions is likely to be ''infused with a religious purpose.'' *Amos,* 483 U.S. at 342 (Brennan, J., concurring). And churches and other religious entities ''often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster.'' *Id.* at 344 (footnote omitted). In other words, the provision of ''secular'' social services and charitable works that do not involve ''explicitly religious content'' and are not ''designed to inculcate the views of a particular religious faith,'' *Bowen* v. *Kendrick,* 487 U.S. 589, 621 (1988), nevertheless may well be ''religiously inspired,'' *id.,* and play an important part in the ''furtherance of an organization's religious mission.'' *Amos,* 483 U.S. at 342 (Brennan, J., concurring).
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> 31 O.L.C. 162, 172 172–73 (2007)

Second, this burden exists even when not imposed directly. The Office of Legal Counsel, in the same opinion, further recognized that a burden on religious organizations' free exercise of religion can occur not only through direct imposition of requirements but through conditions on grants or other benefits, citing many of the same cases cited in *Trinity Lutheran* for that proposition. *See* 31 O.L.C. at 174–75; *Trinity Lutheran,* 137 S. Ct. at 2022. Those concerns about burdening religious exercise through conditions naturally extend to conditions on contracts as well. *See* Office of the Att'y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty at 2, 6, 8, 14a–16a (Oct. 6, 2017), *available at www.justice.gov/opa/press-release/file/1001891/download.* Third, the definition of *Particular religion* promulgated here attempts to alleviate that burden by permissibly accommodating religious organizations. ''[T]he government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause. . . . There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.' '' *Amos,* 483 U.S. at 344 (quoting *Walz* v. *Tax Comm'n,* 397 U.S. 664, 673 (1970)). *See also* E.O. 13279 § 4; 68 FR at 56393 (codified at 41 CFR 60–1.5(a)(5)). This rule relieves religious organizations of government interference by permitting them to take into account their employees' particular religion—including acceptance of or adherence to religious tenets—to ensure their employees are committed to the religious organization. In some instances, as described below, RFRA may also come into play to require accommodations.

Regarding the comment that the rule violates the Establishment Clause by funding positions that require specific religious beliefs or customs, that is a criticism of the E.O. 11246 religious exemption itself, which has been part of federal law for nearly twenty years and is not at issue in this rulemaking. This is addressed more below.

b. The Exemption's Scope: Coreligionists

As explained in the NPRM, the religious exemption is not restricted to a purely denominational preference. The religious exemption allows religious contractors not only to prefer in employment individuals who share their religion, but also to condition employment on acceptance of or adherence to religious tenets as understood by the employing contractor. This definition flows directly from the broad definition of *Religion,* discussed above, to include all aspects of religious belief, observance, and practice as understood by the employer. It is also consistent with Title VII case law holding that ''the permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts.'' *Little,* 929 F.2d at 951; *see also, e.g., Kennedy,* 657 F.3d at 194 (''Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.' '' (quoting *Little,* 929 F.2d at 951)); *Hall,* 215 F.3d at 624 (''The decision to employ individuals 'of a particular religion' under [42 U.S.C.] § 2000e–1(a) and § 2000e–2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.'' (citing, *inter alia, Little,* 929 F.2d at 951)); *Killinger,* 113 F.3d at 200 (''[T]he exemption [in 42 U.S.C. 2000e–1(a)] allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities.'').

This approach is also consistent with Supreme Court decisions emphasizing that ''condition[ing] the availability of benefits upon a recipient's willingness

to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties.'' *Trinity Lutheran,* 137 S. Ct. at 2022 (alterations omitted) (quoting *McDaniel,* 435 U.S. at 626 (plurality opinion)). These decisions naturally extend to include the right to compete on a level playing field for federal government contracts. *See id.* (holding the government burdens religious exercise when it so conditions ''a benefit or privilege,'' ''eligibility for office,'' ''a gratuitous benefit,'' or the ability ''to compete with secular organizations for a grant'' (quoted sources omitted)); *accord* E.O. 13831 § 1 (''The executive branch wants faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for . . . contracts . . . and other Federal funding opportunities.'').

OFCCP believes this clarification will assist contractors that have looked for guidance on the religious exemption in OFCCP's past statements. These past statements may have suggested that the exemption permits qualifying organizations only to prefer members of their own faith in their employment practices. *See, e.g.,* OFCCP, Compliance Webinar (Mar. 25, 2015), *available at https://www.dol.gov/ofccp/LGBT/FTS_TranscriptEO13672_PublicWebinar_ES_QA_508c.pdf* (''This exemption allows religious organizations to hire only members of their own faith.''). OFCCP based such statements on guidance from the EEOC, the agency primarily responsible for enforcing Title VII. *See, e.g.,* EEOC, EEOC Compliance Manual § 12–I.C.1 (July 22, 2008) (''Under Title VII, religious organizations are permitted to give employment preference to members of their own religion.''). However, with this final rule, OFCCP is clarifying that it applies the principles discussed above, permitting qualifying employers to take religion—defined more broadly than simply preferring coreligionists—into account in their employment decisions. The case law makes clear that qualifying employers ''need not enforce an across-the-board policy of hiring only coreligionists.'' *LeBoon,* 503 F.3d at 230; *Killinger,* 113 F.3d at 199–200 (''We are also aware of no requirement that a religious educational institution engage in a strict policy of religious discrimination—such as always preferring Baptists in employment decisions—to be entitled to the exemption.'').

Some commenters expressed support for OFCCP's proposal to extend the definition beyond preferring coreligionists, which they viewed as overly narrow, to include acceptance of or adherence to religious tenets as a condition of employment. Many of these commenters agreed with OFCCP that the definition as proposed was necessary to ensure that religious organizations could carry out their missions without losing their identities. For example, a religious school association commented that being able to ensure that applicants and employees concur with its schools' religion-based conduct expectations is essential to fulfilling the schools' religious mission. Similarly, a religious civil rights organization commented that the entire ''raison d'être'' of religious non-profits would be undermined if employees could subvert their religious missions. Other commenters, including a religious medical organization, a religious liberty coalition, and a state religious public policy organization, echoed these sentiments in support of the proposal. A private religious university further asserted that the proposed definition would increase religious diversity, because its protections are not limited to hiring decisions based on co-religiosity but also allow organizations to hire based on applicants' support for their religious missions.

Many commenters asserted that the proposed definition conflicts with the EEOC's interpretation, OFCCP's previous interpretation, or both. For example, a civil liberties organization commented that the EEOC interprets the text of the Title VII religious exemption to mean that religious organizations may give employment preference to members of their own religion. Several commenters referred to OFCCP's previous interpretation as reflected in its 2015 answers to FAQs regarding the E.O. 13672 Final Rule.[18] For example, a legal think tank noted that in 2015, OFCCP issued guidance mirroring the EEOC's interpretation of the Title VII religious exemption and confirming that the plain text of section 204(c) is limited to religious organizations with hiring preferences for coreligionists and to the ministerial exemption. Other commenters, including an LGBT legal services organization, a reproductive rights organization, and a public policy research and advocacy organization, made similar points.

OFCCP appreciates the various comments received on this topic. After careful consideration, OFCCP disagrees with the comments arguing that the religious exemption should extend no further than a coreligionist preference for several reasons.

First, a coreligionist preference could be construed narrowly, as some commenters seemed to urge, as allowing religious organizations to prefer those who share a religious identity in name but nothing more. OFCCP disagrees that the exemption should be construed to permit religious employers to prefer fellow members of their faith—or people who profess to be members of their faith—but forbid requiring their adherence to that faith's tenets in word and deed. Religious employers can require more than nominal membership from their employees, as shown by *Amos,* where the plaintiffs were discharged for failing to qualify for a certificate showing that they were members of the employer's church and met certain standards of religious conduct. *See* 483 U.S. at 330 n.4; *Amos* v. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints,* 594 F. Supp. 791, 796 (D. Utah 1984) (describing plaintiffs' failure to meet church worthiness requirements), *rev'd,* 483 U.S. 327; *see also Killinger,* 113 F.3d at 198–200 (holding despite plaintiff's claim that he subscribed to university's ''legitimate religious requirements,'' including the requirement to ''subscribe to the 1963 Baptist Statement of Faith and Message,'' he was permissibly removed from a teaching post in the divinity school ''because he did not adhere to and sometime[s] questioned the fundamentalist theology advanced by the [school's] leadership'' (first alteration in original)). Any other course would entangle OFCCP in deciding between competing views of a religion's requirements—in essence, deciding for example, ''who is and who is not a good Catholic.'' *Maguire* v. *Marquette Univ.,* 627 F. Supp. 1499, 1500 (E.D. Wis. 1986) (holding despite plaintiff's claim to be Catholic, a Catholic religious university permissibly declined to hire her ''because of her perceived hostility to the institutional church and its teachings''), *aff'd in part, vacated in part,* 814 F.2d 1213 (7th Cir. 1987). OFCCP is not permitted to make such determinations. *See Our Lady of Guadalupe,* 140 S. Ct. at 2068–69 (''[D]etermining whether a person is a 'co-religionist' will not always be easy. See Reply Brief 14 ('Are Orthodox Jews and non-Orthodox Jews coreligionists? . . . Would Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists?'). Deciding such questions would risk judicial entanglement in religious issues.''); *Hall,* 215 F.3d at 626–27 (''If a particular

[18] These 2015 FAQs are archived at *https://web.archive.org/web/20150709220056/http:/www.dol.gov/ofccp/LGBT/LGBT_FAQs.html.*

religious community wishes to differentiate between the severity of violating two tenets of its faith, it is not the province of the federal courts to say that such differentiation is discriminatory and therefore warrants Title VII liability.'' (quoted source omitted)); *Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church,* 393 U.S. 440, 449–50 (1969) (''Plainly, the First Amendment forbids civil courts from playing such a role [in interpreting particular church doctrines and their importance to the religion].'').

In addition, some commenters argued that the religious exemption might allow religious employers to require faithfulness of a coreligionist employee, but the exemption does not permit them to impose religious requirements on their other employees. OFCCP declines to so narrow its interpretation of the exemption. The exemption was expanded decades ago to include employees engaged not just in the organization's religious activities, but in any of its activities. And the purpose of the religious exemption is to preserve ''the ability of religious organizations to define and carry out their religious missions.'' *Amos,* 483 U.S. at 335. As other commenters stated, some religious organizations hire employees outside their faith tradition yet require those employees to follow at least some religious standards in order to preserve the organization's integrity Courts have recognized the legitimacy of that view. *See Kennedy,* 657 F.3d at 190–91 (holding a religious nursing-care facility affiliated with the Roman Catholic Church was protected by the religious exemption when it took action against an employee of a different faith who refused to change her own religiously inspired garb); *Little,* 929 F.2d at 951 (''[I]t does not violate Title VII's prohibition of religious discrimination for a parochial school to discharge a Catholic *or a non-Catholic* teacher who has publicly engaged in conduct regarded by the school as inconsistent with its religious principles.'' (emphasis added)). This view is also consistent with guidance from the U.S. Department of Justice. *See* Office of the Att'y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty (Oct. 6, 2017), *www.justice.gov/opa/press-release/file/1001891/download* (stating that, under the Title VII religious exemption, ''a Lutheran secondary school may choose to employ only practicing Lutherans, only practicing Christians, or only those willing to adhere to a code of conduct consistent with the precepts of the Lutheran community sponsoring the school'').

Beyond compromising the integrity of religious organizations, OFCCP would be wary of drawing a line here between coreligionist employees and other employees for other reasons. As illustrated by the cases declining to decide ''who is and who is not a good Catholic,'' OFCCP does not believe it should or could in disputed cases decide who is a coreligionist. This would be especially difficult when the employer has no particular denomination, as there would be no simple denominational match between the employer and employee. Cases like *World Vision* and *Little* v. *Wuerl* show that a religious organization may require that its employees subscribe to certain precepts regardless of their particular religious affiliation, if they have any affiliation at all. OFCCP must, and should, treat these religious organizations equally with those that have a defined denominational membership. *See World Vision,* 633 F.3d at 731 (O'Scannlain, J., concurring).

OFCCP also views an artificial line between coreligionists and non-coreligionists as presenting an unwelcome either-or dilemma for religious organizations. By declining to draw such a line, a religious organization would be permitted to require certain religious practices or conduct from its coreligionist employees, but not from its non-coreligionist employees; yet the religious organization would also be permitted to, for instance, decline to hire or promote that same non-coreligionist altogether. In other words, a religious organization could discriminate against a non-coreligionist altogether in hiring or promotion, but could not instead offer a job or promotion contingent on adherence to certain mission-oriented religious criteria. Religious organizations should be, and under this rule continue to be, permitted to use this middle ground. *See Kennedy,* 657 F.3d at 194.

c. The Exemption's Scope: Employment Practices

In a related vein, commenters also shared their views on not only which employees should be covered by the exemption, but also which employment practices of religious organizations should be protected by the exemption. Some of these commenters asserted that the proposed definition was too broad. For example, a transgender civil rights organization commented that, because the proposed definition encompasses ''all aspects of religious belief, observance and practice as understood by the employer,'' it would permit the subjective viewpoint of the employer to determine what constitutes religion. Similarly, a reproductive rights organization claimed that the proposed rule would expand the scope of the exemption in violation of federal law.

As explained above in the discussion of the definition of *Religion,* OFCCP has chosen a definition that is well-established in federal law, including in the text of Title VII. *See* 42 U.S.C. 2000e(j). And as explained above in the discussion of the definition of *Religious corporation, association, educational institution, or society,* OFCCP has significant constitutional and practical concerns about substituting its own judgment for a contractor's view—found to be sincere—that a particular activity, purpose, or belief has religious meaning. It bears repeating: Any other course would risk ''[t]he prospect of church and state litigating in court about what does or does not have religious meaning [, which] touches the very core of the constitutional guarantee against religious establishment.'' *Cathedral Acad.,* 434 U.S. at 133. OFCCP will refrain from resolving disputes between employers and employees as to what has religious meaning or not, when the employer proves its sincere belief that something does have religious meaning. However, as explained in more detail below, just because an employment practice is religiously motivated does not mean that it is always protected by the exemption.

This leads to a separate set of issues raised by commenters. Many commenters who opposed the proposed definition stated that it is inconsistent with Title VII in one or more respects. For example, a group of state attorneys general stated that the proposed definition is contrary to the text of Title VII and congressional intent. Specifically, the group pointed out that the plain language of the exemption covers only employer preferences based on a ''particular religion,'' meaning that religious employers cannot broadly discriminate on the basis of religion by, for instance, adopting policies such as ''Jews and Muslims Need Not Apply.'' Some commenters stated that the proposed definition is unsupported by Title VII case law. For example, a civil liberties organization criticized OFCCP for not citing to court decisions holding that the Title VII exemption is intended to shield employers from all religiously motivated discrimination, as opposed to discrimination that is ''on the basis of

religion alone.'' [19] A city commented that OFCCP's reliance on *Little,* 929 F.2d 944; *Kennedy,* 657 F.3d 189; *Hall,* 215 F.3d 618; and *Killinger,* 113 F.3d 196, is misplaced and misleading because, in each of those cases, the courts found that a religious institution with a substantiated religious purpose could discriminate against an employee performing work connected in some manner to the institution's religious mission.

The NPRM did not suggest that the religious exemption would permit religious organizations to single out other religions for disfavor. No employer OFCCP is aware of holds such an exclusionary policy; no commenter identified such an employer; and such a policy would run contrary to the country's experience under the Title VII religious exemption, where no litigant to OFCCP's knowledge has asserted such a policy. Instead, the mine run of cases have involved a church, religious educational institution, or religious nonprofit raising the defense that it is only requiring employees or applicants—whether strictly defined as coreligionists or not [20]—to follow its own religiously inspired standards of belief or conduct. The exemption historically has been a shield, not a sword, and it remains so under this rule.

OFCCP also believes it has relied properly on cases like *Little* and *Kennedy.* As stated in the NPRM, these cases hold that the religious exemption ''includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts.'' *Little,* 929 F.2d at 951; *see also, e.g., Kennedy,* 657 F.3d at 194 (''Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.' '') (quoting *Little,* 929 F.2d at 951); *Hall,* 215 F.3d at 624 (''The decision to employ individuals 'of a particular religion' under [42 U.S.C.] § 2000e–1(a) and § 2000e–2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.'' (citing, inter alia, *Little,* 929 F.2d at 951)); *Killinger,* 113 F.3d at 200 (''[T]he exemption [in 42 U.S.C. 2000e–1(a)] allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities.''); *accord* Att'y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty (Oct. 6, 2017), *www.justice.gov/opa/press-release/file/1001891/download* (''[R]eligious organizations may choose to employ only persons whose beliefs and conduct are consistent with the organizations' religious precepts.'').

These cases were grounded in the basic principle that these religious employment criteria are permitted because they are necessary for the religious organization's integrity. *See Little,* 929 F.2d at 950 (''[T]he legislative history . . . suggests that the sponsors of the broadened exception were solicitous of religious organizations' desire to create communities faithful to their religious principles.''); *Kennedy,* 657 F.3d at 193 (finding the religious organization exemption '' 'reflect[s] a decision by Congress that the government interest in eliminating religious discrimination by religious organizations is outweighed by the rights of those organizations to be free from government intervention.' '' (alteration in original) (quoting *Little,* 929 F.2d at 951)); *Killinger,* 113 F.3d at 201 (''[F]ederal court[s] must give disputes about what particulars should or should not be taught in theology schools a wide-berth. Congress, as we understand it, has told us to do so for purposes of Title VII.''); *Hall,* 215 F.3d at 623 (''In recognition of the constitutionally-protected interest of religious organizations in making religiously-motivated employment decisions . . . Title VII has expressly exempted religious organizations from the prohibition against discrimination on the basis of religion . . . .''). That means that the religious employer must explain how its sincere religious beliefs translate into particular religious requirements for its employees and applicants. *Cf. Geary,* 7 F.3d at 330 (''The institution, at most, is called upon to explain the application of its own doctrines.''). But the exemption does not require the religious employer to further prove that a particular employee or applicant's adherence to those religious requirements is necessary, in any contested instance, to further the religious organization's mission. That added burden would be contrary to the 1972 amendment of the Title VII religious exemption, which expanded the exemption from employees who perform work connected to the organization's religious activities to employees who perform work connected to any of the organization's activities. As the Supreme Court observed, this expansion was aimed toward relieving religious organizations of the kind of burden sought by the commenters:

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.

Amos, 483 U.S. at 336

OFCCP shares the same concerns about requiring contractors to justify otherwise-protected employment decisions as additionally furthering the organization's mission. Difficulties could arise were OFCCP to draw distinctions between religiously motivated employment decisions that further an employer's religious mission and those that do not. *Amos* observed that difficulty, in which the district court had drawn an at-least questionable distinction between the termination of a truck driver at a church-affiliated workshop (protected) with the termination of a building engineer at a church-affiliated gymnasium (not protected). *See id.* at 330, 333 n.13, 336 n.14. The exemption does not require such hair-splitting—indeed, it appears to forbid it—and OFCCP sees no useful reason to attempt drawing such distinctions. *See also Little,* 929 F.2d at 951 (''Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.' '').

d. The Exemption's Scope: Other Protected Bases

i. Comments

As is made clear by the text of section 204(c) of E.O. 11246 and the corresponding regulation at 41 CFR 60–1.5(a)(5), the religious exemption itself does not exempt or excuse a contractor from complying with other applicable requirements. *See* E.O. 11246 § 204(c) (''Such [religious] contractors and subcontractors are not exempted or excused from complying with other requirements contained in this Order.''); 41 CFR 60–1.5(a)(5) (same). Thus, religious employers are not exempted from E.O. 11246's requirements regarding antidiscrimination and affirmative action, generally speaking;

[19] This point is addressed more fulsomely in the next section regarding E.O. 11246's other protected bases.

[20] For the reasons discussed earlier, OFCCP does not believe restricting the exemption to a purely coreligionist preference is required or the most reasonable approach.

notices to applicants, employees, and labor unions; compliance with OFCCP's implementing regulations; the furnishing of reports and records to the government; and flow-down clauses to subcontractors. *See* E.O. 11246 §§ 202–203.

Although Title VII does not contain a corresponding proviso, courts have generally interpreted the Title VII religious exemption to be similarly precise, so that religious employers are not exempted from Title VII's other provisions protecting employees. *See, e.g., Kennedy,* 657 F.3d at 192; *Rayburn* v. *Gen. Conference of Seventh-Day Adventists,* 772 F.2d 1164, 1166 (4th Cir. 1985); *cf. Hobby Lobby,* 573 U.S. at 733 (rejecting ''the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction''); *Bob Jones Univ.* v. *United States,* 461 U.S. 574, 604 (1983) (''[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . .'').

Many commenters nevertheless assumed that OFCCP would apply the proposed definition to allow religious contractors to discriminate on bases other than religion. Most of these commenters stated that doing so would be contrary to E.O. 11246, and they argued that OFCCP lacks authority to expand the existing exemption or grant any new exemption. For example, a civil liberties organization commented that the preamble indicates that OFCCP intends to authorize discrimination based even on other protected bases like sex or race, contrary to the text of E.O. 11246. Similarly, a group of U.S. Senators commented that the proposed rule would allow employers to discriminate against employees on bases other than religion by, for instance, permitting employers to justify sex discrimination based on their religious tenets.

These commenters pointed to the second sentence of section 204(c) of E.O. 11246 as supporting their criticism. For example, a legal think tank commented that it was unclear how the proposed rule's ''expansive definition of 'particular religion' '' could be reconciled with its insistence that ''an employer may not . . . invoke religion to discriminate on other bases protected by law.''

Other commenters also stated that it would be inconsistent with Title VII case law to allow religious contractors to discriminate on bases other than religion. These commenters, including a legal think tank, a group of state attorneys general, a labor union, a civil liberties organization, and a reproductive rights organization, cited cases in which, they asserted, courts prohibited religious employers from discriminating on bases other than religion. For example, the civil liberties organization commented that courts have consistently prohibited religious organizations from discriminating on other bases, including sex, even where that discrimination is motivated by the organization's sincere religious beliefs (citing *Rayburn,* 772 F.2d at 1166; *Kennedy,* 657 F.3d at 192; *EEOC* v. *Pac. Press Publ'g Ass'n,* 676 F.2d 1272, 1277 (9th Cir. 1982), *abrogated on other grounds by Alcazar* v. *Corp. of Catholic Archbishop of Seattle,* 598 F.3d 668 (9th Cir. 2010); *Elbaz* v. *Congregation Beth Judea, Inc.,* 812 F. Supp. 802, 807 (N.D. Ill. 1992); *Dolter* v. *Wahlert High Sch.,* 483 F. Supp. 266, 269 (N.D. Iowa 1980); *accord McClure* v. *Salvation Army,* 460 F.2d 553, 558 (5th Cir. 1972)).

Some commenters argued that religion has long been used as a way to justify discrimination. For example, an affirmative action professionals association asserted that religious freedom has historically been invoked to defend slavery, the denial of women's suffrage, Jim Crow laws, and segregation. That commenter cited a recent news story in which a mixed-race couple was allegedly denied the use of a hall for a wedding because of the owner's religious beliefs.

Several commenters expressed concern specifically about the effect of the proposal on E.O. 11246's protections from discrimination based on sexual orientation and gender identity. For example, an LGBT rights advocacy organization commented that it was troubled by the fact that OFCCP failed to cite sexual orientation and gender identity in the proposed rule as the protected characteristics most likely to be impacted by the rule. And a legal professional organization expressed concern that OFCCP may interpret E.O. 11246 to allow federal contractors to discriminate based on sexual orientation as long as they cite sincere religious reasons for doing so.

On the other hand, as noted above, other commenters expressed support for the proposal because they believed it would exempt religious organizations from the prohibitions on discrimination based on sexual orientation and gender identify, which would provide them protection to staff their organizations consistent with their sincere religious beliefs.

Some commenters requested guidance to resolve the perceived conflict. For example, an individual commenter asked whether protection for a client's religion or protection for an applicant or employee's sexual orientation and/or gender identity would prevail under the proposed regulations. A pastoral membership organization stated that if the terms ''sexual orientation'' and ''gender identity'' include conduct, it is difficult to determine whether the prohibition on discrimination based on sexual orientation and gender identity or the protection for religiously-motivated conduct applies.

Many of these commenters criticized the proposal for not clearly stating how OFCCP would resolve the perceived contradiction between its assertion that religious contractors would not be permitted to discriminate on other protected bases and its inclusion in the proposed definition of ''acceptance of or adherence to religious tenets as understood by the employer as a condition of employment.'' For example, the legal think tank asserted that OFCCP does not explain how it will apply these two provisions in cases in which they appear to conflict, and observed that the proposed regulatory text does not limit its definition of ''religious tenets'' to tenets defined without reference to race, color, sex, sexual orientation, gender identity, or national origin. A state's attorney general asserted that, because the proposed rule fails to define or limit the type of ''conduct'' that can form the basis of permissible discrimination by religious entities, it allows contractors to discriminate based on any arbitrary characteristic.

Many supportive commenters recommended that OFCCP resolve the perceived conflict by clarifying that the non-discrimination requirements of Title VII and E.O. 11246 do not apply under the corresponding religious exemptions. For example, an anonymous commenter suggested that OFCCP clarify that religious organizations are permitted to discriminate on the bases of sexual orientation and gender identity because, in the commenter's view, an action that falls within the religious exemption would be outside the bounds of Title VII and E.O. 11246, ''regardless of whether it would otherwise be prohibited by other provisions.'' Other supportive commenters offered a similar view, stating that the proposed definition provided helpful clarification. For example, a religious liberties legal organization criticized ''the suggestion from the Obama administration'' that the exemption should be limited to ''religious people cannot be discriminatory for hiring only members of their own religion'' rather than ''non-discrimination law does not apply in religious contexts'' as provided under

the Civil Rights Act, and praised the proposed rule for affirming that requiring adherence to an employer's religious tenets does not constitute discrimination. Similarly, a U.S. Senator commented that the proposed helpfully clarifies that religious employers that contract with the federal government retain the right to hire employees that support their religious mission, consistent with Title VII. Some supportive commenters also noted that the proposed definition was consistent with the First Amendment and Title VII case law. For example, a religious legal association and an association of evangelical churches and schools commented that the principle that religious employers should be allowed to require their employees to conduct themselves in accordance with the employers' code of moral conduct has been ''almost universally'' accepted by courts, who have relied alternatively on Section 702(a) of Title VII, the First Amendment's Religion Clauses, and other considerations recognizing that ''religious organizations may have legitimate, nondiscriminatory reasons'' for practicing their religious beliefs through employment decisions.

In a joint comment, a religious legal association and an association of evangelical churches and schools commented that Section 204(c) of E.O. 11246 should be construed to exempt religious organizations from the nondiscrimination mandates of Section 202, except to the extent that a religious organization's employment decision is based on race.

To address these comments, OFCCP here first discusses the applicable Title VII principles established by case law, including how those principles may apply where religious organizations maintain sincerely held beliefs regarding matters such as marriage and intimacy, which may implicate protected classes under E.O. 11246. OFCCP then discusses its recognition that religious organizations in appropriate circumstances will be entitled to relief under the Religious Freedom Restoration Act.

The public should bear in mind that this discussion is restricted solely to these difficult and sensitive questions raised by commenters. This rule does not affect the overwhelming majority of federal contractors and subcontractors, which are not religious, and OFCCP remains fully committed to enforcing all E.O. 11246 nondiscrimination requirements, including those protecting employees from discrimination on the bases of sexual orientation and gender identity. Even for religious organizations that serve as government contractors or subcontractors, they too must comply with all of E.O. 11246's nondiscrimination requirements except in some narrow respects under some reasonable circumstances recognized by law. This rule provides clarity on those circumstances, consistent with OFCCP's obligations and desire to also respect and accommodate the free exercise of religion.

ii. Legal Principles

OFCCP acknowledges first and foremost the United States' deeply rooted tradition of respect for religion and religious institutions. Religious individuals and organizations operate within and contribute to civil society and do not relinquish their religious freedom protections when they participate in the public square.[21]

With respect to commenters' concerns and questions here, many relate to the interaction of two well-established Title VII principles: First, that religious organizations can take religion into account when making employment decisions; and second, that religious organizations cannot discriminate on other protected bases. Each of those two principles taken by itself has clear answers. Where an employment decision made on the basis of religion also implicates another protected basis, however, the law is less clear.

As to the first principle, virtually all commenters agreed with what the plain text of the exemption provides: That religious organizations can consider an employee's particular religion when taking employment action. As discussed elsewhere in this rule's preamble, commenters disagreed as to the scope of that exemption—which employees it applies to, and which employer actions—but the basic principle was not disputed.

As to the second principle, as many commenters recognized, E.O. 11246's other employment protections apply to religious organizations. Protections on the basis of race, color, sex, sexual orientation, gender identity, and national origin do not categorically disappear when the employer is a religious organization. Thus the religious exemption does not permit religious organizations to engage in prohibited discrimination when there is no religious basis for the action. For instance, a religious organization that declined to promote a non-ministerial employee not for religious reasons, but because of animus borne of the employee's country of birth or skin color, would violate E.O. 11246. Courts in the Title VII context have engaged in careful, fact-bound inquiries to determine whether a religious organization's action was based on religion *or* instead on a prohibited basis.[22] For instance, courts may inquire whether a plaintiff was subjected to adverse employment action because of his or her sex or because of a violation of religious tenets. *See, e.g., Cline* v. *Catholic Diocese of Toledo,* 206 F.3d 651, 655–56, 658 (6th Cir. 2000); *cf. EEOC* v. *Miss. Coll.,* 626 F.2d 477, 485–86 (5th Cir. 1980) (holding if religious organization shows that its decision was based on religion, the religious exemption prohibits a further inquiry into pretext). To that extent, courts are virtually uniform in the view that the religious exemption does not permit discrimination on bases other than religion.[23]

The question posed here, however, is the interaction of those two principles: Specifically, the outcome when a religion organization's action is based on and motivated by the employee's adherence to religious tenets yet implicates another category protected by E.O. 11246. OFCCP concludes, as explained in detail below, that the religious exemption itself, as interpreted by the courts, has left the question open, but that such activity would also give rise to an inquiry under RFRA, which must be assessed based on applicable case law and the specific facts presented.

At the federal appellate court level, the question of the religious exemption's interaction with other protected bases was left open in, for instance, *EEOC* v. *Mississippi College,* where an EEOC subpoena did ''not clearly implicate any religious practices of the College.'' 626 F.2d at 487. The court noted that the college had a scripturally rooted policy of hiring only men to teach courses in religion, but stated that ''[b]efore the EEOC could require the College to alter that practice, the College would have an opportunity to litigate in a federal forum whether [the religious exemption] exempts or the first amendment protects that particular

[21] *See* Office of the Att'y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty 1–2 (Oct. 6, 2017).

[22] *See* below for a more fulsome discussion of how courts have determined the applicability of the religious exemption.

[23] This is separate from the question of whether application of Title VII in any particular instance is tolerable under the First Amendment or other law, such as where the employee is a minister, *see Our Lady of Guadalupe,* 140 S. Ct. 2049, or where the employment relationship is otherwise ''so pervasively religious'' that it raises First Amendment concerns, *see DeMarco* v. *Holy Cross High Sch.,* 4 F.3d 166, 172 (2d Cir. 1993).

practice.'' *Id.* The Seventh Circuit has similarly characterized the question of whether ''the religious-employer exemptions in Title VII [are] applicable only to claims of *religious* discrimination'' as ''a question of first impression in this circuit.'' *Her*x v. *Diocese of Fort Wayne-South Bend, Inc.,* 772 F.3d 1085, 1087 (7th Cir. 2014). Other courts have indicated that the religious exemption may be preeminent in such a situation. *See Little,* 929 F.2d at 951 (''[T]he permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts.''); *see also Kennedy,* 657 F.3d at 194 (''Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices.'' (quoting *Little,* 929 F.2d at 951)).

The only two federal appellate-level cases with fact patterns involving the precise issue are a pair of Ninth Circuit cases from the 1980s. The first, *EEOC* v. *Pacific Press Publishing Association,* held as a statutory matter that Title VII's prohibitions on sex discrimination and on retaliation applied to a religious organization. *See* 676 F.2d 1272, 1277 (9th Cir. 1982). But the court determined that the practice at issue that resulted in sex discrimination ''does not and could not conflict with [the employer's] religious doctrines, nor does it prohibit an activity rooted in religious belief.'' *Id.* at 1279. Regarding retaliation, the court held as a constitutional matter that Title VII's anti-retaliation provision should apply to the religious organization even when the employee was dismissed for violating church doctrine that prohibited members from bringing lawsuits against the church. *See id.* at 1280.

The second decision, *EEOC* v. *Fremont Christian School,* 781 F.2d 1362 (9th Cir. 1986), is less instructive. It held in relevant part that Title VII could be applied to prohibit a religiously grounded health benefits program that benefited one sex more than the other. However, as a statutory matter, the court held that the religious exemption was not implicated because the employment practice did not concern the selection of employees based on their religion—the text of the exemption refers to ''employment of individuals *of a particular religion*'' [24]—and as a constitutional matter noted that ''[e]liminating the employment policy involved here would not interfere with religious belief and only minimally, if at all, with the practice of religion.'' *Id.* at 1366, 1368.

The Supreme Court also has not answered whether an employment action motivated by religion but implicating a protected classification violates Title VII. The Court's cases offer no clear conclusion whether the religious exemption should be read so narrowly that its protections are overcome by the rest of E.O. 11246's (or Title VII's) protections when they are both at issue. For example, in *Bostock* v. *Clayton County,* 140 S. Ct. 1731 (2020), the Court held that Title VII's prohibition on discrimination because of sex includes discrimination on the basis of sexual orientation and transgender status. That holding itself is not particularly germane to OFCCP's enforcement of E.O. 11246, which has expressly protected sexual orientation and gender identity since 2015. What is certainly germane is the Court's recognition of the ''fear that complying with Title VII's requirement in cases like [*Bostock*] may require some employers to violate their religious convictions'' and its assurance that it, too, was ''deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society.'' *Id.* at 1753–54. The Court then noted that Title VII contains ''an express statutory exception for religious organizations,'' but did not explain whether an employment action motivated by religion that implicates a protected classification violates Title VII. *Id.* at 1754.

Regardless, OFCCP ultimately does not need to answer this open question on the proper interpretation of the religious exemption in E.O. 11246, and declines to do so, because RFRA can guide the agency's determination if and when a particular case presents a situation where a religiously motivated employment action implicates a classification protected under the Executive Order. As noted in *Bostock,* RFRA ''prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. [42 U.S.C.] § 2000bb–1.'' *Id.* Moreover, ''[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases. [42 U.S.C.] § 2000bb–3.'' *Id.*[25] Concerns raised by supportive commenters in this rulemaking have alerted the agency that application of E.O. 11246 may substantially burden their religious exercise, especially if the religious exemption does not clearly protect their ability to maintain employees faithful to their practices and beliefs. The ministerial exception offers religious organizations broad freedom in the selection of ministers, but that is only a subset of their employees. *See generally Our Lady of Guadalupe,* 140 S. Ct. 2049. In contrast, the religious exemption applies to all of a religious organization's employees, but the scope of its protections is not settled when religious tenets implicate other protected classes. Thus, the Department should consider RFRA, since in some circumstances neither the ministerial exception nor the religious exemption may alleviate E.O. 11246's burden on religious exercise. *See Little Sisters of the Poor,* 140 S. Ct. at 2383–84 (holding agencies should consider RFRA when it is an important aspect of the problem involved in the rulemaking).

The discussion below addresses in general terms how OFCCP views its obligations under RFRA in the specific situation raised by commenters and addressed here: Where the religious organization takes employment action regarding an applicant or an employee, the employment action is motivated solely on the employee's adherence to a sincere religious tenet, yet that tenet also implicates an E.O. 11246 protected category other than race (which is discussed separately). RFRA requires a fact-specific analysis, so the discussion here of necessity can speak only to OFCCP's general approach; specific situations involving specific parties will require consideration of any additional, unique facts. And of course the contractor or subcontractor involved will need to demonstrate its religious sincerity and burden so that it falls within this rubric. Nonetheless, OFCCP believes its RFRA analysis here will provide clarity for religious contractors and subcontractors, regardless of how future cases may interpret the interplay of the religious exemption in and of itself with other protected classes under Title VII or E.O. 11246.

[24] As explained elsewhere in this preamble, the religious exemption is more than a mere hiring preference for coreligionists. OFCCP nonetheless agrees that the policy in *Fremont* would not be covered by the religious exemption because it did not pertain to the *employee's* particular religion. Nothing about the employee's religious beliefs or conduct would affect the policy—only his or her sex.

[25] RFRA was not raised before the Court in *Bostock.* Thus, the Court left that ''question[ ] for future cases.'' 140 S. Ct. at 1754.

iii. Application of the Religious Freedom Restoration Act

''Congress enacted RFRA in 1993 in order to provide very broad protection of religious liberty.'' *Hobby Lobby,* 573 U.S. at 693. RFRA responded to ''*Employment Division* v. *Smith*, 494 U.S. 872 (1990) [in which] the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion'' under the First Amendment, and restored by statute ''the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).'' 42 U.S.C. 2000bb(a)(4), (b)(1); *see Hobby Lobby,* 573 U.S. at 693–95.

Under RFRA, the federal government may not ''substantially burden a person's exercise of religion.'' 42 U.S.C. 2000bb–1(a). Government is excepted from this requirement only if it ''demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest.'' *Id.* 2000bb–1(b).

RFRA ''applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993,'' *Id.* 2000bb–3(a), including agency regulations, *see Little Sisters of the Poor,* 140 S. Ct. at 2383. As ''Federal law, and the implementation of that law,'' E.O. 11246 fits within that scope as well.

(1) Substantial Burden

The question of whether government action substantially burdens an employer's exercise of religion can be separated into two parts. *See Hobby Lobby,* 573 U.S. at 720–26; *Little Sisters of the Poor,* 140 S. Ct. at 2389 (Alito, J., concurring). First, the government must ask whether the consequences of noncompliance put substantial pressure on the objecting party to comply. *See Hobby Lobby,* 573 U.S. at 720–23. Second, the government must ask whether compliance with the regulation would violate or modify the objecting party's sincerely-held religious exercise (as the objecting party understands that exercise and any underlying beliefs), including the party's ''ability . . . to conduct business in accordance with [its] religious beliefs.'' *Hobby Lobby,* 573 U.S. at 724; *see also Sherbert,* 374 U.S. at 405–06.[26] If the answer to both questions is yes, then the regulation substantially burdens the exercise of religion.

On the first question, noncompliance with the nondiscrimination requirements of E.O. 11246 could have substantial adverse consequences on religious organizations that participate in government contracting. One private religious university supportive of the proposed rule stated that it is ''a large research university with dozens of active federal contracts at any given time,'' while another stated that ''religious organizations have long been significant participants in federal procurement programs.'' Noncompliance with E.O. 11246 can result in awards of back pay and other make-whole relief to affected employees and applicants, cancellation or suspension of the contract, and even suspension or debarment. *See* E.O. 11246 § 202(7); 41 CFR 60–1.26. That is substantial pressure. Indeed, it is a substantial burden for the government to compel someone ''to choose between the exercise of a First Amendment right and participation in an otherwise available public program.'' *Thomas,* 450 U.S. at 716; *Sherbert,* 374 U.S. at 404 (''It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.''). ''Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed'' for engaging in religious action. *Sherbert,* 374 U.S. at 404. ''Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.''). *Thomas,* 450 U.S. at 717–18.

On the second question, the Supreme Court emphasized in *Hobby Lobby* that, in determining whether compliance with a particular mandate would substantially burden the objecting party's ability to operate in accordance with its religious beliefs, the federal government must ''not presume to determine the plausibility of a religious claim.'' *Hobby Lobby,* 573 U.S. at 724 (quoting *Smith,* 494 U.S. at 887). It is not for a court, or for OFCCP, to say whether a particular set of religious beliefs is ''mistaken or insubstantial.'' *Hobby Lobby,* 573 U.S. at 725. Furthermore, religious exercise means more than being able to express particular views—a right to freedom of religion requires the right to act in conformance with that religion. *See Espinoza,* 140 S. Ct. at 2277 (Gorsuch, J., concurring) (''The right to be religious without the right to do religious things would hardly amount to a right at all.''). It is this right to engage in conduct consistent with sincerely held belief—and a right to be free of demands to engage in conduct conflicting with those sincerely held beliefs—that RFRA protects. *See Little Sisters of the Poor,* 140 S. Ct. at 2390.

Compliance with the nondiscrimination provisions in E.O. 11246, if interpreted to apply when an employment action is motivated by religion yet also implicates a protected classification, could force religious organizations to violate their sincerely held religious beliefs or to compromise their religious integrity or mission by placing substantial pressure on them to violate or modify their religious tenets related to their employees and their religious communities. The comments on the proposed rule made this clear. For example, a private religious university noted the importance for religious employers to be able to ''employ[ ] persons whose beliefs and conduct are consistent with [their] religious precepts.'' Similarly, a nationwide ecclesiastical organization stated in its comment that faith-based organizations should be able to ''lawfully prefer for employment those who, by word and conduct, accept and adhere to that faith as the organization understands it, regardless of the applicant's or employee's religious affiliation.'' An association of religious universities echoed these sentiments, stating that ''[o]ur schools are committed to upholding their religion-based standards by aligning

[26] Case law is clear that RFRA's substantial burden test does not insist that a challenged government action require an objecting party to *violate* its religious beliefs. Instead, substantial pressure on a party to modify its religiously motivated practice is also sufficient to establish a substantial burden. *See, e.g., Archdiocese of Wash.* v. *Wash. Metro. Area Transit Auth.,* 897 F.3d 314, 333 (D.C. Cir. 2018) (defining ''substantial burden'' under RFRA as ''substantial pressure on an adherent to modify his behavior and to violate his beliefs'') (quoting *Thomas* v. *Review Bd.,* 450 U.S. 707, 718 (1981)); *EEOC* v. *Catholic Univ. of Am.,* 83 F.3d 455, 467 (D.C. Cir. 1996) (finding that government's interest in eliminating employment discrimination at Catholic university was outweighed by university's right of autonomy in its own domain); *Jolly* v. *Coughlin,* 76 F.3d 468, 477 (2d Cir. 1996) (finding that right to free exercise of religion is ''substantially burdened'' within meaning of RFRA where state puts substantial pressure on adherent to modify his behavior and to violate his beliefs); *In re Young,* 82 F.3d 1407, 1418 (8th Cir. 1996) (''[D]efining substantial burden broadly to include religiously motivated as well as religiously compelled conduct is consistent with the RFRA's purpose to restore pre-*Smith* free exercise case law.'').

employment expectations exclusively with applicants and employees who concur with these expectations. These expectations are essential to fulfilling our religious mission.'' While the commenter explained that generally its associated ''schools do not accept direct government funding,'' it highlighted the importance for its members that ''no organization should be excluded by the government from competing for contracts or other funds simply because the religious organization is serious about maintaining its religious identity and religious practices.''

The case law also indicates that certain E.O. 11246 obligations may impose a burden on religious organizations. *Bostock* expressly acknowledged that enforcing certain nondiscrimination provisions could pose challenges for religious employers under RFRA. *See* 140 S. Ct. at 1754. And many cases show instances of religious employers seeking to apply religiously inspired codes of conduct that pertain to matters of marriage and sexual intimacy. *See Little,* 929 F.2d at 946 (upholding termination of employee for violations of ''Cardinal's Clause,'' which included ''*entry by the teacher into a marriage which is not recognized by the Catholic Church*'' (emphasis in original)); *Cline,* 206 F.3d at 666 (holding fact issue remained as to whether plaintiff was terminated for pregnancy or for whether she had ''violated her clear duties as a teacher by engaging in premarital sex''); *Boyd* v. *Harding Acad. of Memphis, Inc.,* 88 F.3d 410, 414 (6th Cir. 1996) (upholding district court's determination that the defendant ''articulated a legitimate, non-discriminatory reason for plaintiff's termination when it stated that plaintiff was fired not for being pregnant, but for having sex outside of marriage in violation of Harding's code of conduct'' and rejecting claim of pretext when school's president ''had terminated at least four individuals, both male and female, who had engaged in extramarital sexual relationships that did not result in pregnancy''); *Gosche* v. *Calvert High Sch.,* 997 F. Supp. 867, 872 (N.D. Ohio 1998) (dismissing Title VII claim of plaintiff fired for having affair and concluding that ''[w]hatever Plaintiff's own *post-hoc* claims may be regarding the relevance of her sexual conduct to her employment at a Catholic school, it is clear that the Diocese and Parish considered her sexual conduct to be relevant to her employment''); *Ganzy* v. *Allen Christian Sch.,* 995 F. Supp. 340, 359–60 (E.D.N.Y. 1998) (noting in case with similar facts and holding as *Cline* that ''[r]eligious institutions . . . are provided leeway under federal constitutional and statutory law in regulating the sexual conduct of those in their employ in keeping with their religious views''); *Dolter* v. *Wahlert High Sch.,* 483 F. Supp. 266, 270 (N.D. Iowa 1980) (''Nor does the court quarrel with defendant's contention that it can define moral precepts and prescribe a code of moral conduct that its teachers . . . must follow.'').[27]

Of particular concern here as well is that ''[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission.'' *Amos,* 483 U.S. at 336; *cf. Hosanna-Tabor,* 565 U.S. at 197 (Thomas, J., concurring) (''[U]ncertainty about whether its ministerial designation will be rejected, and a corresponding fear of liability, may cause a religious group to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding.''). Here, out of fear of violating E.O. 11246's requirements, a religious organization might simply choose to forsake certain of its religious tenets related to employment. That is a religious burden in itself. And that change could in turn result in the organization hiring and retaining employees who, by word or deed, undermine the religious organization's character and purpose—but which the organization would feel compelled to accept rather than risk liability. That is a second religious burden, which in particular may pose a risk to smaller or nontraditional religious groups. *Cf. Hosanna-Tabor,* 565 U.S. at 197 (Thomas, J., concurring) (noting that a bright-line test or multifactor analysis for the definition of ''minister'' ''risk[s] disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some,'' including by ''caus[ing] a religious group to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding'').

Alternatively, to avoid this problem, the religious organization might consider drawing stricter lines around those it considers ''coreligionists,'' for even the narrowest reading of the religious exemption permits religious organizations to prefer ''coreligionists'' in employment decisions. In that case, religious organizations would draw strict lines by stating that certain behaviors, beliefs, or statements are anathema to the religion and take one outside the religious community. That way, employment action would be more readily identified as resting solely on religious grounds as a preference against a non-coreligionist. *See Mississippi College,* 626 F.2d at 484–85; *cf. Amos,* 483 U.S. at 343 (Brennan, J., concurring) (''A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believe that religious commitment was important in performing other tasks as well.''). Here, the religious burden would be government pressure on how the religious organization defines who is and who is not a member of its religious community.

Demonstrating burden is necessarily fact-dependent. There may be instances where the organization sincerely believes as a religious matter that it can tolerate some kinds of religious noncompliance from some of its employees without seriously compromising its religious mission or identity. That may be the case especially for employees in less prominent roles or who have little interaction with students or the public. But there may be other instances where, in the sincere view of the organization, a non-ministerial employee must adhere to the organization's religious tenets as an important part of furthering the organization's religious mission and maintaining its religious identity, and where strict enforcement of certain E.O. 11246 requirements would substantially burden those aims.

(2) Compelling Interest

Many courts have recognized the importance of the government's interest in enforcing Title VII's nondiscrimination provisions. *See, e.g., Rayburn,* 772 F.2d at 1169; *Pacific Press,* 676 F.2d at 1280. The following RFRA analysis does not address OFCCP's enforcement program broadly, including the context of a religious organization's discriminating on the basis of a protected characteristic other than religion for non-religious reasons. OFCCP will continue to fully enforce E.O. 11246's requirements in those contexts. Rather, the compelling-interest analysis here focuses solely on the questions raised by commenters regarding a situation in which a religious organization takes employment

[27] *Amos* also implicated such facts. The appellee had been discharged for failing to ''qualify for a temple recommend, that is, a certificate that he is a member of the Church and eligible to attend its temples,'' which ''are issued only to individuals who observe the Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco.'' *Amos,* 483 U.S. at 330 & n.4. The plaintiffs below had alleged that those standards necessitated employer inquiries into their ''sexual activities'' and ''moral cleanliness and purity.'' *Amos,* 594 F. Supp. at 830.

action based solely on sincerely held religious tenets that also implicate a protected classification.

To satisfy RFRA, OFCCP must do more than assert a generalized compelling interest on a ''categorical'' basis. *O Centro,* 546 U.S. at 431. Instead, ''RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.'' *Id.* at 430–31 (quoting 42 U.S.C. 2000bb–1(b)). This requires ''look[ing] beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants.'' *Id.* at 431.

Thus OFCCP must demonstrate that it has a compelling governmental interest in enforcing a nondiscrimination requirement against ''particular religious claimants'' (*e.g.,* particular contractors who qualify for the religious exemption) when doing so places a substantial burden on the ability of those particular contractors to freely exercise their religion. *Id.* This statutory requirement is reflected in OFCCP's current RFRA policy, under which ''OFCCP will consider'' a contractor's request for ''an exemption to E.O. 11246 pursuant to RFRA . . . based on the facts of the particular case.'' OFCCP, *Religious Employers and Religious Exemption, www.dol.gov/agencies/ofccp/faqs/religious-employers-exemption.* As explained below, OFCCP has determined on the basis of several independent reasons that it has less than a compelling interest in enforcing nondiscrimination requirements—except for protections on the basis of race—when enforcement would seriously infringe the religious mission or identity of a religious organization.

Exceptions provided other contractors. OFCCP's general interest in enforcing E.O. 11246 is less than compelling in the religious context addressed here, given the numerous exceptions from its nondiscrimination requirements it has authority to grant, and has granted, in nonreligious contexts. Granting accommodations in nonreligious contexts strongly suggests that OFCCP does not have a compelling interest in disfavoring religious contractors by refusing to grant accommodations in religious contexts. *See O Centro,* 546 U.S. at 436 (''RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.' '' (quoting 42 U.S.C. 2000bb–1(a))). When ''[t]he proffered objectives are not pursued with respect to analogous nonreligious conduct,'' those exceptions suggest that ''those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree.'' *Holt,* 574 U.S. at 367.

The President has granted OFCCP broad authority and discretion to exempt contracts from the requirements of E.O. 11246. Most prominent is section 204(a) of E.O. 11246, which authorizes the Secretary of Labor to grant exemptions from any or all of the equal opportunity clause's requirements ''when the Secretary deems that special circumstances in the national interest so require.'' This is not the kind of language government typically uses when it seeks a policy of absolute enforcement. Rather, it is the kind of language government uses when granting highly discretionary power. *Cf. Webster* v. *Doe,* 486 U.S. 592, 600 (1988) (removing an employee ''whenever the Director 'shall *deem* such termination necessary or advisable in the interests of the United States' '' is a standard that ''fairly exudes deference to the Director'' (quoting National Security Act § 102(c)). The Executive Order contains many other exceptions as well. Section 204(b) authorizes the Secretary to exempt contracts that are to be performed outside the United States, contracts that are for standard commercial supplies or raw materials, contracts that do not meet certain thresholds (dollar amounts or numbers of employees), and subcontracts below a specified tier. Section 204(d) authorizes the Secretary to exempt a contractor's facilities that are separate and distinct from activities related to the performance of the contract, as long as ''such an exemption will not interfere with or impede the effectuation of the purposes of this Order.'' OFCCP's implementing regulations contain exemptions as well. OFCCP has implemented section 204(b) to the maximum extent possible by exempting all contracts and subcontracts for work performed outside the United States by employees not recruited in the United States. *See* 41 CFR 60–1.5(3). OFCCP's regulations also contain a religious exemption for religious educational institutions and permit a preference for ''Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation.'' 41 CFR 60–1.5(6)–(7).

On several occasions OFCCP has used its power to exempt contracts ''in the national interest.'' ''Prior administrations granted [national interest exemptions] for Hurricanes Sandy and Katrina,'' [28] and OFCCP has granted temporary exemptions from some E.O. 11246 requirements in response to more recent national disasters. OFCCP has similarly granted an exemption during the COVID–19 pandemic. *See* OFCCP, National Interest Exemptions, *https://www.dol.gov/agencies/ofccp/national-interest-exemption.* And the National Interest Exemptions that OFCCP has granted can be quite broad, applying, for example, to *all* new contracts providing coronavirus relief during the applicable time period. *See* OFCCP, Coronavirus National Interest Exemption Frequently Asked Questions, *https://www.dol.gov/agencies/ofccp/faqs/covid-19#Q1.*

OFCCP has also issued a final rule effecting a permanent exemption from all OFCCP authority for healthcare providers that participate in the TRICARE program and have no otherwise covered contracts. The final rule expressed OFCCP's view that a 2011 statute removed whatever authority OFCCP may have had over TRICARE providers and did not replace it with a separate nondiscrimination provision; Congress' action indicates that OFCCP's interest is less than compelling interest. *See* 85 FR 39834, 39837–39 (July 2, 2020). Additionally, the final rule exempted TRICARE providers on the alternative ground of a national interest exemption, citing its concern that ''the prospect of exercising authority over TRICARE providers is affecting or will affect the government's ability to provide health care to uniformed service members, veterans, and their families,'' a determination that ''pursuing enforcement efforts against TRICARE providers is not the best use of its resources'' given a history of litigation and legal uncertainty in the area, and the need to ''provide uniformity and certainty in the health care community with regard to legal obligations concerning participation in TRICARE.'' *Id.* at 39839.

The various exemptions that OFCCP can and does provide in secular settings show that its interest in enforcing E.O. 11246's requirements can give way to other considerations. Many of those same considerations exist here, so OFCCP's enforcement interest should similarly give way to religious accommodation. For example, many of the same reasons underlying OFCCP's exemption for TRICARE providers apply here as well: Conservation of resources in an area that could lead to protracted

[28] OFCCP, ''Coronavirus National Interest Exemption Frequently Asked Questions,'' Question #12, *https://www.dol.gov/agencies/ofccp/faqs/covid-19#Q12.*

litigation; the need to bring clarity to a group of potential contractors under a cloud of legal uncertainty; and a goal of improving the government's access to certain services. In the TRICARE rule, the goal was to foster access to care for veterans and their families. In this rule, it is the goal of fostering the equal participation of religious organizations in government contracting and subcontracting in order to increase the contracting pool's competition and diversity and thus improve economy and efficiency in procurement. Likewise OFCCP's limited exemptions during emergencies and the pandemic demonstrate the agency's judgment that securing services for the government can override aspects of E.O. 11246's obligations. Here, too, a limited religious accommodation may encourage religious organizations to begin or continue participating in government contracting and subcontracting. And like those other exemptions, a religious accommodation here would be limited. It would be limited to employment action grounded in a sincere religious belief with respect to the employee's religion. It would not excuse religious organizations from their antidiscrimination obligations otherwise and never on the basis of race, nor from their affirmative-action obligations, reporting requirements, or other requirements under E.O. 11246.

E.O. 11246's many available exemptions, and OFCCP's history of recognizing exemptions, also undercuts the idea that individualized religious exemptions would undermine the agency's overall enforcement of E.O. 11246 or that their denial would be equitable to religious organizations. *See Holt,* 574 U.S. at 368 (''At bottom, this argument is but another formulation of the 'classic rejoinder . . . : If I make an exception for you, I'll have to make one for everybody, so no exceptions.' We have rejected a similar argument in analogous contexts, and we reject it again today.'') (internal citations omitted) (quoting *O Centro,* 546 U.S. at 436); *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark,* 170 F.3d 359, 365 (3d Cir. 1999) (''[W]e conclude that the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny.'').

Recognizing the value that religious contractors provide, OFCCP has determined that it has less than a compelling interest in enforcing E.O. 11246 when a religious organization takes employment action solely on the basis of sincerely held religious tenets that also implicate a protected classification, other than race. OFCCP has determined that, in these circumstances, it should instead appropriately accommodate religion, especially when doing so (as with national interest exemptions) would foster a more competitive pool of government contractors. *See Boyle* v. *United Techs. Corp.,* 487 U.S. 500, 506 (1988) (noting that ''the Federal Government's interest in the procurement of equipment is implicated'' where ''[t]he imposition of liability on Government contractors'' will cause the contractors to ''decline to manufacture'' a good or to ''raise its price'').

Establishment Clause concerns. OFCCP's interest in enforcing E.O. 11246 is attenuated when doing so seriously risks violating the Establishment Clause. But as noted earlier, strict application of all E.O. 11246 requirements to religious organizations could, in some instances, chill their protected religiously based requirements for employment out of fear of liability. It could also chill religious organizations from taking employment action despite an employee, by word or deed, undermining the religious organization's tenets and purposes.

Alternatively, it could incentivize religious organizations, because of the risk that the government might misunderstand the organization's motivations, to draw stricter lines around who it considers a coreligionist. In this situation, the religious organization would first take some form of purely religious action against an employee to designate the employee as no longer a part of the religious community, and then take employment action, so that employment action would be more readily identified as resting solely on grounds of religious preference. And it poses a risk to smaller or nontraditional religious groups, whose membership practices may not be as readily understood by the government. *Cf. Hosanna-Tabor,* 565 U.S. at 197 (Thomas, J., concurring).

Such government pressure on religious organizations' membership and doctrinal decisions would raise serious concerns under not only the Free Exercise Clause, but the Establishment Clause as well. ''[T]he Religion Clauses protect the right of churches and other religious institutions to decide matters 'of faith and doctrine' without government intrusion. . . . [A]ny attempt by government to dictate or *even to influence* such matters would constitute one of the central attributes of an establishment of religion.'' *Our Lady of Guadalupe,* 140 S. Ct. at 2060 (emphasis added) (quoting *Hosanna-Tabor,* 565 U.S. at 186 (opinion for the court)); *see also Hosanna-Tabor,* 565 U.S. at 197 (Thomas, J., concurring) (''These are certainly dangers that the First Amendment was designed to guard against.''). In essence, such an approach could have the unfortunate consequence of pushing religious organizations to extremes to avoid liability. Religious organizations could do so either by forsaking their religiously based requirements for employment, or by engaging in more definitive religious actions to demonstrate their religious disassociation from someone who breaches a religiously based requirement for employment. OFCCP also has concerns about inter-religious discrimination, since some bona fide religious organizations require adherence to a common set of beliefs or tenets but do not have a formal membership structure, *see World Vision,* 633 F.3d at 728 (O'Scannlain, J., concurring), so they may have more difficulty than traditional churches in showing that an employee or applicant is not (or is no longer) a coreligionist.

OFCCP cannot avoid this Establishment Clause problem by attempting to determine whether a religious organization's decision to deem someone a non-coreligionist was motivated by discriminatory animus rather than a sincere application of religious tenets. Unlike the fact-finding to determine the reason for an *employment* decision, which does not always raise Establishment Clause concerns, this would be fact-finding to determine the reason for a *religious* decision on community membership. Testing the basis of that decision would most likely violate the First Amendment. It would violate the religious organization's right to choose its membership free of government influence, and the process of inquiry alone into such a sensitive area ''would risk judicial entanglement in religious issues.'' *Our Lady of Guadalupe,* 140 S. Ct. at 2069; *see Catholic Bishop,* 440 U.S. at 502.

The absence of a clear command. Finally, a compelling interest ought to be one that is clearly spelled out by the government. For instance, in his concurrence in *Little Sisters of the Poor,* Justice Alito observed that it was highly significant that Congress itself had not treated free access to contraception as a compelling government interest. *See Little Sisters of the Poor,* 140 S. Ct. at 2392–93 (Alito, J., concurring). Here, however, the scope of the religious exemption is unsettled. As discussed above, courts have consistently interpreted the religious exemption to

prohibit religious organizations from discriminating on bases other than religion. But *Bostock* left open the scope of the exemption's protection for religious discrimination, and only two federal court of appeal decisions have addressed a fact pattern in which a religious organization's religious tenets conflicted with a non-religious Title VII protection. *See Fremont,* 781 F.2d at 1368 (finding challenged religious practice outside the scope of the religious exemption and changing the practice would pose little interference with the organization's religious belief and practice); *Pacific Press,* 676 F.2d at 1279 (determining that the EEOC's action ''does not and could not conflict with [the employer's] religious doctrines, nor does it prohibit an activity rooted in religious belief''). Without stronger legal evidence that the religious exemption's protections are cabined by E.O. 11246's other protections (and thus may seriously infringe religious freedom), OFCCP is hesitant to describe that theory as furthering a compelling government interest.

(3) Least Restrictive Means

In the third step of the RFRA analysis, OFCCP assesses whether its application of the religious burden to the person ''is the least restrictive means of furthering that compelling government interest.'' 42 U.S.C. 2000bb–1(b)(2). Because OFCCP believes that it has less than a compelling interest in enforcing E.O. 11246 in the circumstances contemplated for purposes of this general RFRA analysis it need not consider whether that foreclosed enforcement would be by the least restrictive means. When the Supreme Court has found a regulation violated RFRA, the Court has permitted the regulatory agency to determine the correct remedy. *See, e.g., Hobby Lobby,* 573 U.S. at 726, 731, 736; 79 FR 51118 (Aug. 27, 2014) (proposed modification in light of *Hobby Lobby*). As a result, OFCCP has discretion to determine an appropriate accommodation without having to also determine the least restrictive alternative. As Justice Alito recently explained, RFRA ''does not require . . . that an accommodation of religious belief be narrowly tailored to further a compelling interest. . . . Nothing in RFRA requires that a violation be remedied by the narrowest permissible corrective.'' *Little Sisters of the Poor,* 140 S. Ct. at 2396 (Alito, J., concurring). OFCCP further believes the RFRA approach outlined here is an appropriate accommodation, which applies only to bona fide religious employers and which permits only employment actions based on sincere religious tenets; employees remain protected from discrimination motivated by animus or any other non-religious reason, and employment actions based on race always remain prohibited.

(4) The Harris Case

OFCCP does not view the Sixth Circuit's opinion in *EEOC* v. *R.G. & G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560 (6th Cir. 2018), *aff'd, Bostock* v. *Clayton Cnty.,* 140 S. Ct. 1731 (2020), as requiring a different analysis here. In that case (one of three consolidated in *Bostock*), an employee of a funeral home informed the funeral home's owner of the employee's intention to present as a member of the opposite sex while at work. The owner stated that he would violate his religious beliefs were he to permit the employee to do so and terminated the employee. *See id.* at 568–69. In the ensuing litigation, the funeral home raised a RFRA defense. The Sixth Circuit held that Title VII discrimination claims ''will necessarily defeat'' RFRA defenses to such discrimination. *Id.* at 595. The court addressed each element of RFRA. Regarding substantial burden, the court held in relevant part that the employer's mere toleration of the employee's conduct to comply with Title VII is not an endorsement of it, so it was not a substantial burden. Regarding the furtherance of a compelling interest, the court held that failure to enforce Title VII would result in the employee suffering discrimination, ''an outcome directly contrary to the EEOC's compelling interest in combating discrimination in the workforce.'' *Id.* at 592. Regarding least-restrictive means, the court held that enforcement of Title VII is itself the least-restrictive means for eradicating employment discrimination on the basis of sex. *See id.* at 593–97.

The defendant in *Harris* did not raise the RFRA issue to the Supreme Court, but the Court in *Bostock* nonetheless observed that, ''[b]ecause RFRA operates as a kind of super statute . . . it might supersede Title VII's commands in appropriate cases.'' [29] *Bostock,* 140 S. Ct. at 1754. To the extent *Harris* remains good law, OFCCP does not view the Sixth Circuit's RFRA analysis as applicable here, as the facts of the case are readily distinguishable from this rule's protections for religious organizations. The funeral home at the center of the *Harris* case was not a religious organization. *See* 884 F.3d at 581. Unlike the religious employers that are OFCCP's focus here, the funeral home had ''virtually no religious characteristics,'' *id.* at 582: No religiously inspired code of conduct, no doctrinal statement, and no other religious requirement for employees. Nor did the funeral home through its work seek to advance the values of a particular religion. *See id.* Indeed, the funeral home was clearly outside the scope of OFCCP's religious exemption—which exists to prevent E.O. 11246's nondiscrimination provisions from interfering with a religious organization's freedom to employ ''individuals of a particular religion''—and furthermore the funeral home's own testimony indicated that its conduct was motivated by commercial rather than religious concerns. *See id.* at 576 n.5, 586, 589 n.10.

Bearing those key factual differences in mind, OFCCP disagrees that, at least as applied to religious organizations regulated by OFCCP, ''tolerating'' employee conduct that is contrary to the organization's sincerely held religious tenets can never constitute a substantial burden under RFRA, as the court held in *Harris. Id.* at 588. That holding is, at the very least, in tension with *Little Sisters of the Poor, Hobby Lobby,* and the Free Exercise Clause precedents they rested on. *See Hobby Lobby,* 573 U.S. at 723–25; *see also Little Sisters of the Poor,* 140 S. Ct. at 2383 (''[In *Hobby Lobby,*] we made it abundantly clear that, under RFRA, the Departments must accept the sincerely held complicity-based objections of religious entities.''); *id.* at 2390 (Alito, J., concurring) (observing that ''federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable,'' including religious beliefs underlying complicity-based objections). When government requires conduct proscribed by religious faith on pain of substantial penalty, there is a burden upon religious exercise. *See Sherbert,* 374 U.S. at 404.

Additionally, the burden is even clearer for an objecting religious organization than it was for the funeral home in *Harris.* Unlike a secular employer, a religious organization has a religious foundation and purpose and may select its employees on the basis of their religious adherence. Requiring religious employers to maintain employees who disregard the organization's religious tenets thus more seriously threatens to undermine the organization's mission and integrity. This gives even more credence to a claim that forcing a religious employer

[29] The Court also observed that ''other employers in other cases may raise free exercise arguments that merit careful consideration.'' *Bostock,* 140 S. Ct. at 1754.

to maintain such an employee would substantially burden its religious exercise.

OFCCP also does not view *Harris's* treatment of the compelling-interest prong of RFRA as persuasive when applied to religious organizations regulated by OFCCP. First, because the defendant was not a religious organization, the *Harris* court did not consider the antecedent question of whether the government has a compelling interest in applying nondiscrimination laws to a religious organization when doing so would threaten to compromise the organization's integrity or mission, with its attendant more-severe infringements on religious free exercise and establishment problems. As discussed above, there are instances where that could occur, so accordingly in that situation the RFRA analysis is different. Additionally, E.O. 11246 contains additional and discretionary exceptions that Title VII does not have, which further alter the compelling-interest balance.

(5) OFCCP's Compelling Interest in Prohibiting Racial Discrimination

In response to commenters who raised the issue, OFCCP reiterates here that it has a compelling interest in eradicating racial discrimination, even as against religious organizations. To be sure, OFCCP is currently unaware of any contractor contending that its religious beliefs required it to take employment actions that implicate race, and commenters supplied no evidence of that occurring. Nonetheless, in response to commenters' broader concerns, OFCCP makes clear here that its overwhelming interest in eradicating racial discrimination would defeat RFRA claims in the context addressed in this section of the rule's preamble. OFCCP will enforce E.O. 11246 against any contractor or subcontractor that takes employment actions on the basis of race, even if religiously motivated. At least one commenter that strongly supported the proposed rule likewise recognized that the religious exemption should not protect ''a religious organization's employment decision . . . based on racial status.''

OFCCP treats racial discrimination as unique because the Constitution does as well. The Supreme Court recognizes that ''[r]acial bias is distinct.'' *Pena-Rodriguez* v. *Colorado,* 137 S. Ct. 855, 868 (2017). Indeed, a long history of the Court's ''decisions demonstrate that racial bias implicates *unique* historical, constitutional, and institutional concerns.'' *Id.* (emphasis added). Although this final rule recognizes that religious accommodations may be necessary in certain other contexts regarding considerations of sex, ''discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.' '' *Id.* (quoting *Rose* v. *Mitchell,* 443 U.S. 545, 555 (1979)).

The Supreme Court has elsewhere recognized the government's unique interest in eradicating racial discrimination. In *Hobby Lobby,* the Court considered ''the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction,'' but explained that ''[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.'' 573 U.S. at 733. In *Bob Jones University,* the Court similarly concluded that the government had a ''compelling'' interest—described as ''a fundamental overriding interest''—''in eradicating racial discrimination,'' and further explained the ''governmental interest'' in eradicating racial discrimination ''substantially outweighs whatever burden'' the government action in that case ''place[d] on petitioners' exercise of their religious beliefs.'' *Bob Jones,* 461 U.S. at 604; *see also Newman* v. *Piggie Park Enters., Inc.,* 390 U.S. 400, 402 n.5 (1968) (describing as ''patently frivolous'' the argument that a prohibition on racial discrimination ''was invalid because it contravenes the will of God and constitutes an interference with the free exercise of the Defendant's religion'') (internal quotation marks omitted).

The government's heightened interest in eradicating racial discrimination is further exhibited by the Supreme Court's jurisprudence regarding the Equal Protection Clause of the Fourteenth Amendment. In Equal Protection Clause cases, the Court applies ''strict scrutiny'' to instances of race-based classifications, meaning that ''all racial classifications, imposed by whatever federal, state, or local governmental actor . . . are constitutional only if they are narrowly tailored measures that further compelling governmental interests.'' *Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200, 227 (1995). Strict scrutiny presents a more pressing standard than the ''intermediate scrutiny'' that the Court applies in Equal Protection Clause cases to instances of sex-based classifications, *see, e.g., Craig* v. *Boren,* 429 U.S. 190, 197 (1976)) (''[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.''); *id.* at 218 (Rehnquist, J., dissenting) (referring to the majority approach as ''intermediate'' scrutiny), and the ''rational-basis scrutiny'' that the Court has sometimes applied to classifications based on sexual orientation, *see Lawrence* v. *Texas,* 539 U.S. 558, 578 (2003); *Romer* v. *Evans,* 517 U.S. 620, 631–32 (1996). The Supreme Court has further recognized that traditional views on marriage do not suggest bigotry or invidious discrimination but instead are held ''in good faith by reasonable and sincere people here and throughout the world.'' *Obergefell* v. *Hodges,* 576 U.S. 644, 657 (2015).[30] The Constitution, as interpreted by the Supreme Court, is more protective of race than other protected classifications. Thus, the Court's long-established Equal Protection jurisprudence supports the conclusion that although the government has an interest in eradicating discrimination on the bases of all protected classes, the governmental interest in eradicating racial discrimination is particularly strong. This final rule is consistent with that framework.

e. Application of the Religious Exemption

As explained in the proposed rule, when evaluating allegations of discrimination on bases other than religion against employers that are entitled to the Title VII religious exemption, courts carefully evaluate whether the employment action was permissibly based on the ''particular religion'' of the employee. The particulars vary. In the absence of direct evidence of discrimination on a protected basis other than religion, courts generally invoke the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), to determine whether a religious employer's invocation of religion (or a religiously motivated policy) in making an employment decision was genuine or, instead, was merely a pretext for discrimination prohibited under Title VII. *See Cline,* 206 F.3d 651; *Boyd,* 88 F.3d 410; *cf. Geary,* 7 F.3d 324 (applying *McDonnell Douglas* in assessing religious-exemption defense to claim under the Age Discrimination in Employment Act). At least one other

[30] *Cf. Masterpiece Cakeshop,* 138 S. Ct. at 1727 (stating that a clergy member's refusal to perform a gay marriage ''would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth'').

case has noted that ''[o]ne way'' to show discriminatory intent using circumstantial evidence ''is through the burden-shifting framework set out in *McDonnell Douglas,*'' but another way is to ''show enough non-comparison circumstantial evidence to raise a reasonable inference of intentional discrimination.'' *Hamilton* v. *Southland Christian Sch., Inc.,* 680 F.3d 1316, 1320 (11th Cir. 2012).

In undertaking this evaluation, OFCCP, like courts, ''merely asks whether a sincerely held religious belief actually motivated the institution's actions.'' *Geary,* 7 F.3d at 330. The religious organization's burden ''to explain is considerably lighter than in a non-religious employer case,'' since the organization, ''at most, is called upon to explain the application of its own doctrines.'' *Id.* ''Such an explanation is no more onerous than is the initial burden of any institution in any First Amendment litigation to advance and explain a sincerely held religious belief as the basis of a defense or claim.'' *Id.; see Seeger,* 380 U.S. at 185 (holding whether a belief is ''truly held'' is ''a question of fact''). The sincerity of religious exercise is often undisputed or stipulated. *See, e.g., Hobby Lobby,* 573 U.S. at 717 (''The companies in the case before us are closely held corporations, each owned and controlled by a single family, and no one has disputed the sincerity of their religious beliefs.''); *Holt,* 574 U.S. at 361 (''Here, the religious exercise at issue is the growing of a beard, which petitioner believes is a dictate of his religious faith, and the Department does not dispute the sincerity of petitioner's belief.''). In assessing sincerity, OFCCP takes into account all relevant facts, including whether the contractor had a preexisting basis for its employment policy and whether the policy has been applied consistently to comparable persons, although absolute uniformity is not required. *See Kennedy,* 657 F.3d at 194 (noting that the Title VII religious exemption permits religious organizations to ''consider some attempt at compromise''); *LeBoon,* 503 F.3d at 229 (''[R]eligious organizations need not adhere absolutely to the strictest tenets of their faiths to qualify for Section 702 protection.''); *see also Killinger,* 113 F.3d at 199–200. OFCCP will also evaluate any factors that indicate an insincere sham, such as acting ''in a manner inconsistent with that belief'' or ''evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.'' *Philbrook,* 757 F.2d at 482 (quoting *Barber,* 650 F.2d at 441) (internal quotation mark omitted); *cf., e.g., Hobby Lobby,* 573 U.S. at 117 n.28 (''To qualify for RFRA's protection, an asserted belief must be 'sincere'; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.''); *Quaintance,* 608 F.3d at 724 (Gorsuch, J.) (''[T]he record contains additional, overwhelming contrary evidence that the [defendants] were running a commercial marijuana business with a religious front.'').

Other decisions have not used the *McDonnell Douglas* framework, particularly when an inquiry into purported pretext would risk entangling the court in the internal affairs of a religious organization or require a court or jury to assess religious doctrine or the relative weight of religious considerations. *See Geary,* 7 F.3d at 330–31 (discussing cases). Depending on the circumstances, such an inquiry by a court or an agency could impermissibly infringe on the First Amendment rights of the employer. This arises most prominently in the context of the ministerial exception, a judicially recognized exemption grounded in the First Amendment from employment-discrimination laws for decisions regarding employees who ''minister to the faithful.'' *Hosanna-Tabor,* 565 U.S. at 189; *see also Our Lady of Guadalupe,* 140 S. Ct. at 2060. The exemption ''is not limited to the head of a religious congregation,'' nor subject to ''a rigid formula for deciding when an employee qualifies as a minister.'' *Hosanna-Tabor,* 565 U.S. at 190; *see also Our Lady of Guadalupe,* 140 S. Ct. at 2067. ''The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.'' *Hosanna-Tabor,* 565 U.S. at 189. The ministerial exception thus bars ''an employment discrimination suit brought on behalf of a minister.'' *Id.; see also Our Lady of Guadalupe,* 140 S. Ct. at 2073. In such a situation, it is dispositive that the employee is a minister; there is no further inquiry into the employer's motive. *See Hosanna-Tabor,* 565 U.S. at 706 (''By imposing an unwanted minister, the state infringes the Free Exercise Clause . . . and the Establishment Clause''); *see, e.g., Rayburn,* 772 F.2d at 1169 (''In 'quintessentially religious' matters, the free exercise clause of the First Amendment protects the act of decision rather than a motivation behind it.'' (quoting *Serbian E. Orthodox Diocese* v. *Milivojevich,* 426 U.S. 696, 720 (1976))).

Some commenters, such as a religious legal association and an association of evangelical churches and schools, agreed with OFCCP that governmental inquiry into religious employers' practices could violate the First Amendment. A religious legal organization commended OFCCP for deferring to religious organizations on matters of doctrine and religious observance, and commented that doing otherwise could lead to unconstitutional entanglement with religion. These are the constitutional concerns that likewise constrain courts' analyses when an employer makes an employment decision based on religious criteria, yet the employee disputes the religious criteria. In those situations, courts have stated that ''if a religious institution . . . presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, § 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination.'' *Little,* 929 F.2d at 948 (quoting *Mississippi College,* 626 F.2d at 485). Courts have noted the constitutional dangers of ''choos[ing] between parties' competing religious visions'' and entangling themselves in deciding whether the employer or the employee has the better reading of doctrine, or which tenets an employee must follow or believe to remain in employment. *Geary,* 7 F.3d at 330; *see Curay-Cramer,* 450 F.3d at 141 (''While it is true that the plaintiff in *Little* styled her allegation as one of religious discrimination whereas [this plaintiff] alleges gender discrimination, we do not believe the difference is significant in terms of whether serious constitutional questions are raised by applying Title VII. Comparing [plaintiff] to other Ursuline employees who have committed 'offenses' against Catholic doctrine would require us to engage in just the type of analysis specifically foreclosed by *Little.*''); *Little,* 929 F.2d at 949 (''In this case, the inquiry into the employer's religious mission is not only likely, but inevitable, because the specific claim is that the employee's beliefs or practices make her unfit to advance that mission. It is difficult to imagine an area of the employment relationship *less* fit for scrutiny by secular courts.''); *Maguire,* 627 F. Supp. at 1507 (''Despite [plaintiff's] protests that she is a Catholic, 'of a particular religion,' the determination of who fits into that category is for religious

authorities and not for the government to decide.'').

Some commenters criticized OFCCP's description of the extent to which it would be permissible to inquire into whether a religious employer's adverse employment action was based on religion or on another protected characteristic. Many of these commenters believed OFCCP's proposed approach is inconsistent with courts' inquiry in Title VII cases. For example, a group of state attorneys general asserted that, unlike the definition in the proposed rule, Title VII jurisprudence and case law has required nuanced and fact-dependent inquiry into whether a religious employer discriminated against a worker based on his or her ''particular religion'' or on another protected basis. An LGBT rights advocacy organization criticized OFCCP for rejecting the traditional burden-shifting framework set forth in *McDonnell Douglas* and instead placing the burden on workers. Some of these commenters stated that OFCCP's proposed inquiry would not be adequately rigorous. For example, a civil liberties and human rights legal advocacy organization asserted that OFCCP's approach as described in the preamble ''allows religion to serve as a pretext for discrimination, and creates roadblocks for individuals seeking to bring claims of discrimination against federal contractors.'' An organization that advocates separation of church and state asserted that a more rigorous inquiry would not violate the First Amendment and stated that OFCCP's concerns about impermissible entanglement are overblown and cannot justify its refusal to engage in any investigation of religious employers at all. An anti-bigotry religious organization similarly asserted that a more rigorous inquiry would not violate RFRA, citing *Hobby Lobby,* 573 U.S. at 733.

Some commenters believed the proposal did not clearly describe the inquiry that OFCCP would undertake to determine whether an adverse action was based on religion or another protected characteristic. For example, a legal think tank commented that OFCCP's failure to meaningfully address various cases discussing the issue of pretext on the basis that they ''turn on their individual facts'' contravenes OFCCP's stated goal of ''bringing clarity and certainty to federal contractors.'' OFCCP disagrees with these commenters' characterization of the NPRM, but reiterates—and to the extent necessary, clarifies for their benefit—that OFCCP intends to apply the religious exemption as it has been applied in the mine run of Title VII cases. In line with those cases, there are indeed aspects of the discrimination inquiry that are necessarily and rightly nuanced and fact-dependent, and there are aspects where inquiry can infringe upon religious organizations' autonomy and are either prohibited or must be performed with care. The principles set out in those cases are reiterated below.

First, if a contractor raises the defense that an employee or applicant is covered by the ministerial exception, OFCCP can inquire whether that is in fact so. But if so, then that is the end of the inquiry. OFCCP will not apply the executive order in those circumstances. *See Our Lady of Guadalupe,* 140 S. Ct. at 2060–61; *Hosanna–Tabor,* 565 U.S. at 194–95.

Second, when the ministerial exception does not apply and the employee or applicant suffers adverse employment action by a contractor that is entitled to the religious exemption, OFCCP will apply traditional Title VII tools to ascertain whether the action was impermissible discrimination. In the absence of direct evidence of discrimination on a protected basis other than religion, this will typically involve application of the familiar *McDonnell Douglas* framework, in which (1) OFCCP must establish a prima facie case of discrimination on a protected basis other than religion; (2) the employer can respond with a nondiscriminatory reason, such as an explanation that its action was permitted under the religious exemption as pertaining to the individual's particular religion; and (3) OFCCP, to find a violation, must rebut that explanation as a mere pretext. *See McDonnell Douglas,* 411 U.S. 792.

Third, ascertaining whether unlawful discrimination motivated an employer's action requires consideration of all relevant facts and circumstances. OFCCP will consider all available evidence as to whether a religious organization's employment action was in fact sincerely motivated by the applicant's or employee's particular religion—such as, for instance, their adherence to the organization's religious tenets—or whether that was a mere pretext for impermissible discrimination.

Fourth, while OFCCP can inquire into the sincerity of the employer's religious belief, it is constitutionally prohibited from refereeing internal religious matters of contractors that are entitled to the religious exemption. Thus OFCCP cannot decide, when the matter is disputed, whether the employer or the employee has the better reading of religious doctrine; whether an employee should be considered a faithful member of a religious organization's community; whether some religious offenses or requirements are more important than others and should merit particular employment responses; whether the employer's sincerely held religious view is internally consistent or logically appealing; and similar issues.

Fifth, OFCCP believes these principles will cover the vast majority of scenarios, but there may be rare instances where an inquiry by a court or an agency into employment practices otherwise threatens First Amendment rights. *See DeMarco* v. *Holy Cross High Sch.,* 4 F.3d 166, 172 (2d Cir. 1993) (''There may be cases involving lay employees in which the relationship between employee and employer is so pervasively religious that it is impossible to engage in an age-discrimination inquiry without serious risk of offending the Establishment Clause.''). Commenters argued that this final caveat detracted from the clarity of the proposed rule. OFCCP disagrees. This observation merely notes, as have courts, that there may be instances outside the ministerial exception where a discrimination case might involve the kinds of questions prohibited by the First Amendment. *See id.* (finding employee's failed religious duties were ''easily isolated and defined,'' so a trial could be conducted ''without putting into issue the validity or truthfulness of Catholic religious teaching''). Instructive here are the sorts of questions found constitutionally offensive by the Supreme Court in *Catholic Bishop,* in which a hearing officer tested a witness's memory and knowledge of Catholic liturgies and masses. *See Catholic Bishop,* 440 U.S. at 502 & n.10; *id.* at 507–08 (appendix); *see also Great Falls,* 278 F.3d at 1343. OFCCP believes these cases provide sufficient principles for the agency to properly guide its inquiry if and when needful.

f. Causation

OFCCP proposed to apply a but-for standard of causation when evaluating claims of discrimination by religious organizations based on protected characteristics other than religion. Specifically, where a contractor that is entitled to the religious exemption claims that its challenged employment action was based on religion, OFCCP proposed finding a violation of E.O. 11246 only if it could prove by a preponderance of the evidence that a protected characteristic other than religion was a but-for cause of the adverse action. *See Univ. of Tex. Sw. Med. Ctr.* v. *Nassar,* 570 U.S. 338, 362–63 (2013); *Gross* v. *FBL Fin. Servs., Inc.,* 557 U.S. 167, 180 (2009). OFCCP stated

that this approach was necessary in situations where a religious organization, acting on a sincerely held belief, took adverse action against an employee on the basis of the employee's religion. OFCCP believed that application of the motivating factor framework in such cases might result in inappropriate encroachment upon the organization's religious integrity. However, the NPRM recognized that in prior notice-and-comment rulemaking implementing Executive Order 13665, 79 FR 20749 (Apr. 11, 2014) (amending E.O. 11246 to include pay transparency nondiscrimination), OFCCP rejected comments stating that a but-for causation standard was required and instead adopted the motivating factor framework as expressed in the Title VII post-1991 Civil Rights Act for analyzing causation. *See* 80 FR 54934, 54944–46 (Sept. 11, 2015).

A few commenters encouraged OFCCP to adopt the proposed but-for causation standard because they felt it would reduce government encroachment on religious autonomy. For instance, a private religious university commented that the proposed but-for standard is in line with statutory and First Amendment jurisprudence requiring the use of the least restrictive means to achieve government objectives that impinge on the exercise of religion. Another private religious university echoed this sentiment and added that the proposed but-for standard would enable religious entities to make employment decisions consistent with their sincerely held religious beliefs while still participating fully in the marketplace.

However, the majority of commenters who addressed the proposed but-for standard opposed it, and many recommended that OFCCP instead continue to apply the motivating-factor standard of causation to all claims of discrimination under E.O. 11246. These commenters cited a wide variety of concerns related to the proposed but-for standard.

Several commenters stated that the proposed standard would be too deferential to employers and/or impose too heavy a burden on employees. For instance, a national interfaith organization commented that, as long as an employer can cite another plausible reason for its actions, an employee cannot prove that discrimination occurred. The organization noted that under this standard, employees are far less likely to prevail.

Other commenters expressed skepticism at OFCCP's proffered rationale for departing from its established policy and practice of interpreting the nondiscrimination requirements of E.O. 11246 in a manner consistent with Title VII principles. For instance, a national reproductive rights organization commented that, for decades, courts have resolved claims of employment discrimination by religious organizations without implicating the concerns OFCCP cites. The organization added that OFCCP's concerns about impermissible entanglement are overblown and unsupported by case law. A transgender legal professional organization expressed similar concerns.

Relatedly, a number of commenters opposed the proposed but-for standard on the basis that it conflicts with Title VII and related case law. Several of these commenters criticized OFCCP's reliance on *Nassar,* 570 U.S. at 362–63, and *Gross,* 557 U.S. at 180, and argued that these cases do not bridge the gap between the proposed but-for standard and Title VII principles. For instance, a contractor association commented: ''The Supreme Court has adopted the 'but for' standard for retaliation claims under Title VII (*Nassar*) and for ADEA claims (*Gross*); it has not done so for discrimination claims under Title VII.'' Similarly, an LGBT rights advocacy organization commented the two cases cited by OFCCP did not adopt a but-for causation requirement for Title VII or E.O. 11246 cases.

Additionally, multiple commenters expressed concern that the proposed but-for standard would run contrary to E.O. 11246's prohibition on discrimination and/or OFCCP's core mission of enforcing the Executive Order. For instance, a group of state attorneys general commented that the proposed but-for standard is contrary to law and exceeds OFCCP's authority because it impermissibly interprets the Executive Order's anti-discrimination provisions. And a national health policy organization commented: ''The new proposed rule threatens to jeopardize the very mission of OFCCP and the original intent of the E.O. 11246 to protect workers from discrimination . . . .''

Finally, several commenters raised practical objections to the proposed but-for standard. For instance, an atheist civil liberties organization commented that applying different causation standards to cases involving similarly situated employers would ''make it challenging for contractors seeking to comply with federal law, resulting in extra expense and legal confusion for workers and employers.'' An organization that advocates separation of church and state expressed similar concerns, arguing that ''status-based discrimination claims based on identical conduct would be evaluated according to different standards of proof.''

Considering the comments received, OFCCP will apply the motivating-factor analysis to all claims of discrimination, including discrimination by religious organizations based on protected characteristics other than religion. OFCCP agrees that it can avoid impermissible entanglement while applying a motivating-factor standard of causation. *See, e.g., Curay-Cramer,* 450 F.3d at 139 (''[A]s long as the plaintiff did not challenge the validity or plausibility of the religious doctrine said to support her dismissal, but only questioned whether it was the actual motivation, excessive entanglement questions were not raised.'') (citing *Geary,* 7 F.3d at 330); *DeMarco,* 4 F.3d at 170–71)). Where there is a dispute as to whether an employment action was motivated by the employee's adherence to religious tenets, or instead was motivated by impermissible discrimination—a ''one or the other'' scenario—OFCCP will apply the principles just discussed in subsection II.A.5.e, ''Application of the Religious Exemption.'' Where instead an employment action is motivated by the employee's adherence or non-adherence to religious tenets that implicate another protected category, OFCCP will assess the action on a case-by-case basis in accordance with the general RFRA analysis discussed earlier. The approach adopted in this final rule is consistent with OFCCP's longstanding policy and practice as well as Title VII principles and case law.

f. Conclusion

For the reasons described above and in the NPRM, and considering the comments received, OFCCP finalizes the proposed definition of *Particular religion* without modification.

B. Section 60–1.5 Exemptions

This rule proposed to add paragraph (e) to 41 CFR 60–1.5 to establish a rule of construction for subpart A of 41 CFR part 60–1 that provides for the broadest protection of religious exercise permitted by the Constitution and laws, including RFRA. This rule of construction is adapted from RLUIPA, 42 U.S.C. 2000cc–3(g). Significantly, RFRA applies to all government conduct, not just to legislation or regulation. 42 U.S.C. 2000bb–1. Paragraph (e) is clarifying, since the Constitution and federal law, including RFRA, already bind OFCCP.

Some commenters expressed general support for the proposed rule of

construction based on the importance of protecting religious freedom, including constitutional protections. For example, a religious leadership and policy organization approved of the fact that the proposal gives religious freedom due deference by advocating for a broad and robust interpretation of its protections. In a joint comment, a religious legal association and an association of evangelical churches and schools commented that the proposed rule of construction reflects longstanding religious freedom principles recognized by Congress and protected by the First Amendment. A pastoral membership organization commented that the proposed rule of construction gives religious exercise the special protection required by the constitutional text and history. A religious professional education association commented that the proposed rule of construction provided clarity regarding the meaning, scope, and application of the religious exemption. Additional supportive commenters, including an evangelical chaplains' advocacy organization, stated that the rule of construction is consistent with executive orders and the Attorney General's memorandum on religious liberty.

Other commenters opposed the proposed rule of construction for a variety of reasons, including arguing that its application in this context would actually be inconsistent with the U.S. Constitution and federal laws. For example, a labor organization commented that the interpretation goes beyond the Constitution and law, including RFRA. An anti-bigotry religious organization further noted, with regard to RFRA, the Supreme Court's holding in *Hobby Lobby* that ''anti-discrimination prohibitions are the least restrictive means of achieving the government's compelling interest in providing equality in the workplace,'' and commented that this principle applied with greater force to employment by federal contractors. Other commenters, including a group of state attorneys general and a transgender advocacy organization, cautioned that construing the religious exemption broadly would ''exceed[ ] statutory and judicial limits'' and conflict with the purpose and text of federal equal employment laws to provide maximum nondiscrimination protections for workers. A talent management assessment company commented that the ''maximum extent permitted by law'' standard was vague and left too much discretion to the agency charged with enforcement.

OFCCP did not intend, in proposing the rule of construction at § 60–1.5(e), to create any new legal obligation or proscription on the rights of workers, but rather sought only to reaffirm existing protections found in federal law that already apply to OFCCP. The parallel rule of construction in RLUIPA has been in place for nearly 20 years and has proved to be a workable legal standard. OFCCP emphasizes that this rule of construction provides for broad protection of both employers' and employees' religious exercise. Moreover, by its terms, the provision limits the agency's interpretation of this protection to what is permitted under the U.S. Constitution, RFRA, and other applicable laws. It thus reflects the Supreme Court's recognition that, within the religion clauses of the First Amendment, there is ''room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'' *Walz,* 397 U.S. at 669. Accordingly, for the reasons described above and in the NPRM, considering the comments received, OFCCP finalizes the proposed rule of construction without modification.

C. Severability

The Department has decided to include severability provisions as part of this final rule. To the extent that any provision of this final rule is declared invalid by a court of competent jurisdiction, the Department intends for all other provisions that are capable of operating in the absence of the specific provision that has been invalidated to remain in effect. Severability clauses have been added at the end of 41 CFR 60–1.3 and as a new paragraph, 41 CFR 60–1.5(f).

III. Other Comments

Numerous commenters raised a variety of other general points about the proposed rule.

A. Religious Liberty for Employees

Several commenters opposed the proposed rule as undermining or failing to promote religious liberty. For instance, a group of U.S. Senators commented that the proposed rule will allow employers to refuse to interview even highly qualified candidates simply because they do not regularly attend religious services in their employer's faith. According to the Senators, this could create a situation in which religious employers are allowed to discriminate against workers ''who practice their faith differently—a fundamental right guaranteed by the Constitution.'' A religious women's organization echoed this concern and also stated that the proposed rule would promote one interpretation of one religion—namely, evangelical Christianity—at the expense of religious liberty more broadly. Some commenters stated that the proposal would allow contractors to compel employees to follow their religious practices, which they argued directly violates Title VII and even the Constitution. A group of state attorneys general commented that, under the proposed rule, employers' religious freedom would come at the cost of the loss of the religious freedom of employees forced to abide by their employers' religious beliefs. A legal professional organization commented that the proposed rule would protect for-profit or nominally religious employers' right to require employees to participate in prayer or other religious practices. A religious organization commented that employers could invoke the religious exemption to coerce their workers into participating in certain religious practices under the threat of termination. Several other commenters, including a legal professional association, an organization that advocates separation of church and state, an anti-bigotry religious organization, and a migrants' rights organization, expressed general concern that the proposed rule would weaken religious liberty.

OFCCP believes that the final rule's overall effect will be to promote religious liberty. *See, e.g., Hobby Lobby,* 573 U.S. at 707 (''[P]rotecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.''). The Supreme Court has described the expansion of the Title VII religious exemption as ''lifting a regulation that burdens the exercise of religion.'' *Amos,* 483 U.S. 327, 338 (1987). As described above, the proposed definitions have been altered in the final rule to respond to commenters' concerns that nominally religious employers might qualify for the exemption, as well as to clarify the steps OFCCP will take in analyzing claims of discrimination by religious contractors. To the extent that commenters believe that the religious exemption itself increases employers' religious liberty at the expense of employees' religious liberty, OFCCP reiterates that it is required to administer the religious exemption as part of E.O. 11246. The President, following Congress's lead, has already decided how to balance the religious liberty of religious employers and their employees, and OFCCP cannot modify that. Additionally, claiming the

religious exemption and taking employment action under its protections is purely optional for employers; the government does not require any employment action that may be protected by the exemption.

B. Establishment Clause and Other Constitutional Questions

Several commenters stated that the proposal violates constitutional prohibitions on aiding private actors that discriminate. This concern was shared by an affirmative action professionals association, a civil liberties organization, a professional organization of educators, and an organization that advocates separation of church and state, among others. The civil liberties organization commented, for instance, that the proposed rule would permit contractors to discriminate with federal funds, thus putting the government's imprimatur on discrimination in violation of the Equal Protection and Establishment Clauses.

A variety of commenters opposed the proposed rule on the basis that it violates the Establishment Clause and/or general church-state separation principles. For instance, an atheist civil liberties organization commented that the proposed rule will violate the Constitution's religion clauses by involving the government in religious practice, promoting dominant religious practices, burdening unpopular religious practices, and harming third parties. Similarly, a labor union raised concerns that the rule crosses into territory proscribed by the Establishment Clause by authorizing federal contractors to advance their religious preferences and practices through the receipt of federal funds and the performance of public functions.

Other commenters stated that the proposed rule violates separation of powers. For instance, an LGBT rights advocacy organization stated that since 2001, Congress has repeatedly rejected efforts to extend the Title VII exemption to government-funded entities. Likewise, a consortium of federal contractors and subcontractors asserted that it would be inappropriate for OFCCP to regulate the religious exemption without direct and actual legislative or constitutional guidance.

Finally, several commenters, including an anti-bigotry religious organization and a civil liberties and human rights legal advocacy organization, raised concerns that the proposal violates a variety of other constitutional principles, including the no-religious-tests clause, the free speech clause, and the constitutional right of privacy.

Other commenters supported the proposed rule as consistent with constitutional principles. These commenters stated, among other things, that the proposal appropriately respects freedom of religion, helpfully clarifies that religious hiring protections apply even when federal funding is involved, and is consistent with the Establishment Clause. A religious liberties legal organization commented, for instance, that the proposed rule adheres to the traditional understanding that ''the Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any'' (quoting *Lynch* v. *Donnelly,* 465 U.S. 668, 668 (1984)). A religious leadership and policy organization commented that the proposal reflects an accurate understanding of the free exercise of religion and ''its place in our society.''

OFCCP agrees with the commenters who stated that the proposal is consistent with constitutional principles. As noted in the NPRM and above, OFCCP believes that the final rule is supported by recent Supreme Court decisions that protect religion-exercising organizations and individuals under the U.S. Constitution and federal law. *See, e.g., Little Sisters of the Poor,* 140 S. Ct. 2367; *Espinoza,* 140 S. Ct. 2246; *Our Lady of Guadalupe,* 140 S. Ct. 2049; *Masterpiece Cakeshop,* 138 S. Ct. 1719; *Trinity Lutheran,* 137 S. Ct. 2012; *Hobby Lobby,* 573 U.S. 682; *Hosanna-Tabor,* 565 U.S. 171. These decisions make clear, among other constitutional principles, that ''condition[ing] the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties.'' *Trinity Lutheran,* 137 S. Ct. at 2022 (alterations omitted) (quoting *McDaniel,* 435 U.S. at 626 (plurality opinion)); *see also Espinoza,* 140 S. Ct. at 2256. OFCCP believes that the final rule achieves consistency with these landmark Supreme Court decisions and is constitutionally valid. Moreover, the definitions and rule of construction adopted in the final rule will help OFCCP avoid the ''constitutional minefield'' into which some courts have fallen when adjudicating Title VII claims against religious organizations. *World Vision,* 633 F.3d at 730 (O'Scannlain, J., concurring). The final rule will enable OFCCP to apply the religious exemption without engaging in an analysis that would be inherently subjective and indeterminate, outside its competence, susceptible to discrimination among religions, or prone to entanglement with religious activity. *See, e.g., Mitchell* v. *Helms,* 530 U.S. 793, 828 (2000) (plurality opinion); *Colo. Christian Univ.* v. *Weaver,* 534 F.3d 1245, 1261–62 (10th Cir. 2008); *Great Falls,* 278 F.3d at 1342–43. We address these points in more detail next.

1. Neutrality Toward Religion

The rule does not impermissibly favor religion. In *Bowen* v. *Kendrick,* 487 U.S. 589 (1988), the Supreme Court held that a religious organization is not disqualified from government programs that fund religious and nonreligious entities alike on a neutral basis. A ''neutral basis'' means that the criteria are neutral and secular, with no preference for religious institutions because of their religious character. *Id.; see also Rosenberger* v. *Rector & Visitors of Univ. of Va.,* 515 U.S. 819 (1995) (''A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.''); U.S. Dep't of Justice, Office of Legal Counsel, *Religious Restrictions on Capital Financing for Historically Black Colleges and Universities,* 2019 WL 4565486 (Aug. 15, 2019) (''*Religious Restrictions*'') (''The neutrality principle runs throughout the Court's decisions, and is broadly consistent with a tradition of federal support for religious institutions that dates from the time of the Founding.'').

This rule is motivated by legitimate secular purposes: To expand the eligible pool of federal contractors to include religious organizations, so that the federal government may choose from among competing vendors the best combination of price, quality, reliability, and other purely secular criteria; to clarify the law for religious organizations and thus reduce compliance burdens; to correct any misperception that religious organizations are disfavored in government contracting; and ''to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions,'' *Amos,* 483 U.S. at 336, by appropriately protecting their autonomy to hire employees who will further their religious missions. The final rule also has a religion-neutral effect. Under the final rule, both religious and secular organizations will retain the ability to bid on government contracts. Proposed vendors will have to compete solely on the basis of secular criteria. The use of sectarian criteria remains forbidden; nothing in the

proposed rule sanctions the use of sectarian criteria for contract awards.

2. Secular and Sectarian Activities

Nothing in the final rule sanctions direct federal funding of religious activities. In *Kendrick,* the Court forbade such direct funding of religious activity but upheld a statute authorizing payments to religious organizations that sought to eliminate or reduce the social and economic problems caused by teenage sexuality because the services to be provided under the statute were ''not religious in character.'' *Kendrick,* 487 U.S. at 605; *see also* U.S. Dep't of Justice, Office of Legal Counsel, *Department of Housing and Urban Development Restrictions on Grants to Religious Organizations that Provide Secular Social Services,* 12 Op. O.L.C. 190, 199 (1998) (concluding that the government can fund a religious organization's secular activities if they can be meaningfully and reasonably separated from the sectarian activities). Likewise here, in the relatively rare circumstances in which a proposed vendor both qualifies as a religious organization and receives a federal contract, the federal funds will pay the organization *to fulfill the terms of the secular contract,* not to pray or to proselytize.

Moreover, the Establishment Clause does not forbid the federal government from contracting with religious organizations for a secular purpose, even if the receipt of the contract incidentally helps the religious organization advance its sectarian purpose. As *Kendrick* explained, ''Nothing in our previous cases prevents Congress from . . . recognizing the important part that religion or religious organizations may play in resolving certain secular problems. . . . To the extent that this congressional recognition has any effect of advancing religion, the effect is at most 'incidental and remote.' '' 487 U.S. at 607; *see, e.g., Roemer* v. *Bd. of Pub. Works of Md.,* 426 U.S. 736 (1976) (''[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all.''); *Barnes-Wallace* v. *City of San Diego,* 704 F.3d 1067 (9th Cir. 2012) (finding no Establishment Clause violation where city leased land to both secular and sectarian organizations). Here, as in *Kendrick,* nothing in the final rule ''indicates that a significant proportion of the federal funds will be disbursed to 'pervasively sectarian' institutions.'' *Kendrick,* 487 U.S. at 610. There are also no concerns that funds will be used for an ''essentially religious endeavor''; rather, funds will be used to fulfill the government' secular contracting requirements. *Espinoza,* 140 S. Ct. at 225. The rule simply allows religious organizations to compete with secular organizations on the basis of secular criteria without being forced to compromise their religious purpose. Commenters objecting on this basis are dissatisfied with the existence of the exemption.

3. Respecting the First Amendment

Of great significance to OFCCP, the rule's clarifications and accommodations better comport with the Free Exercise Clause by affording religious organizations an appropriate level of autonomy in their hiring decisions while still permitting them to engage in federal contracting. As the Court explained in *Trinity Lutheran,* 137 S. Ct. at 2022, the government violates the Free Exercise Clause when it conditions a generally available public benefit on an entity's giving up its religious character, unless that condition withstands the strictest scrutiny. ''[D]enying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order.'' *Id.; see also Locke* v. *Davey,* 540 U.S. 712 (2004) (holding government may not deny generally available funding to a sectarian institution because of its religious character); *Trinity Lutheran,* 137 S. Ct. at 2021 (''The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. . . . [S]uch a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.'' (citing *Lukumi,* 508 U.S. at 546)). When the government conditions a program in this way, the government ''has punished the free exercise of religion. ''To condition the availability of benefits . . . upon [a recipient's] willingness to . . . surrender[] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties.'' *Id.* at 2022 (quoting *McDaniel,* 435 U.S. at 626 (plurality opinion)); *cf. Trinity Lutheran,* 137 S. Ct. at 2022 (citing *Ne. Fla. Chapter, Associated Gen. Contractors of Am.* v. *Jacksonville,* 508 U.S. 656, 666 (1993) (''[T]he 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract.'')).

In a recent opinion, the Department of Justice's Office of Legal Counsel concluded that the government violates the Free Exercise Clause by denying sectarian organizations an opportunity to compete on equal footing for federal dollars. *See Religious Restrictions,* 2019 WL 4565486. As an initial matter, OLC explained that ''[t]he Establishment Clause permits the government to include religious institutions, along with secular ones, in a generally available aid program that is secular in content. There is nothing inherently religious in character about loans for capital improvement projects; this is not a program in which the government is 'dol[ing] out crosses or Torahs to [its] citizens.' '' *Id.* at *6 (citing *Am. Atheists, Inc.* v. *City of Detroit Downtown Dev. Auth.,* 567 F.3d 278, 292 (6th Cir. 2009)). Because the capital-financing program at issue was a secular, neutral aid program, it did not violate the Establishment Clause. On the other hand, the government would violate the Free Exercise Clause by denying loans to an institution ''in which a substantial portion of its functions is subsumed in a religious mission,'' because such a restriction ''discriminates based on the religious character of an institution.'' OLC concluded that the appropriate balance was to deny loans under the program only for facilities that are predominantly used for devotional religious activity, or for facilities that offer only programs of instruction devoted to vocational religious education.

Here, some commenters made clear that the federal government's current practice presented religious organizations with a dubious choice: They may participate in the government contracting process or retain their religious integrity, but not both. As one commenter noted, ''If the best service provider or subcontractor happens to be a religious entity, they are often unwilling to comply with the federal anti-discrimination laws for fear that they will no longer be able to preserve the integrity of their organizations. This is a direct result of the uncertainty in the applicability of the religious exemption under the current law.'' Similarly, another commenter, an association of medical professionals, recently surveyed health professional members working in faith-based organizations overseas and found that almost half, 49%, feel that the U.S. government is not inclined to work with faith-based organizations. The final rule thus removes any such concerns raised by contractors and instead provides appropriate religious accommodation.

4. Use of Federal Funds

Some commenters expressed concern that the rule would allow employers to use federal funds to discriminate against job applicants and employees on the

basis of religion. That is a critique of the E.O. 11246 religious exemption itself, not this rule. OFCCP cannot and does not by this rule reopen that determination by the President. Additionally, as noted earlier, claiming the religious exemption and taking employment action under its protections is purely optional for employers; the government does not require any employment action that may be protected by the exemption.

Regardless, as the Department of Justice's Office of Legal Counsel has pointed out, the federal government has repeatedly permitted religious organizations to receive federal funds while also maintaining autonomy over their hiring practices. *See* 31 O.L.C. 162, 185–86 (2007); *accord* Office of the Att'y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty at 6 (Oct. 6, 2017), *available at www.justice.gov/opa/press-release/file/1001891/download.* Likewise, the proposed rule does not run afoul of the Establishment Clause merely because of the possibility that, in some rare instance, a court may determine that a particular contract award to a religious organization impermissibly endorses religion. ''[W]hile religious discrimination in employment might be germane to the question whether an organization's secular and religious activities are separable in a government-funded program, that factor is not legally dispositive.'' U.S. Dep't of Justice, Office of Legal Counsel, Memorandum for William P. Marshall from Randolph D. Moss at 20 (Oct. 12, 2000), *available at justice.gov/olc/page/file/936211/download.* To the contrary, if the government ''is generally indifferent to the criteria by which a private organization chooses its employees and to the identity and characteristics of those employees, there would be less likelihood that the government could reasonably be perceived to endorse the organization's use of religious criteria in employment decisions.'' *Id.* at 25. And in some situations, the religious exemption ''might be a permissible religious accommodation that alleviates *special* burdens rather than an impermissible religious preference.'' *Id.* at 30. For instance, the Office of Legal Counsel concluded that RFRA in one instance *required* the Department's grant-making arm to exempt a religious organization from the religious nondiscrimination provisions of Title VII. *See id.; see also* 31 O.L.C. 162, 190 (2007). Here, several religious organizations commented that the current contracting rules erect a barrier to participation by eroding their ability to hire members of their particular faith. Generally speaking, then, OFCCP, in line with case law from *Amos* to *Trinity Lutheran,* views this rule as merely providing permissible accommodation rather than impermissibly establishing religion.

5. Effects on Applicants and Employees

Finally, several commenters opposed the proposed rule on the basis that it would increase discrimination against contractors' employees and applicants. Some cited historical discrimination against disadvantaged groups, warning that the proposal would cause a regression in civil rights protections, and stated that religion has often been used as a way to justify discrimination. For example, an affirmative action professionals association asserted that employment discrimination permitted by the proposed rule could eliminate the civil rights protections that minorities and women have enjoyed for decades.

Commenters also gave examples of how potential discrimination could play out. For example, an organization advocating for the separation of church and state commented that, for instance, an evangelical Christian might refuse to hire a gay man, but agree to hire a twice-divorced, thrice-married man, even though both homosexuality and divorce are prohibited by evangelical Christianity. An LGBT civil rights organization argued that even a construction company, janitorial service, or low-level healthcare provider could claim a religious mission and refuse to hire or provide services to single parents or individuals who become pregnant outside marriage or within a same-sex relationship.

Many commenters warned that adoption of the proposed rule would increase discrimination against lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals, specifically. Some commenters alleged that the proposed rule was part of a concerted effort to roll back the rights of LGBTQ individuals and other disadvantaged groups. Several commenters stated that transgender employees in particular already face high rates of discrimination and poverty, and that this proposal would leave them even more vulnerable. A transgender civil rights and advocacy organization commented specifically that transgender people are already far more likely to be unemployed, and that approximately 1 in 4 earn less than $24,000 per year. A women and family rights advocacy organization wrote that, currently, almost half of LGBTQ workers report actively concealing their identity out of fear of discrimination, and that the proposal would exacerbate this issue. Commenters wrote that effects might include LGBTQ individuals being less inclined to seek HIV care and services for the aging, as well as facing increased vulnerability to trafficking. Others stated that the proposal would permit contractors to discriminate against people in same-sex relationships, including refusing to hire applicants, terminating employees when they marry someone of the same sex, or denying spousal benefits. Several commenters stated that even LGBTQ people of faith would be discriminated against.

Commenters also asserted that the proposed rule could increase discrimination against women and pregnant people based on religious beliefs about work, family roles, and reproduction. This included the possibility of discrimination against women for becoming pregnant outside of marriage, using contraception, using in vitro fertilization, seeking abortions, or getting divorced. An organization combatting hunger wrote that even facially neutral practices may ''disproportionately'' harm women, because when an employer opposes ''sexual practices out of wedlock, those who bear the physical evidence—pregnancy—are going to be the ones that get fired.'' Several commenters also stated that employers may discriminate against women based on religious beliefs that women should not work outside the home. For example, a women and family rights advocacy organization commented that some employers may refuse to hire women altogether, and that women may also be denied health insurance, professional growth opportunities, or other benefits because of an employer's belief that women are not the ''head of the household'' and therefore do not need such benefits. Additionally, an interfaith policy and advocacy organization commented that an employer could cite a belief that women should not be alone with men they are not married to in order to deny female employees access to mentorship, training opportunities, and senior leadership positions in the workplace.

Commenters also asserted that the proposal would increase discrimination against religious minorities and/or atheists. Many stated that federal contractors should not be permitted to categorically exclude applicants of a particular religion. A transgender civil rights and advocacy organization commented that the proposed rule would promote sectarianism by allowing people of different faiths to

discriminate against one another. A number of commenters, including a civil liberties advocacy group and an interfaith policy and advocacy organization, commented: ''Federal contractors should not be allowed to hang a sign that says 'Jews, Sikhs, Catholics, Latter-day Saints need not apply.' ''

Many commenters asserted that the proposal could allow racial discrimination as well. An organization combatting hunger claimed that discrimination would occur by citing a 2014 study in their comment which found that only 10% of Americans were comfortable permitting a small business to refuse service to African-Americans based on a religious reason. Commenters including an LGBTQ wellness organization also warned that, under the proposal, a religious contractor will be permitted to discriminate against interracial couples if it believes that marriage should be between a man and a woman of the same race. A legal think tank commented that employers could require employees to join a majority- or exclusively-white church, for instance, or to share particular religious beliefs that have racial implications and/or are more common among white Christians.

Some commenters argued that federal funds should not be used by contractors who may commit hiring discrimination. For example, a transgender advocacy organization commented that people should not be legally compelled to financially support entities that would refuse to employ them because of their identities, and noted that religious employers who seek to employ only ''their own kind'' should seek out non-federal funding. Other commenters stated that U.S. federal government contracting serves as a model for the private sector or foreign nations, which may emulate discriminatory practices permitted by this proposal.

As explained above, the religious exemption generally speaking does not excuse a contractor from complying with E.O. 11246's requirements regarding antidiscrimination and affirmative action; notices to applicants, employees, and labor unions; compliance with OFCCP's implementing regulations; the furnishing of reports and records to the government; and flow-down clauses to subcontractors. *See* E.O. 11246 §§ 202–203. Religious organizations that serve as government contractors must comply with all of E.O. 11246's nondiscrimination requirements except in some narrow respects, under some narrow and reasonable circumstances recognized under law, where religious organizations maintain, for instance, sincerely held religious tenets regarding matters such as marriage and intimacy which may implicate certain protected classes under E.O. 11246.

Some commenters argued that the proposed rule would violate the Establishment Clause specifically because of the increased discrimination they believed it would permit. Most of these commenters argued that potential discrimination will unconstitutionally burden third parties, including employees, applicants, and beneficiaries of contracting services. A labor union wrote that granting employers a broad religious exemption would harm employees and applicants based on their own religious beliefs and practices (or lack thereof), in violation of the Establishment Clause.

As noted above, the Supreme Court upheld Title VII's religious exemption, on which E.O. 11246's exemption is modeled, against an Establishment Clause challenge. *Amos,* 483 U.S. at 330. It did so in spite of the fact that the application of the exemption ''had some adverse effect on those holding or seeking employment with those organizations.'' *Tex. Monthly, Inc.* v. *Bullock,* 489 U.S. 1, 18 n.8 (1989); *cf. Amos,* 483 U.S. at 338–39 (rejecting the claim that the religious exemption ''offends equal protection principles by giving less protection to the employees of religious employers than to the employees of secular employers'' in part because the exemption had ''a permissible purpose of limiting governmental interference with the exercise of religion''). If the E.O. 11246 religious exemption similarly affects some third parties, it does so to ''prevent[ ] potentially serious encroachments on protected religious freedoms.'' *Texas Monthly,* 489 U.S. at 18 n.8.

Some commenters stated that what they viewed as the proposal's failure to consider the effects of increased discrimination made the proposed rule inconsistent with OFCCP's previous rulemakings. Multiple commenters stated that previous rulemakings identified discrimination as wasteful of taxpayers' money, and that this proposal failed to address this issue. For example, a state civil liberties organization commented that, in prior rules, OFCCP has consistently stated that discrimination in government contracting wastes taxpayer funds by preventing the hiring of the best talent, increasing turnover, and decreasing productivity. In addition, several commenters, including a women and family rights advocacy organization, referred to the rule as an ''abrupt departure'' from OFCCP's previous EEO enforcement. A civil liberties organization commented that the ''Department itself has previously acknowledged the harms of discrimination to the country as a whole, but ignores them entirely in the Proposed Rule.'' An LGBT legal services organization commented that the proposed rule indicates that OFCCP will not enforce the relevant protections sufficiently.

Some commenters noted more specifically that they believe the proposal is inconsistent with the agency's rule implementing E.O. 13672, which added sexual orientation and gender identity to the bases protected by E.O. 11246. For example, a legal think tank commented that, in its rule on sexual orientation and gender identity, OFCCP took into account the benefits of nondiscrimination—meaning that it would be arbitrary and capricious for OFCCP to ignore these benefits of non-discrimination ''in the present rulemaking.'' A watchdog organization wrote that ''undoing these protections could have adverse long-term effects on the federal contracting system, including lower-quality goods and services, and impaired federal programs and missions.''

Commenters also criticized the proposal as purportedly inconsistent with OFCCP's 2016 sex discrimination rule. A civil liberties organization commented that, in that rule, the agency cited social science research supporting the need for effective nondiscrimination enforcement. Similarly, a legal think tank wrote that, in its sex discrimination rulemaking, OFCCP specifically cited research indicating that employment discrimination against transgender workers is pervasive. These commenters asserted that OFCCP ignored such statistics in proposing the current rule.

OFCCP continues to believe that discrimination by federal contractors generally has a negative impact on the economy and efficiency of government contracting. Indeed, that is one of the primary justifications for E.O. 11246. However, it has long been recognized that a religious exemption in the Executive Order is also warranted, Congress has determined that accommodations under RFRA are sometimes required, and OFCCP's policy is to respect the religious dignity of employers and employees to the maximum extent permissible by law. Further, OFCCP believes that this rule will have a net benefit to the economy and efficiency of government contracting. For those current and potential federal contractors and subcontractors interested in the

exemption, this rule will help them understand its scope and requirements and may encourage a broader pool of organizations to compete for government contracts and more of them, which will inure to the government's benefit.

Commenters' concerns here are also exaggerated. As explained above, OFCCP does not anticipate this rule will affect the vast majority of contractors or the agency's regulation of them, since they do not and would not seek to qualify for the religious exemption. As commenters noted, religious organizations do not appear to be a large portion of federal contractors. And even for them, adherence to E.O. 11246's nondiscrimination provisions is required except in those circumstances well-established under law, including the religious exemption, the ministerial exception, and RFRA. OFCCP also reemphasizes that the proposed definitions have been altered in the final rule to respond to commenters' concerns that nominally religious employers might qualify for the exemption, as well as to clarify the steps OFCCP will take in analyzing claims of discrimination by religious contractors. As explained in more detail in the Regulatory Procedures section below, OFCCP has considered the possible adverse effects of the rule and believes they will be minimal and will be outweighed by the benefits.

C. The Equal Employment Opportunity Commission

Some commenters raised concerns about this rule's compatibility with the positions of the EEOC. Different aspects of this concern have been described and addressed in earlier parts of this preamble. OFCCP consolidates those concerns and addresses them here as well. Those concerns included general concerns that the proposed rule would undermine the EEOC's efforts by taking positions contrary to the EEOC or that the proposed rule would introduce confusion by subjecting federal contractors to conflicting or at least different legal regimes. Commenters also objected to specific aspects of the rule on grounds that they differed from the EEOC's position, including the proposed rule's inclusion of for-profit entities as among those able to qualify for the religious exemption, the proposed rule's disagreement that the exemption's scope is limited to a coreligionist preference, and the proposed rule's but-for causation standard.

OFCCP has a decades-long partnership with the EEOC and works closely with it to ensure equal employment opportunity for American workers. OFCCP rejects the idea that this rule would undermine that longstanding and constructive partnership. The EEOC reviewed the proposed rule and this final rule. This final rule applies only to government contractors and subcontractors, not the broader swath of U.S. employers that the EEOC regulates. Within that smaller segment of employers, it applies only to that small minority of contractors and subcontractors that qualify or may seek to qualify for the religious exemption. Among that group, they would need to have 15 or more employees to be covered by the EEOC. And within that group, there would still need to be a situation in which any differences between the views of OFCCP and EEOC would cause a different result. In short, OFCCP doubts this rule will create any systemic disharmony between the agencies' enforcement programs.

For the small universe of employers remaining as defined above, the differences that may exist are minor. At the outset, OFCCP notes that EEOC does not have substantive rulemaking authority under Title VII, *see EEOC* v. *Arabian Am. Oil Co.,* 499 U.S. 244, 257 (1991), and the EEOC statements on this issue are in nonbinding subregulatory guidance. As to the specifics of that guidance, the differences that do exist are small. OFCCP has revised its approach in the final rule to adopt a motivating-factor standard of causation, so a difference there, assuming there was one, no longer exists. Regarding OFCCP's definition of *Religious corporation, association, educational institution, or society,* the EEOC's current subregulatory guidance on this topic has not been updated since 2008, before *World Vision* and *Hobby Lobby* were decided.[31] Contrary to some commenters' assertions, this guidance treats for-profit status as a significant factor, but not as dispositive; this final rule does the same. Notably, the EEOC very recently issued a proposal to update its compliance manual on religious discrimination.[32] This rule is not inconsistent with the proposal either, which notes that ''[t]he religious organization exemption under Title VII does not mention nonprofit and for-profit status'' and states that ''[w]hether a for-profit corporation can constitution a religious corporation under Title VII is an open question.'' [33] The EEOC's 2008 guidance states that the exception is only for organizations that are primarily religious. Its recently proposed guidance describes the inquiry as one into ''whether an entity is religious.'' [34] OFCCP's test also seeks to identify organizations that are primarily religious—through an appropriately guided, reliable, and objective inquiry. The EEOC's 2008 guidance (and its proposed guidance) suggests an open-ended set of non-dispositive factors, while this final rule uses a set of clearly defined factors that are sufficient for non-profit entities; regarding for-profit entities, additional evidence compatible with some of the additional factors listed by the EEOC's 2008 guidance may come into play. Insofar as any difference still remains between this final rule and EEOC's 2008 guidance, OFCCP believes that difference is tolerable when weighed against the subsequent developments in the case law, the reasoning of which OFCCP finds persuasive, and OFCCP's desire for a more structured test, especially given OFCCP's unique contract-based regulatory structure.

Regarding OFCCP's definition of *Particular religion,* the same EEOC guidance documents from 2008 state that the religious exemption ''only allows religious organizations to prefer to employ individuals who share their religion.'' It then addresses two religiously based views that are not protected by the exemption: Racial discrimination and differences in fringe benefits between men and women. This final rule is fully compatible with both those examples. As discussed earlier in this preamble, OFCCP always has a compelling interest in enforcing prohibitions on racial discrimination, and OFCCP endorses the result in *Fremont,* 781 F.2d 1362. This final rule, however, does provide an exemption broader than a mere coreligionist hiring preference. OFCCP believes, for the reasons stated earlier in this preamble, that that view is sufficiently supported by the Title VII case law, and in fact is the more persuasive view of the law. OFCCP also believes that a broader view is more likely to encourage religious organizations to enter the pool of competitors for government contracts, which benefits the government. For

[31] *See* EEOC, Questions and Answers: Religious Discrimination in the Workplace (July 22, 2008), *www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace*; EEOC, EEOC Compliance Manual § 12–I.C.1 (July 22, 2008), *www.eeoc.gov/laws/guidance/section-12-religious-discrimination.* The EEOC's website states for both these documents that, ''[a]s a result of the Supreme Court's decision in *Our Lady of Guadalupe School* v. *Morrissey-Berru,* we are currently working on updating this web page.'' *Id.*

[32] *See* EEOC, ''PROPOSED Updated Compliance Manual on Religious Discrimination'' (Nov. 17, 2020), *https://beta.regulations.gov/document/EEOC-2020-0007-0001* (last accessed November 18, 2020).

[33] *Id.* at 21.

[34] *Id.* at 20.

these reasons, OFCCP believes that any issues arising from any differences with the EEOC's views as stated in subregulatory guidance from 2008 are outweighed by the benefits of adopting a broader view of the exemption. Additionally, OFCCP believes any differences on this issue may be resolved in the near future. The EEOC's proposed guidance is even more consistent with OFCCP's final rule. The proposed guidance states that ''the exemption allows religious organizations to prefer to employ individuals who share their religion, defined not by the self-identified religious affiliation of the employee, but broadly by the employer's religious observances, practices, and beliefs.'' [35] The guidance goes on to state that ''[t]he prerogative of a religious organization to employ individuals '' 'of a particular religion' . . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.'' [36]

OFCCP also believes some commenters mischaracterize any differences between the OFCCP and EEOC in this area as presenting contractors with conflicting liability. OFCCP's final rule is at least as, or more, protective of religious organizations than the view stated in the EEOC's guidance. A contractor can choose to adhere to the view articulated by the EEOC in 2008 and be in full compliance under the view of both agencies.

Finally, OFCCP must balance its coordination with the EEOC with its need to follow directives from the President and the U.S. Department of Justice. Section 4 of Executive Order 13798 states that ''[i]n order to guide all agencies in complying with relevant Federal law, the Attorney General shall, as appropriate, issue guidance interpreting religious liberty protections in Federal law.'' The Attorney General issued such guidance on October 6, 2017, ''to guide all administrative agencies and executive departments in the executive branch.'' Office of the Att'y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty at 1 (Oct. 6, 2017), *available at www.justice.gov/opa/press-release/file/1001891/download*. This rule is fully compatible with that guidance:

> Religious corporations, associations, educational institutions, and societies—that is, entities that are organized for religious purposes and engage in activity consistent with, and in furtherance of, such purposes—have an express statutory exemption from Title VII's prohibition on religious discrimination in employment. Under that exemption, religious organizations may choose to employ only persons whose beliefs and conduct are consistent with the organizations' religious precepts. For example, a Lutheran secondary school may choose to employ only practicing Lutherans, only practicing Christians, or only those willing to adhere to a code of conduct consistent with the precepts of the Lutheran community sponsoring the school. Indeed, even in the absence of the Title VII exemption, religious employers might be able to claim a similar right under RFRA or the Religion Clauses of the Constitution.
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> *Id.* at 6; *see also id.* at 12a–13a

[35] EEOC, ''PROPOSED Updated Compliance Manual on Religious Discrimination'' at 24.

[36] *Id.* (citing *Hall,* 215 F.3d at 625; *Little,* 929 F.3d at 951).

IV. Regulatory Procedures

A. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

Under Executive Order 12866 (E.O. 12866), OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of E.O. 12866 and OMB review. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866. This final rule has been designated a ''significant regulatory action'' although not economically significant, under section 3(f) of E.O. 12866. The Office of Management and Budget has reviewed this final rule. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA designated this rule as not a ''major rule,'' as defined by 5 U.S.C. 804(2).

Executive Order 13563 (E.O. 13563) directs agencies to adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

This final rule is an E.O. 13771 deregulatory action because it is expected to reduce compliance costs and potentially the cost of litigation for regulated entities.

1. The Need for the Regulation

As discussed in the preamble, OFCCP received numerous comments addressing the need for the regulation. Some commenters stated the proposal was necessary to ensure religious entities could contract with the federal government without compromising their religious identities or missions. Some commenters also agreed with OFCCP's observation that religious organizations have been reluctant to participate as federal contractors because of the lack of clarity or perceived narrowness of the E.O. 11246 religious exemption.

OFCCP also received comments objecting to the proposal because they claimed it would permit taxpayer- or government-funded discrimination. Commenters argued that the Government should not allow federal contractors to fire or refuse to hire qualified individuals because they do not regularly attend religious services or adhere to the ''right'' religion. Additionally, commenters expressed skepticism about religious organizations' reluctance to participate as federal contractors. Many of these commenters stated that OFCCP provided no evidence to support its claim or asserted that the proposed rule would increase rather than reduce confusion. In addition, several commenters cited a report from a progressive policy institute concluding that faith-based organizations that had objected to the lack of an expanded religious exemption in E.O. 13672 continued to be awarded government contracts.

OFCCP disagrees with commenters' characterization of the rule as discriminatory. OFCCP is committed to enforcing all of E.O. 11246's protections, including those protecting employees from discrimination on the basis of religion. OFCCP emphasizes again that

this rule will have no effect on the overwhelming majority of federal contractors. Even for religious organizations that serve as government contractors, they too must comply with all of E.O. 11246's nondiscrimination requirements except in some narrow respects under some narrow and reasonable circumstances recognized under law. This rule provides clarity on those circumstances, consistent with OFCCP's obligations to also respect and accommodate the free exercise of religion.

OFCCP agrees with the comments stating that the religious exemption contained in section 204(c) of E.O. 11246 is necessary to ensure religious organizations can contract with the federal government without compromising their religious identities or missions. The fact that some faith-based organizations have been willing to enter into federal contracts does not mean that other faith-based organizations have not been reluctant to do so. Indeed, a few commenters offered evidence that religious organizations have been reluctant to contract with or receive grants from the federal government because of the lack of clarity regarding religious exemptions in federal law. In addition, although some commenters objected to the provision of any religious exemption for federal contractors, the religious exemption is part of E.O. 11246 that OFCCP is obligated to administer and enforce and has been part of the Executive Order for nearly two decades.

OFCCP is publishing this final rule to clarify the scope and application of the religious exemption. The intent is to provide certainty and make clear that the exemption includes not only churches but employers that are organized for religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in activity consistent with and in furtherance of that religious purpose. OFCCP believes that the rule will promote consistency in OFCCP's administration and that it will be clearer for contractors to follow. Further, OFCCP believes it will help achieve consistency with the administration policy to enforce federal law's robust protections of religious freedom.

2. Discussion of Impacts

In this section, OFCCP presents a summary of the costs associated with the new definitions in § 60–1.3 and the new rule of construction in § 60–1.5. While this rule will only apply to federal contractors that are religious, OFCCP lacks data to determine the number of contractors that would fall within that definition and thus evaluates the impacts using data for the entire contractor universe despite the fact this number significantly overstates the number of religious contractors. Prior to publication of the NPRM, OFCCP surveyed the list of contractors in the General Service Administration's System for Award Management (SAM) to identify organizations whose North American Industry Classification System (NAICS) descriptions or names included the word ''religious,'' ''church,'' ''mosque,'' etc. This survey was not a useful or appropriate proxy for the number of potentially affected entities for several reasons. First, not all organizations with ''religious'' NAICS codes or names would qualify for the exemption, given that any formulation of the religious-organization test is fact-intensive and requires much more than that the organization simply have (what is commonly understood to be) a religious term in its name. This holds true under any formulation of the test, whether that used in a case like *LeBoon* or the test set out in the NPRM and refined in the final rule. Second, and similarly, many religious organizations that could qualify for the religious employer exemption at issue here may not include one of those three specific descriptors in their NAICS description much like many religious organizations do not include one of those three words in their legal names. Third, the religious exemption is an optional accommodation. Organizations that qualify for it may choose to use it, or not, and OFCCP has no reliable way of determining which will do so. Fourth, OFCCP believes that, as a government agency, it would be a fraught matter for it to search for potentially religious organizations based on its own view of what sorts of terms are religious, assess the results in the abstract, and attempt to attribute religious characteristics to the organizations found. This rule elsewhere rejects that sort of approach. For all these reasons, OFCCP has chosen to use broader estimates of the contractor universe.

Further, OFCCP anticipates that many contractors would affirmatively disclaim any religious basis and thus OFCCP recognizes that the following analysis will be an overestimate, but uses it out of an abundance of caution. OFCCP determined that there are approximately 435,000 entities registered in the SAM database.[37] Entities registered in the SAM database consist of contractor firms and other entities (such as state and local governments and other organizations) that are interested in federal contracting opportunities and other forms of federal financial assistance. The total number of entities in the SAM database fluctuates and is posted on a monthly basis. The current database includes approximately 435,000 entities. Thus, OFCCP determines that 435,000 entities is a reasonable representation of the number of entities that may be affected by the final rule.[38] OFCCP recognizes that this SAM number likely results in an overestimation for two reasons: The system captures firms that do not meet the jurisdictional dollar thresholds for the three laws that OFCCP enforces, and it captures contractor firms for work performed outside the United States by individuals hired outside the United States, over which OFCCP does not have authority. Further, because this rule only applies to religious contractors, OFCCP is confident that this estimate overstates the true universe of contractors affected by the rule.

OFCCP anticipates three main groups that potentially will be impacted: Religious organizations that decide to become federal contractors because of this final rule's clarity on the scope and application of the religious exemption, religious organizations that are already federal contractors, and all current federal contractors. OFCCP is unable to reasonably quantify the costs, benefits, and transfers for these three groups of organizations, but provides the following qualitative analysis. Though religious organizations new to federal contracting will likely incur upfront costs and compliance costs associated with becoming a federal contractor, it is reasonable to assume they believe that becoming a federal contractor will further their goals, which will result in benefits to the organization (whether increased revenues, more financial stability, or better market access). In addition, if the new potential contractors are awarded government contracts, the government and the public will receive better quality or lower-cost services because most federal contracts are rewarded through competitive bidding which selects (generally speaking) either the lowest

[37] U.S. General Services Administration, System for Award Management, data released in monthly files, available at *https://sam.gov*. The SAM database is an estimate with the most recent download of data occurring November 2020.

[38] While the final rule may result in more religious corporations, associations, educational institutions or societies entering into federal contracting or subcontracting, there is no way to estimate the volume of increase. As noted above, OFCCP does not anticipate that the number of religious contractors will grow to be equal to non-religious contractors, but uses this estimate due to the lack of data.

cost per unit or highest quality unit at a specific price. As the number of potential federal contractors rises, the competitive process should result in better quality and prices for goods and services which will enhance the societal benefits of federal contracting. If total costs from contracting with the new organization are lower than the status quo, the result will be a transfer to taxpayers.

Religious organizations which are already federal contractors will see a minimal cost for rule familiarization and compliance and will continue to efficiently provide services to the U.S. government. The clear boundaries of the religious exemption may permit these contractors to more freely seek the religious exemption with assurance that they are complying with their legal obligations under Executive Order 11246, and they may revisit their employment practices accordingly. OFCCP cannot determine quantitatively the direction or magnitude of any changes in employment but believes the overall effects will be quite small at these organizations, as most employees at them were likely attracted to them because of a shared sense of religious mission, and extremely small when considering the entire contractor universe or the economy as a whole. On one hand, religious employers may feel more free to hire those that are not denominational coreligionists, given this final rule's explanation, consistent with law, that an organization does not forfeit the exemption when it hires outside strict denominational boundaries, and that an organization may require acceptance of or adherence to particular religious tenets as part of the employment relationship regardless of employees' denominational membership. On the other hand, given this clarity, religious employers may also feel more confident in their ability to hire and retain employees based on religious criteria. Additionally, OFCCP believes these assurances for religious organizations will result in reduced legal costs for both the religious contractors and OFCCP.

All current federal contractors may face additional competition as new potential competitors enter the market. Since the total amount of available government contracts is not anticipated to change, the increased competition may provide better prices for the government, but may also result in a reallocation of the contracts. Should this occur, it is possible that revenues will be transferred between various government contractors or from current contractors to new entrants.

3. Public Comments

In this section, OFCCP addresses the public comments specifically received on the Regulatory Impact Analysis.

One commenter, a public policy research and advocacy organization, asserted that OFCCP underestimated the wage rate of the employees who would likely review the rule. The commenter asserted that the employee would likely be an attorney rather than a human resource manager. The commenter suggested that most contractors would consult in-house or outside counsel to help with rule familiarization. The commenter also provided an alternate fully loaded hourly compensation rate for Lawyers (SOC 23–1011). OFCCP acknowledges that some contractors may have in-house counsel review the final rule. However, some contractors do not have in-house counsel, and their review will be conducted by human resource managers. Taking into consideration this comment, OFCCP has adjusted its wage rate to reflect review by either in-house counsel or human resource managers.

Several commenters addressed the time needed for a contractor to become familiar with the final rule. These commenters asserted that the estimate of one half-hour was too low. One commenter provided no additional information or alternative calculation. The remaining two provided alternative estimates ranging from 1.5 hours to 2.5 hours to become familiar with the final rule. OFCCP acknowledges that the precise amount of time each company will take to become familiar with understanding the new regulations is difficult to estimate. However, the elements that OFCCP uses in its calculation take into account the length and complexity of the final rule. The final rule adds definitions to the existing regulations implementing E.O. 11246 and clarifies the exemption contained in section 204(c) of E.O. 11246. As such, the final rule clarifies requirements and reduces burdens on contractors trying to understand their obligations and responsibilities of complying with E.O. 11246. Thus, OFCCP has decided to retain its initial estimate of one half-hour for rule familiarization. This estimate accounts for the time needed to read the final rule or participate in an OFCCP webinar about the final rule.

Many commenters asserted that OFCCP did not address the potential costs of the final rule on employees, taxpayers, and minority groups, including LGBT individuals, women, and religious minorities. The commenters asserted that OFCCP failed to address the economic and non-economic costs to employees in the form of lost wages and benefits, out of pocket medical expenses, job searches, and negative mental and physical health consequences of discrimination. Two commenters, a civil liberties organization and a labor union, mentioned that there are 25 states without explicit statutory protections barring employment discrimination based on gender identity and sexual orientation and asserted that workers in these states are not otherwise covered by statutory protections. The commenters who made these assertions provided no additional information or data to support their assertions. Additionally, given *Bostock's* holding that Title VII's prohibition on sex discrimination includes discrimination on the basis of sexual orientation and transgender status, these concerns seem lessened.

OFCCP has reviewed these comments and notes that any attempt to project costs to employees would necessarily require OFCCP to speculate that certain workers will face discrimination only once this rule is finalized. Further, the commenters ignore the possibility that contractors may choose to hire individuals of greater religious diversity as a result of this rule because their incentive to only hire coreligionists will be diminished. Absent data regarding the number of individuals who are not discriminated against in the status quo but would be discriminated against when this rule is finalized, and non-coreligionist individuals who will be hired by a contractor as a result of this rule that OFCCP cannot assess the mere possibility that some workers could face different costs. Likewise, OFCCP lacks data for the number of new contractors that may enter the market and the number of employees that work for such companies. As such, OFCCP does not estimate the benefits to the employees of those new contractors.

Commenters also said that OFCCP failed to address the costs to taxpayers in the form of a restricted labor pool, decreased productivity, employee turnover, and increased health care costs related to employment discrimination and increased social stigma. In addition, some commenters mentioned that OFCCP did not account for intangible costs related to reductions in equity, fairness, and personal freedom that would result from allowing businesses and organizations receiving taxpayer dollars to opt out of critical nondiscrimination provisions that protect employees based on gender identity and sexual orientation. The commenters who made these assertions

provided no additional information or data to support their assertions. Further, the commenters provide no additional support for their assertion that the rule will increase costs to taxpayers and ignore the possibility that the rule will expand the pool of federal contractors, thereby saving taxpayers money.

Similarly, several commenters addressed the potential impact of the rule on state and local governments. Three commenters, a city attorney, a state's attorney, and a civil liberties and human rights legal advocacy organization, mentioned that state and local governments may lose important tax revenue if people relocate or choose to withdraw from the workforce because of the final rule. Another commenter mentioned that state and local governments that serve victims of discrimination will need to contribute to, provide, and administer more public benefits programs for vulnerable populations. These comments are assume that the rule will impose costs on workers and that those costs will in turn be imposed upon the communities in which those workers live. None of these commenters provided additional information or data to support their statements.

One individual commenter asserted that OFCCP did not properly determine the rule's economic significance. The commenter asserted that the Regulatory Impact Analysis in the NPRM did not take into account ''the actual monetary impact of the regulation.'' Using all available information and data, OFCCP has addressed the quantifiable and qualitative costs and benefits of this final rule as required. It provides an assessment of the costs associated with rule familiarization and concludes that the addition of definitions and clarification of an exemption do not create additional burdens for the regulated community. As stated in the preamble, the intent of the final rule is to clarify the scope of the religious exemption and promote consistency in OFCCP's administration of it. The commenter also asserted that OFCCP did not account for the impact on larger contractors. The Regulatory Flexibility Act requires agencies to consider the impact of a regulation on a wide range of small entities, including small businesses, nonprofit organizations, and small governmental jurisdictions. It does not address larger corporations. However, OFCCP's assessment reflects that it does not anticipate any costs beyond rule familiarization for contractors.

Taking the Regulatory Impact Analysis comments into consideration, OFCCP has assessed the costs and benefits of the final rule as follows.

OFCCP believes that either a Human Resource Manager (SOC 11–3121) or a Lawyer (SOC 23–1011) would review the final rule. OFCCP estimates that 50% of the reviewers would be human resource managers and 50% would be in-house counsel. Thus, the mean hourly wage rate reflects a 50/50 split between human resource managers and lawyers. The mean hourly wage of human resource managers is $62.29 and the mean hourly wage of lawyers is $69.86.[39] Therefore, the average hourly wage rate is $66.08 (($62.29 + $69.86)/2). OFCCP adjusted this wage rate to reflect fringe benefits such as health insurance and retirement benefits, as well as overhead costs such as rent, utilities, and office equipment. OFCCP used a fringe benefits rate of 46% [40] and an overhead rate of 17%,[41] resulting in a fully loaded hourly compensation rate of $107.71 ($66.08 + ($66.08 × 46%) + ($66.08 × 17%)).

TABLE 1—LABOR COST

Major occupational groups	Average hourly wage rate	Fringe benefit rate (%)	Overhead rate (%)	Fully loaded hourly compensation
Human Resources Managers and Lawyers	$66.08	46	17	$107.71

4. Cost of Regulatory Familiarization

OFCCP acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis the estimated time it will take for contractors to review and understand the instructions for compliance. In order to minimize the burden, OFCCP will publish compliance assistance materials, such as fact sheets and answers to frequently asked questions. OFCCP may also host webinars for interested persons that describe the new regulations and conduct listening sessions to identify any specific challenges contractors believe they face, or may face, when complying with the new regulations. OFCCP notes that such informal compliance guidance is not binding.

OFCCP believes that human resource managers or lawyers at each contractor firm would be the employees responsible for understanding the new regulations. OFCCP further estimates that it will take a minimum of one half-hour for a human resource professional or lawyer at each contractor firm to read the rule, read the compliance assistance materials provided by OFCCP, or participate in an OFCCP webinar to learn the new requirements.[42] Consequently, the estimated burden for rule familiarization would be 217,500 hours (435,000 contractor firms × ½ hour). OFCCP calculates the total estimated cost of rule familiarization as $23,426,925 (217,500 hours × $107.71/hour) in the first year, which amounts to a 10-year annualized cost of $2,666,359 at a discount rate of 3% (which is $6.13 per contractor firm) or $3,117,259 at a discount rate of 7% (which is $7.17 per contractor firm).

TABLE 2—REGULATORY FAMILIARIZATION COSTS

Total number of contractors	435,000.
Time to review rule	30 minutes.

[39] BLS, Occupational Employment Statistics, Occupational Employment and Wages, May 2019, *https://www.bls.gov/oes/current/oes_nat.htm*.

[40] BLS, Employer Costs for Employee Compensation, *https://www.bls.gov/ncs/data.htm*. Wages and salaries averaged $24.26 per hour worked in 2017, while benefit costs averaged $11.26, which is a benefits rate of 46%.

[41] Cody Rice, U.S. Environmental Protection Agency, ''Wage Rates for Economic Analyses of the Toxics Release Inventory Program'' (June 10, 2002), *https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005*.

[42] OFCCP believes that contractor firms that may be potentially affected by the rule may take more time to review the final rule, while contractor firms that may not be affected may take less time, so the one half-hour reflects an estimated average for all contractor firms.

TABLE 2—REGULATORY FAMILIARIZATION COSTS—Continued

Human resources manager and lawyer fully loaded hourly compensation	$107.71.
Regulatory familiarization cost	$23,426,925.
Annualized cost with 3% discounting	$2,666,359.
Annualized cost per contractor with 3% discounting	$6.13.
Annualized cost with 7% discounting	$3,117,259.
Annualized cost per contractor with 7% discounting	$7.17.

5. Cost Savings

OFCCP expects that contractors impacted by the rule will experience cost savings. Specifically, the clarity provided in the new definitions and the interpretation provided will reduce the risk of noncompliance to contractors and the potential legal costs that findings of noncompliance with OFCCP's requirements might impose. One mass mail campaign of commenters asserted that allowing religious organizations to continue to provide a variety of services, such as assisting victims of sexual abuse, the hungry, and the homeless, is effective because it saves taxpayer dollars through contracting instead of expanding government bureaucracy.

Some commenters argued that the rule will decrease clarity and will thus increase costs for contractors, especially if those contractors believe their obligations under the EEOC conflict with their obligations under the final rule. First, OFCCP believes that the E.O. 11246 nondiscrimination obligations it enforces remain in force and that the rule is sufficiently consistent with Title VII case law and principles and that it will promote consistency in administration. Second, even assuming for purposes of this analysis that contractors' obligations under EEOC and E.O. 11246 differ (*e.g.,* that the exemption in E.O. 11246 permits an action forbidden under the EEOC's view of Title VII), a contractor remains obligated to abide by Title VII and any exemption from E.O. 11246 simply prevents additional liability before OFCCP for the same action. Accordingly, only those contractors that wish to rely on the E.O. 11246 exemption need consider it, and we expect that the additional costs incurred by such organizations to understand the exemption beyond their existing compliance costs will be minimal.

6. Benefits

E.O. 13563 recognizes that some rules have benefits that are difficult to quantify or monetize but are important, and states that agencies may consider such benefits. This final rule improves equity and fairness by giving contractors clear guidance on the scope and application of the religious exemption to E.O. 11246. It also increases religious freedom for religious employers.

The final rule increases clarity for federal contractors. This impact most likely yields a benefit to taxpayers (if contractor fees decrease because they do not need to engage third-party representatives to interpret OFCCP's requirements). While some commenters expressed concern that the rule was not clear, OFCCP believes that the rule is sufficiently consistent with Title VII case law and principles and that it will promote consistency in administration. Furthermore, by increasing clarity for both contractors and for OFCCP enforcement, the final rule may reduce the number and costs of enforcement proceedings by making it clearer to both sides at the outset what is required under the regulations. This would also most likely represent a benefit to taxpayers (since fewer resources would be spent in OFCCP administrative litigation).

OFCCP notes that some commenters asserted that OFCCP did not provide evidence that faith-based organizations have been reluctant to contract with the federal government because of the lack of certainty about the religious exemption. The fact that some small number of faith-based organizations have been willing to enter into federal contracts does not mean that other faith-based organizations have not been reluctant to do so. OFCCP believes that providing clarity to the religious exemption currently included under E.O. 11246 will promote clarity and certainty for all contractors. Moreover, a few commenters confirmed OFCCP's observation that religious organizations have been reluctant to participate as federal contractors because of the lack of clarity or perceived narrowness of the E.O. 11246 religious exemption. One individual commenter described his experience with religious organizations' reluctance to contract or subcontract with the federal government, and two other commenters offered examples or evidence of religious organizations' reluctance to participate in other contexts, such as federal grants. Thus, OFCCP expects that the number of new contractors may increase because religious entities may be more willing to contract with the government after the religious exemption is clarified.

A further benefit of this rule would be that some religious contractors will increase the diversity of their workforce. Under some prior interpretations, the religious exemption was only provided to contractors who hired co-religionists (*e.g.,* a Catholic company hiring only Catholics; a Latter-day Saint contractor hiring only Latter-day Saints; etc.) and thus religious contractors were incentivized to limit their hiring to only co-religionists. Once this rule is finalized, such religious contractors will no longer be required to limit their hiring. The likely outcome of this change is that the workforces of religious employers will become more diverse.

B. Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)

The agency did not receive any public comments on the Regulatory Flexibility Analysis.

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.'' Public Law 96–354, 2(b). The RFA requires agencies to consider the impact of a regulation on a wide range of small entities, including small businesses, nonprofit organizations, and small governmental jurisdictions.

Agencies must review whether a final rule would have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603. If the rule would, then the agency must prepare a regulatory flexibility analysis as described in the RFA. *See id.* However, if the agency determines that the rule would not be expected to have a significant economic impact on a substantial number of small entities, then the head of the agency may so certify and the RFA does not require a regulatory flexibility analysis. *See* 5 U.S.C. 605. The certification must provide the factual basis for this determination.

OFCCP does not expect the final rule to have a significant economic impact on a substantial number of small entities and does not believe the final rule has any recurring costs. The regulatory familiarization cost discounted at a 7% rate of $50.33 per contractor or $7.17 annualized is a *de minimis* cost. Therefore, the first year and annualized burdens as a percentage of the smallest employer's revenue would be far less than 1%. Accordingly, OFCCP certifies that the final rule would not have a significant economic impact on a substantial number of small entities. That is consistent with the Department's analysis in the NPRM.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 requires that OFCCP consider the impact of paperwork and other information collection burdens imposed on the public. *See* 44 U.S.C. 3507(d). An agency may not collect or sponsor the collection of information or impose an information collection requirement unless the information collection instrument displays a currently valid OMB control number. *See* 5 CFR 1320.5(b)(1).

OFCCP has determined that there is no new requirement for information collection associated with this final rule. The final rule provides definitions and a rule of construction to clarify the scope and application of current law. The information collections contained in the existing E.O. 11246 regulations are currently approved under OMB Control Number 1250–0001 (Construction Recordkeeping and Reporting Requirements) and OMB Control Number 1250–0003 (Recordkeeping and Reporting Requirements—Supply and Service). Consequently, this final rule does not require review by the Office of Management and Budget under the authority of the Paperwork Reduction Act.

D. Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this final rule does not include any federal mandate that may result in excess of $100 million in expenditures by state, local, and tribal governments in the aggregate or by the private sector.

E. Executive Order 13132 (Federalism)

OFCCP has reviewed this final rule in accordance with Executive Order 13132 regarding federalism. OFCCP recognizes that there may be some existing costs that may shift from the federal government to state or local governments; however, the agency believes that these effects will be neither direct nor substantial. Thus, OFCCP has determined that it does not have ''federalism implications.'' 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.''

F. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This final rule does not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The final rule will not ''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.''

List of Subjects in 41 CFR Part 60–1

Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Investigations, Labor, and Reporting and recordkeeping requirements.

Craig E. Leen,
Director, OFCCP.

For the reasons set forth in the preamble, OFCCP revises 41 CFR part 60–1 as follows:

PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

■ 1. The authority citation for part 60–1 continues to read as follows:

Authority: Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964–1965 Comp., p. 339, as amended by E.O. 11375, 32 FR 14303, 3 CFR, 1966–1970 Comp., p. 684, E.O. 12086, 43 FR 46501, 3 CFR, 1978 Comp., p. 230, E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258 and E.O. 13672, 79 FR 42971.

■ 2. Amend § 60–1.3 by
■ a. Adding in alphabetical order the definitions of ''Particular religion,'' ''Religion,'' ''Religious corporation, association, educational institution, or society,'' and ''Sincere,'' and
■ b. Adding paragraph (a) and adding and reserving paragraph (b).

The revisions read as follows:

§ 60–1.3 Definitions.

* * * * *

Particular religion means the religion of a particular individual, corporation, association, educational institution, society, school, college, university, or institution of learning, including acceptance of or adherence to sincere religious tenets as understood by the employer as a condition of employment, whether or not the particular religion of an individual employee or applicant is the same as the particular religion of his or her employer or prospective employer.

* * * * *

Religion includes all aspects of religious observance and practice, as well as belief.

* * * * *

Religious corporation, association, educational institution, or society. (1) Religious corporation, association, educational institution, or society means a corporation, association, educational institution, society, school, college, university, or institution of learning that:

(i) Is organized for a religious purpose;

(ii) Holds itself out to the public as carrying out a religious purpose;

(iii) Engages in activity consistent with, and in furtherance of, that religious purpose; and

(iv)(A) Operates on a not-for-profit basis; or

(B) Presents other strong evidence that its purpose is substantially religious.

(2) Whether an organization's engagement in activity is consistent with, and in furtherance of, its religious purpose is determined by reference to the organization's own sincere understanding of its religious tenets.

(3) To qualify as religious a corporation, association, educational institution, society, school, college, university, or institution of learning may, or may not: Have a mosque, church, synagogue, temple, or other house of worship; or be supported by, be affiliated with, identify with, or be composed of individuals sharing, any single religion, sect, denomination, or other religious tradition.

(4) The following examples apply this definition to various scenarios. It is assumed in each example that the employer is a federal contractor subject to Executive Order 11246.

(i)(A) *Example.* A closely held for-profit manufacturer makes and sells metal candlesticks and other decorative items. The manufacturer's mission statement asserts that it is committed to providing high-quality candlesticks and similar items to all of its customers, a majority of which are churches and synagogues. Some of the manufacturer's items are also purchased by federal agencies for use during diplomatic events and presentations. The manufacturer regularly consults with

ministers and rabbis regarding new designs to ensure that they conform to any religious specifications. The manufacturer also advertises heavily in predominantly religious publications and donates a portion of each sale to charities run by churches and synagogues.

(B) *Application.* The manufacturer likely does not qualify as a religious organization. Although the manufacturer provides goods predominantly for religious communities, the manufacturer's fundamental purpose is secular and pecuniary, not religious, as evidenced by its mission statement. Because the manufacturer lacks a religious purpose, it cannot carry out activity consistent with that (nonexistent) religious purpose. And while the manufacturer advertises heavily in religious publications and consults with religious functionaries on its designs, the manufacturer does not identify itself, as opposed to its customers, as religious. Finally, given that the manufacturer is a for-profit entity, it would need to make a strong evidentiary showing that it is a religious organization, which it has not.

(ii)(A) *Example.* A nonprofit organization enters government contracts to provide chaplaincy services to military and federal law-enforcement organizations around the country. The contractor is organized as a non-profit, but it charges the military and other clients a fee, similar to fees charged by other staffing organizations, and its manager and employees all collect a market-rate salary. The organization's articles of incorporation state that its purpose is to provide religious services to members of the same faith wherever they may be in the world, and to educate other individuals about the faith. Similar statements of purpose appear on the organization's website and in its bid responses to government requests for proposals. All employees receive weekly emails, and occasionally videos, about ways to promote faith in the workplace. The employee handbook contains several requirements regarding personal and workplace conduct to ensure ''a Christian atmosphere where the Spirit of the Lord can guide the organization's work.''

(B) *Application.* Under these facts, the contractor likely qualifies as a religious organization. The contractor's organizing documents expressly state that its mission is primarily religious in nature. Moreover, the contractor exercises religion through its business activities, which is providing chaplaincy services, and through its hiring and training practices. Through its emails and other communications, the contractor holds itself out as a religious organization to its employees, applicants, and clients. Finally, notwithstanding that the contractor collects a placement fee similar to nonreligious staffing companies, it is organized as a non-profit.

(iii)(A) *Example.* A small catering company provides kosher meals primarily to synagogues and for various events in the Jewish community, but other customers, including federal agencies, sometimes hire the caterer to provide meals for conferences and other events. The company's two owners are Hasidic Jews and its six employees, while not exclusively Jewish, receive instruction in kosher food preparation to ensure such preparation comports with Jewish laws and customs. This additional work raises the company's operating costs higher than were it to provide non-kosher meals. The company's mission statement, which has remained substantially the same since the company was organized, describes its purpose as fulfilling a religious mandate to strengthen the Jewish community and ensure Jewish persons can participate fully in public life by providing kosher meals. The company's ''about us'' page on its website states that above all else, the company seeks to ''honor G-d'' and maintain the strength of the Jewish religion through its kosher meal services. The company also donates a portion of its proceeds to charitable projects sponsored by local Jewish congregations. In its advertising and on its website, the company prominently includes religious symbols and text.

(B) *Application.* The company likely qualifies as a religious organization. The company's mission statement and other materials show a religious purpose. Its predominant business activity of providing kosher meals directly furthers and is wholly consistent with that self-identified religious purpose, as are its hiring and training practices. Through its advertising and website, the company holds itself out as a religious organization. Finally, although the company operates on a for-profit basis, the other facts here show strong evidence that the company operates as a religious organization.

(iv)(A) *Example.* A for-profit collector business sells a wide variety of artistic, cultural, religious, and archeological items. The government purchases some of these from time to time for research or aesthetic purposes. The business's mission statement provides that its purpose is to curate the world's treasures to perpetuate its historic, cultural, and religious legacy. Most of the business's customers are private individuals or museums interested in the items as display pieces or for their cultural value. The business's marketing materials include examples of religious iconography and artifacts from a variety of world religions, as well as various cultural and artistic items.

(B) *Application.* The business likely does not qualify as a religious organization. Its mission statement references an arguably religious purpose, namely perpetuating the world's religious legacy, but in context that appears to have more to do with religion's historic value rather than evidencing a religious conviction of the business or its owner. Similarly, it is at best unclear whether the business is engaging in activities in furtherance of this purpose when most of its sales serve no religious purpose. Finally, while the business displays some religious items, these appear to be a minor part of the business's overall presentation and do not convey that the business has a religious identity. The factors to qualify as a religious organization do not appear to be met, especially given that the business as a for-profit entity would need to make a strong evidentiary showing that it is a religious organization.

* * * * *

Sincere means sincere under the law applied by the courts of the United States when ascertaining the sincerity of a party's religious exercise or belief.

* * * * *

(a) *Severability.* Should a court of competent jurisdiction hold any provision(s) of this section to be invalid, such action will not affect any other provision of this section.

(b) [Reserved]

■ 3. Amend § 60–1.5 by adding paragraphs (e) and (f) to read as follows:

§ 60–1.5 Exemptions.

* * * * *

(e) *Broad interpretation.* This subpart shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the U.S. Constitution and law, including the Religious Freedom Restoration Act of 1993, as amended, 42 U.S.C. 2000bb *et seq*.

(f) *Severability.* Should a court of competent jurisdiction hold any provision(s) of this section to be invalid, such action will not affect any other provision of this section.

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(i) Are located in an area designated by the Federal Emergency Management Agency (FEMA) as a floodplain area having special flood hazards; or

(ii) Are otherwise determined by the Commissioner to be subject to a flood hazard.

(2) No mortgage may be insured that covers property improvements located in an area that has been identified by FEMA as an area having special flood hazards, unless the community in which the area is situated is participating in the NFIP and flood insurance is obtained by the borrower. Such flood insurance shall be in the form of the standard policy issued under the National Flood Insurance Program (NFIP) or private flood insurance as defined in § 203.16a. Such requirement for flood insurance shall be effective one year after the date of notification by FEMA to the chief executive officer of a flood prone community that such community has been identified as having special flood hazards.

* * * * *

§ 206.134 [Amended]

■ 8. In § 206.134, amend paragraph (b)(3) by adding the phrase ''or obtain equivalent private flood insurance coverage, as defined in § 203.16a'' after ''National Flood Insurance Program''.

Dana T. Wade,

Assistant Secretary for Housing, Federal Housing Commissioner.

[FR Doc. 2020–25105 Filed 11–20–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 212

[Docket DARS–2020–0044]

RIN 0750–AL19

Defense Federal Acquisition Regulation Supplement: Commercial Item Determinations (DFARS Case 2020–D033)

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 further implement a section of the National Defense Authorization Act for Fiscal Year 2018 that provides that a contract for an item using Federal Acquisition Regulation (FAR) part 12 procedures shall serve as a prior commercial item determination.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before January 22, 2021, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2020–D033, using any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Search for ''DFARS Case 2020–D033''. Select ''Submit a Comment Now'' and follow the instructions provided to submit a Comment. Please ''DFARS Case 2020–D033'' on any attached document.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2020–D033 in the subject line of the message.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Heather Kitchens, OUSD(A&S)DPC/DARS, Room 3B938, 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: Ms. Heather Kitchens, telephone 571–372–6104.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 84 FR 65322 on November 27, 2019, under DFARS Case 2019–D029 to implement sections 877 and 878 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328) and further implement section 848 of the NDAA for FY 2018 (Pub. L. 115–91). DoD is publishing a second proposed rule under DFARS Case 2020–D033 to further implement section 848, because of substantial changes from the first proposed rule. Section 848 modifies 10 U.S.C. 2380(b) to provide that a contract for an item using FAR part 12 procedures shall serve as a prior commercial item determination, unless the appropriate official determines in writing that the use of such procedures was improper or that it is no longer appropriate to acquire the item using commercial item acquisition procedures. This rule also proposes to remove the procedures at DFARS subpart 212.70, established pursuant to section 856 of the NDAA for FY 2016 (Pub. L. 114–92), which apply to procurements of more than $1 million previously procured under a prime contract using FAR part 12 procedures. The authority for these procedures expires on November 25, 2020.

II. Discussion and Analysis

One respondent submitted public comments with regard to prior use of part 12 procedures and commercial item determinations in response to the first proposed rule. DoD reviewed the public comments in the development of this second proposed rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

1. Moves to paragraph 212.102(a)(ii) the coverage on prior commercial item determinations proposed originally at paragraph 212.102(a)(iii), in order to precede the paragraph on commercial item determinations.

2. Rewrites the coverage at 212.102(a)(ii) to shift emphasis to prior use of commercial item determinations.

3. Changes the applicability of the proposed paragraph on commercial item determinations at 212.102(a)(iii) to apply to acquisitions at any dollar value, not just those that exceed $1 million.

B. Analysis of Public Comments

Comment: One respondent recommended revision of the proposed rule to direct contracting officers to rely on prior use of FAR part 12 procedures or prior commercial item determinations and only request waivers on a case-by-case basis. The respondent believed that the proposed rule, as written, would undermine this policy objective, and recommended rewrite of proposed DFARS 212.102(a)(ii)(A) and (a)(iii)(B)(*2*).

Response: DoD has increased the emphasis on the requirement to rely on prior use of FAR part 12 procedures. However, some recommendations were not accepted, such as removal of the limited applicability to acquisition of commercial items pursuant to 212.102(a)(i)(A), and the requirement of higher-level approvals for certain commercial item determinations. The following are responses to specific aspects of the respondent's comments on the first proposed rule:

1. Applicability to statutory exceptions (212.102(a)(i)(B)). 10 U.S.C. 2380(b)(1) requirement with regard to prior use of FAR part 12 procedures

serving as prior commercial item determination does not apply to items purchased using FAR part 12 procedures that are not commercial items, but only treated as commercial items (*i.e.,* 41 U.S.C. 1903 and 10 U.S.C. 2380a). It does not make sense to infer a commercial item determination for acquisitions of items that may not be commercial items, and do not require a commercial item determination. Further, applicability of these statutory exceptions to treat certain items as commercial items is not dependent on the particular items being purchased, but on circumstances peculiar to a particular acquisition, that cannot be extrapolated to other acquisitions of the same item. DoD concluded that the 10 U.S.C. 2380(b)(1) statement ''shall serve as a prior commercial item determinations for such item for purposes of this chapter'' is applicable only if a commercial item determination is applicable to the item.

2. Applicability at all dollar values. According to 10 U.S.C. 2380, as amended by section 848 of the NDAA for FY 2018, unless certain determinations are made, a contract for an item acquired using commercial item acquisition procedures under part 12 of the Federal Acquisition Regulation shall serve as a prior commercial item determination with respect to such item for purposes of this chapter. This law does not distinguish between acquisitions above or below $1 million. DoD concluded that it, therefore, applies regardless of dollar value.

3. Prior use of FAR part 12 procedures (212.102(a)(ii)). Due to amendment of 10 U.S.C. 2380 by section 848 of the NDAA for FY 2019, the consideration of whether FAR part 12 procedures have been previously used should be the next step in the decision-making process (after determining that a statutory exception does not apply). Therefore, these paragraphs have been relocated from 212.102(a)(iii) to 212.102(a)(ii), because prior use of part 12 procedures needs to be considered prior to the need for a new commercial item determination. In order to determine whether part 12 procedures have been previously used, the contracting officer shall review the Commercial Item Determination Database, or may utilize other available evidence. The contracting officer shall document the file accordingly.

This proposed rule limits to DoD contracts the requirement that prior use of part 12 procedures shall serve as a commercial item determination, because this is a DoD statute, implemented in the DFARS, and DoD does not control how civilian agencies make commercial item determinations and use FAR part 12 procedures, nor does it have the data on civilian agency commercial item determinations in its commercial item determination database.

DoD has not accepted all of the recommended changes to the prior use of FAR part 12 procedures, because there are nuances relating to other statutes that need to be addressed; this rule also addresses 10 U.S.C. 2306a(b)(4) and 10 U.S.C. 2380b. This rule also retains the delegation to the head of the contracting activity of the function assigned in the statute to the senior procurement executive.

4. Million dollar threshold for commercial item determinations (when there is no evidence of prior use of FAR part 12 procedures for the acquisition of commercial items (212.102(a)(iii)). The million dollar threshold was based on policy, to avoid overly burdensome requirements on lower dollar value acquisitions. If contracting officers are accepting prior use of part 12 procedures, even below $1 million, as commercial item determinations for subsequent buys, then it is necessary to apply the same standards at any dollar value, since these determinations can form the basis for much larger acquisitions.

C. Other Changes

The rule proposes to delete, add, or amend some of the pointers to DFARS Procedures, Guidance, and Information (PGI) to conform to the current PGI.

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 create any new solicitation provisions or contract clauses, or amend any existing provisions or clauses.

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. Executive Order 13771

This rule is not expected to be subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. 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 performed and is summarized as follows:

This proposed rule is necessary in order to further implement section 848 of the National Defense Authorization Act (NDAA) for Fiscal Fear (FY) 2018 (10 U.S.C. 2380(b)).

The objective of this rule is to address the use of FAR part 12 procedures and commercial item determinations. If the Commercial Item Determination Database contains a prior commerciality determination, or the contracting officer has other evidence that an item has previously been acquired by DoD using commercial item acquisition procedures under FAR part 12, the prior contract shall serve as a prior determination that an item is a commercial item, as defined in FAR 2.101. The legal basis for the rule is the NDAA section cited as the reason for the action.

DoD awarded contracts to an average of 40,689 unique entities (including 30,806 small businesses) each year from FY 2016 through FY 2018. This rule impacts the procedures for commercial item determinations for products and services offered to the Government.

This rule does not impose any new reporting, recordkeeping, or other compliance requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD did not identify any significant alternatives that would minimize or reduce the significant economic impact on small entities, because there is no significant impact on small entities. Any impact is expected to be beneficial.

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 2020–D033), in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any new 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 Part 212

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 212 is proposed to be amended as follows:

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 1. The authority citation for part 212 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 chapter 1.

■ 2. Revise section 212.102 to read as follows:

212.102 Applicability.

(a)(i) *Use of FAR part 12 procedures.* Use of FAR part 12 procedures is based on—

(A) A determination that an item is a commercial item, as defined in FAR 2.101 (see paragraph (a)(iii) of this section); or

(B) Applicability of one of the following statutes that provide for treatment as a commercial item and use of part 12 procedures, even though the item may not meet the definition of ''commercial item'' at FAR 2.101 and does not require a commercial item determination:

(1) 41 U.S.C. 1903—Supplies or services to be used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack pursuant to FAR 12.102(f); or

(2) 10 U.S.C. 2380a—Supplies or services from nontraditional defense contractors pursuant to 212.102(a)(iv).

(ii) *Prior use of FAR part 12 procedures.* (A) Pursuant to 10 U.S.C. 2380(b), except as provided in paragraph (a)(ii)(B) of this section or unless the item was acquired pursuant to paragraph (a)(i)(B) of this section, if the Commercial Item Determination (CID) Database (for website see PGI 212.102(a)(iii)(*3*)) contains a prior commerciality determination, or the contracting officer has other evidence that an item has been acquired previously by DoD using commercial item acquisition procedures under FAR part 12, then the prior contract shall serve as a determination that an item is a commercial item, as defined in FAR 2.101. The contracting officer shall document the file accordingly.

(B)*(1)* If the item to be acquired meets the criteria in paragraph (a)(ii)(A) of this section the item may not be acquired using other than FAR part 12 procedures unless the head of a contracting activity issues a determination as specified in paragraph (a)(ii)(B)(*2*)(*ii*) of this section.

(*2*) Pursuant to 10 U.S.C. 2306a(b)(4)(A), the contracting officer may presume that a prior commercial item determination made by a military department, a defense agency, or another component of DoD shall serve as a determination for subsequent procurements of such item. In accordance with 10 U.S.C. 2306a(b)(4) and 10 U.S.C. 2380(b), if the contracting officer questions a prior determination to use part 12 procedures and instead chooses to proceed with a procurement of an item previously determined to be a commercial item using procedures other than FAR part 12 procedures, the contracting officer shall request a review by the head of the contracting activity that will conduct the procurement. Not later than 30 days after receiving a request for review, the head of a contracting activity shall—

(*i*) Confirm that the prior use of FAR part 12 procedures was appropriate and still applicable; or

(*ii*) Issue a determination that the prior use of FAR part 12 procedures was improper or that it is no longer appropriate to acquire the item using FAR part 12 procedures, with a written explanation of the basis for the determination.

(iii) *Commercial item determination.* Unless the procedures in paragraph (a)(ii) of this section are applicable, when using FAR part 12 procedures for acquisitions of commercial items pursuant to 212.102(a)(i)(A), the contracting officer shall—

(A) Determine in writing that the acquisition meets the commercial item definition in FAR 2.101;

(B) Include the written determination in the contract file;

(C) Obtain approval at one level above the contracting officer when a commercial item determination relies on paragraphs (1)(ii), (3), (4), or (6) of the ''commercial item'' definition at FAR 2.101; and

(D) Follow the procedures and guidance at PGI 212.102(a)(iii) regarding file documentation and commercial item determinations.

(iv) *Nontraditional defense contractors.* In accordance with 10 U.S.C. 2380a, contracting officers—

(A) Except as provided in paragraph (a)(iii)(B) of this section, may treat supplies and services provided by nontraditional defense contractors as commercial items. This permissive authority is intended to enhance defense innovation and investment, enable DoD to acquire items that otherwise might not have been available, and create incentives for nontraditional defense contractors to do business with DoD. It is not intended to recategorize current noncommercial items; however, when appropriate, contracting officers may consider applying commercial item procedures to the procurement of supplies and services from business segments that meet the definition of ''nontraditional defense contractor'' even though they have been established under traditional defense contractors. The decision to apply commercial item procedures to the procurement of supplies and services from nontraditional defense contractors does not require a commercial item determination and does not mean the item is commercial;

(B) Shall treat services provided by a business unit that is a nontraditional defense contractor as commercial items, to the extent that such services use the same pool of employees as used for commercial customers and are priced using methodology similar to methodology used for commercial pricing; and

(C) Shall document the file when treating supplies or services from a nontraditional defense contractor as commercial items in accordance with paragraph (a)(iii)(A) or (B) of this section.

(v) *Commercial item guidebook.* For a link to the commercial item guidebook, see PGI 212.102(a)(iii)(*4*).

Subpart 212.70 [Removed and reserved]

■ 3. Remove and reserve subpart 212.70, consisting of sections 212.7000 and 212.7001.

[FR Doc. 2020–25430 Filed 11–20–20; 8:45 am]

BILLING CODE 5001–06–P

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 124, 125, 126, 127, and 134

RIN 3245–AG94

Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: In response to President Trump's government-wide regulatory reform initiative, the U.S. Small Business Administration (SBA) initiated a review of its regulations to determine which might be revised or eliminated. As a result, this rule merges the 8(a) Business Development (BD) Mentor-Protégé Program and the All Small Mentor-Protégé Program to eliminate confusion and remove unnecessary duplication of functions within SBA. This rule also eliminates the requirement that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture submit the joint venture agreement to SBA for review and approval prior to contract award, revises several 8(a) BD program regulations to reduce unnecessary or excessive burdens on 8(a) Participants, and clarifies other related regulatory provisions to eliminate confusion among small businesses and procuring activities. In addition, in response to public comment, the rule requires a business concern to recertify its size and/or socioeconomic status for all set-aside orders under unrestricted multiple award contracts, unless the contract authorized limited pools of concerns for which size and/or status was required.

DATES: This rule is effective on November 16, 2020, except for § 127.504 which is effective October 16, 2020.

FOR FURTHER INFORMATION CONTACT: Mark Hagedorn, U.S. Small Business Administration, Office of General Counsel, 409 Third Street SW, Washington, DC 20416; (202) 205–7625; *mark.hagedorn@sba.gov.*

SUPPLEMENTARY INFORMATION:

I. Background Information

On January 30, 2017, President Trump issued Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs'', which is designed to reduce unnecessary and burdensome regulations and to control costs associated with regulations. In response to the President's directive to simplify regulations, SBA initiated a review of its regulations to determine which might be revised or eliminated. Based on this analysis, SBA identified provisions in many areas of its regulations that can be simplified or eliminated.

On November 8, 2019, SBA published in the **Federal Register** a comprehensive proposal to merge the 8(a) Business Development (BD) Mentor-Protégé Program and the All Small Mentor-Protégé Program to eliminate confusion and remove unnecessary duplication of functions within SBA; eliminate the requirement that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture submit the joint venture to SBA for review and approval prior to contract award; revise several 8(a) BD program regulations to reduce unnecessary or excessive burdens on 8(a) Participants; and clarify other related regulatory provisions to eliminate confusion among small businesses and procuring activities. 84 FR 60846. Some of the proposed changes involved technical issues. Others were more substantive and resulted from SBA's experience in implementing the current regulations. The proposed rule initially called for a 70-day comment period, with comments required to be made to SBA by January 17, 2020. SBA received several comments in the first few weeks after the publication to extend the comment period. Commenters felt that the nature of the issues raised in the rule and the timing of comments during the holiday season required more time for affected businesses to adequately review the proposal and prepare their comments. In response to these comments, SBA published a notice in the **Federal Register** on January 10, 2020, extending the comment period an additional 21 days to February 7, 2020. 85 FR 1289.

As part of the rulemaking process, SBA also held tribal consultations pursuant to Executive Order 13175, Tribal Consultations, in Minneapolis, MN, Anchorage, AK, Albuquerque, NM and Oklahoma City, OK to provide interested tribal representatives with an opportunity to discuss their views on various 8(a) BD-related issues. *See* 84 FR 66647. These consultations were in addition to those held by SBA before issuing the proposed rule in Anchorage, AK (*see* 83 FR 17626), Albuquerque, NM (*see* 83 FR 24684), and Oklahoma City, OK (*see* 83 FR 24684). SBA considers tribal consultation meetings a valuable component of its deliberations and believes that these tribal consultation meetings allowed for constructive dialogue with the Tribal community, Tribal Leaders, Tribal Elders, elected members of Alaska Native Villages or their appointed representatives, and principals of tribally-owned and Alaska Native Corporation (ANC) owned firms participating in the 8(a) BD Program. Additionally, SBA held a Listening Session in Honolulu, HI to obtain comments and input from key 8(a) BD program stakeholders in the Hawaiian small business community, including 8(a) applicants and Participants owned by Native Hawaiian Organizations (NHOs).

During the proposed rule's 91-day comment period, SBA received 189 timely comments, with a high percentage of commenters favoring the proposed changes. A substantial number of commenters applauded SBA's effort to clarify and address misinterpretations of the rules. For the most part, the comments supported the substantive changes proposed by SBA.

This rule merges the 8(a) BD Mentor-Protégé Program and the All Small Mentor-Protégé Program. The rule also eliminates the requirement that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture must submit the joint venture to SBA for review and approval prior to contract award in every instance. Additionally, the rule makes several other changes to the 8(a) BD Program to eliminate or reduce unnecessary or excessive burdens on 8(a) Participants.

The rule combines the 8(a) BD Mentor-Protégé Program and the All Small Mentor-Protégé Program in order to eliminate confusion regarding perceived differences between the two Programs, remove unnecessary duplication of functions within SBA, and establish one, unified staff to better coordinate and process mentor-protégé applications. SBA originally established a mentor-protégé program for 8(a) Participants a little more than 20 years ago. 63 FR 35726, 35764 (June 30, 1998). The purpose of that program was to encourage approved mentors to provide various forms of business assistance to eligible 8(a) Participants to aid in their development. On September 27, 2010, the Small Business Jobs Act of 2010 (Jobs Act), Public Law 111–240 was enacted. The Jobs Act was designed to protect the interests of small businesses and increase opportunities in the Federal marketplace. The Jobs Act was drafted by Congress in recognition of the fact that mentor-protégé programs serve an important business development function for small businesses and therefore included language authorizing SBA to establish separate mentor-protégé programs for the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) Program, the HUBZone Program, and the Women-Owned Small Business (WOSB)

Program, each of which was modeled on SBA's existing mentor-protégé program available to 8(a) Participants. *See* section 1347(b)(3) of the Jobs Act. Thereafter, on January 2, 2013, the National Defense Authorization Act for Fiscal Year 2013 (NDAA 2013), Public Law 112–239 was enacted. Section 1641 of the NDAA 2013 authorized SBA to establish a mentor-protégé program for all small business concerns. This section further provided that a small business mentor-protégé program must be identical to the 8(a) BD Mentor-Protégé Program, except that SBA could modify each program to the extent necessary, given the types of small business concerns to be included as protégés.

Subsequently, SBA published a Final Rule in the **Federal Register** combining the authorities contained in the Jobs Act and the NDAA 2013 to create a mentor-protégé program for all small businesses. 81 FR 48558 (July 25, 2016).

The mentor-protégé program available to firms participating in the 8(a) BD Program has been used as a business development tool in which mentors provide diverse types of business assistance to eligible 8(a) BD protégés. This assistance may include, among other things, technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts; and/or assistance in performing Federal prime contracts through joint venture arrangements. The explicit purpose of the 8(a) BD Mentor-Protégé relationship has been to enhance the capabilities of protégés and to improve their ability to successfully compete for both government and commercial contracts. Similarly, the All Small Mentor-Protégé Program is designed to require approved mentors to aid protégé firms so that they may enhance their capabilities, meet their business goals, and improve their ability to compete for contracts. The purposes of the two programs are identical. In addition, the benefits available under both programs are identical. Small businesses and 8(a) Program Participants receive valuable business development assistance and any joint venture formed between a protégé firm and its SBA-approved mentor receives an exclusion from affiliation, such that the joint venture will qualify as a small business provided the protégé individually qualifies as small under the size standard corresponding to the NAICS code assigned to the procurement. A protégé firm may enter a joint venture with its SBA-approved mentor and be eligible for any contract opportunity for which the protégé qualifies. If a protégé firm is an 8(a) Program Participant, a joint venture between the protégé and its mentor could seek any 8(a) contract, regardless of whether the mentor-protégé agreement was approved through the 8(a) BD Mentor-Protégé Program or the All Small Mentor-Protégé Program. Moreover, a firm could be certified as an 8(a) Participant after its mentor-protégé relationship has been approved by SBA through the All Small Mentor-Protégé Program and be eligible for 8(a) contracts as a joint venture with its mentor once certified.

Because the benefits and purposes of the two programs are identical, SBA believes that having two separate mentor-protégé programs is unnecessary and causes needless confusion in the small business community. As such, this rule eliminates a separate 8(a) BD Mentor-Protégé Program and continues to allow any 8(a) Participant to enter a mentor-protégé relationship through the All Small Mentor-Protégé Program. Specifically, the rule revises § 124.520 to merely recognize that an 8(a) Participant, as any other small business, may participate in SBA's Small Business Mentor-Protégé Program. In merging the 8(a) BD Mentor-Protégé Program with the All Small Mentor-Protégé Program, the rule also makes conforming amendments to SBA's size regulations (13 CFR part 121), the joint venture provisions (13 CFR 125.8), and the All Small Mentor-Protégé Program regulations (13 CFR 125.9).

A mentor-protégé relationship approved by SBA through the 8(a) BD Mentor-Protégé Program will continue to operate as an SBA-approved mentor-protégé relationship under the All Small Mentor-Protégé Program. It will continue to have the same remaining time in the All Small Mentor-Protégé Program as it would have had under the 8(a) BD Mentor-Protégé Program if that Program continued. Any mentor-protégé relationship approved under the 8(a) BD Mentor-Protégé Program will count as one of the two lifetime mentor-protégé relationships that a small business may have under the All Small Mentor-Protégé Program.

As stated previously, SBA has also taken this action partly in response to the President's directive that each agency review its regulations. Therefore, this rule also revises regulations pertaining to the 8(a) BD and size programs in order to further reduce unnecessary or excessive burdens on small businesses and to eliminate confusion or more clearly delineate SBA's intent in certain regulations. Specifically, this rule makes additional changes to the size and socioeconomic status recertification requirements for orders issued against multiple award contracts (MACs). A detailed discussion of these changes is contained below in the Section-by-Section Analysis.

II. Section-by-Section Analysis

Section 121.103(b)(6)

The rule amends the references to SBA's mentor-protégé programs in this provision, specifying that a protégé firm cannot be considered affiliated with its mentor based solely on assistance received by the protégé under the mentor-protégé agreement. The rule eliminates the cross-reference to the regulation regarding the 8(a) BD Mentor-Protégé Program (13 CFR 124.520), leaving only the reference to the regulation regarding the All Small Business Mentor-Protégé Program.

Section 121.103(f)(2)(i)

Under § 121.103(f)(2), SBA may presume an identity of interest (and thus affiliate one concern with another) based upon economic dependence if the concern in question derived 70 percent or more of its receipts from another concern over the previous three fiscal years. The proposed rule provided that this presumption may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern, such as where the concern has been in business for a short amount of time and has only been able to secure a limited number of contracts or where the contractual relations do not restrict the concern in question from selling the same type of products or services to another purchaser. Commenters supported this change, appreciating that SBA seemed to be making economic dependence more about the issue of control, where they thought it should be. SBA adopts this language as final.

Section 121.103(g)

The rule amends the newly organized concern rule contained in § 121.103(g) by clarifying that affiliation may be found where both former and ''current'' officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees. The rule merely adds the word ''current'' to the regulatory text to ensure that affiliation may arise where the key individuals are still associated with the first company. SBA believes that such a finding of affiliation has always been authorized,

but merely seeks to clarify its intent to make sure there is no confusion. Several commenters were concerned that the rule was not clear with respect to entity-owned firms, specifically that the newly organized concern rule should not apply to tribes, ANCs and NHOs. SBA believes that entities and entity-owned firms are already excepted from affiliation under the newly organized concern rule by § 121.103(b)(2). A few commenters recommended that SBA put in clarifying language to ensure that the rule cannot be read to contradict § 124.109(c)(4)(iii), which permits a manager of a tribally-owned concern to manage no more than two Program Participants at the same time. The final rule adds such clarifying language.

Section 121.103(h)

The proposed rule sought to amend the introductory text to § 121.103(h) to revise the requirements for joint ventures. SBA believes that a joint venture is not an on-going business entity, but rather something that is formed for a limited purpose and duration. If two or more separate business entities seek to join together through another entity on a continuing, unlimited basis, SBA views that as a separate business concern with each partner affiliated with each other. To capture SBA's intent on limited scope and duration, SBA's current regulations provide that a joint venture is something that can be formed for no more than three contracts over a two-year period. The proposed rule sought to eliminate the three-contract limit for a joint venture, but continue to prescribe that a joint venture cannot exceed two years from the date of its first award. In addition, the proposed rule clarified SBA's current intent that a novation to the joint venture would start the two-year period if that were the first award received by the joint venture. Commenters generally supported the proposal to eliminate the three-contract limit, saying that the change will eliminate significant and unnecessary confusion. Commenters also believed that requiring partners to form a second or third joint venture after they received three contract awards created an undue administrative burden on joint ventures, and they viewed this change as an elimination of an unnecessary burden. Several commenters recommended further amending the rule to extend the amount of time that a joint venture could seek contracts to some point greater than two years. These commenters recommended two approaches, either allowing all joint ventures to seek contracts for a period greater than two years or allowing only joint ventures between a protégé and its mentor to seek contracts beyond two years. In the mentor-protégé context, commenters reasoned that a joint venture between a protégé and its mentor should be either three years (the length of the initial mentor-protégé agreement) or six years (the total allowable length of time for a mentor-protégé relationship to exist). It is SBA's view that the requirements for all joint ventures should be consistent, and that they should not be different with respect to joint ventures between protégé firms and their mentors. One of the purposes of this final rule is to remove inconsistencies and confusion in the regulations. SBA believes that having differing requirements for different types of joint ventures would add to, not reduce, the complexity and confusion in the regulations. Regarding extending the amount of time a joint venture could operate and seek additional contracts generally, SBA opposes such an extension. As SBA noted in the supplementary information to the proposed rule, SBA believes that a joint venture should not be an on-going entity, but, rather, something formed for a limited purpose with a limited duration. SBA believes that allowing a joint venture to operate as an independent business entity for more than two years erodes the limited purpose and duration requirements of a joint venture. If the parties intend to jointly seek work beyond two years from the date of the first award, the regulations allow them to form a new joint venture. That new entity would then be able to seek additional contracts over two years from the date of its first award. Although requiring the formation of several joint venture entities, SBA believes that is the correct approach. To do otherwise would be to ignore what a joint venture is intended to do.

In addition, one commenter sought further clarification regarding novations. The rule makes clear that where a joint venture submits an offer prior to the two-year period from the date of its first award, the joint venture can be awarded a contract emanating from that offer where award occurs after the two-year period expires. The commenter recommended that SBA add clarifying language that would similarly allow a novation to occur after the two-year period if the joint venture submits a novation package for contracting officer approval within the two-year period. SBA agrees, and has added clarifying language to one of the examples accompanying the regulatory text.

In the proposed rule, SBA also asked for comments regarding the exception to affiliation for joint ventures composed of multiple small businesses in which firms enter and leave the joint venture based on their size status. In this scenario, in an effort to retain small business status, joint venture partners expel firms that have exceeded the size standard and then possibly add firms that qualify under the size standard. This may be problematic where the joint venture is awarded a Federal Supply Schedule (FSS) contract or any other MAC vehicle. A joint venture that is awarded a MAC could receive many orders beyond the two-year limitation for joint venture awards (since the contract was awarded within that two-year period), and could remain small for any order requiring recertification simply by exchanging one joint venture partner for another (*i.e.,* a new small business for one that has grown to be other than small). SBA never intended for the composition of joint ventures to be fluid. The joint venture generally should have the same partners throughout its lifetime, unless one of the partners is acquired. SBA considers a joint venture composed of different partners to be a different joint venture than the original one. To reflect this understanding, the proposed rule asked for comments as to whether SBA should specify that the size of a joint venture outside of the mentor-protégé program will be determined based on the current size status and affiliations of all past and present joint venture partners, even if a partner has left the joint venture. SBA received several comments responding to this provision on both sides of the issue. Several commenters believed that SBA should not consider the individual size of partners who have left the joint venture in determining whether the joint venture itself continues to qualify as small. These commenters thought that permitting substitution of joint venture partners allows small businesses to remain competitive for orders under large, complex MACs. Other commenters acknowledged that SBA has accurately recognized a problem that gives a competitive advantage to joint ventures over individual small businesses. They agreed that SBA likely did not contemplate a continuous turnover of joint venture partners when it changed its affiliation rules to allow a joint venture to qualify as small provided that each of its partners individually qualified as small (instead of aggregating the receipts or employees of all joint venture partners as was previously the case). SBA notes that this really is an issue only with respect to MACs. For a single award contract, size is

determined at one point in time—the date on which an offeror submits its initial offer including price. Where an offeror is a joint venture, it qualifies as small provided each of the partners to the joint venture individually qualifies as small on the date of the offer. The size of the joint venture awardee does not change if an individual member of the joint venture grows to be other than small during the performance of the contract. As detailed elsewhere in this rule, for a MAC that is not set-aside for small business, however, size may be determined as of the date a MAC holder submits its offer for a specific order that is set-aside for small business. In such a case, if a partner to the joint venture has grown to be other than small, the joint venture would not be eligible as a small business for the order. One commenter recommended that once a multi-small business joint venture wins its first MAC, its size going forward (for future contracts or any recertification required under the awarded MAC) should be determined based on the size of the joint venture's present members and any former members that were members as of the date the joint venture received its first MAC. This would allow a joint venture to remove members for legitimate reasons before the first award of the first MAC, but not allow the joint venture to change members after such an award just to be able to recertify as small for an order under the MAC. SBA thoroughly considered all the comments in response to this issue. After further considering the issue, SBA does not believe that reaching back to consider the size of previous partners (who are no longer connected to the joint venture) would be workable. A concern that is no longer connected to the joint venture has no incentive to cooperate and provide information relating to its size, even if it still qualified individually as small. Thus, SBA is not making any changes to the regulatory text to address this issue in this final rule.

The rule also proposed to add clarifying language to the introductory text of § 121.103(h) to recognize that, although a joint venture cannot be populated with individuals intended to perform contracts awarded to the joint venture, the joint venture can directly employ administrative personnel and such personnel may specifically include Facility Security Officers. SBA received overwhelming support of this change and adopts it as final in this rule.

The proposed rule also sought comments on the broader issue of facility clearances with respect to joint ventures. SBA understands that some procuring agencies will not award a contract requiring a facility security clearance to a joint venture if the joint venture itself does not have such clearance, even if both partners to the joint venture individually have such clearance. SBA does not believe that such a restriction is appropriate. Under SBA's regulations, a joint venture *cannot* hire individuals to perform on a contract awarded to the joint venture (the joint venture cannot be ''populated''). Rather, work must be done individually by the partners to the joint venture so that SBA can track who does what and ensure that some benefit flows back to the small business lead partner to the joint venture. SBA proposed allowing a joint venture to be awarded a contract where either the joint venture itself or the lead small business partner to the joint venture has the required facility security clearance. In such a case, a joint venture lacking its own separate facility security clearance could still be awarded a contract requiring such a clearance provided the lead small business partner to the joint venture had the required facility security clearance and committed to keep at its cleared facility all records relating to the contract awarded to the joint venture. Additionally, if it is established that the security portion of the contract requiring a facility security clearance is ancillary to the principal purpose of the procurement, then the non-lead partner to the joint venture (which may include a large business mentor) could possess such clearance. The majority of commenters supported this proposal, agreeing that it does not make sense to require the joint venture to have the necessary facility security clearance where the joint venture entity itself is not performing the contract. These commenters believed that as long as the joint venture partner(s) performing the necessary security work had the required facility security clearance, the Government would be adequately protected.

This rule also removes current § 121.103(h)(3)(iii), which provides that a joint venture between a protégé firm and its mentor that was approved through the 8(a) BD Mentor-Protégé Program is considered small provided the protégé qualifies as individually small. Because this rule eliminates the 8(a) BD Mentor-Protégé Program as a separate program, this provision is no longer needed.

The proposed rule also clarified how to account for joint venture receipts and employees during the process of determining size for a joint venture partner. The joint venture partner must include its percentage share of joint venture receipts and employees in its own receipts or employees. The proposed rule provided that the appropriate percentage share is the same percentage figure as the percentage figure corresponding to the joint venture partner's share of work performed by the joint venture. Commenters generally agreed with the proposed treatment of receipts. Several commenters sought further clarification regarding subcontractors, specifically asking how to treat revenues generated through subcontracts from the individual partners. One commenter recommended that the joint venture partner responsible for a specific subcontract should take on that revenue as its share of the contract's total revenues. As with all contracts, SBA does not exclude revenues generated by subcontractors from the revenues deemed to be received by the prime contractor. Where a joint venture is the prime contractor, 100 percent of the revenues will be apportioned to the joint venture partners, regardless of how much work is performed by other subcontractors. The joint venture must perform a certain percentage of the work between the partners to the joint venture (generally 50 percent, but 15 percent for general construction). SBA does not believe that it matters which partner to the joint venture the subcontract flows through. Of the 50 percent of the total contract that the joint venture partners must perform, SBA will look at how much is performed by each partner. That is the percentage of total revenues that will be attributed to each partner. This rule makes clear that revenues will be attributed to the joint venture in the same percentage as that of the work performed by each partner.

A few commenters thought that that same approach should not be applied to the apportionment of employees. They noted that some or all of the joint venture's employees may also be employed concurrently by a joint venture partner. Without taking that into account, the proposed methodology would effectively double count employees who were also employed by one of the joint venture partners. In response, SBA has amended this paragraph to provide that for employees, the appropriate way to apportion individuals employed by the joint venture is the same percentage of employees as the joint venture partner's percentage ownership share in the joint venture, after first subtracting any joint venture employee already accounted for in the employee count of one of the partners.

Section 121.402

The proposed rule amended how NAICS codes are applied to task orders to ensure that the NAICS codes assigned to specific procurement actions, and the corresponding size standards, are an accurate reflection of the contracts and orders being awarded and performed. Consistent with the final rule for FAR Case 2014–002, 85 FR 11746 (Feb. 27, 2020), a contracting officer must assign a single NAICS code for each order issued against a MAC, and that NAICS code must be a NAICS code that is included in the underlying MAC and represents the principal purpose of the order. SBA believes that the NAICS code assigned to a task order must reflect the principal purpose of that order. Currently, based on the business rules of the Federal Procurement Data System (FPDS) and the FAR, all contracts including MACs are restricted to only being assigned a single NAICS code, and if a MAC is assigned a service NAICS code, then that service NAICS code flows down to each individual order under that MAC. SBA does not believe it is appropriate for a task order that is nearly entirely for supplies to have a service NAICS code. In such a case, a firm being awarded such an order would not have to comply with the nonmanufacturer rule. In particular, set-aside orders should be assigned a manufacturing/supply NAICS code, so that the nonmanufacturer rule will apply to the order if it is awarded to a nonmanufacturer. Additionally, the current method for NAICS code assignment can also be problematic where a MAC is assigned a NAICS code for supplies but a particular order under that MAC is almost entirely for services. In such a case, firms that qualified as small for the larger employee-based size standard associated with a manufacturing/supply NAICS code may not qualify as small businesses under a smaller receipts-based services size standard. As such, because the order is assigned the manufacturing/supply NAICS code associated with the MAC, firms that should not qualify as small for a particular procurement that is predominantly for services may do so. SBA recognizes that § 121.402(c) already provides for a solution that will ensure that NAICS codes assigned to task and delivery orders accurately reflect the work being done under the orders. Specifically, the requirement for certain MACs to be assigned more than one NAICS code (*e.g.,* service NAICS code and supply NAICS code) will allow for orders against those MACs to reflect both a NAICS code assigned to the MAC and also a NAICS code that accurately reflects work under the order. The requirement to assign certain MACs more than one NAICS code has already been implemented in the FAR at 48 CFR 19.102(b)(2)(ii) but it will not go into effect until October 1, 2022. The future effective date is when FPDS is expected to implement the requirement and it allows all the Federal agencies to budget and plan for internal system updates across their multiple contracting systems to accommodate the requirement. Thus, this rule makes only minor revisions to the existing regulations to ensure that the NAICS codes assigned to specific procurement actions, and the corresponding size standards, are an accurate reflection of the contracts and orders being awarded and performed.

Commenters supported SBA's intent. They noted that allowing contracting officers to assign a NAICS code to an order that differs from the NAICS code(s) already contained in the MAC could unfairly disadvantage contractors who did not compete for the MAC because they did not know orders would be placed under NAICS codes not in the MAC's solicitation. A commenter noted, however, that the proposed rule added a new § 121.402(c)(2)(ii) when it appears that a revision to § 121.402(c)(2)(i) might be more appropriate. SBA agrees and has revised § 121.402(c)(2)(i) in this final rule to clarify that orders must reflect a NAICS code assigned to the underlying MAC.

In addition, the rule makes a minor change to § 121.402(e) by removing the passive voice in the regulatory text. The rule also clarifies that in connection with a size determination or size appeal, SBA may supply an appropriate NAICS code designation, and accompanying size standard, where the NAICS code identified in the solicitation is prohibited, such as for set-aside procurements where a retail or wholesale NAICS code is identified.

Sections 121.404(a)(1), 124.503(i), 125.18(d), and 127.504(c)

Size Status

SBA has been criticized for allowing agencies to receive credit towards their small business goals for awards made to firms that no longer qualify as small. SBA believes that much of this criticism is misplaced. Where a small business concern is awarded a small business set-aside contract with a duration of not more than five years and grows to be other than small during the performance of the contract, some have criticized the exercise of an option as an award to an other than small business. SBA disagrees with such a characterization. Small business set-aside contracts are restricted only to firms that qualify as small as of the date of a firm's offer for the contract. A firm's status as a small business is relevant to its qualifying for the award of the contract. If a concern qualifies as small for a contract with a duration of not more than five years, it is considered a small business throughout the life of that contract. Even for MACs that are set-aside for small business, once a concern is awarded a contract as a small business it is eligible to receive orders under that contract and perform as a small business. In such a case, size was relevant to the initial award of the contract. Any competitor small business concern could protest the size status of an apparent successful offeror for a small business set-aside contract (whether single award or multiple award), and render a concern ineligible for award where SBA finds that the concern does not qualify as small under the size standard corresponding to the NAICS code assigned to the contract. Furthermore, firms awarded long-term small business set-aside contracts must recertify their size status at five years and every option thereafter. Firms are eligible to receive orders under that contract and perform as a small business so long as they continue to recertify as small at the required times (*e.g.,* at five years and every option thereafter). Not allowing a concern that legitimately qualified at award and/or recertified later as small to receive orders and continue performance as a small business during the base and option periods, even if it has naturally grown to be other than small, would discourage firms from wanting to do business with the Government, would be disruptive to the procurement process, and would disincentivize contracting officers from using small business set-asides.

SBA believes, however, that there is a legitimate concern where a concern self-certifies as small for an unrestricted MAC and at some point later in time when the concern no longer qualifies as small the contracting officer seeks to award an order as a small business set-aside and the firm uses its self-certification as a small business for the underlying unrestricted MAC. A firm's status as a small business does not generally affect whether the firm does or does not qualify for the award of an unrestricted MAC contract. As such, competitors are very unlikely to protest the size of a concern that self-certifies as small for an unrestricted MAC. In SBA's view, where a contracting officer sets aside an order for small business under

an unrestricted MAC, the order is the first time size status is important. That is the first time that some firms will be eligible to compete for the order while others will be excluded from competition because of their size status. To allow a firm's self-certification for the underlying MAC to control whether a firm is small at the time of an order years after the MAC was awarded does not make sense to SBA.

In considering the issue, SBA looked at the data for orders that were awarded as small business set-asides under unrestricted base multiple award vehicles in FY 2018. In total, 8,666 orders were awarded as small business set-asides under unrestricted MACs in FY 2018. Of those set-aside orders, 10 percent are estimated to have been awarded to firms that were no longer small in SAM under the NAICS code size standard at the time of the order award. Further, it is estimated that 7.0 percent of small business set-aside orders under the FSS were awarded to firms that were no longer small in SAM under the NAICS code size standard at the time of the order (510 out of 7,266 orders). That amounted to 12.6 percent of the dollars set-aside for small business under the FSS ($129.6 million to firms that were no longer small in SAM out of a total of $1.0723 billion in small business set-aside orders). Whereas, it is estimated that 49.4 percent of small business set-aside orders under government-wide acquisition contracts (GWACs) were awarded to firms that were no longer small in SAM under the NAICS code size standard at the time of the order (261 out of 528 orders). That amounted to 67 percent of the dollars set-aside for small business under GWACs ($119.6 million to firms that were no longer small in SAM out of a total of $178.6 million in small business set-aside orders). SBA then considered the number and dollar value of new orders that were awarded as small business set-asides under unrestricted base multiple award vehicles in FY 2018 using the size standard ''exceptions'' that apply in some of SBA's size standards (*e.g.,* the IT Value-Added Reseller exception to NAICS 541519). Taking into account all current size standards exceptions, which allow a firm to qualify under an alternative size standard for certain types of contracts, it is estimated that 6.4 percent of small business set-aside orders under the FSS were awarded to firms that were no longer small in SAM at the time of the order (468 out of 7,266 orders). That amounted to 11.3 percent of the dollars set-aside for small business under the FSS ($120.7 million to firms that were no longer small in SAM out of a total of $1.0723 billion in small business set-aside orders). Considering exceptions for set-aside orders under GWACs, it is estimated that 11.6 percent were awarded to firms that were no longer small in SAM at the time of the order (61 out of 528 orders). That amounted to 39.5 percent of the dollars set-aside for small business under GWACs ($70.5 million to firms that were no longer small in SAM out of a total of $178.6 million in small business set-aside orders). It is not possible to tell from FPDS whether the ''exception'' size standard applied to the contract or whether the agency applied the general size standard for the identified NAICS code. Thus, all that can be said with certainty is that for small business set-aside orders under the FSS, between 11.3 percent and 12.1 percent of the order dollars set-aside for small business were awarded to firms that were no longer small in SAM. This amounted to somewhere between $120.7 million and $129.6 that were awarded to firms that were no longer small in SAM. For GWACs, the percentage of orders and order dollars being awarded to firms that no longer qualify as small is significantly greater. Between 39.5 percent and 67.0 percent of the order dollars set-aside for small business under GWACs were awarded to firms that were no longer small in SAM. This amounted to somewhere between $70.5 million and $119.6 million that were awarded to firms that were no longer small in SAM.

Because discretionary set-asides under the FSS programs have proven effective in making awards to small business under the program and SBA did not want to add unnecessary burdens to the program that might discourage the use of set-asides, the proposed rule provided that, except for orders or Blanket Purchase Agreements issued under any FSS contract, if an order under an unrestricted MAC is set-aside exclusively for small business (*i.e.,* small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as such at the time it submits its initial offer, which includes price, for the particular order.

SBA received a significant number of comments on this issue. Many commenters supported the proposed language as a needed approach to ensure that firms that are not small do not receive orders set-aside for small businesses and procuring agencies do not inappropriately take credit for awards to small business when the awardees are not in fact small. Many of these commenters believed that it was not fair to them as small businesses to have to compete for small business set-aside orders under unrestricted MACs with concerns that did not currently qualify as small and may not have done so for several years. Other commenters opposed the proposal for various reasons. Some believed that the regulations should be intended to foster and promote growth in small businesses and that the recertification requirement could stifle that growth. Others believed that the proposal undermines the general rule that a concern maintains its small business status for the life of a contract. SBA does not believe that a rule that requires a concern to actually be what it claims to be (*i.e.,* a small business) in any way stifles growth. Of course, SBA supports the growth of small businesses generally. SBA encourages concerns to grow naturally and permits concerns that have been awarded small business set-aside contracts to continue to perform those contracts as small businesses throughout the life of those contracts (*i.e.,* for the base and up to four additional option years). This rule merely responds to perceptions that SBA has permitted small business awards to concerns that do not qualify as small. As noted above, it is intended to apply only to unrestricted procurements where size and status were not relevant to the award of the underlying MAC. SBA also disagrees that this provision is inconsistent with the general rule that once a concern qualifies as small for a contract it can maintain its status as a small business throughout the life of that contract. SBA does not believe that a representation of size or status that does not affect the concern's eligibility to be awarded a contract should have the same significance as one that does.

Several commenters agreed with SBA's intent but believed that the rule needed to more accurately take into account today's complex acquisition environment. These commenters noted that many MACs now seek to make awards to certain types of business concerns (*i.e.,* small, 8(a), HUBZone, WOSB, SDVO) in various reserves or ''pools,'' and that concerns may be excluded from a particular pool if they do not qualify as eligible for the pool. These commenters recommended that a concern being awarded a MAC for a particular pool should be able to carry the size and/or status of that pool to each order made to the pool. SBA agrees. As noted above, SBA proposed recertification in connection with orders

set-aside for small business under an unrestricted MAC because that is the first time that some firms will be eligible to compete for the order while others will be excluded from competition because of their size and/or status. However, where a MAC solicitation seeks to make awards to reserves or pools of specific types of small business concerns, the concerns represent that they are small or qualify for the status designated by the pool and having that status or not determines whether the firm does or does not qualify for the award of a MAC contract for the pool. In such a case, SBA believes that size and status should flow from the underlying MAC to individual orders issued under that MAC, and the firm can continue to rely on its representations for the MAC itself unless a contracting officer requests recertification of size and/or status with respect to a specific order. SBA makes that revision in this final rule.

Many commenters also believed that there was no legitimate programmatic reason for excluding the FSS program from this recertification requirement. The commenters, however, miss that the FSS program operates under a separate statutory authority and that set-asides are discretionary, not mandatory under this authority. SBA and GSA worked closely together to stand up and create this discretionary authority and it has been very successful. This discretionary set-aside authority was authorized by the Small Business Jobs Act of 2010 (Pub. L. 111–240) and implemented in FAR 8.405–5 in November 2011. As a result, benefits to small businesses have been significant. The small business share of GSA Schedule sales rose from 30% in fiscal year 2010 (the last full fiscal year before the authority was implemented) to 39% in fiscal year 2019. That equates to an additional $1 billion going to small businesses in fiscal year 2019. Although SBA again considered applying the recertification requirement to the FSS program (and allow the FSS, as with any other MAC, to establish reserves or pools for business concerns with a specified size or status), SBA believes that is unworkable at this time. Consequently, consistent with the proposed rule, this final rule does not apply the modified recertification requirement to the FSS program. Doing so would pose an unnecessary risk to a program currently yielding good results for small business.

For a MAC that is set aside for small business (*i.e.,* small business set-aside, 8(a) small business, SDVO small business, HUBZone small business, or WOSB), the rule generally sets size status as of the date of the offer for the underlying MAC itself. A concern that is small at the time of its offer for the MAC will be considered small for each order issued against the contract, unless a contracting officer requests a size recertification in connection with a specific order. As is currently the case, a contracting officer has the discretion to request recertification of size status on MAC orders. If that occurs, size status would be determined at the time of the order. That would not be a change from the current regulations.

Socioeconomic Status

Where the required status for an order differs from that of the underlying contract (*e.g.,* the MAC is a small business set-aside award, and the procuring agency seeks to restrict competition on the order to only certified HUBZone small business concerns), SBA believes that a firm must qualify for the socioeconomic status of a set-aside order at the time it submits an offer for that order. Although size may flow down from the underlying contract, status in this case cannot. Similar to where a procuring agency seeks to compete an order on an unrestricted procurement as a small business set-aside and SBA would require offerors to qualify as small with respect to that order, (except for orders under FSS contracts),), SBA believes that where the socioeconomic status is first required at the order level, an offeror seeking that order must qualify for the socioeconomic status of the set-aside order when it submits its offer for the order.

Under current policy and regulations, where a contracting officer seeks to restrict competition of an order under an unrestricted MAC to eligible 8(a) Participants only, the contracting officer must offer the order to SBA to be awarded through the 8(a) program, and SBA must accept the order for the 8(a) program. In determining whether a concern is eligible for such an 8(a) order, SBA would apply the provisions of the Small Business Act and its current regulations which require a firm to be an eligible Program Participant as of the date set forth in the solicitation for the initial receipt of offers for the order.

This final rule makes these changes in § 121.404(a)(1) for size, § 124.503(i) for 8(a) BD eligibility, § 125.18(d) for SDVO eligibility, and § 127.504(c) for WOSB eligibility.

Several commenters voiced concern with allowing the set-aside of orders to a smaller group of firms than all holders of a MAC. They noted that bid and proposal preparation costs can be significant and a concern that qualified for the underlying MAC as a small business or some other specified type of small business could be harmed if every order was further restricted to a subset of small business. For example, where a MAC is set-aside for small business and every order issued under that MAC is set-aside for 8(a) small business concerns, SDVO small business concerns, HUBZone small business concerns and WOSBs, those firms that qualified only as small business concerns would be adversely affected. In effect, they would be excluded from competing for every order. SBA agrees that is a problem. That is not what SBA intended when it authorized orders issued under small business set-aside contracts to be further set-aside for a specific type of small business. SBA believes that an agency should not be able to set-aside all of the orders issued under a small business set-aside MAC for a further limited specific type of small business. As such, this final rule provides that where a MAC is set-aside for small business, the procuring agency can set-aside orders issued under the MAC to a more limited type of small business. Contracting officers are encouraged to review the award dollars under the MAC and to aim to make available for award at least 50 percent of the award dollars under the MAC to all contract holders of the underlying MAC.

In addition, a few commenters asked for further clarification as to whether orders issued under a MAC set-aside for 8(a) Participants, HUBZone small business concerns, SDVO small business concerns or WOSBs/EDWOSBs could be further set aside for a more limited type of small business. These commenters specifically did not believe that allowing the further set-aside of orders issued under a multiple award set-aside contract should be permitted in the 8(a) context. The commenters noted that the 8(a) program is a business development program of limited duration (*i.e.,* nine years), and felt that it would be detrimental to the business development of 8(a) Participants generally if an agency could issue an order set-aside exclusively for 8(a) HUBZone small business concerns, 8(a) SDVO small business concerns, or 8(a) WOSBs. The current regulatory text of § 125.2(e)(6)(i) provides that a ''contracting officer has the authority to set aside orders against Multiple Award Contracts, including contracts that were set aside for small business,'' for small and subcategories of small businesses. SBA intended to allow a contracting officer to issue orders for subcategories of small businesses only under small

business set-aside contracts. This rule clarifies that intent.

Section 121.404

In addition to the revision to § 121.404(a)(1) identified above, the rule makes several other changes or clarifications to § 121.404. In order to make this section easier to use and understand, the rule adds headings to each subsection, which identify the subject matter of the subsection.

The proposed rule amended § 121.404(b), which requires a firm applying to SBA's programs to qualify as a small business for its primary industry classification as of the date of its application. The proposed rule eliminated references to SBA's small disadvantaged business (SDB) program as obsolete, and added a reference to the WOSB program. SBA received no comments on these edits and adopts them as final in this rule.

The proposed rule also amended § 121.404(d) to clarify that size status for purposes of compliance with the nonmanufacturer rule, the ostensible subcontractor rule and joint venture agreement requirements is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding. Currently, only compliance with the nonmanufacturer rule is specifically addressed in this paragraph, but SBA's policy has been to apply the same rule to determine size with respect to the ostensible subcontractor rule and joint venture agreement requirements. This would not be a change in policy, but rather a clarification of existing policy. Several commenters misconstrued this to be a change in policy or believed that this would be a departure from the snapshot in time rule for determining size as of the date a concern submits its initial offer including price. As noted, SBA has intended this to be the current policy and is merely clarifying it in the regulatory text. In addition, SBA does not view this as a departure from the snapshot in time rule. The receipts/employees are determined at one specific point in time—the date on which a concern submits its initial offer including price. SBA believes that compliance with the nonmanufacturer rule, the ostensible subcontractor rule and joint venture agreement requirements can justifiably change during the negotiation process. If an offer changes during negotiations in a way that would make a large business mentor joint venture partner be in control of performance, for example, SBA does not believe that the joint venture should be able to point back to its initial offer in which the small business protégé partner to the joint venture appeared to be in control.

The proposed rule also added a clarifying sentence to § 121.404(e) that would recognize that prime contractors may rely on the self-certifications of their subcontractors provided they do not have a reason to doubt any specific self-certification. SBA believes that this has always been the case, but has added this clarifying sentence, nevertheless, at the request of many prime contractors. SBA received positive comments on this change and adopts it as final in this rule.

The proposed rule made several revisions to the size recertification provisions in § 121.404(g). First, the recertification rule pertaining to a joint venture that had previously received a contract as a small business was not clear. If a partner to the joint venture has been acquired, is acquiring or has merged with another business entity, the joint venture must recertify its size status. In order to remain small, however, it was not clear whether only the partner which has been acquired, is acquiring or has merged with another business entity needed to recertify its size status or whether all partners to the joint venture had to do so. The proposed rule clarified that only the partner to the joint venture that has been acquired, is acquiring, or has merged with another business entity must recertify its size status in order for the joint venture to recertify its size. Commenters generally supported this revision. One commenter believed that a joint venture should be required to recertify its size only where the managing venture, or the small business concern upon which the joint venture's eligibility for the contract was based, is acquired by, is acquiring, or has merged with another business entity. SBA disagrees. SBA seeks to make the size rules pertaining to joint ventures similar to those for individual small businesses. Where an individual small business awardee grows to be other than small, its performance on a small business contract continues to count as an award to small business. Similarly, where a joint venture partner grows to be other than small naturally, that should not affect the size of the joint venture. However, under SBA's size rules, in order for a joint venture to be eligible as small, each partner to the joint venture must individually qualify as small. Size is not determined solely by looking at the size of the managing venture. Just as an individual small business awardee must recertify its size if it is acquired by, is acquiring, or has merged with another business entity, so too should the partner to a joint venture that is acquired by, is acquiring, or has merged with another business entity. As such, SBA adopts the proposed language as final in this rule.

Additionally, the proposed rule clarified that if a merger or acquisition causes a firm to recertify as an other than small business concern between time of offer and award, then the recertified firm is not considered a small business for the solicitation. Under the proposed rule, SBA would accept size protests with specific facts showing that an apparent awardee of a set-aside has recertified or should have recertified as other than small due to a merger or acquisition before award. SBA received comments on both sides of this issue. Some commenters supported the proposed provision as a way to ensure that procuring agencies do not make awards to firms who are other than small. They thought that such awards could be viewed as frustrating the purpose of small business set-asides. Other commenters opposed the proposed change. A few of these commenters believed that a firm should remain small if it was small at the time it submitted its proposal. SBA wants to make it clear that is the general rule. Size is generally determined only at the date of offer. If a concern grows to be other than small between the date of offer and the date of award (*e.g.,* another fiscal year ended and the revenues for that just completed fiscal year render the concern other than small), it remains small for the award and performance of that contract. The proposed rule dealt only with the situation where a concern merged with or was acquired by another concern after offer but before award. As stated in the supplementary information to the proposed rule, SBA believes that situation is different than natural growth. Several other commenters opposing the proposed rule believed such a policy could adversely affect small businesses due to the often lengthy contract award process. Contract award can often occur 18 months or more after the closing date for the receipt of offers. A concern could submit an offer and have no plans to merge or sell its business at that time. If a lengthy amount of time passes, these commenters argued that the concern should not be put in the position of declining to make a legitimate business decision concerning the possible merger or sale of the concern simply because the concern is hopeful of receiving the award of a contract as a small business. Several commenters recommended an intermediate position where recertification must occur if the merger or acquisition occurs within a certain amount of time from either the concern's offer or the date for the receipt

of offers set forth in the solicitation. This would allow SBA to prohibit awards to concerns that may appear to have simply delayed an action that was contemplated prior to submitting their offers, but at the same time not prohibit legitimate business decisions that could materialize months after submitting an offer. Commenters recommended requiring recertification when merger or acquisition occurs within 30 days, 90 days and 6 months of the date of an offer. SBA continues to believe that recertification should be required when it occurs close in time to a concern's offer, but agrees that it would not be beneficial to discourage legitimate business transactions that arise months after an offer is submitted. In response, the final rule continues to provide that if a merger, sale or acquisition occurs after offer but prior to award the offeror must recertify its size to the contracting officer prior to award. If the merger, sale or acquisition (including agreements in principal) occurs within 180 days of the date of an offer, the concern will be ineligible for the award of the contract. If it occurs after 180 days, award can be made, but it will not count as an award to small business.

The proposed rule also clarified that recertification is not required when the ownership of a concern that is at least 51 percent owned by an entity (*i.e.,* tribe, ANC, or Community Development Corporation (CDC)) changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity. When the small business continues to be owned to the same extent by the tribe, ANC or CDC, SBA does not believe that the real ownership of the concern has changed, and, therefore, that recertification is not needed. Commenters overwhelmingly supported this change, and SBA adopts it as final in this rule. The rule makes this same change to § 121.603 for 8(a) contracts as well.

Finally, the proposed rule sought to amend § 121.404(g)(3) to specifically permit a contracting officer to request size recertification as he or she deems appropriate at any point in a long-term contract. SBA believes that this authority exists within the current regulatory language but is merely articulating it more clearly in this rule. Several commenters opposed this provision, believing that it would undermine the general rule that a concern's size status should be determined as of the date of its initial offer. They believe that establishing size at one point in time provides predictability and consistency to the procurement process. SBA agrees that size for a single award contract that does not exceed five years should not be reexamined during the life of a contract. SBA believes, however, that the current regulations allow a contracting officer to seek recertifications with respect to MACs. Pursuant to § 121.404(g), ''if a business concern is small at the time of offer for a Multiple Award Contract . . ., then it will be considered small for each order issued against the contract with the same NAICS code and size standard, *unless* a contracting officer requests a new size certification in connection with a specific order.'' (Emphasis added). The regulations at § 121.404(g)(3) also provide that for a MAC with a duration of more than five years, a contracting officer must request that a business concern recertify its small business size status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option thereafter. Under this provision, a business concern is not required to recertify its size status until prior to the end of the fifth year of that contact. However, SBA also interprets § 121.404(g)(3) as not prohibiting a contracting officer from requesting size recertification prior to the 120-day point in the fifth year of the long-term contract. As noted above, the general language of § 121.404(g) allows a contracting officer to request size recertification with respect to each order. SBA believes that the regulations permit a contracting officer the discretion to request size recertification at the contract level prior to the end of the fifth year if explicitly requested for the contract at issue and if requested of all contract holders. In this respect, the authority to request size recertification at the contract level prior to the fifth year is an extension of the authority to request recertification for subsequent orders. As such, this final rule clarifies that a contracting officer has the discretion to request size recertification as he or she deems appropriate at any point only for a long-term MAC.

Section 121.406

The rule merely corrects a typographical error by replacing the word ''provided'' with the word ''provide.''

Section 121.702

The proposed rule clarified the size requirements applicable to joint ventures in the Small Business Innovation Research (SBIR) program. Although the current regulation authorizes joint ventures in the SBIR program and recognizes the exclusion from affiliation afforded to joint ventures between a protégé firm and its SBA-approved mentor, it does not specifically apply SBA's general size requirements for joint ventures to the SBIR program. The proposed rule merely sought to apply the general size rule for joint ventures to the SBIR program. In other words, a joint venture for an SBIR award would be considered a small business provided each partner to the joint venture, including its affiliates, meets the applicable size standard. In the case of the SBIR program, this means that each partner does not have more than 500 employees. Comments favored this proposal and SBA adopts it as final in this rule.

Section 121.1001

SBA proposed to amend § 121.1001 to provide authority to SBA's Associate General Counsel for Procurement Law to independently initiate or file a size protest, where appropriate. Commenters supported this provision, and SBA adopts it as final in this rule. In response to a comment, the final rule also revises § 121.1001(b) to reflect which entities can request a formal size determination. Specifically, a commenter pointed out that although § 121.1001(b) gave applicants for and participants in the HUBZone and 8(a) BD programs the right to request formal size determinations in connection with applications and continued eligibility for those programs, it did not provide that same authority to WOSBs/EDWOSBs and SDVO small business concerns in connection with the WOSB and SDVO programs. The final rule harmonizes the procedures for SBA's various programs as part of the Agency's ongoing effort to promote regulatory consistency.

Sections 121.1004, 125.28, 126.801, and 127.603

This rule adds clarifying language to § 121.1004, § 125.28, § 126.801, and § 127.603 regarding size and/or socioeconomic status protests in connection with orders issued against a MAC. Currently, the provisions authorize a size protest where an order is issued against a MAC if the contracting officer requested a recertification in connection with that order. This rule specifically authorizes a size protest relating to an order issued against a MAC where the order is set-aside for small business and the underlying MAC was awarded on an unrestricted basis, except for orders or Blanket Purchase Agreements issued under any FSS contract. The rule also specifically authorizes a socioeconomic protest relating to set-aside orders based on a different socioeconomic status from the underlying set-aside MAC.

Section 121.1103

An explanation of the change is provided with the explanation for § 134.318.

Section 124.3

In response to concerns raised to SBA by several Program Participants, the proposed rule added a definition of what a follow-on requirement or contract is. Whether a procurement requirement may be considered a follow-on procurement is important in several contexts related to the 8(a) BD program. First, SBA's regulations provide that where a procurement is awarded as an 8(a) contract, its follow-on or renewable acquisition must remain in the 8(a) BD program unless SBA agrees to release it for non-8(a) competition. 13 CFR 124.504(d)(1). SBA's regulations also require SBA to conduct an adverse impact analysis when accepting requirements into the 8(a) BD program. However, an adverse impact analysis is not required for follow-on or renewal 8(a) acquisitions or for new requirements. 13 CFR 124.504(c). Finally, SBA's regulations provide that once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on procurement to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same tribe, ANC, NHO, or CDC. 13 CFR 124.109(c)(3)(ii), 124.110(e) and 124.111(d).

In order to properly assess what each of these regulations requires, the proposed rule defined the term ''follow-on requirement or contract''. The definition identified certain factors that must be considered in determining whether a particular procurement is a follow-on requirement or contract: (1) Whether the scope has changed significantly, requiring meaningful different types of work or different capabilities; (2) whether the magnitude or value of the requirement has changed by at least 25 percent; and (3) whether the end user of the requirement has changed. These considerations should be a guide, and not necessarily dispositive of whether a requirement qualifies as ''new.'' Applying the 25 percent rule contained in this definition rigidly could permit procuring agencies and entity-owned firms to circumvent the intent of release, sister company restriction, and adverse impact rules.

For example, a procuring agency may argue that two procurement requirements that were previously awarded as individual 8(a) contracts can be removed from the 8(a) program without requesting release from SBA because the value of the combined requirement would be at least 25 percent more than the value of either of the two previously awarded individual 8(a) contracts, and thus would be considered a new requirement. Such an application of the new requirement definition would permit an agency to remove two requirements from the 8(a) BD program without requesting and receiving SBA's permission for release from the program. We believe that would be inappropriate and that a procuring agency in this scenario must seek SBA's approval to release the two procurements previously awarded through the 8(a) BD program. Likewise, if an entity-owned 8(a) Participant previously performed two sole source 8(a) contracts and a procuring agency sought to offer a sole source requirement to the 8(a) BD program on behalf of another Participant owned by the same entity (tribe, ANC, NHO, or CDC) that, in effect, was a consolidation of the two previously awarded 8(a) procurements, we believe it would be inappropriate for SBA to accept the offer on behalf of the sister company. Similarly, if a small business concern previously performed two requirements outside the 8(a) program and a procuring agency wanted to combine those two requirements into a larger requirement to be offered to the 8(a) program, SBA should perform an adverse impact analysis with respect to that small business even though the combined requirement had a value that was greater than 25 percent of either of the previously awarded contracts.

SBA received a significant number of comments regarding what a follow-on requirement is and how SBA's rules regarding what a follow-on contract is should be applied to the three situations identified above. Many commenters believed that the proposed language was positive because it will help alleviate confusion in determining whether a requirement should be considered a follow-on or not. In terms of taking requirements or parts of requirements that were previously performed through the 8(a) program out of the program, commenters overwhelmingly supported SBA's involvement in the release process. Commenters were concerned that agencies have increased the value of procurement requirements marginally by 25 percent merely to call the procurements new and remove them from the 8(a) program without going through the release process. These commenters were particularly concerned where the primary and vital requirements of a procurement remained virtually identical and an agency merely intended to add ancillary work in order to freely remove the procurement from the 8(a) BD program. A few commenters also recommended that SBA provide clear guidance when the contract term of the previously awarded 8(a) contract is different than that of a successor contracting action. Specifically, these commenters believed that an agency should not be able to compare a contract with an overall $2.5 million value (consisting of a one year base period and four one-year options each with a $500,000 value) with a successor contract with an overall value of $1.5 million (consisting of a one year base period and two one-year options each with a $500,000 value) and claim it to be new. In such a case, the yearly requirement is identical and commenters believed the requirement should not be removed without going through the release process. SBA agrees. The final rule clarifies that equivalent periods of performance relative to the incumbent or previously-competed 8(a) requirement should be compared.

Many commenters agreed that the 25 percent rule should not be applied rigidly, as that may open the door for the potential for (more) contracts to be taken out of the 8(a) BD program. Commenters also believed that SBA should be more involved in the process, noting that firms currently performing 8(a) contracts often do not discover a procuring agency's intent to reprocure that work outside the 8(a) BD program by combining it with other work and calling it a new requirement until very late in the procurement process. Once a solicitation is issued that combines work previously performed through an 8(a) contract with other work, it is it difficult to reverse even where SBA believes that the release process should have been followed. Several commenters recommended adding language that would require a procuring agency to obtain SBA concurrence that a procurement containing work previously performed through an 8(a) contract does not represent a follow-on requirement before issuing a solicitation for the procurement. Although SBA does not believe that concurrence should be required, SBA does agree that a procuring activity should notify SBA if work previously performed through the 8(a) program will be performed through a different means. A contracting officer will make the determination as to whether a requirement is new, but SBA should be given the opportunity to look at the procuring activity's strategy and supply input where appropriate. SBA has added such language to § 124.504(d) in this final rule.

Several commenters supported the proposed definition of a follow-on procurement for release purposes where they agreed that a procuring agency should not be able to remove two requirements from the 8(a) program merely by combining them and calling the consolidated requirement new because it exceeds the 25 percent increase in magnitude. These commenters, however, recommended that the 25 percent change in magnitude be a ''bright-line rule'' with respect to whether a requirement should be considered a follow-on requirement to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same tribe, ANC, Native Hawaiian Organization (NHO), or CDC. SBA understands the desire to have clear, objective rules. However, as noted previously, SBA opposes a bright-line 25 percent change in magnitude rule in connection with release. In addition, because SBA does not believe that it is good policy to have one definition of what a follow-on requirement is for one purpose and have a different definition for another purpose, SBA opposes having a bright-line 25 percent change in magnitude rule in determining whether to allow a sister company to perform a particular sole source 8(a) contract and then provide discretion only in the context of whether certain work can be removed from the 8(a) program. SBA continues to believe that the language as proposed that allows discretion when appropriate is the proper alternative. In the context of determining whether to allow a sister company to perform a particular sole source 8(a) contract, SBA agrees that a 25 percent change in magnitude should be sufficient for SBA to approve a sole source contract to a sister company. It would be the rare instance where that is not the case.

Section 124.105

The proposed rule amended § 124.105(g) to provide more clarity regarding situations in which an applicant has an immediate family member that has used his or her disadvantaged status to qualify another current or former Participant. The purpose of the immediate family member restriction is to ensure that one individual does not unduly benefit from the 8(a) BD program by participating in the program beyond nine years, albeit through a second firm. This most often happens when a second family member in the same or similar line of business seeks 8(a) BD certification. However, it is not necessarily the type of business which is a problem, but, rather, the involvement in the applicant firm of the family member that previously participated in the program. The current regulatory language requires an applicant firm to demonstrate that ''no connection exists'' between the applicant and the other current or former Participant. SBA believes that requiring no connections is a bit extreme. If two brothers own two totally separate businesses, one as a general construction contractor and one as a specialty trade construction contractor, in normal circumstances it would be completely reasonable for the brother of the general construction firm to hire his brother's specialty trade construction firm to perform work on contracts that the general construction firm was doing. Unfortunately, if either firm was a current or former Participant, SBA's rules prevented SBA from certifying the second firm for participation in the program, even if the general construction firm would pay the specialty trade firm the exact same rate that it would have to pay to any other specialty trade construction firm. SBA does not believe that makes sense. An individual should not be required to avoid all contact with the business of an immediate family member. He or she should merely have to demonstrate that the two businesses are truly separate and distinct entities.

To this end, SBA proposed that an individual would not be able to use his or her disadvantaged status to qualify a concern for participation in the 8(a) BD program if that individual has an immediate family member who is using or has used his or her disadvantaged status to qualify another concern for the 8(a) BD program and the concerns are connected by any common ownership or management, regardless of amount or position, or the concerns have a contractual relationship that was not conducted at arm's length. In the first instance, if one of the two family members (or business entities owned by the family member) owned *any* portion of the business owned by the other family member, the second in time family member could not qualify his or her business for the 8(a) BD program. Similarly, if one of the two family members had any role as a director, officer or key employee in the business owned by the other family member, the second in time family member could not qualify his or her business for the 8(a) BD program. In the second instance, the second in time family member could not qualify his or her business for the 8(a) BD program if it received or gave work to the business owned by the other family member at other than fair market value. With these changes, SBA believes that the rule more accurately captures SBA's intent not to permit one individual from unduly benefitting from the program, while at the same time permitting normal business relations between two firms. Commenters generally supported this change. A few commenters supported the provision but believed that an additional basis for disallowing a new immediate family member applicant into the 8(a) BD program should be where the applicant shared common facilities with a current or former Participant owned and controlled by an immediate family member. SBA agrees that an applicant owned by an immediate family member of a current or former Participant should not be permitted to share facilities with that current or former Participant. This rule adds that situation as a basis for declining an applicant. Several commenters sought further clarification as to whether a presumption against immediate family members in the same or similar line of business would continue from the previous regulations into this revised provision, and whether some sort of waiver will be needed to allow an immediate family member applicant to be certified into the 8(a) BD program. In particular, a few commenters were concerned that if an immediate family member attempted to certify an applicant concern in the same primary NAICS as the current or former Participant and the individual applying for certification has no management or technical experience in that NAICS code, that the owner/manager of the current or former Participant would play a significant role in the applicant concern even though a formal role was not identified. As noted above, SBA believes that the rules pertaining to immediate family members seeking to participate in the 8(a) BD program have been too harsh. The rule seeks to allow an applicant owned and controlled by an immediate family member of current or former Participant into the program, even in the same or similar line of business, provided certain conditions do not exist. SBA agrees with the comments that an individual seeking to certify an applicant concern in a primary NAICS code that is the same primary NAICS code of a current or former Participant operated by an immediate family member must have management or technical experience in that primary NAICS code. SBA agrees that without such a requirement, there is a risk that the owner/manager of the current or former Participant would have some role in the management or control of the applicant concern. This

rule adds a requirement that an individual applying in the same primary NAICS code as an immediate family member must have management or technical experience in that primary NAICS code, which would include experience acquired from working for an immediate family member's current or former Participant. Aside from that refinement, there is no presumption against such an applicant. The applicant must, however, demonstrate that there is no common ownership, control or shared facilities with the current or former Participant, and that any contractual relations between the two companies are arm's length transactions. One commenter questioned whether the revised requirement in proposed § 124.105(g)(2) that SBA would annually assess whether the two firms continue to ''operate independently'' of one another after being admitted to the program was inconsistent with the language in § 124.105(g)(1) that allows fair market contractual relations between the two firms. That language was not meant to imply that those arm's length transactions cannot occur once the second firm is admitted to the program. As part of an annual review, SBA will determine that ownership, management, and facilities continue to be separate and that any contractual relations are at fair market value. SBA would not initiate termination proceedings merely because the two firms entered into fair market value contracts after the second firm is admitted to the program. One commenter recommended that SBA should place a limit on the amount of contractual, arm's length transactions that have occurred between the firms (either dollar value or percentage of revenue). SBA disagrees. SBA does not believe a firm should be penalized for having an immediate family member participate in the 8(a) BD program. It does not make sense that a business concern owned by one family member cannot hire the business concern owned by another family member as a subcontractor at the same rate that it could hire any other business concern. Business relationships are often built upon trust. If a subcontractor has done a good job at a fair price, it is likely that the prime contractor will hire that firm again when the need arises to do that kind of work. Based upon the comments received in response to proposed § 121.103(f) (which loosened the presumption of economic dependence where one concern derived at least 70 percent of its revenues from one other business concern), most commenters believed there should not be a hard restriction on the amount of work one business concern should be able to do with another. SBA believes the same should apply in the immediate family member context as long as a clear line of fracture exists between the two business concerns. As such, SBA does not adopt this recommendation in this final rule.

The proposed rule also amended the 8(a) BD change of ownership requirements in § 124.105(i). First, the proposed rule lessened the burden on 8(a) Participants seeking minor changes in ownership by providing that prior SBA approval is not needed where a previous owner held less than a 20 percent interest in the concern both before and after the transaction. This is a change from the previous requirement which allows a Participant to change its ownership without SBA's prior approval where the previous owner held less than a 10 percent interest. This change from 10 percent to 20 percent permits Participants to make minor changes in ownership more frequently without requiring them to wait for SBA approval.

In addition, the proposed rule eliminated the requirement that all changes of ownership affecting the disadvantaged individual or entity must receive SBA prior approval before they can occur. Specifically, proposed revisions to § 124.105(i)(2) provided that prior SBA approval is not needed where the disadvantaged individual (or entity) in control of the Participant will increase the percentage of his or her (its) ownership interest. SBA believes that prior approval is not needed in such a case because if SBA determined that an individual or entity owned and controlled a Participant before a change in ownership and the change in ownership only increases the ownership interest of that individual or entity, there could be no question as to whether the Participant continues to meet the program's ownership and control requirements. This change will decrease the amount of times and the time spent by Participant firms seeking SBA approval of a change in ownership. SBA received unanimous support on these provisions and adopts them as final in this rule.

Section 124.109

In order to eliminate confusion, this rule clarifies several provisions relating to tribally-owned (and ANC-owned) 8(a) applicants and Participants. First, SBA amends § 124.109(a)(7) and § 124.109(c)(3)(iv) to clarify that a Participant owned by an ANC or tribe need not request a change of ownership from SBA where the ANC or tribe merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the ANC/tribe and the Participant. SBA believes that a tribe or ANC should be able to replace one wholly-owned intermediary company with another without going through the change of ownership process and obtaining prior SBA approval. In each of these cases, SBA believes that the underlying ownership of the Participant is not changing substantively and that requiring a Participant to request approval from SBA is unnecessary. The recommendation and approval process for a change of ownership can take several months, so this change will relieve Participants owned by tribes and ANCs from this unnecessary burden and allow them to proactively conduct normal business operations without interruption.

Second, the rule amends § 124.109(c)(3)(ii) to clarify the rules pertaining to a tribe/ANC owning more than one Participant in the 8(a) BD program. The rule adds two subparagraphs and an example to § 124.109(c)(3)(ii) for ease of use and understanding. In addition, SBA clarifies that if the primary NAICS code of a tribally-owned Participant is changed pursuant to § 124.112(e), the tribe could immediately submit an application to qualify another of its firms for participation in the 8(a) BD program under the primary NAICS code that was previously held by the Participant whose primary NAICS code was changed. A change in a primary NAICS code under § 124.112(e) should occur only where SBA has determined that the greatest portion of a Participant's revenues for the past three years are in a NAICS code other than the one identified as its primary NAICS code. In such a case, SBA has determined that in effect the second NAICS code really has been the Participant's primary NAICS code for the past three years. Commenters supported these provisions, and SBA adopts them as final.

The rule also clarifies SBA current policy that because an individual may be responsible for the management and daily business operations of two tribally-owned concerns, the full-time devotion requirement does not apply to tribally-owned applicants and Participants. This flows directly from the statutory provision which allows an individual to manage two tribally-owned firms. Commenters supported this change, noting that if statutory and regulatory requirements explicitly allow an individual to manage two 8(a) firms,

then it would be illogical to impose the full-time work requirement on such a manager. This rule adopts the proposed language as final.

Finally, the proposed rule clarified the 8(a) BD program admission requirements governing how a tribally-owned applicant may demonstrate that it possesses the necessary potential for success. SBA's regulations previously permitted the tribe to make a firm written commitment to support the operations of the applicant concern to demonstrate a tribally-owned firm's potential for success. Due to the increased trend of tribes establishing tribally-owned economic development corporations to oversee tribally owned businesses, SBA recognizes that in some circumstances it may be adequate to accept a letter of support from the tribally-owned economic development company rather than the tribal leadership. The proposed rule permitted a tribally-owned applicant to satisfy the potential for success requirements by submitting a letter of support from the tribe itself, a tribally-owned economic development corporation or another relevant tribally-owned holding company. In order for a letter of support from the tribally-owned holding company to be sufficient, there must be sufficient evidence that the tribally-owned holding company has the financial resources to support the applicant and that the tribally-owned company is controlled by the tribe. Commenters supported this change. They noted that an economic development corporation or tribally-owned holding company is authorized to act on behalf of the tribe and is essentially an economic arm of the tribe, and that oftentimes due to the size of the tribe it can be difficult and take significant amounts of time and resources to obtain a commitment letter from the tribe itself. SBA adopts this provision as final in this rule.

Section 124.110

The proposed rule would make some of the same changes to § 124.110 for applicants and Participants owned and controlled by NHOs as it would to § 124.109 for tribally-owned applicants and Participants. Specifically, the proposed rule would subdivide § 124.110(e) for ease of use and understanding and would clarify that if the primary NAICS code of an NHO-owned Participant is changed pursuant to § 124.112(e), the NHO could submit an application and qualify another firm owned by the NHO for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

Section 124.111

The proposed rule made the same change for CDCs and CDC-owned firms as for tribes and ANCs mentioned above. It clarified that a Participant owned by a CDC need not request a change of ownership from SBA where the CDC merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the CDC and the Participant. It also subdivided the current subparagraph (d) into three smaller paragraphs for ease of use and understanding, and clarified that if the primary NAICS code of a CDC-owned Participant is changed pursuant to § 124.112(e), the CDC could submit an application and qualify another firm owned by the CDC for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed. SBA did not receive any comments in response to these changes. As such, SBA adopts them as final in this rule.

Section 124.112

SBA proposed to amend § 124.112(d)(5) regarding excessive withdrawals in connection with entity-owned 8(a) Participants. The proposed rule permitted an 8(a) Participant that is owned at least 51 percent by a tribe, ANC, NHO or CDC to make a distribution to a non-disadvantaged individual that exceeds the applicable excessive withdrawal limitation dollar amount if it is made as part of a pro rata distribution to all shareholders. Commenters supported this change as a needed clarification to allow an entity-owned firm to increase its distribution to the tribe, ANC, NHO or CDC, and thus enable it to provide additional resources to the tribal or disadvantaged community. A few commenters were concerned with having dollar numbers in the examples set forth in the regulatory text. They were concerned that $1 million would become the default unless done in pro rata share. SBA believes these commenters misunderstood the intent of this provision. The example in the regulation provides that where a tribally-owned Participant pays $1,000,000 to a non-disadvantaged manager that was not part of a pro rata distribution to all shareholders, SBA would consider that to be an excessive withdrawal. SBA continues to believe that a $1 million payout to a non-disadvantaged individual in that context is excessive. If a tribe, ANC, NHO, or CDC owns 100 percent of an 8(a) Participant and wants to give back to the native or underserved community, nothing in this regulation would prohibit it from doing so. That Participant could give a distribution of $1 million or more back to the tribe, ANC, NHO, or CDC in order to ensure that the native or underserved community receives substantial benefits. The clarification regarding pro rata distributions was intended to allow greater distributions to tribal communities, not to restrict such distributions. The final rule adopts that provision.

In 2016, SBA amended § 124.112(e) to implement procedures to allow SBA to change the primary NAICS code of a Participant where SBA determined that the greatest portion of the Participant's total revenues during a three-year period have evolved from one NAICS code to another. 81 FR 48558, 48581 (July 25, 2016). The procedures require SBA to notify the Participant of its intent to change the Participant's primary industry classification and afford the Participant the opportunity to submit information explaining why such a change would be inappropriate. The proposed rule authorized an appeal process, whereby a Participant whose primary NAICS code was changed by its servicing district office could seek further review of that determination at a different level. Commenters supported this provision and SBA adopts it as final in this rule.

Section 124.201

The proposed rule did not amend § 124.201. However, SBA sought comments as to whether SBA should add a provision that would require a small business concern that seeks to apply for participation in the 8(a) BD program to first take an SBA-sponsored preparatory course regarding the requirements and expectations of the 8(a) BD program. Commenters were split on this proposal. Some felt it would be helpful to those firms who did not have a clear understanding of the expectations of participating in the 8(a) BD program. Others thought it would merely delay their participation in the program needlessly. Some commenters were concerned that there might be time commitments and travel expenses if a live course were required and recommended having the option to provide such training via a web-based platform. Commenters also noted that for entity-owned applicants, this requirement should not apply beyond the entity's first company to enter the 8(a) BD program. After reviewing the

comments, SBA believes that such a preparatory course should be an option, but not a requirement. As such, SBA does not believe that the regulatory text needs to be revised in this final rule.

Section 124.203

Section 124.203 requires applicants to the 8(a) BD program to submit certain specified supporting documentation, including financial statements, copies of signed Federal personal and business tax returns and individual and business bank statements. In 2016, SBA removed the requirement that an applicant must submit a signed Internal Revenue Service (IRS) Form 4506T, Request for Copy or Transcript of Tax Form, in all cases. 81 FR 48558, 48569 (July 25, 2016). At that time, SBA agreed with a commenter to the proposed rule that questioned the need for every applicant to submit IRS Form 4506T. In eliminating that requirement for every applicant, SBA reasoned that it always has the right to request any applicant to submit specific information that may be needed in connection with a specific application. As long as SBA's regulations clearly provide that SBA may request any additional documents SBA deems necessary to determine whether a specific applicant is eligible to participate in the 8(a) BD program, SBA will be able to request that a particular firm submit IRS Form 4506T where SBA believes it to be appropriate. SBA proposed to amend § 124.203 to add back the requirement that every applicant to the 8(a) BD program submit IRS Form 4506T (or when available, IRS Form 4506C) because not having the Form readily available when needed has unduly delayed the application process for those affected applicants. In addition, SBA believed that requiring Form 4506T in every case would serve as a deterrent to firms that may think it is not necessary to fully disclose all necessary financial information.

However, during the comment period SBA determined that neither Form is a viable option for independent personal income verification purposes at this time. On July 1, 2019, the IRS removed the third-party mailing option from the Form 4506T after it was determined that this delivery method presents a risk to sensitive taxpayer information. As a result, the IRS will no longer send tax return transcripts directly to SBA; rather, transcripts must be mailed to the taxpayer's address of record. Because SBA may not receive tax return transcripts directly from the IRS under Form 4506T, the Agency no longer believes it is an effective tool for independent income verification. In addition, current IRS guidance indicates that Form 4506C is available only to industry lenders participating in the Income Verification Express Service program.

SBA nevertheless continues to recognize the importance of obtaining authorization to receive taxpayer information at the time of application. It is SBA's understanding that the IRS is currently developing a successor form or program through which SBA and other Federal agencies may directly receive a taxpayer's tax return information for income verification purposes. As such, the final rule provides that each individual claiming disadvantaged status must authorize SBA to request and receive tax return information directly from the IRS if such authorization is required. Although SBA does not anticipate using this authorization often to verify an applicant's information, SBA believes that this additional requirement imposes a minimal burden on 8(a) BD program applicants. Additionally, SBA believes that this required authorization will help to maintain the integrity of the program.

Section 124.204

This rule provides that SBA will suspend the time to process an 8(a) application where SBA requests clarifying, revised or other information from the applicant. While SBA is waiting on the applicant to provide clarifying or responsive information, the Agency is not continuing to process the application. This is not a change in policy, but rather a clarification of existing policy. Commenters did not have any issue with this change, believing that it already is SBA's existing practice and that the regulatory change will simply clarify/formalize this practice. As such, SBA adopts it as final in this rule.

Sections 124.205, 124.206 and 124.207

The proposed rule amended § 124.207 to allow a concern that has been declined for 8(a) BD program participation to submit a new application 90 days after the date of the Agency's final decision to decline. Under the current regulations, a firm is required to wait 12 months from the date of the final agency decision to reapply. SBA believes that this change will reduce the number of appeals to SBA's Office of Hearings and Appeals (OHA) and greatly reduce the costs associated with appeals borne by disappointed applicants. In addition, because a firm that is declined could submit a new application 90 days after the decline decision, SBA requested comments on whether the current reconsideration process should be eliminated. Commenters enthusiastically supported the proposed change to allow firms to remedy eligibility deficits and reapply after 90 days instead of one year. In conjunction with this proposed change, many commenters supported eliminating the reconsideration process as unnecessary due to the shorter reapplication time period. A few commenters supported both the reduction in time to reapply and elimination of the reconsideration process, but asked SBA to ensure that SBA provide comprehensive denial letters to fully apprise applicants of any issues or shortcomings with their applications. SBA agrees that denial letters must fully inform applicants of any issues with their applications, and will continue to explain as specifically as possible the shortcomings in any declined application. Several commenters opposed changing the current reconsideration process because they believed that it could take longer for an applicant to ultimately be admitted to the program if all it had to do was change one or two minor things, and that doing so during reconsideration would be quicker than SBA looking at a re-application anew. Contrary to what some commenters believed, SBA looks at all eligibility criteria during reconsideration and may find additional reasons to decline an application during reconsideration that were not clearly identified in the initial application process. Where that occurs, a firm may be entitled to an additional reconsideration process which may potentially prolong the review process even further. SBA believes reducing the timeframe to address identified deficits and reapply from one year to 90 days will obviate the need for a separate, possibly drawn-out reconsideration process. One commenter believed that allowing the shortened 90-day waiting period to re-apply to the 8(a) BD program would encourage concerns that are clearly ineligible to repeatedly apply for certification. Although SBA does not believe that this would be a significant problem, SBA does understand that its limited resources could be overburdened if clearly ineligible business concerns are able to re-apply to the program every 90 days. As such, this final rule amends § 124.207 to incorporate a 90-day wait period to reapply generally, but adds language that provides that where a concern has been declined three times within 18 months of the date of the first final agency decision finding the concern ineligible, the concern cannot submit a new application for admission to the

program until 12 months from the date of the third final Agency decline decision. The final rule also amends § 124.205 to eliminate a separate reconsideration process and § 124.206 to delete paragraph (b) as unnecessary.

Section 124.300 and 124.301

The proposed rule redesignated the current § 124.301 (which discusses the various ways a business may leave the 8(a) BD program) as § 124.300 and added a new § 124.301 to specifically enunciate the voluntary withdrawal and early graduation procedures. The rule set forth SBA's current policy that a Participant may voluntarily withdraw from the 8(a) BD program at any time prior to the expiration of its program term. In addition, where a Participant believes it has substantially achieved the goals and objectives set forth in its business plan, the Participant may elect to voluntarily early graduate from the 8(a) BD program. That too is SBA's current policy, and the proposed rule merely captured it in SBA's regulations.

The proposed rule, however, changed the level at which voluntary withdrawal and voluntary early graduation could be finalized by SBA. Prior to this final rule, a firm submitted its request to voluntarily withdraw or early graduate to its servicing SBA district office. Once the district office concurs, the request was sent to the Associate Administrator for Business Development (AA/BD) for final approval. SBA believes that requiring several layers of review to permit a concern to voluntarily exit the 8(a) BD program is unnecessary. SBA proposed that a Participant must still request voluntary withdrawal or voluntary early graduation from its servicing district office, but the action would be complete once the District Director recognizes the voluntary withdrawal or voluntary early graduation. SBA believes this will eliminate unnecessary delay in processing these actions. Commenters supported giving voluntary withdrawal and voluntary early graduation decisions to the district office level, agreeing with SBA that the change will assist in reducing processing times. As such, SBA adopts the proposed changes as final.

Section 124.304

The proposed rule clarified the effect of a decision made by the AA/BD to terminate or early graduate a Program Participant. Under SBA's current procedures, once the AA/BD renders a decision to early graduate or terminate a Participant from the 8(a) BD program, the affected Participant has 45 days to appeal that decision to SBA's OHA. If no appeal is made, the AA/BD's decision becomes the final agency decision after that 45-day period. If the Participant appeals to OHA, the final agency decision will be the decision of the administrative law judge at OHA. There has been some confusion as to what the effect of the AA/BD decision is pending the decision becoming the final agency decision. The proposed rule clarified that where the AA/BD issues a decision terminating or early graduating a Participant, the Participant would be immediately ineligible for additional program benefits. SBA does not believe that it would make sense to allow a Participant to continue to receive program benefits after the AA/BD has terminated or early graduated the firm from the program. If OHA ultimately overrules the AA/BD decision, SBA would treat the amount of time between the AA/BD's decision and OHA's decision on appeal similar to how it treats a suspension. Upon OHA's decision overruling the AA/BD's determination, the Participant would immediately be eligible for program benefits and the length of time between the AA/BD's decision and OHA's decision on appeal would be added to the Participant's program term. Commenters generally supported this clarification. One commenter opposed the change, believing ineligibility or suspension should not be automatic, but rather, occur only where SBA ''determines that suspension is needed to protect the interests of the Federal Government, such as because where information showing a clear lack of program eligibility or conduct indicating a lack of business integrity exists'' as set forth in § 124.305(a). SBA believes this comment misses the point. The suspension identified in § 124.305(a) is an interim determination pending a final action by the AA/BD as to whether a Participant should be terminated from the program. The suspension identified here flows from the AA/BD's final decision that termination is appropriate. As noted above, SBA believes it is contradictory to allow a Participant to continue to receive program benefits after the AA/BD has terminated or early graduated the firm from the program. As such, SBA adopts the proposed language as final in this rule.

Sections 124.305 and 124.402

Section 124.402 requires each firm admitted to the 8(a) BD program to develop a comprehensive business plan and to submit that business plan to SBA. Currently, § 124.402(b) provides that a newly admitted Participant must submit its business plan to SBA as soon as possible after program admission and that the Participant will not be eligible for 8(a) BD benefits, including 8(a) contracts, until SBA approves its business plan. Several firms have complained that they missed contract opportunities because SBA did not approve their business plans before procuring agencies sought to award contracts to fulfill certain requirements. The proposed rule amended § 124.402(b) to eliminate the provision that a Participant cannot receive any 8(a) BD benefits until SBA has approved its business plan. Instead, the proposed rule provided that SBA would suspend a Participant from receiving 8(a) BD program benefits if it has not submitted its business plan to the servicing district office and received SBA's approval within 60 days after program admission. A firm coming in to the 8(a) BD program with commitments from one or more procuring agencies will immediately be able to be awarded one or more 8(a) contracts. Commenters appreciated SBA's recognition of the delays and possible missed opportunities caused by the current requirements and supported this change. They believed that the change will enable Participants to start receiving the benefits of the program in a more timely manner and enjoy their full nine-year term. A few commenters recommended that a new Participant should not be suspended where it has submitted its business plan within 60 days of being certified into the program but SBA has not approved it within that time. These commenters believed that a Participant should be suspended in this context only for actions within the Participant's control (*i.e.,* where the Participant did not submit its business plan within 60 days, not where SBA has not approved it within that time). That is SBA's intent. The proposed rule provided that SBA will suspend a Participant from receiving 8(a) BD program benefits, including 8(a) contracts, if it has not submitted its business plan to the servicing district office within 60 days after program admission. As long as a Participant has submitted its business plan to SBA within the 60-day timeframe, it will not be suspended. SBA believes that is clear in the regulatory text as proposed and that no further clarification is needed. As such, SBA adopts the proposed language as final in this rule.

This rule also corrects a typographical error contained in § 124.305(h)(1)(ii). Under § 124.305(h)(1)(ii), an 8(a) Participant can elect to be suspended from the 8(a) program where a disadvantaged individual who is involved in controlling the day-to-day

management and control of the Participant is called to active military duty by the United States. Currently, the regulation states that the Participant may elect to be suspended where the individual's participation in the firm's management and daily business operations is critical to the firm's continued eligibility, and the Participant elects not to designate a non-disadvantaged individual to control the concern during the call-up period. That should read where the Participant elects not to designate another disadvantaged individual to control the concern during the call-up period. It was not SBA's intent to allow a non-disadvantaged individual to control the firm during the call-up period and permit the firm to continue to be eligible for the program. Finally, one commenter questioned why SBA required a suspension action to generally be initiated simultaneous with or after the initiation of a BD program termination action. The commenter believed that if the Government's interests needed to be protected quickly, SBA should be able to suspend a particular Program Participant without also simultaneously initiating a termination proceeding. The commenter argued that the Government should be able to stop inappropriate or fraudulent conduct immediately. Although SBA envisions initiating a termination proceeding simultaneously with a suspension action in most cases, SBA concurs that immediate suspension without termination may be needed in certain cases. As such, the final rule amends § 124.305(a) to allow the AA/BD to immediately suspend a Participant when he or she determines that suspension is needed to protect the interests of the Federal Government.

Sections 124.501 and 124.507

Section 124.501 is entitled ''What general provisions apply to the award of 8(a) contracts?'' SBA must determine that a Participant is eligible for the award of both competitive and sole source 8(a) contracts. However, the requirement that SBA determine eligibility is currently contained only in the 8(a) competitive procedures at § 124.507(b)(2). Although SBA determines eligibility for sole source 8(a) awards at the time it accepts a requirement for the 8(a) BD program, that process is not specifically stated in the regulations. The proposed rule moved the eligibility determination procedures for competitive 8(a) contracts from § 124.507(b)(2) to the general provisions of § 124.501 and specifically addressed eligibility determinations for sole source 8(a) contracts. To accomplish this, the proposed rule revised current § 124.501(g). Commenters did not object to this clarification. One commenter sought further clarification regarding eligibility for 8(a) sole source contracts. The commenter noted that for a sole source 8(a) procurement, SBA determines eligibility of a nominated 8(a) firm at the time of acceptance. The commenter recommended that the regulation clearly notify 8(a) firms and procuring agencies that if a firm graduates from the program before award occurs, the award cannot be made. Although SBA believes that is currently included within § 124.501(g), this final rule adds additional clarifying language to remove any confusion. One commenter also sought further clarification for two-step competitive procurements to be awarded through the 8(a) BD program. The commenter noted that the solicitation has two dates, and asked SBA to clarify which date controls for eligibility for the 8(a) competitive award. In response, this final rule adds a new § 124.507(d)(3) that provides that for a two-step design-build procurement to be awarded through the 8(a) BD program, a firm must be a current Participant eligible for award of the contract on the initial date specified for receipt of phase one offers contained in the contract solicitation.

Similarly, SBA believes that the provisions requiring a bona fide place of business within a particular geographic area for 8(a) construction awards should also appear in the general provisions applying to 8(a) contracts set forth in § 124.501. Section 8(a)(11) of the Small Business Act, 15 U.S.C. 637(a)(11), requires that to the maximum extent practicable 8(a) construction contracts ''shall be awarded within the county or State where the work is to be performed.'' SBA has implemented this statutory provision by requiring a Participant to have a bona fide place of business within a specific geographic location. Currently, the bona fide place of business rules appear only in the procedures applying to competitive 8(a) procurements in § 124.507(c)(2). The proposed rule moved those procedures to a new § 124.501(k) to clearly make them applicable to both sole source and competitive 8(a) awards. Based on the statutory language, SBA believes that the requirement to have a bona fide place of business in a particular geographic area currently applies to both sole source and competitive 8(a) procurements, but moving the requirement to the general applicability section removes any doubt or confusion. Commenters did not object to these changes and SBA adopts them as final in this rule.

In response to concerns raised by Participants, the proposed rule also imposed time limits within which SBA district offices should process requests to add a bona fide place of business. SBA has heard that several Participants missed out on 8(a) procurement opportunities because their requests for SBA to verify their bona fide places of business were not timely processed. In order to alleviate this perceived problem, SBA proposed to provide that in connection with a specific 8(a) competitive solicitation, the reviewing office will make a determination whether or not the Participant has a bona fide place of business in its geographical boundaries within 5 working days of a site visit or within 15 working days of its receipt of the request from the servicing district office if a site visit is not practical in that timeframe. SBA also requested comments on whether a Participant that has filed a request to have a bona fide place of business recognized by SBA in time for a particular 8(a) construction procurement may submit an offer for that procurement where it has not received a response from SBA before the date offers are due. Commenters supported imposing time limits in the regulations for SBA to process requests to establish bona fide places of business. Commenters also supported Participants being able to presume approval and submit an offer as an eligible Participant where SBA has not issued a decision within the specified time limits. One commenter asked SBA to clarify what happens if a Participant submits an offer based on this presumption and SBA later does not verify the Participant's bona fide place of business. SBA does not believe that verification will not occur before award. The final rule allows a Participant to presume that SBA has approved its request for a bona fide place of business if SBA does not respond in the time identified. This allows a Participant to submit an offer where a bona fide place of business is required. However, clarification is added at 124.501(k)(2)(iii)(B) that in order to be eligible for award, SBA must approve the bona fide place of business prior to award. If SBA has not acted prior to the time that a Participant is identified as the apparent successful offeror, SBA will make such a determination within 5 days of receiving a procuring activity's request for an eligibility determination unless the procuring activity grants additional time for review.

Several commenters recommended that SBA broaden the geographic

boundaries as to what it means to have a bona fide place of business within a particular area. As identified above, the bona fide place of business concept evolved from the statutory requirement that to the maximum extent practicable 8(a) construction contracts must be awarded within the county or State where the work is to be performed. Commenters believed that strict state line boundaries may not be appropriate where a given area is routinely served by more than one state. A commenter recommended that SBA use Metropolitan Statistical Areas (MSAs) to better define the area within which a business should be located in order to be deemed to have a bona fide place of business in the area. The Office of Management and Budget has defined an MSA as ''A Core Based Statistical Area associated with at least one urbanized area that has a population of at least 50,000. The MSA comprises the central county or counties containing the core, plus adjacent outlying counties having a high degree of social and economic integration with the central county or counties as measured through commuting.'' 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas, 75 FR 37246–37252 (June 28, 2010). The commenter noted that metropolitan areas frequently do not fit within one state and believed that a state does not always represent a single geography or economy. As an example, the commenter pointed to the Philadelphia, Pennsylvania MSA, which includes counties in four states, Delaware, Maryland, New Jersey and Pennsylvania. This MSA represents one regional economy, but is serviced by four different SBA District Offices: Baltimore, Philadelphia, Delaware and New Jersey. SBA believes that such an expansion makes sense in today's complex business environment. However, the use of MSAs will mostly impact the more densely populated coasts of the country, and not necessarily more rural or less populated areas. SBA believes the same rationale could be used in those areas, but instead use contiguous counties. A Participant located on the other side of a state border may be closer to the construction site than a Participant located in the same state as the construction site. It does not make sense to exclude a Participant immediately across the border from where construction work is to be done merely because that Participant is serviced by a different SBA district office, but to allow another Participant that may be located on the other side of the state where construction work is to be done (and be hundreds of miles further away from the construction site than the Participant in the other state) to be eligible because it is serviced by the correct SBA district office. As such this final rule defines bona fide place of business to be the geographic area serviced by the SBA district office, a MSA, or a contiguous county to (whether in the same or different state) where the work will be performed.

Section 124.503

The proposed rule amended § 124.503(e) to clarify SBA's current policy regarding what happens if after SBA accepts a sole source requirement on behalf of a particular Participant the procuring agency determines, prior to award, that the Participant cannot do the work or the parties cannot agree on price. In such a case, SBA allows the agency to substitute one 8(a) Participant for another if it believes another Participant could fulfill its needs. If the procuring agency and SBA agree that another Participant cannot fulfill its needs, the procuring agency may withdraw the original offering letter and fulfill its needs outside the 8(a) BD program. This change to the regulatory text was merely an attempt to codify existing procedures to make the process more transparent. No one objected to this provision, and SBA adopts it as final in this rule.

Currently, § 124.503(g) provides that a Basic Ordering Agreement (BOA) is not a contract under the Federal Acquisition Regulation (FAR). Rather, each order to be issued under the BOA is an individual contract. As such, a procuring activity must offer, and SBA must accept, each task order under a BOA in addition to offering and accepting the BOA itself. Once a Participant leaves the 8(a) BD program or otherwise becomes ineligible for future 8(a) contracts (*e.g.,* becomes other than small under the size standard assigned to a particular contract) it cannot receive further 8(a) orders under a BOA. Similarly, a blanket purchase agreement (BPA) is also not a contract. A BPA under FAR part 13 is not a contract because it neither obligates funds nor requires placement of any orders against it. Instead, it is an understanding between an ordering agency and a contractor that allows the agency to place future orders more quickly by identifying terms and conditions applying to those orders, a description of the supplies or services to be provided, and methods for issuing and pricing each order. The government is not obligated to place any orders, and either party may cancel a BPA at any time.

Although current § 124.503(g) addresses BOAs, it does not specifically mention BPAs. This rule amends § 124.503 to merely specifically recognize that BPAs are also not contracts and should be afforded the same treatment as BOAs.

Section 124.504

SBA proposed several changes to § 124.504.

The proposed rule amended § 124.504(b) to alter the provision prohibiting SBA from accepting a requirement into the 8(a) BD program where a procuring activity competed a requirement among 8(a) Participants prior to offering the requirement to SBA and receiving SBA's formal acceptance of the requirement. SBA believes that the restriction as written is overly harsh and burdensome to procuring agencies. Several contracting officers have not offered a follow-on procurement to the 8(a) program prior to conducting a competition restricted to eligible 8(a) Participants because they believed that because a follow-on requirement must be procured through the 8(a) program, such offer and SBA's acceptance were not required. They issued solicitations identifying them as competitive 8(a) procurements, selected an apparent successful offeror and then sought SBA's eligibility determination prior to making an award. A strict interpretation of the current regulatory language would prohibit SBA from accepting such a requirement. Such an interpretation could adversely affect an agency's procurement strategy in a significant way by unduly delaying the award of a contract. That was never SBA's intent. As long as a procuring agency clearly identified a requirement as a competitive 8(a) procurement and the public fully understood it to be restricted only to eligible 8(a) Participants, SBA should be able to accept that requirement regardless of when the offering occurred. Commenters supported this change as a logical remedy to an unintended consequence, and SBA adopts it as final in this rule.

The proposed rule clarified SBA's intent regarding the requirement that a procuring agency must seek and obtain SBA's concurrence to release any follow-on procurement from the 8(a) BD program. This is not a change in policy, but rather a clarification of SBA's current policy and the position SBA has taken in several protests before the Government Accountability Office. Some agencies have attempted to remove a follow-on procurement from

the incumbent 8(a) contractor and re-procure the requirement through a different contract vehicle (a MAC or Government-wide Acquisition Contract (GWAC) that is not an 8(a) contract) without seeking release by saying that they intend to issue a competitive 8(a) order off the other contract vehicle. In other words, because the order under a MAC or GWAC would be offered to and accepted for award through the 8(a) BD program and the follow-on work would be performed through the 8(a) BD program, some procuring agencies believe that release is not needed. SBA does not agree. In such a case, the underlying contract is not an 8(a) contract. The procuring agency may be attempting to remove a requirement from the 8(a) program to a contract that is not an 8(a) contract. That is precisely what release is intended to apply to. Moreover, because § 124.504(d)(4) provides that the requirement to seek release of an 8(a) requirement from SBA does not apply to orders offered to and accepted for the 8(a) program where the underlying MAC or GWAC is not itself an 8(a) contract, allowing a procuring agency to move an 8(a) contract to an 8(a) order under a non-8(a) contract vehicle would allow the procuring agency to then remove the next follow-on to the 8(a) order out of the 8(a) program entirely without any input from SBA. A procuring agency could take an 8(a) contract with a base year and four one-year option periods, turn it into a one-year 8(a) order under a non-8(a) contract vehicle, and then remove it from the 8(a) program entirely after that one-year performance period. That was certainly not the intent of SBA's regulations.

SBA has received additional comments recommending that release should also apply even if the underlying pre-existing MAC or GWAC to which a procuring agency seeks to move a follow-on requirement is itself an 8(a) contract. These commenters argue that an 8(a) incumbent contractor may be seriously hurt by moving a procurement from a general 8(a) competitive procurement to an 8(a) MAC or GWAC to which the incumbent is not a contract holder. In such a case, the incumbent would have no opportunity to win the award for the follow-on contract, and, would have no opportunity to demonstrate that it would be adversely impacted or to try to dissuade SBA from agreeing to release the procurement. Commenters believe that this directly contradicts the business development purposes of the 8(a) BD program. In response, the rule provides that a procuring activity must notify SBA where it seeks to re-procure a follow-on requirement through a limited contracting vehicle which is not available to all 8(a) BD Program Participants (*e.g.,* any multiple award or Governmentwide acquisition contract, whether or not the underlying MAC or GWAC is itself an 8(a) contract). If an agency seeks to re-procure a current 8(a) requirement as a competitive 8(a) award for a new 8(a) MAC or GWAC vehicle, SBA's concurrence will not be required because such a competition would be available to all 8(a) BD Program Participants.

The proposed rule also clarified that in all cases where a procuring agency seeks to fulfill a follow-on requirement outside of the 8(a) BD program, except where it is statutorily or otherwise required to use a mandatory source (*see* FAR subpart 8.6 and 8.7), it must make a written request to and receive the concurrence of SBA to do so. In such a case, the proposed rule would require a procuring agency to notify SBA that it will take a follow-on procurement out of the 8(a) procurement because of a mandatory source. Such notification would be required at least 30 days before the end of the contract period to give the 8(a) Participant the opportunity to make alternative plans.

In addition, SBA does not typically consider the value of a bridge contract when determining whether an offered procurement is a new requirement. A bridge contract is meant to be a temporary stop-gap measure intended to ensure the continuation of service while an agency finalizes a long-term procurement approach. As such, SBA does not typically consider a bridge contract as part of the new requirement analysis, unless there is some basis to believe that the agency is altering the duration of the option periods to avoid particular regulatory requirements. Whether to consider the bridge contract is determined on a case-by-case basis given the facts of the procurement at issue. SBA sought comments as to whether this long-standing policy should also be incorporated into the regulations. Although SBA did not receive many comments on this issue, those who did comment believed it made sense to clarify this in the regulatory text. This final rule does so.

Section 124.505

As noted above, SBA received a significant number of comments recommending more transparency in the process by which procuring agencies seek to remove follow-on requirements from the 8(a) BD program. In particular, commenters believed SBA should be able to question whether a requirement is new or a follow-on to a previously awarded contract. In response, the final rule adds language to § 124.505(a) authorizing SBA to appeal a decision by a contracting officer that a particular procurement is a new requirement that is not subject to the release requirements set forth in § 124.504(d).

Section 124.509

The proposed rule revised § 124.509(e), regarding how a Participant can obtain a waiver to the requirement prohibiting it from receiving further sole source 8(a) contracts where the Participant does not meet its applicable non-8(a) business activity target. Currently, the regulations require the AA/BD to process a Participant's request for a waiver in every case. The proposed rule substituted SBA for the AA/BD to allow flexibility to SBA to determine the level of processing in a standard operating procedure outside the regulations. SBA believes that at least at some level, the district office should be able to process such requests for waiver.

The current regulation also requires the SBA Administrator on a non-delegable basis to decide requests for waiver from a procuring agency. In other words, if the Participant itself does not request a waiver to the requirement prohibiting it from receiving further sole source 8(a) contracts, but an agency does so because it believes that the award of a sole source contract to the identified Participant is needed to achieve significant interests of the Government, the SBA Administrator must currently make that determination. Requiring such a request to be processed by several levels of SBA reviewers and then by the Administrator slows down the processing. If a procuring agency truly needs something quickly, it could be harmed by the processing time. The proposed rule changed the Administrator from making these determinations to SBA. Commenters believed that waiver requests should be processed at the district office level, as adding additional layers of review significantly delays the processing time, which harms both the Participant and the procuring agency and causes additional work for SBA. SBA has adopted these changes as final in this rule. This should allow these requests to be processed more quickly.

SBA also received a few comments regarding the business activity targets contained in § 124.509. Commenters supported the proposed revisions that changed requiring Participants to make ''maximum efforts'' to obtain business outside the 8(a) BD program, and

''substantial and sustained efforts'' to attain the targeted dollar levels of non-8(a) revenue, to requiring them to make good faith efforts. These commenters also felt that the non-8(a) business activity target percentages for firms in the transitional stage of program participation are too high. The commenters noted that the Small Business Act did not require any specific percentages of non-8(a) work and believed that SBA was free to adjust them in order to promote the business development purposes of the program. They also believed that the current rules rigidly apply sole source restrictions without taking into account extenuating circumstances such as a reduction in government funding, continuing resolutions and budget uncertainties, increased competition driving prices down, and having prime contractors award less work to small business subcontractors than originally contemplated. They recommended that the sole source restrictions should be discretionary, depending upon circumstances and efforts made by the Participant to obtain non-8(a) revenues. SBA first notes that although the Small Business Act itself does not establish specific non-8(a) business activity targets, the conference report to the Business Opportunity Development Reform Act of 1988, Public Law 100–656, which established the competitive business mix requirement, did recommend certain non-8(a) business activity targets. That report noted that Congress intended that the non-8(a) business activity targets should generally require about 25 percent of revenues from sources other than 8(a) contracts in the fifth and sixth years of program participation and about 50 percent in the seventh and eighth years of program participation. H. Rep. No. 100–1070, at 63 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5485, 5497. In response to the comments, this rule slightly adjusts the non-8(a) business activity targets to be more in line with the Congressional intent. In addition, SBA believes that the strict application of sole source restrictions may be inappropriate in certain extenuating circumstances. That same conference report provides that SBA ''should consider a full range of options to encourage firms to achieve the competitive business targets,'' and that these options might ''include conditioning the award of future sole-source contracts or business development assistance on the firm's taking specified steps, such as changes in marketing or financing strategies.'' *Id.* In addition, the conference report provides that SBA should take appropriate remedial actions, ''including reductions in sole-source contracting,'' to ensure that firms complete the program with optimum prospects for success in a competitive business environment. *Id.* Thus, Congress intended SBA to place conditions on firms to allow then to continue to receive one or more future 8(a) contracts and that sole source ''reductions'' should be an alternative. It appears that a strict ban on receiving any future 8(a) contracts is not appropriate in all instances. SBA believes that may make sense as a remedial measure if a particular Participant has made no efforts to seek non-8(a) awards, but it should not automatically occur if a firm fails to meet its applicable non-8(a) business activity target. The final rule recognizes that a strict prohibition on a Participant receiving new sole source 8(a) contracts should be imposed only where the Participant has not made good faith efforts to meet its applicable non-8(a) business activity target. Where a Participant has not met its applicable non-8(a) business activity target, however, SBA will condition the eligibility for new sole source 8(a) contracts on the Participant taking one or more specific actions, which may include obtaining business development assistance from an SBA resource partner such as a Small Business Development Center. The final rule also rearranges several current provisions for ease of use.

Section 124.513

Currently, § 124.513(e) provides that SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture. This requirement applies to both competitive and sole source 8(a) procurements. SBA does not approve joint venture agreements in any other context, including a joint venture between an 8(a) Participant and its SBA-approved mentor (which may be other than small) in connection with a non-8(a) contract (*i.e.,* small business set-aside, HUBZone, SDVO small business, or WOSB contract). In order to be considered an award to a small disadvantaged business (SDB) for a non-8(a) contract, a joint venture between an 8(a) Participant and a non-8(a) Participant must be controlled by the 8(a) partner to the joint venture and otherwise meet the provisions of § 124.513(c) and (d). If the non-8(a) partner to the joint venture is also a small business under the size standard corresponding to the NAICS code assigned to the procurement, the joint venture could qualify as small if the provisions of § 124.513(c) and (d) were not met (*see* § 121.103(h)(3)(i), where a joint venture can qualify as small as long as each party to the joint venture individually qualifies as small), but the joint venture could not qualify as an award to an SDB in such case. If the joint venture were between an 8(a) Participant and its large business mentor, the joint venture could not qualify as small if the provisions of § 124.513(c) and (d) were not met. The size of a joint venture between a small business protégé and its large business mentor is determined without looking at the size of the mentor only when the joint venture complies with SBA's regulations regarding control of the joint venture. Where another offeror believes that a joint venture between a protégé and its large business mentor has not complied with the applicable control regulations, it may protest the size of the joint venture. The applicable Area Office of SBA's Office of Government Contracting would then look at the joint venture agreement to determine if the small business is in control of the joint venture within the meaning of SBA's regulations. If that Office determines that the applicable regulations were not followed, the joint venture would lose its exclusion from affiliation, be found to be other than small, and, thus, ineligible for an award as a small business. This size protest process has worked well in ensuring that small business joint venture partners do in fact control non-8(a) contracts with their large business mentors. Because size protests are authorized for competitive 8(a) contracts, SBA believes that the size protest process could work similarly for competitive 8(a) contracts. As such, the proposed rule eliminated the need for 8(a) Participants to seek and receive approval from SBA of every initial joint venture agreement and each addendum to a joint venture agreement for competitive 8(a) contracts. Commenters supported this change, noting that this will eliminate an unnecessary burden and noting that this will also eliminate the significant expense firms often incur during the SBA approval process. SBA believes that this will significantly lessen the burden imposed on 8(a) small business Participants. Participants will not be required to submit additional paperwork to SBA and will not have to wait for SBA approval in order to seek competitive 8(a) awards. This rule finalizes that change.

Section 124.515

The proposed rule amended § 124.515 regarding the granting of a waiver to the statutorily mandated termination for

convenience requirement where the ownership or control of an 8(a) Participant performing an 8(a) contract changes. The statute and regulations allow the ownership and control of an 8(a) Participant performing one or more 8(a) contracts to pass to another 8(a) Participant that would otherwise be eligible to receive the 8(a) contracts directly. Specifically, the proposed rule amended § 124.515(d) to provide that SBA determines the eligibility of an acquiring Participant by referring to the items identified in § 124.501(g) and deciding whether at the time of the request for waiver (and prior to the transaction) the acquiring Participant is an eligible concern with respect to each contract for which a waiver is sought. As part of the waiver request, the acquiring concern must certify that it is a small business for the size standard corresponding to the NAICS code assigned to each contract for which a waiver is sought. SBA will not grant a waiver for any contract if the work to be performed under the contract is not similar to the type of work previously performed by the acquiring concern. A few commenters objected to this last provision in the context of an entity-owned firm seeking to acquire an 8(a) Participant currently performing one or more 8(a) contracts. These commenters believed that this provision should not apply to entity-owned Participants because prior performance in a specific industry is not required for entity-owned firms seeking to enter the program. SBA disagrees. Those are two entirely separate requirements. In the case of program entry, SBA allows an entity-owned applicant to be eligible for the program where the entity (tribe, ANC, NHO or CDC) demonstrates a firm commitment to back the applicant concern. In other words, SBA will waive the general potential for success provision requiring an applicant to have at least two years of business in its primary NAICS code where the entity represents that it will support the applicant concern. In such case, SBA is assured that the applicant concern will be able to survive despite having little or no experience in its designated primary NAICS code. The termination for convenience and waiver provisions are statutory and serve an entirely different purpose. The general rule is that an 8(a) contract must be performed by the 8(a) Participant to which that contract was initially awarded. Where the ownership or control of the Participant awarded an 8(a) contract changes, the statute requires a procuring agency to terminate that contract unless the SBA Administrator grants a waiver based on one of five statutory reasons. One of those reasons is where the ownership and control of an 8(a) Participant will pass to another otherwise eligible 8(a) Participant. The proposed rule merely clarifies SBA's current policy that in order to be an ''eligible'' Participant, the acquiring firm must be responsible to perform the contract, and responsibility is determined prior to the transfer, just as responsibility is determined prior to the award of any contract. This has nothing to do with the entity-owned firm's potential for success in the program, but, rather, whether that firm would be deemed a responsible contractor and whether a procuring agency contracting officer would find the firm capable of performing the work required under the contract before any change of ownership or control occurs. Because SBA believes that this responsibility issue is relevant of all Participants acquiring another Participant that has been awarded one or more 8(a) contracts, the final rule adopts the language as proposed.

Section 124.518

The final rule clarifies when one 8(a) Participant can be substituted for another in order to complete performance of an 8(a) contract without receiving a waiver to the termination for convenience requirement set forth in of § 124.515. Specifically, the rule provides that SBA may authorize another Participant to complete performance of an 8(a) contract and, in conjunction with the procuring activity, permit novation of the contract where a procuring activity contracting officer demonstrates to SBA that the Participant that was awarded an 8(a) contract is unable to complete performance, where an 8(a) contract will otherwise be terminated for default, or where SBA determines that substitution would serve the business development needs of both 8(a) Participants.

Section 124.519

Section 124.519 limits the ability of 8(a) Participants to obtain additional sole source 8(a) contracts once they have reached a certain dollar level of overall 8(a) contracts. Currently, for a firm having a receipts-based size standard corresponding to its primary NAICS code, the limit above which a Participant can no longer receive sole source 8(a) contracts is five times the size standard corresponding to its primary NAICS code, or $100,000,000, whichever is less. For a firm having an employee-based size standard corresponding to its primary NAICS code, the limit is $100,000,000. In order to simplify this requirement, this proposed rule provided that a Participant may not receive sole source 8(a) contract awards where it has received a combined total of competitive and sole source 8(a) contracts in excess of $100,000,000 during its participation in the 8(a) BD program, regardless of its primary NAICS code. In addition, the proposed rule clarified that in determining whether a Participant has reached the $100 million limit, SBA would consider only the 8(a) revenues a Participant has actually received, not projected 8(a) revenues that a Participant might receive through an indefinite delivery or indefinite quantity contract, a multiple award contract, or options or modifications. Finally, the proposed rule amended what types of small dollar value 8(a) contracts should not be considered in determining whether a Participant has reached the 8(a) revenue limit. Currently, SBA does not consider 8(a) contracts awarded under $100,000 in determining whether a Participant has reached the applicable 8(a) revenue limit. The proposed rule replaced the $100,000 amount with a reference to the Simplified Acquisition Threshold (SAT). SBA has delegated to procuring agencies the ability to award sole source 8(a) contracts without offer and acceptance for contracts valued at or below the SAT. Because SBA does not accept such procurements into the 8(a) BD program, it is difficult for SBA to monitor these awards. The proposed rule merely aligned the 8(a) revenue limit with that authority. Commenters generally supported each of these changes. SBA adopts them as final in this rule.

Section 125.2

The proposed rule added a new paragraph (g) requiring contracting officers to consider the capabilities and past performance of first tier subcontractors in certain instances. This consideration is statutorily required for bundled or consolidated contracts (15 U.S.C. 644(e)(4)(B)(i)) and for multiple award contracts valued above the substantial bundling threshold of the Federal agency (15 U.S.C. 644(q)(1)(B)). Following the statutory provisions, the proposed rule required a contracting officer to consider the past performance and experience of first tier subcontractors in those two categories of contracts. The proposed rule did not require a contracting officer to consider the past performance, capabilities and experience of each first tier subcontractor as the capabilities and past performance of the small business prime contractor in other instances. Instead, it provided discretion to

contracting officers to consider such past performance, capabilities and experience of each first tier subcontractor where appropriate. SBA specifically requested comments as to whether as a policy matter such consideration should be required in all cases, or limited only to the statutorily required instances as proposed. The comments overwhelmingly supported the same treatment for all contracts. Most commenters believed that there was a valid policy reason to consider the capabilities and past performance of first tier subcontractors in every case since it is clear that those identified subcontractors will be responsible for some performance of the contract should the corresponding prime contractor be awarded the contract. Some commenters believed that small businesses may have the necessary capabilities, past performance and experience to perform smaller, non-bundled contracts on their own. Therefore, these commenters felt that it may not be necessary for an agency to consider the capabilities and past performance of first tier subcontractors in all cases. SBA believes that first tier subcontractors should be considered if the capabilities and past performance of the small business prime contractor does not demonstrate capabilities and past performance for award. As such this final rule adds language requiring a procuring agency to consider the capabilities and past performance of first tier subcontractors where the first-tier subcontractors are specifically identified in the proposal and the capabilities and past performance of the small business prime do not independently demonstrate capabilities and past performance necessary for award.

Section 125.3

The Small Business Act explicitly prohibits the Government from requiring small businesses to submit subcontracting plans. 15 U.S.C. 637(d)(8). This prohibition is set forth in § 125.3(b) of SBA's regulations and in FAR 19.702(b)(1). Under the Alaska Native Claims Settlement Act (ANCSA), a contractor receives credit towards the satisfaction of its small or small disadvantaged business subcontracting goals when contracting with an ANC-owned firm. 43 U.S.C. 1626(e)(4)(B). There has been some confusion as to whether an ANC-owned firm that does not individually qualify as small but counts as a small business or a small disadvantaged business for subcontracting goaling purposes under 43 U.S.C. 1626(e)(4)(B) must itself submit a subcontracting plan. SBA believes that such a firm is not currently required to submit a subcontracting plan, but proposed to add clarifying language to § 125.3(b) to clear up any confusion. The proposed rule clarified that all firms considered to be small businesses, whether the firm qualifies as a small business concern for the size standard corresponding to the NAICS code assigned to the contract or is deemed to be treated as a small business concern by statute, are not be required to submit subcontracting plans. Commenters supported this provision and this rule adopts it as final.

The final rule also fixes typographical errors contained in paragraphs 125.3(c)(1)(viii) and 125.3(c)(1)(ix).

Section 125.5

The proposed rule clarified that SBA does not use the certificate of competency (COC) procedures for 8(a) sole source contracts. This has long been SBA's policy. *See* 62 FR 43584, 43592 (Aug. 14, 1997). Instead of using SBA COC procedures, an agency that finds a potential 8(a) sole source awardee to be non-responsible should proceed through the substitution or withdrawal procedures in the proposed § 124.503(e). SBA did not receive any comments on this provision and adopts it as final in this rule.

Section 125.6

The final rule first fixes a typographical error contained in the introductory text of § 125.6(a). It also amends § 125.6(b). Section 125.6(b) provides guidance on which limitation on subcontracting requirement applies to a ''mixed contract.'' The section currently refers to a mixed contract as one that combines both services and supplies. SBA inadvertently did not include the possibility that a mixed contract could include construction work, although in practice SBA has applied this section to a contract requiring, for example, both services and construction work. The proposed rule merely recognized that a mixed contract is one that integrates any combination of services, supplies, or construction. A contracting officer would then select the appropriate NAICS code, and that NAICS code is determinative as to which limitation on subcontracting and performance requirement applies. SBQ did not receive any comments on this change, and adopts it as final in this rule.

SBA also asked for comments in the proposed rule regarding how the nonmanufacturer rule should be applied in multiple item procurements (reference § 125.6(a)(2)(ii)). Currently, for a multiple item procurement where a nonmanufacturer waiver is granted for one or more items, compliance with the limitation on subcontracting requirement will not consider the value of items subject to a waiver. As such, more than 50 percent of the value of the products to be supplied by the nonmanufacturer that are not subject to a waiver must be the products of one or more domestic small business manufacturers or processors. The regulation gives an example where a contract is for $1,000,000 and calls for the acquisition of 10 items. Market research shows that nine of the items can be sourced from small business manufacturers and one item is subject to an SBA class waiver. The projected value of the item that is waived is $10,000. Under the current regulatory language, at least 50 percent of the value of the items not subject to a waiver, or $495,000 (50 percent of $990,000), must be supplied by one or more domestic small business manufacturers, and the prime small business nonmanufacturer may act as a manufacturer for one or more items. Several small business nonmanufacturers have disagreed with this provision. They believe that in order to qualify as a small business nonmanufacturer, at least 50 percent of the value of the contract must come from either small business manufacturers or from any businesses for items which have been granted a waiver (or that small business manufacturers plus waiver must equal at least 50 percent). In other words, in the above example, $500,000 (50 percent of the value of the contract) must come from small business manufacturers or be subject to a waiver. If items totaling $10,000 are subject to a waiver, then only $490,000 worth of items must come from small business manufacturers, thus requiring $5,000 less from small business manufacturers. The proposed rule asked for comments on whether this approach makes sense. Several commenters supported the change outlined in the proposed rule, believing that implementation of the change will provide less confusion to both small businesses and procuring agencies as the math is easier to understand. One commenter believed that was how the nonmanufacturer rule was already being applied in multiple item procurements, was concerned others too may have misinterpreted the rule, and, thus, supported the change. The final rule provides that a procurement should be set aside where at least 50 percent of the value of the contract comes from either small business manufacturers or from any business where a nonmanufacturer rule

waiver has been granted (or, in other words, a set aside should occur where small plus waiver equals at least 50 percent).

Section 125.8

The proposed rule made conforming changes to § 125.8 in order to take into account merging the 8(a) BD Mentor-Protégé Program with the All Small Mentor-Protégé Program. The comments supported these changes, and those changes are finalized in this rule.

Proposed § 125.8(b)(2)(iv) permitted the parties to a joint venture to agree to distribute profits from the joint venture so that the small business participant(s) receive profits from the joint venture that exceed the percentage commensurate with the work performed by them. Although several commenters questioned whether mentors would be willing to agree to distribute profits in such a manner, most commenters supported this proposed change. As such, SBA adopts it as final in this rule.

In response to the proposed rule, SBA also received comments seeking clarification of certain other requirements applicable to joint ventures. First, commenters sought guidance regarding the performance of work or limitation on subcontracting requirements in § 125.8(c). Specifically, commenters questioned whether the same rules as those set forth in § 125.6 apply to the calculation of work performed by a protégé in a joint venture and whether the 40 percent performance requirement for a protégé firm could be met through performance of work by a similarly situated subcontractor. SBA has always intended that the same rules as those set forth in § 125.6 should generally apply to the calculation of a protégé firm's workshare in the context of a joint venture. This means that the rules concerning supplies, construction and mixed contracts apply to the joint venture situation and certain costs are excluded from the limitation on subcontracting calculation. For instance, the cost of materials would first be excluded in a contract for supplies or products before determining whether the joint venture is not subcontracting more than 50 percent of the amount paid by the Government. However, SBA has never intended that a protégé firm could subcontract its 40 percent performance requirement to a similarly situated entity. In other words, SBA has always believed that the protégé itself must perform at least 40 percent of the work to be performed by a joint venture between the protégé firm and its mentor, and that it cannot subcontract such work to a similarly situated entity. The only reason that a large business mentor is able to participate in a joint venture with its protégé for a small business contract is to promote the business development of the protégé firm. Where a protégé firm would subcontract some or all of its requirement to perform at least 40 percent of the work to be done by the joint venture to a similarly situated entity, SBA does not believe that this purpose would be met. The large business mentor is authorized to participate in a joint venture as a small business only because its protégé is receiving valuable business development assistance through the performance of at least 40 percent of the work performed by the joint venture. Thus, although a similarly situated firm can be used to meet the 50 percent performance requirement, it cannot be used to meet the 40 percent performance requirement for the protégé itself. For example, if a joint venture between a protégé firm and its mentor were awarded a $10 million services contract and a similarly situated entity were to perform $2 million of the required services, the joint venture would be required to perform $3 million of the services (*i.e.,* to get to a total of $5 million or 50 percent of the value of the contract between the joint venture and the similarly situated entity). If the joint venture were to perform $3 million of the services, the protégé firm, and only the protégé firm, must perform at least 40 percent of $3 million or $1.2 million. The final rule clarifies that rules set forth in § 125.6 generally apply to joint ventures and that a protégé cannot meet the 40 percent performance requirement by subcontracting to one or more similar situated entities.

Comments also requested further guidance on the requirement in § 125.8(b)(2)(ii) that a joint venture must designate an employee of the small business managing venture as the project manager responsible for performance of the contract. These commenters pointed out that many contracts do not have a position labeled ''project manager,'' but instead have a position named ''program manager,'' ''program director,'' or some other term to designate the individual responsible for performance. SBA agrees that the title of the individual is not the important determination, but rather the responsibilities. The provision seeks to require that the individual responsible for performance must come from the small business managing venture, and this rule makes that clarification. For consistency purposes, SBA has made these same changes to § 124.513(c) for 8(a) joint ventures, to § 125.18(b)(2) for SDVO small business joint ventures, to § 126.616(c) for HUBZone joint ventures, and to § 127.506(c) for WOSB joint ventures.

Several commenters sought additional clarification to the rules pertaining to joint ventures for the various small business programs. Specifically, these commenters believed that the rules applicable to small business set-asides in § 125.8(a) were not exactly the same as those set forth in §§ 125.18(b)(1)(i) (for SDVO joint ventures), 126.616(b)(1) (for WOSB joint ventures) and 127.506(a)(1) (for HUBZone joint ventures), and that a mentor-protégé joint venture might not be able to seek the same type of contract, subcontract or sale in one program as it can in another. In response, SBA has added language to § 125.9(d)(1) to make clear that a joint venture between a protégé and mentor may seek a Federal prime contract, subcontract or sale as a small business, HUBZone small business, SDB, SDVO small business, or WOSB provided the protégé individually qualifies as such.

One commenter recommended a change to proposed § 125.8(e) regarding the past performance and experience of joint venture partners. The proposed rule provided that when evaluating the past performance and experience of a joint venture submitting an offer for a contract set aside or reserved for small business, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. The commenter agreed with that provision, but recommended that it be further refined to prohibit a procuring activity from requiring the protégé to individually meet any evaluation or responsibility criteria. SBA understands the concern that some procuring activities have required unreasonable requirements of protégé small business partners to mentor-protégé joint ventures. SBA's rules require a small business protégé to have some experience in the type of work to be performed under the contract. However, it is unreasonable to require the protégé concern itself to have the same level of past performance and experience (either in dollar value or number of previous contracts performed, years of performance, or otherwise) as its large business mentor. The reason that any small business joint ventures with another business entity, whether a mentor-protégé joint venture or a joint venture with another small business concern, is because it cannot meet all performance requirements by itself and seeks to gain experience through the help of its joint venture partner. SBA

believes that a solicitation provision that requires both a protégé firm and a mentor to each have the same level of past performance (*e.g.,* each partner to have individually previously performed 5 contracts of at least $10 million) is unreasonable, and should not be permitted. However, SBA disagrees that a procuring activity should not be able to require a protégé firm to individually meet any evaluation or responsibility criteria. SBA intends that the protégé firm gain valuable business development assistance through the joint venture relationship. The protégé must, however, bring something to the table other than its size or socio-economic status. The joint venture should be a tool to enable it to win and perform a contract in an area that it has some experience but that it could not have won on its own.

Section 125.9

This final rule first reorganizes some of the current provisions in § 125.9 for ease of use and understanding. The rule reorganizes and clarifies § 125.9(b). It clarifies that in order to qualify as a mentor, SBA will look at three things, whether the proposed mentor: Is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement; does not appear on the Federal list of debarred or suspended contractors; and can impart value to a protégé firm. Instead of requiring SBA to look at and determine that a proposed mentor possesses good character in every case, the rule amends this provision to specify that SBA will decline an application if SBA determines that the mentor does not possess good character. The rule also clarifies that a mentor that has more than one protégé cannot submit competing offers in response to a solicitation for a specific procurement through separate joint ventures with different protégés. That has always been SBA's intent (the current rule specifies that a second mentor-protégé relationship cannot be a competitor of the first), but SBA wants to make this clear in response to questions SBA has received regarding this issue. Commenters generally supported these clarifications. One commenter asked SBA to clarify the provision prohibiting a mentor that has more than one protégé from submitting competing offers in response to a solicitation for a specific procurement. Specifically, the commenter noted that many multiple award procurements have separate pools of potential awardees. For example, an agency may have a single solicitation that calls for awarding indefinite delivery indefinite quantity (IDIQ) contracts in unrestricted, small business, HUBZone, 8(a), WOSB, and SDVO small business pools. All offerors submit proposals in response to the same solicitation and indicate the pool(s) for which they are competing. The commenter sought clarification as to whether a mentor with two different protégés could submit an offer as a joint venture with one protégé for one pool and another offer as a joint venture with a second protégé for a different pool. SBA first notes that in order for SBA to approve a second mentor-protégé relationship for a specific mentor, the mentor must demonstrate that the additional mentor-protégé relationship will not adversely affect the development of either protégé firm. In particular, the mentor must show that the second protégé will not be a competitor of the first protégé. Thus, the mentor has already assured SBA that the two protégés would not be competitors. If the two mentor-protégé relationships were approved in the same NAICS code, then the mentor must have already made a commitment that the two firms would not compete against each other. This could include, for example, a commitment that the one mentor-protégé relationship would seek only HUBZone and small business set-aside contracts while the second would seek only 8(a) contracts. That being the case, the same mentor could submit an offer as a joint venture with one protégé for one pool and another offer as a joint venture with a second protégé for a different pool on the same solicitation because they would not be deemed competitors with respect to that procurement. SBA does not believe, however, that a change is needed from the proposed regulatory text since that is merely an interpretation of what ''competing offers'' means. SBA adopts the proposed language as final in this rule.

The proposed rule also sought comments as to whether SBA should limit mentors only to those firms having average annual revenues of less than $100 million. Currently, any concern that demonstrates a commitment and the ability to assist small business concerns may act as a mentor. This includes large businesses of any size. This proposal was in response to suggestions from ''mid-size'' companies (*i.e.,* those that no longer qualify as small under their primary NAICS codes, but believe that they cannot adequately compete against the much larger companies) that a mentor-protégé program that excluded very large businesses would be beneficial to the mid-size firms and allow them to more effectively compete. This was the single most commented-on issue in the proposed rule. SBA received more than 150 comments in response to this alternative. The vast majority of commenters strongly opposed this proposal. Commenters agreed with SBA's stated intent that the focus of the mentor-protégé program should be on the protégé firm, and how best valuable business development assistance can be provided to a protégé to enable that firm to more effectively compete on its own in the future. They believed that such a restriction would harm small businesses, as it would restrict the universe of potential mentors which could provide valuable business assistance to them. Commenters believed that the size of the mentor should not matter as long as that entity is providing needed business development assistance to its protégé. Commenters believed that SBA's priority should be to ensure that needed business development assistance will be provided to protégé firms though a mentor-protégé agreement, and the size of the mentor should not be a relevant consideration. All that should matter is whether the proposed mentor demonstrates a commitment and the ability to assist small business concerns. Several commenters believed that larger business entities actually serve as better mentors since they are involved in the program to help the protégé firm and not to gain further access to small business contracting (through joint ventures) for themselves. In response, SBA will not adopt the proposal, but rather will continue to allow any business entity, regardless of size, that demonstrates a commitment and the ability to assist small business concerns to act as a mentor.

This rule also implements Section 861 of the National Defense Authorization Act (NDAA) of 2019, Public Law 115–232, to make three changes to the mentor-protégé program in order to benefit Puerto Rican small businesses. First, the rule amends § 125.9(b) regarding the number of protégé firms that one mentor can have at any one time. Currently, the regulation provides that under no circumstances can a mentor have more than three protégés at one time. Section 861 of the NDAA provides that the restriction on the number of protégé firms a mentor can have shall not apply to up to two mentor-protege relationships if such relationships are with a small business that has its principal office located in the Commonwealth of Puerto Rico. As such, § 125.9(b)(3)(ii) provides that a

mentor generally cannot have more than three protégés at one time, but that the first two mentor-protégé relationships between a specific mentor and a small business that has its principal office located in the Commonwealth of Puerto Rico will not count against the limit of three protégés that a mentor can have at one time. Thus, if a mentor did have two protégés that had their principal offices in Puerto Rico, it could have an additional three protégés, or a total of five protégés, and comply with SBA's requirements. The rule also adds a new § 125.9(d)(6) to implement a provision of Section 861 of NDAA 2019, which authorizes contracting incentives to mentors that subcontract to protégé firms that are Puerto Rico businesses. Specifically, § 125.9(d)(6) provides that a mentor that provides a subcontract to a protégé that has its principal office located in Puerto Rico may (i) receive positive consideration for the mentor's past performance evaluation, and (ii) apply costs incurred for providing training to such protégé toward the subcontracting goals contained in the subcontracting plan of the mentor. Commenters supported these provisions, and SBA adopts them as final in this rule. A few commenters asked for clarification as to whether these provisions applied to entity-owned firms located in Puerto Rico. The statute and proposed regulatory text notes that it applies to any business concern that has its principal office in Puerto Rico. If a tribally-owned or ANC-owned firm has its principal office in Puerto Rico, then the provision applies to it. SBA does not believe further clarification is needed. The principal office requirement should be sufficient. One commenter also questioned the provision in the proposed rule allowing mentor training costs to count toward a mentor's small subcontracting goals, believing that training costs should never be allowed as subcontracting costs. That is not something SBA proposed on its own. That provision was specifically authorized by Section 861 of NDAA 2019. As such, that provision is unchanged in this final rule.

A few commenters also recommended that SBA allow a mentor to have more than three protégés at a time generally (*i.e.,* not only where small businesses in Puerto Rico are involved). These commenters noted that very large business concerns operate under multiple NAICS codes and have the capability to mentor a large number of small protégé firms that are not in competition with each other. Although SBA understands that many large businesses have the capability to mentor more than three small business concerns at one time, SBA does not believe it is good policy for anyone to perceive that one or more large businesses are unduly benefitting from small business programs. The rules allow a mentor to joint venture with its protégé and be deemed small for any contract for which the protégé individually qualifies as small, and to perform 60 percent of whatever work the joint venture performs. Moreover, a mentor can also own an equity interest of up to 40 percent in the protégé firm. If a large business mentor were able to have five (or more) protégés at one time, it could have a joint venture with each of those protégés and perform 60 percent of every small business contract awarded to the joint venture. It also could (though unlikely) have a 40 percent equity interest in each of those small protégé firms. In such a case, SBA believes that it would appear that the large business mentor is unduly benefitting from contracting programs intended to be reserved for small businesses. As such, this rule does not increase the number of protégé firms that one mentor can have.

The proposed rule clarified the requirements for a firm seeking to form a mentor-protégé relationship in a NAICS code that is not the firm's primary NAICS code (§ 125.9(c)(1)(ii)). SBA has always intended that a firm seeking to be a protégé could choose to establish a mentor-protégé relationship to assist its business development in any business area in which it has performed work as long as the firm qualifies as small for the work targeted in the mentor-protégé agreement. The proposed rule highlighted SBA's belief that a firm must have performed some work in a secondary industry or NAICS code in order for SBA to approve such a mentor-protégé relationship. SBA does not want a firm that has grown to be other than small in its primary NAICS codes to form a mentor-protégé relationship in a NAICS code in which it had no experience simply because it qualified as small in that other NAICS code. SBA believes that such a situation (*i.e.,* having a protégé with no experience in a secondary NAICS code) could lead to abuse of the program. It would be hard for a firm with no experience in a secondary NAICS code to be the lead on a joint venture with its mentor. Similarly, a mentor with all the experience could easily take control of a joint venture and perform all of the work required of the joint venture. The proposed rule clarified that a firm may seek to be a protégé in any NAICS code for which it qualifies as small and can form a mentor-protégé relationship in a secondary NAICS code if it qualifies as small and has prior experience or previously performed work in that NAICS code. Several commenters sought further clarification of this provision. Commenters noted that a procuring activity may assign different NAICS codes to the same basic type of work. These commenters questioned whether a firm needed to demonstrate that it performed work in a specific NAICS code or could demonstrate that it has performed the same type of work, whatever NAICS code was assigned to it. Similarly, other commenters again questioned whether a firm must demonstrate previous work performed in a specific NAICS code, or whether similar work that would logically lead to work in a different NAICS code would be permitted. SBA agrees with these comments. SBA believes that similar work performed by the prospective protégé to that for which a mentor-protégé relationship is sought should be sufficient, even if the previously performed work is in a different NAICS code than that for which a mentor-protégé agreement is sought. In addition, if the NAICS code in which a mentor-protégé relationship is sought is a logical progression from work previously performed by the intended protégé firm, that too should be permitted. SBA's intent is to encourage business development, and any relationship that promotes a logical business progression for the protégé firm fulfills that intent.

The proposed rule also responded to concerns raised by small businesses regarding the regulatory limit of permitting only two mentor-protégé relationships even where the small business protégé receives no or limited assistance from its mentor through a particular mentor-protégé agreement. SBA believes that a relationship that provides no business development assistance or contracting opportunities to a protégé should not be counted against the firm, or that the firm should not be restricted to having only one additional mentor-protégé relationship in such a case. However, SBA did not want to impose additional burdens on protégé firms that would require them to document and demonstrate that they did not receive benefits through their mentor-protégé relationships. In order to eliminate any disagreements as to whether a firm did or did not receive any assistance under its mentor-protégé agreement, SBA proposed to establish an easily understandable and objective basis for counting or not counting a

mentor-protégé relationship. Specifically, the proposed rule amended § 125.9(e)(6) to not count any mentor-protégé relationship toward a firm's two permitted lifetime mentor-protégé relationships where the mentor-protégé agreement is terminated within 18 months from the date SBA approved the agreement. The vast majority of commenters supported a specific, objective amount of time within which a protégé could end a mentor-protégé relationship without having it count against the two in a lifetime limit. Commenters pointed out, however, that the supplementary information to and the regulatory text in the proposed rule were inconsistent (*i.e.,* the supplementary information saying 18 months and the regulatory text saying one year). Several comments recommended increasing the lifetime number of mentor-protégé relationships that a small business concern could have. Finally, a few commenters opposed the proposed exemption to the two-in-lifetime rule because allowing protégé firms such an easy out within 18 months, whether or not the protégé received beneficial business development assistance, could act as a detriment to firms that would otherwise be willing to serve as mentors. One commenter was concerned that if a bright line 18-month test is all that is required, nothing would prevent an unscrupulous business from running through an endless chain of relatively short-lived mentor-protégé relationships. SBA does not believe that will be a frequent occurrence. Nevertheless, in response, the final rule provides that if a specific small business protégé appears to use the 18-month test as a means of using many short-term mentor-protégé relationships, SBA may determine that the business concern has exhausted its participation in the mentor-protégé program and not approve an additional mentor-protégé relationship.

The proposed rule also eliminated the reconsideration process for declined mentor-protégé agreements in § 125.9(f) as unnecessary. Currently, if SBA declines a mentor-protégé agreement, the prospective small business protégé may make changes to its agreement and seek reconsideration from SBA within 45 days of SBA's decision to decline the mentor-protégé relationship. The current regulations also allow the small business to submit a new (or revised) mentor-protégé agreement to SBA at any point after 60 days from the date of SBA's final decision declining a mentor-protégé relationship. SBA believes that this ability to submit a new or revised mentor-protégé agreement after 60 days is sufficient. Most commenters supported this change, agreeing that a separate reconsideration process is unnecessary. A few commenters disagreed, believing that requiring a small business to wait 60 days to submit a revised mentor-protégé agreement and then start SBA's processing time instead of submitting a revised agreement within a few days of a decline decision could add an additional two months of wait time to an ultimate approval. SBA continues to believe that the small amount of time a small business must wait to resubmit a new/revised mentor-protégé agreement to SBA for approval makes the reconsideration process unnecessary. As such, this rule finalizes the elimination of a separate reconsideration process.

The proposed rule added clarifying language regarding the annual review of mentor-protégé relationships. It is important that SBA receive an honest assessment from the protégé of how the mentor-protégé relationship is working, whether the protégé has received the agreed-upon business development assistance, and whether the protégé would recommend the mentor to be a mentor for another small business in the future. SBA needs to know if the mentor is not providing the agreed-upon business development assistance to the protégé. This would affect that firm's ability to be a mentor in the future. Several commenters were also concerned about mentors that did not live up to their commitments. A few commenters recommended that a protégé firm should be able to ask SBA to intervene if it thought it was not receiving the assistance promised by the mentor or if it thought that the assistance provided was not of the quality it anticipated. SBA believes that makes sense and this rule adds a provision allowing a protégé to request SBA to intervene on its behalf with the mentor. Such a request would cause SBA to notify the mentor that SBA had received adverse information regarding its participation as a mentor and allow the mentor to respond to that information. If the mentor did not overcome the allegations, SBA would terminate the mentor-protégé agreement. The final rule also adds a provision that allows a protégé to substitute another firm to be its mentor for the time remaining in the mentor-protégé agreement without counting against the two-mentor limit. If two years had already elapsed in the mentor-protégé agreement, the protégé could substitute another firm to be its mentor for a total of four years.

Prior to the proposed rule, SBA had also received several complaints from small business protégés whose mentor-protégé relationships were terminated by the mentor soon after a joint venture between the protégé and mentor received a Government contract as a small business. The proposed rule asked for comments about the possibility of adding a provision requiring a joint venture between a protégé and its mentor to recertify its size if the mentor prematurely ended the mentor-protégé relationship. Commenters did not support this possible approach, believing that such a recertification requirement would have a much more serious impact on the protégé than on the mentor. In effect, such a provision would punish a protégé for its mentor's failure to meet its obligations under the mentor-protégé agreement. Upon further review, SBA believes that better options are provided in current § 125.9(h), which provides consequences for when a mentor does not provide to the protégé firm the business development assistance set forth in its mentor-protégé agreement. Under the current regulations, where that occurs, the firm will be ineligible to again act as a mentor for a period of two years from the date SBA terminates the mentor-protégé agreement, SBA may recommend to the relevant procuring agency to issue a stop work order for each Federal contract for which the mentor and protégé are performing as a small business joint venture, and SBA may seek to substitute the protégé firm for the joint venture if the protégé firm is able to independently complete performance of any joint venture contract without the mentor. SBA believes that provision should be sufficient to dissuade mentors from terminating mentor-protégé agreements early.

Section 125.18

In addition to the revision to § 125.18(c) identified above, this rule amends the language in § 125.18(a) to clarify what representations and certifications a business concern seeking to be awarded a SDVO contract must submit as part of its offer.

Section 126.602

On November 26, 2019, SBA published a final rule amending the HUBZone regulations. 84 FR 65222. As part of that rule, SBA revised 13 CFR 126.200 by reorganizing the section to make it more readable. However, SBA inadvertently overlooked a cross-reference to section 126.200 contained in § 126.602(c). This rule merely fixes the cross-reference in § 126.602(c).

Section 126.606

The final rule amends § 126.606 to make it consistent with the release requirements of § 124.504(d). Current § 126.606 authorizes SBA to release a follow-on requirement previously performed through the 8(a) BD program for award as a HUBZone contract only where neither the incumbent nor any other 8(a) Participant can perform the requirement. SBA believes that is overly restrictive and inconsistent with the release language contained in § 124.504(d). As such, the final rule provides that a procuring activity may request that SBA release an 8(a) requirement for award as a HUBZone contract under the procedures set forth in § 124.504(d).

Sections 126.616 and 126.618

This rule makes minor revisions to §§ 126.616 and 126.618 by merely deleting references to the 8(a) BD Mentor-Protégé Program, since that program would no longer exist as a separate program.

Sections 127.503(h) and 127.504

In addition to the revision to § 127.504(c) identified above, the proposed rule made other changes or clarifications to § 127.504. The proposed rule renamed and revised § 127.504 for better understanding and ease of use. It changed the section heading to ''What requirements must an EDWOSB or WOSB meet to be eligible for an EDWOSB or WOSB contract?''. SBA received no comments on these changes and adopts them as final in this rule.

This rule also moves the recertification procedures for WOSBs from § 127.503(h) to § 127.504(e).

Sections 134.318 and 121.1103

This rule amends § 134.318 to make it consistent with SBA's size regulations. In this regard, § 121.1103(c)(1)(i) of SBA's size regulations provides that upon receipt of the service copy of a NAICS code appeal, the contracting officer must ''stay the solicitation.'' However, when that rule was implemented, a corresponding change was not made to the procedural rules for SBA's OHA contained in part 134. As such, this rule simply requires that the contracting officer must amend the solicitation to reflect the new NAICS code whenever OHA changes a NAICS code in response to a NAICS code appeal. In addition, for clarity purposes, the rule revises § 121.1103(c)(1)(i) to provide that a contracting officer must stay the date of the closing of the receipt of offers instead of requiring that he or she must stay the solicitation.

III. Compliance With Executive Orders 12866, 12988, 13132, 13175, 13563, 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is a significant regulatory action for the purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act.

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

In combining the 8(a) BD Mentor-Protégé Program and the All Small Mentor-Protégé Program, SBA seeks to eliminate confusion regarding perceived differences between the two Programs, remove unnecessary duplication of functions within SBA, and establish one, unified staff to better coordinate and process mentor-protégé applications. In addition, eliminating the requirement that SBA approve every joint venture in connection with an 8(a) contract will greatly reduce the time required for 8(a) BD Participants to come into and SBA to ensure compliance with SBA's joint venture requirements.

SBA is also making several changes to clarify its regulations. Through the years, SBA has spoken with small business and representatives and has determined that several regulations need further refinement so that they are easier to understand and implement. This rule makes several changes to ensure that the rules pertaining to SBA's various small business procurement programs are consistent. SBA believes that making the programs as consistent and similar as possible, where practicable, will make it easier for small businesses to understand what is expected of them and to comply with those requirements.

2. What is the baseline, and the incremental benefits and costs of this regulatory action?

This rule seeks to address or clarify several issues, which will provide clarity to small businesses and contracting personnel. Further, SBA is eliminating the burden that 8(a) Participants seeking to be awarded a competitive 8(a) contract as a joint venture must submit the joint venture to SBA for review and approval prior to contract award. There are currently approximately 4,500 8(a) BD Participants in the portfolio. Of those, about 10 percent or roughly 450 Participants have entered a joint venture agreement to seek the award of an 8(a) contract. Under the current rules, SBA must approve the initial joint venture agreement itself and each addendum to the joint venture agreement—identifying the type of work and what percentage each partner to the joint venture would perform of a specific 8(a) procurement—prior to contract award. SBA reviews the terms of the joint venture agreement for regulatory compliance and must also assess the 8(a) BD Participant's capacity and whether the agreement is fair and equitable and will be of substantial benefit to the 8(a) concern. It is difficult to calculate the costs associated with submitting a joint venture agreement to SBA because the review process is highly fact-intensive and typically requires that 8(a) firms provide additional information and clarification. However, in the Agency's best professional judgment, it is estimated that an 8(a) Participant currently spends approximately three hours submitting a joint venture agreement to SBA and responding to questions regarding that submission. That equates to approximately 1,350 hours at an estimated rate of $44.06 per hour—the median wage plus benefits for accountants and auditors according to 2018 data from the Bureau of Labor Statistics—for an annual total cost savings to 8(a) Participants of about $59,500. In addition to the initial joint venture review and approval process, each joint venture can be awarded two more contracts which would require additional submissions and explanations for any such joint venture addendum. Not every joint venture is awarded more than one contract, but those that do are often awarded the maximum allowed of three contracts. SBA estimates that Participants submit an additional 300 addendum actions, with each action taking about 1.5 hours for the Participant. That equates to approximately 450 hours at an estimated rate of $44.06 per hour for an annual total cost savings to 8(a) Participants of about $19,800. Between both initial and addendum actions, this equates to an annual total cost savings to 8(a) Participants of about $79,300.

In addition, merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program would also provide cost savings. Firms seeking a mentor-protégé relationship through the All Small Mentor-Protégé Program apply through an on-line, electronic application system. 8(a) Participants seeking SBA's approval of a mentor-protégé relationship through the 8(a) BD

program do not apply through an on-line, electronic system, but rather apply manually through their servicing SBA district office. In SBA's best professional judgment, the additional cost for submitting a manual mentor-protégé agreement to SBA for review and approval and responding manually to questions regarding that submission is estimated at two hours. SBA receives approximately 150 applications for 8(a) mentor-protégé relationships annually, which equates to an annual savings to prospective protégé firms of about 300 hours. At an estimated rate of $44.06 per hour, the annual savings in costs related to the reduced time for mentor-protégé applications through the All Small Mentor Protégé process is about $13,000 per year. In a similar vein, eliminating the manual review and approval process for 8(a) BD Mentor-Protégé Program applications will provide cost savings to the Federal government. As previously noted, an 8(a) Participant seeking SBA's approval of a mentor-protégé relationship through the 8(a) BD program must submit an application manually to its servicing district office. The servicing district office likewise conducts a manual review of each application for completeness and for regulatory compliance. This review process can be cumbersome since the analyst must first download and organize all application materials by hand. In contrast, the on-line, electronic application system available to prospective protégés in the All Small Mentor-Protégé Program has significantly streamlined SBA's review process in two ways. First, it logically organizes application materials for the reviewer, resulting in a more efficient and consistent review of each application. Second, all application materials are housed in a central document repository and are accessible to the reviewer without the need to download files. In the Agency's best professional judgment, this streamlined application review process delivers estimated savings of 30 percent per application as compared to the manual application review process under the 8(a) BD Mentor-Protégé Program. SBA further estimates that it takes approximately three hours to review an application for the All Small Mentor Protégé Program. That equates to approximately 135 hours (*i.e.,* 150 applications multiplied by three hours multiplied by 30 percent) at an estimated rate of $44.06 per hour for an annual total cost savings to the Federal government of about $5,900 per year. The elimination of manual application process creates a total cost savings of $18,900 per year.

Moreover, eliminating the 8(a) BD Mentor-Protégé Program as a separate program and merging it with the All Small Mentor-Protégé Program will eliminate confusion between the two programs for firms seeking a mentor-protégé relationship. When SBA first implemented the All Small Mentor-Protégé Program, it intended to establish a program substantively identical to the 8(a) BD Mentor-Protégé Program, as required by Section 1641 of the NDAA of 2013. Nevertheless, feedback from the small business community reveals a widespread misconception that the two programs offer different benefits. By merging the 8(a) BD Mentor-Protégé Program into the All Small-Mentor Protégé Program, firms will not have to read the requirements for both programs and try to decipher perceived differences. SBA estimates that having one combined program will eliminate about one hour of preparation time for each firm seeking a mentor-protégé relationship. Based on approximately 600 mentor-protégé applications each year (about 450 for the All Small Mentor-Protégé Program and about 150 for the 8(a) BD Mentor-Protégé Program), this would equate to an annual cost savings to prospective protégé firms of about 600 hours. At an estimated rate of $44.06 per hour, the annual savings in costs related to the elimination of confusion caused by having two separate programs is about $26,400.

Thus, in total, the merger of the 8(a) BD mentor-protégé program into the All Small Business Mentor-Protégé Program would provide a cost savings of about $45,300 per year.

In addition, it generally takes between 60 and 90 days for SBA to approve a mentor-protégé relationship through the 8(a) BD program. Conversely, the average time it takes to approve a mentor-protégé relationship through the All Small Mentor-Protégé Program is about 20 working days. To firms seeking to submit offers through a joint venture with their mentors, this difference is significant. Such joint ventures are only eligible for the regulatory exclusion from affiliation if they are formed after SBA approves the underlying mentor-protégé relationship. It follows that firms applying through the 8(a) BD Mentor-Protégé Program could miss out on contract opportunities waiting for their mentor-protégé relationships to be approved. These contract opportunity costs are inherently difficult to measure, but are certainly significant to the firms missing out on specific contract opportunities. However, in SBA's best judgment, faster approval timeframes will mitigate such costs by giving program participants more certainty in planning their proposal strategies.

This rule will also eliminate the requirement that any specific joint venture can be awarded no more than three contracts over a two year period, but will instead permit a joint venture to be awarded an unlimited number of contracts over a two year period. The change removing the limit of three awards to any joint venture will reduce the burden of small businesses being required to form additional joint venture entities to perform a fourth contract within that two-year period. SBA has observed that joint ventures are often established as separate legal entities—specifically as limited liability corporations—based on considerations related to individual venture liability, tax liability, regulatory requirements, and exit strategies. Under the current rule, joint venture partners must form a new joint venture entity after receiving three contracts lest they be deemed affiliated for all purposes. The rule, which allows a joint venture to continue to seek and be awarded contracts without requiring the partners to form a new joint venture entity after receiving its third contract, will save small businesses significant legal costs in establishing new joint ventures and ensuring that those entities meet all applicable regulatory requirements.

This rule also makes several changes to reduce the burden of recertifying small business status generally and requesting changes of ownership in the 8(a) BD program. Specifically, the rule clarifies that a concern that is at least 51 percent owned by an entity (*i.e.,* tribe, ANC, or Community Development Corporation (CDC)) need not recertify its status as a small business when the ownership of the concern changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity. In addition, the rule also provides that a Participant in SBA's 8(a) BD program that is owned by an ANC or tribe need not request a change of ownership from SBA where the ANC or tribe merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the ANC/tribe and the Participant. Both changes will save entity-owned small business concerns time and money. Similarly, the rule provides that prior SBA approval is not needed where the disadvantaged individual (or entity) in control of a Participant in the 8(a) BD program will increase the percentage of his or her (its) ownership interest.

The rule will also allow a concern that has been declined for 8(a) BD program participation to submit a new application 90 days after the date of the Agency's final decision to decline. This changes the current rule which requires a concern to wait 12 months from the date of the final Agency decision to reapply. This will allow firms that have been declined from participating in the 8(a) BD program the opportunity to correct deficiencies, come into compliance with program eligibility requirements, reapply and be admitted to the program and receive the benefits of the program much more quickly. SBA understands that by reducing the re-application waiting period there is the potential to strain the Agency's resources with higher application volumes. In the Agency's best judgment, any costs associated with the increase in application volume would be outweighed by the potential benefit of providing business development assistance and contracting benefits sooner to eligible firms.

This rule also clarifies SBA's position with respect to size and socioeconomic status certifications on task orders under MACs. Currently, size certifications at the order level are not required unless the contracting officer, in his or her discretion, requests a recertification in connection with a specific order. The rule requires a concern to submit a recertification or confirm its size and/or socioeconomic status for all set-aside orders (*i.e.,* small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business) under unrestricted MACs, except for orders or Blanket Purchase Agreements issued under any FSS contracts. Additionally, the rule requires a concern to submit a recertification or confirm its socioeconomic status for all set-aside orders where the required socioeconomic status for the order differs from that of the underlying set aside MAC. The rule does not require recertification, however, if the agency issues the order under a pool or a reserve, and the pool or reserve already was set aside in the same category as the order.

If the firm's size and status in SAM is current and accurate when the firm submits its offer, the concern will not need to submit a new certification or submit any additional documentation with its offer. SBA recognizes that confirming accurate size and socioeconomic status imposes a burden on a small business contract holder, but the burden is minimal. SBA intends that confirmation of size and status under this rule will be satisfied by confirming that the firm's size and status in SAM is currently accurate and qualifies the firm for award.

FPDS–NG indicates that, in Fiscal Year 2019, agencies set aside 1,800 orders under unrestricted MACs, excluding orders under FSS contracts. Agencies also set aside 15 pools or reserves using already-established MACs other than FSS contracts. SBA adopts the assumption from FAR Case 2014–002 that on average there are three offers per set-aside order. SBA also assumes that agencies will award five orders from each set-aside pool or set-aside reserve per year, using the same set-aside category as the pool or reserve. These pool or reserve orders do not require recertification at time of order; therefore, SBA subtracts the pool or reserve orders from the number of orders subject to the rule, leaving 1,725 orders subject to the rule.

The annual number of set-aside orders under unrestricted MACs, excluding FSS orders and orders under set-aside pools or reserves, therefore is calculated as 1,725 orders × 3 offers per order = 5,175. The ease of complying with the rule varies depending on the size of a firm. If the firm's size is not close to the size standard, compliance is simple; the firm merely confirms that it has a SAM registration. SBA estimates those firms spend 5 minutes per offer to comply with this rule. For a firm whose size is close to the size standard, compliance requires determining whether the firm presently qualifies for the set-aside—primarily, whether the firm is presently a small business. SBA adopts the estimate from OMB Control No. 9000–0163 that these firms spend 30 minutes per offer to comply with this rule.

The share of small businesses that are within 10 percent of the size standard is 1.3 percent. Therefore, the annual public burden of requiring present size and socioeconomic status is (5,175 offers × 98.7 percent × 5 minutes × $44.06 cost per hour) + (5,175 offers × 1.3 percent × 30 minutes × $44.06 cost per hour) = $20,250.

FPDS–NG indicates that, in Fiscal Year 2019, agencies set aside about 130 orders under set-aside MACs (other than FSS contracts) in the categories covered by this rule. These categories are WOSB or EDWOSB set-aside/sole-source orders under small business set-aside MACs; SDVOSB set-aside/sole-source orders under small business set-aside MACs; and HUBZone set-aside/sole source orders set-aside/sole-source orders under small business set-aside MACs. The ease of complying on these set-aside within set-asides varies depending on whether the firm has had any of these recent actions: (i) An ownership change, (ii) a corporate change that alters control of the firm, such as change in bylaws or a change in corporate officers, or (iii) for the HUBZone program, a change in the firm's HUBZone certification status under SBA's recently revised HUBZone program procedures. Although data is not available, SBA estimates that up to 25 percent of firms would have any of those recent actions. Firms in that category will spend 30 minutes per offer determining whether the firm presently qualifies for a set-aside order. The remaining 75 percent of firms will spend 5 minutes merely confirming that the firm has an active SAM registration.

Following the same calculations, the annual cost of requiring present socioeconomic status on set-aside orders under set-aside MACs is calculated as (130 orders × 3 offers/order × 75 percent × 5 minutes × $44.06 cost per hour) + (130 orders × 3 offers/order × 25 percent × 30 minutes × $44.06 cost per hour). This amounts to an annual cost of about $3,220.

As reflected in the calculation, SBA believes that being presently qualified for the required size or socioeconomic status on an order, where required, would impose a burden on small businesses. A concern already is required by regulation to update its size and status certifications in SAM at least annually. As such, the added burden to industry is limited to confirming that the firm's certification is current and accurate. The Federal Government, however, will receive greater accuracy from renewed certification which will enhance transparency in reporting and making awards.

The added burden to ordering agencies includes the act of checking a firm's size and status certification in SAM at the time of order award. Since ordering agencies are already familiar with checking SAM information, such as to ensure that an order awardee is not debarred, suspended, or proposed for debarment, this verification is minimal. Further, checking SAM at the time of order award replaces the check of the offeror's contract level certification. SBA also recognizes that an agency's market research for the order level may be impacted where the agency intends to issue a set-aside order under an unrestricted vehicle (or a socioeconomic set-aside under a small business set-aside vehicle) except under FSS contracts. The ordering agency may need to identify MAC-eligible vendors and then find their status in SAM. This is particularly the case where the agency is applying the Rule of Two and verifying that there are at least two

small businesses or small businesses with the required status sufficient to set aside the order. SBA does not believe that conducting SAM research is onerous.

Using the same set-aside order data, the annual cost of checking certifications and conducting additional market research efforts is calculated as (1725 orders off unrestricted + 130 orders off set-asides) × 30 minutes × $44.06/hours = $46,600 in annual government burden.

Currently, recertification at the contract level for long term contracts is specifically identified only at specific points. This rule makes clear that a contracting officer has the discretion to request size recertification as he or she deems appropriate at any point for a long-term MAC. FPDS–NG indicates that, in Fiscal Year 2019, agencies awarded 399 MACs to small businesses. SBA estimates that procuring activities will use their discretion to request recertification at any point in a long term contract approximately 10% of the time. SBA adopts the estimate from OMB Control No. 9000–0163 that procuring activities will spend 30 minutes to comply with this rule. The annual cost of allowing recertification at any point on a long-term contract to procuring activities is calculated as (399 MACs × 10%) × 30 minutes × $44.06 cost per hour. This amounts to an estimated annual cost of $880. Where requested, this recertification would impose a burden on small businesses. Following this same calculation, SBA estimates that the impact to firms will also be $880 ((399 number of MACs × 10%) × 30 minutes × $44.06 per hour). The total cost is $880 × 2 = $1,760.

The annual cost is partially offset by the cost savings that result from other changes in this rule. This change goes more to accountability and ensuring that small business contracting vehicles truly benefit small business concerns. In addition, commenters responding to the costs associated with recertification supported the proposed rule that requires a firm to recertify its size and/or socioeconomic status for set-aside task orders under unrestricted MACs. These commenters agreed that certifying in the System for Award Management (*sam.gov*) should meet this requirement.

3. What are the alternatives to this rule?

As noted above, this rule makes a number of changes intended to reduce unnecessary or excessive burdens on small businesses, and clarifies other regulatory provisions to eliminate confusion among small businesses and procuring activities. SBA has also considered other alternative proposals to achieve these ends. Concerning SBA's role in approving 8(a) joint venture agreements, the Agency could also eliminate the requirement that SBA must approve joint ventures in connection with sole source 8(a) awards. However, as noted above, SBA believes that such approval is an important enforcement mechanism to ensure that the joint venture rules are followed. With respect to the requirement that a concern must wait 90 days to re-apply to the 8(a) BD program after the date of the Agency's final decline decision, SBA could instead eliminate the application waiting period altogether. This would allow a concern to re-apply as soon as it reasonably believed it had overcome the grounds for decline. However, SBA believes that such an alternative would encompass significant administrative burden on SBA.

Under the rule, if an order under an unrestricted MAC is set-aside exclusively for small business (*i.e.,* small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), or the order is set aside in a different category than was the set-aside MAC, a concern must be qualified for the required size and socioeconomic status at the time it submits its initial offer, which includes price, for the particular order. In SBA's view, the order is the first time size or socioeconomic status is important where the underlying MAC is unrestricted or set aside in a different category than the set-aside MAC, and therefore, that is the date at which eligibility should be examined. SBA considered maintaining the status quo; namely, allowing a one-time certification as to size and socioeconomic status (*i.e.,* at the time of the initial offer for the underlying contract) to control all orders under the contract, unless one of recertification requirements applies (*see* 121.404(g)). SBA believes the current policy does not properly promote the interests of small business. Long-term contracting vehicles that reward firms that once were, but no longer qualify as, small or a particular socioeconomic status adversely affect truly small or otherwise eligible businesses.

Another alternative is to require business concerns to notify contracting agencies when there is a change to a concern's socioeconomic status (*e.g.,* HUBZone, WOSB, etc.), such that they would no longer qualify for set-aside orders. The contracting agency would then be required to issue a contract modification within 30 days, and from that point forward, ordering agencies would no longer be able to count options or orders issued pursuant to the contract for small business goaling purposes. This could be less burdensome than recertification of socioeconomic status for each set-aside order.

Summary of Costs and Cost Savings

Table 1: Summary of Incremental Costs and Cost Savings, below, sets out the estimated net incremental cost/(cost saving) associated with this rule. Table 2: Detailed Breakdown of Incremental Costs and Cost Savings, below, provides a detailed explanation of the annual cost/(cost saving) estimates associated with this rule. This rule is an E.O. 13771 deregulatory action. The annualized cost savings of this rule, discounted at 7% relative to 2016 over a perpetual time horizon, is $37,166 in 2016 dollars with a net present value of $530,947 in 2016 dollars.

TABLE 1—SUMMARY OF INCREMENTAL COSTS AND COST SAVINGS

Item No.	Regulatory action item	Annual cost/ (cost saving) estimate
1	Eliminating SBA approval of initial and addendums to joint venture agreements to perform competitive 8(a) contracts and eliminating approval for two additional contracts which would require additional submissions and explanations for any such joint venture addendum.	($79,300)
2	Merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program—Elimination of manual application process.	(18,900)
3	Merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program—Elimination of confusion among firms seeking a mentor-protégé relationship.	(26,400)
4	Requiring recertification for set-aside orders issued under unrestricted Multiple Award Contracts	20,250

TABLE 1—SUMMARY OF INCREMENTAL COSTS AND COST SAVINGS—Continued

Item No.	Regulatory action item	Annual cost/ (cost saving) estimate
5	Requiring recertification for set-aside orders issued under set-aside Multiple Award Contracts	3,220
6	Additional Government detailed market research to identify qualified sources for set-aside orders and verify status.	46,600
7	Contracting officer discretion to request size recertification at any point for a long-term MAC	1,760

TABLE 2—DETAILED BREAKDOWN OF INCREMENTAL COSTS AND COST SAVINGS

Item No.	Regulatory action item details	Annual cost/ (cost saving) estimate breakdown
1	*Regulatory change:* SBA is eliminating the burden that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture must submit the joint venture to SBA for review and approval prior to contract award. In addition, each joint venture can be awarded two more contracts which would require additional submissions and explanations for any such joint venture addendum.	
	Estimated number of impacted entities: There are currently approximately 4,500 8(a) BD Participants in the portfolio. Of those, about 10% or roughly 450 Participants have entered a joint venture agreement to seek the award of an 8(a) contract. There are approximately 300 addendums per year.	450 entities and 300 additional addendums.
	Estimated average impact (labor hour):* SBA estimates that an 8(a) BD Participant currently spends approximately three hours submitting a joint venture agreement to SBA and responding to questions regarding that submission. Each addendum requires 1.5 hours of time.	3 hours and 1.5 hours per additional addendum.
	*2018 Median Pay** (per hour):* Most 8(a) firms use an accountant or someone with similar skills for this task.	$44.06 per hour.
	Estimated Cost/(Cost Saving)	($79,300).
2	*Regulatory change:* SBA is merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program and eliminating the manual application process. This will reduce the burden on 8(a) Participants seeking a mentor-protégé agreement and on SBA to no longer process paper applications.	
	Estimated number of impacted entities: SBA receives approximately 150 applications for 8(a) mentor-protégé relationships annually.	150 entities.
	Estimated average impact (labor hour):* In SBA's best professional judgment, the additional cost for submitting a manual mentor-protégé agreement to SBA for review and approval and responding manually to questions regarding that submission is estimated at two hours. For SBA employees, reviewing the manual mentor-protégé agreements takes 3 hours and this change is expected to save SBA 30% of the time required.	2 hours for applicants and less than 1 hour for SBA.
	*2018 Median Pay** (per hour):* Most 8(a) firms use an accountant or someone with similar skills for this task..	44.06 per hour.
	Estimated Cost/(Cost Saving)	($18,900).
3	*Regulatory change:* SBA is merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program. In doing so, firms will not have to read the requirements for both programs and try to decipher any perceived differences.	
	Estimated number of impacted entities: SBA receives approximately 600 mentor-protégé applications each year—about 450 for the All Small Mentor-Protégé Program and about 150 for the 8(a) BD Mentor-Protégé Program.	600 entities.
	Estimated average impact (labor hour):* SBA estimates that having one combined program will eliminate about one hour of preparation time for each firm seeking a mentor-protégé relationship.	1 hour.
	*2018 Median Pay** (per hour):* Most small business concerns use an accountant or someone with similar skills for this task.	$44.06 per hour.
	Estimated Cost/(Cost Saving)	($26,400).
4	*Regulatory change:* SBA is requiring that a firm be accurately certified and presently qualified as to size and/or status for set-aside orders issued under Multiple Award Contracts that were not set aside or set aside in a separate category, except for the Federal Supply Schedule.	
	Estimated number of impacted entities: Approximately 1,725 set-aside orders are issued annually on Multiple Award Contracts that are not set aside in the same category, including the Federal Supply Schedule, outside of set-aside pools. SBA estimates that three offers are submitted for each order.	5,175 offers.
	Estimated average impact (labor hour):* SBA estimates that a small business that is close to its size standard will spend an average of 30 minutes confirming that size and status is accurate prior to submitting an offer. A small business that is not close to its size standard will spend an average of 5 minutes confirming that it has a SAM registration.	0.5 hours for firms within 10 percent of size standard (1.3% of firms); 5 minutes otherwise (98.7% of firms).
	*2018 Median Pay** (per hour):* Most small business concerns use an accountant or someone with similar skills for this task.	$44.06 per hour.
	Estimated Cost/(Cost Saving)	$20,250.
5	*Regulatory change:* SBA is requiring that a firm be accurately certified and presently qualified as to socioeconomic status for set-aside orders issued under Multiple Award Contracts that were set aside in a separate category, except for the Federal Supply Schedule contracts.	

TABLE 2—DETAILED BREAKDOWN OF INCREMENTAL COSTS AND COST SAVINGS—Continued

Item No.	Regulatory action item details	Annual cost/ (cost saving) estimate breakdown
	Estimated number of impacted entities: Approximately 130 set-aside orders are issued annually on Multiple Award Contracts that are not set aside in the same category, other than on the Federal Supply Schedule, are affected by this rule. SBA estimates that three offers are submitted for each order for a total of 390 offers.	390 offers.
	Estimated average impact (labor hour):* SBA estimates that a small business will spend an average of 30 minutes confirming that size and status is accurate prior to submitting an offer, if it has had a change in ownership, control, or certification. Otherwise, the small business will spend an average of 5 minutes confirming that it has a SAM registration.	0.5 hours for firms with a change in ownership, control, or HUBZone certification (25% of firms); 5 minutes otherwise (75% of firms).
	*2018 Median Pay** (per hour):* Most small business concerns use an accountant or someone with similar skills for this task.	$44.06 per hour.
	Estimated Cost/(Cost Saving)	$3,220.
6	*Regulatory change:* SBA is requiring that firms be accurately certified and presently qualified as to size and socioeconomic status for certain set-aside orders issued under Multiple Award Contracts, except for the Federal Supply Schedule contracts. This change impacts the market research required by ordering activities to determine if a set-aside order for small business or for any of the socioeconomic programs may be pursued and whether the awardee is qualified for award.	
	Estimated number of impacted entities: Approximately 2,115 set-aside orders are issued annually as described in the rule.	2,115 orders.
	Estimated average impact (labor hour):* SBA estimates that ordering activities applying the Rule of Two will spend an average of 30 additional minutes to locate contractors awarded Multiple Award Contracts, looking up the current business size for each of the contractors in SAM to determine if a set-aside order can be pursued, and confirming the status of the awardee.	0.5 hours.
	*2018 Median Pay** (per hour):* Contracting officers typically perform the market research for the acquisition plan.	$44.06 per hour.
	Estimated Cost/(Cost Saving)	$46,600.
7	*Regulatory Change: Contracting officer discretion to request size recertification at any point for a long-term MAC.*	
	Estimated number of impacted entities: Approximately 400 long term MACs are awarded annually to small businesses. SBA estimates that contracting officers will exercise this discretion 10% of the time.	40 contracts.
	Estimated average impact (labor hour):* SBA estimates that ordering activities will spend an average of 30 additional minutes to request this recertification. Contractors will spend an average of 30 additional minutes to respond to the request.	0.5 hours for agencies; 0.5 hours for businesses.
	*2018 Median Pay** (per hour):* Contracting officers will request this recertification	$44.06.
	Estimated Cost/(Cost Saving)	$1,760.

* This estimate is based on SBA's best professional judgment.
** Source: Bureau of Labor Statistics, Accountants and Auditors.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For the purposes of Executive Order 13132, SBA has determined that 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, for the purpose of Executive Order 13132, Federalism, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13175

As part of this rulemaking process, SBA held tribal consultations pursuant to Executive Order 13175, Tribal Consultations, in Minneapolis, MN, Anchorage, AK, Albuquerque, NM and Oklahoma City, OK to provide interested tribal representatives with an opportunity to discuss their views on various 8(a) BD-related issues. *See* 84 FR 66647. These consultations were in addition to those held by SBA in Anchorage, AK (*see* 83 FR 17626), Albuquerque, NM (*see* 83 FR 24684), and Oklahoma City, OK (*see* 83 FR 24684) before issuing a proposed rule. This executive order reaffirms the Federal Government's commitment to tribal sovereignty and requires Federal agencies to consult with Indian tribal governments when developing policies that would impact the tribal community. The purpose of the above-referenced tribal consultation meetings was to provide interested parties with an opportunity to discuss their views on the issues, and for SBA to obtain the views of SBA's stakeholders on approaches to the 8(a) BD program regulations. SBA has always considered tribal consultation meetings a valuable component of its deliberations and believes that these tribal consultation meetings allow for constructive dialogue with the Tribal community, Tribal Leaders, Tribal Elders, elected members of Alaska Native Villages or their appointed representatives, and principals of tribally-owned and ANC-owned firms participating in the 8(a) BD program.

In general, tribal stakeholders were supportive of SBA's intent to implement changes that will make it easier for small business concerns to understand and comply with the regulations

governing the 8(a) BD program, and agreed that this rulemaking will make the program more effective and accessible to the small business community. SBA received significant comments on its approaches to the proposed regulatory changes, as well as several recommendations regarding the 8(a) BD program not initially contemplated by this planned rulemaking. SBA has taken these discussions into account in drafting this final rule.

Executive Order 13563

This executive order directs agencies to, among other things: (a) Afford the public a meaningful opportunity to comment through the internet on proposed regulations, with a comment period that should generally consist of not less than 60 days; (b) provide for an ''open exchange'' of information among government officials, experts, stakeholders, and the public; and (c) seek the views of those who are likely to be affected by the rulemaking, even before issuing a notice of proposed rulemaking. As far as practicable or relevant, SBA considered these requirements in developing this rule, as discussed below.

1. Did the agency use the best available techniques to quantify anticipated present and future costs when responding to E.O. 12866 (e.g., identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes)?

To the extent possible, the agency utilized the most recent data available in the Federal Procurement Data System—Next Generation (FPDS–NG), Dynamic Small Business Search (DSBS) and System for Award Management (SAM).

2. Public participation: Did the agency: (a) Afford the public a meaningful opportunity to comment through the internet on any proposed regulation, with a comment period that should generally consist of not less than 60 days; (b) provide for an ''open exchange'' of information among government officials, experts, stakeholders, and the public; (c) provide timely online access to the rulemaking docket on *Regulations.gov;* and (d) seek the views of those who are likely to be affected by rulemaking, even before issuing a notice of proposed rulemaking?

The proposed rule initially called for a 70-day comment period, with comments required to be made to SBA by January 17, 2020. SBA received several comments in the first few weeks after the publication to extend the comment period. Commenters felt that the nature of the issues raised in the rule and the timing of comments during the holiday season required more time for affected businesses to adequately review the proposal and prepare their comments. In response to these comments, SBA published a notice in the **Federal Register** on January 10, 2020, extending the comment period an additional 21 days to February 7, 2020. 85 FR 1289. All comments received were posted on *www.regulations.gov* to provide transparency into the rulemaking process. In addition, SBA submitted the final rule to the Office of Management and Budget for interagency review.

3. Flexibility: Did the agency identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public?

Yes, the rule is intended to reduce unnecessary or excessive burdens on 8(a) Participants, and clarify other regulatory-related provisions to eliminate confusion among small businesses and procuring activities.

Executive Order 13771

This rule is an E.O. 13771 deregulatory action. The annualized cost savings of this rule is $37,166 in 2016 dollars with a net present value of $530,947 over perpetuity, in 2016 dollars. A detailed discussion of the estimated cost of this proposed rule can be found in the above Regulatory Impact Analysis.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

This rule imposes additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35. The rule provides a number of size and/or socioeconomic status recertification requirements for set-aside orders under MACs. The annual total public reporting burden for this collection of information is estimated to be 82 total hours ($3,625), including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing information reporting.

Respondents: 165.
Responses per respondent: 1.
Total annual responses: 165.
Preparation hours per response: 0.5 (30 min).
Total response burden hours: 82.
Cost per hour: $44.06.
Estimated cost burden to the public: $3,625.

Additionally, the rule adds procuring agency discretion to request recertification at any point for long term MACs. The annual total public reporting burden for this collection of information is estimated to be 20 total hours ($880), including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing information reporting.

Respondents: 40.
Responses per respondent: 1.
Total annual responses: 40.
Preparation hours per response: 0.5 (30 min).
Total response burden hours: 20.
Cost per hour: $44.06.
Estimated cost burden to the public: $880.This added information collection burden will be officially reflected through OMB Control Number 9000–0163 when the rule is implemented. SBA received no comments on the PRA analysis set forth in the proposed rule.

SBA also has an information collection for the Mentor-Protégé Program, OMB Control Number 3245–0393. This collection is not affected by these amendments.

Regulatory Flexibility Act, 5 U.S.C. 601–612

The Regulatory Flexibility Act (RFA) requires administrative agencies to consider the effect of their actions on small entities, small non-profit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines ''small entity'' to include ''small businesses,'' ''small organizations,'' and ''small governmental jurisdictions.''

This rule concerns aspects of SBA's 8(a) BD program, the All Small Mentor-Protégé Program, and various other small business programs. As such, the rule relates to small business concerns but would not affect ''small organizations'' or ''small governmental jurisdictions'' because those programs generally apply only to ''business concerns'' as defined by SBA regulations, in other words, to small businesses organized for profit. ''Small organizations'' or ''small governmental jurisdictions'' are non-profits or governmental entities and do not generally qualify as ''business concerns''

within the meaning of SBA's regulations.

There are currently approximately 4,500 8(a) BD Participants in the portfolio. Most of the changes are clarifications of current policy or designed to reduce unnecessary or excessive burdens on 8(a) BD Participants and therefore should not impact many of these concerns. There are about 385 Participants with 8(a) BD mentor-protégé agreements and about another 850 small businesses that have SBA-approved mentor-protégé agreements through the All Small Mentor-Protégé Program. The consolidation of SBA's two mentor-protégé programs into one program will not have a significant economic impact on small businesses. In fact, it should have no affect at all on those small businesses that currently have or on those that seek to have an SBA-approved mentor-protégé relationship. The rule eliminates confusion regarding perceived differences between the two Programs, removes unnecessary duplication of functions within SBA, and establishes one unified staff to better coordinate and process mentor-protégé applications. The benefits of the two programs are identical, and will not change under the rule.

SBA is also requiring a business to be qualified for the required size and status when under consideration for a set-aside order off a MAC that was awarded outside of the same set-aside category. Pursuant to the Small Business Goaling Report (SBGR) Federal Procurement Data System—Next Generation (FPDS–NG) records, about 236,000 new orders were awarded under MACs per year from FY 2014 to FY 2018. Around 199,000, or 84.3 percent, were awarded under MACs established without a small business set aside. For this analysis, small business set-asides include all total or partial small business set-asides, and all 8(a), WOSB, SDVOSB, and HUBZone awards. There were about 9,000 new orders awarded annually with a small business set-aside under unrestricted MACs. These orders were issued to approximately 2,600 firms. The 9,000 new orders awarded with a small business set-aside under a MAC without a small business set aside were 4.0 percent of the 236,000 new orders under MACs in a year (Table 3).

TABLE 3—0.47% OF NEW MAC ORDERS IN A FY ARE NON-FSS ORDERS SET ASIDE FOR SMALL BUSINESS WHERE UNDERLYING BASE CONTRACT NOT SET ASIDE FOR SMALL BUSINESS

	FY014	FY015	FY016	FY017	FY018	AVG
Total new orders under MACs in FY	244,664	231,694	245,978	234,304	223,861	236,100
Orders awarded with SB set aside under unrestricted MAC	10,089	9,347	9,729	9,198	8,666	9,406
Non-FSS orders awarded with SB set aside without MAC IDV SB set aside ..	902	780	1,019	1,422	1,400	1,105
Percent	0.37	0.34	0.41	0.61	0.63	0.47

If all firms receiving a non-FSS small business set-aside order under a MAC that was not itself set aside for small business were adversely affected by the rule (*i.e.,* every such firm receiving an award as a small business had grown to be other than a small business or no longer qualified as 8(a), WOSB, SDVO, or HUBZone), the rule requiring a business to be certified as small for non-FSS small business set-aside orders under MACs not set aside for small business would impact only 0.47 percent of annual new MAC orders. The proposed rule sought comments as to whether the rule would have a significant economic impact on a substantial number of small entities. SBA did not receive any comments responding to such request. As such, SBA certifies that this rule will not have a significant economic impact on a substantial number of small entities. Nevertheless, throughout the supplementary information to this proposed rule, SBA has identified the reasons why the changes are being made, the objectives and basis for the rule, a description of the number of small entities to which the rule will apply, and a description of alternatives considered.

List of Subjects

13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

13 CFR Part 124

Administrative practice and procedure, Government procurement, Government property, Small businesses.

13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

13 CFR Part 126

Administrative practice and procedure, Government procurement, Penalties, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 127

Government contracts, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 134

Administrative practice and procedure, Claims, Equal employment opportunity, Lawyers, Organization and functions (Government agencies).

Accordingly, for the reasons stated in the preamble, SBA amends 13 CFR parts 121, 124, 125, 126, 127, and 134 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(a)(36), 662, and 694a(9); Pub. L. 116–136, Section 1114.

■ 2. Amend § 121.103 by:
■ a. Revising the first sentence of paragraphs (b)(6) and (9);
■ b. Revising paragraph (f)(2)(i) and Example 2 to paragraph (f);
■ c. Revising the first sentence of paragraph (g);
■ d. Revising paragraph (h) introductory text and Examples 1, 2, and 3 to paragraph (h) introductory text;
■ e. Removing paragraphs (h)(1) and (h)(2);
■ f. Redesignating paragraphs (h)(3) through (h)(5) as paragraphs (h)(1) through (h)(3), respectively;
■ g. Revising the paragraph heading for the newly redesignated paragraph (h)(1) and adding two sentences to the end of newly redesignated paragraph (h)(1)(ii);

■ h. Removing newly redesignated paragraph (h)(1)(iii);
■ i. Adding a paragraph heading for redesignated paragraph (h)(2);
■ j. Revising newly redesignated paragraph (h)(3); and
■ k. Adding paragraph (h)(4).

The revisions and additions read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(b) * * *

(6) A firm that has an SBA-approved mentor-protégé agreement authorized under § 125.9 of this chapter is not affiliated with its mentor or protégé firm solely because the protégé firm receives assistance from the mentor under the agreement. * * *

* * * * *

(9) In the case of a solicitation for a bundled contract or a Multiple Award Contract with a value in excess of the agency's substantial bundling threshold, a small business contractor may enter into a Small Business Teaming Arrangement with one or more small business subcontractors and submit an offer as a small business without regard to affiliation, so long as each team member is small for the size standard assigned to the contract or subcontract.

* * *

* * * * *

(f) * * *

(2) * * *

(i) This presumption may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern, such as where the concern has been in business for a short amount of time and has only been able to secure a limited number of contracts or where the contractual relations do not restrict the concern in question from selling the same type of products or services to another purchaser.

* * * * *

Example 2 to paragraph (f). Firm A has been in business for five years and has approximately 200 contracts. Of those contracts, 195 are with Firm B. The value of Firm A's contracts with Firm B is greater than 70% of its revenue over the previous three years. Unless Firm A can show that its contractual relations with Firm B do not restrict it from selling the same type of products or services to another purchaser, SBA would most likely find the two firms affiliated.

(g) *Affiliation based on the newly organized concern rule.* Except as provided in § 124.109(c)(4)(iii), affiliation may arise where former or current officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise.

* * *

(h) *Affiliation based on joint ventures.* A joint venture is an association of individuals and/or concerns with interests in any degree or proportion intending to engage in and carry out business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that a specific joint venture entity generally may not be awarded contracts beyond a two-year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for the joint venture. Once a joint venture receives a contract, it may submit additional offers for a period of two years from the date of that first award. An individual joint venture may be awarded one or more contracts after that two-year period as long as it submitted an offer including price prior to the end of that two-year period. SBA will find joint venture partners to be affiliated, and thus will aggregate their receipts and/or employees in determining the size of the joint venture for all small business programs, where the joint venture submits an offer after two years from the date of the first award. The same two (or more) entities may create additional joint ventures, and each new joint venture entity may submit offers for a period of two years from the date of the first contract to the joint venture without the partners to the joint venture being deemed affiliates. At some point, however, such a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them. A joint venture: Must be in writing; must do business under its own name and be identified as a joint venture in the System for Award Management (SAM) for the award of a prime contract; may be in the form of a formal or informal partnership or exist as a separate limited liability company or other separate legal entity; and, if it exists as a formal separate legal entity, may not be populated with individuals intended to perform contracts awarded to the joint venture (*i.e.,* the joint venture may have its own separate employees to perform administrative functions, including one or more Facility Security Officer(s), but may not have its own separate employees to perform contracts awarded to the joint venture). SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture pursuant to paragraph (h)(4) of this section. For purposes of this paragraph (h), contract refers to prime contracts, novations of prime contracts, and any subcontract in which the joint venture is treated as a similarly situated entity as the term is defined in part 125 of this chapter.

Example 1 to paragraph (h) introductory text. Joint Venture AB receives a contract on April 2, year 1. Joint Venture AB may receive additional contracts through April 2, year 3. On June 6, year 2, Joint Venture AB submits an offer for Solicitation 1. On July 13, year 2, Joint Venture AB submits an offer for Solicitation 2. On May 27, year 3, Joint Venture AB is found to be the apparent successful offeror for Solicitation 1. On July 22, year 3, Joint Venture AB is found to be the apparent successful offeror for Solicitation 2. Even though the award of the two contracts emanating from Solicitations 1 and 2 would occur after April 2, year 3, Joint Venture AB may receive those awards without causing general affiliation between its joint venture partners because the offers occurred prior to the expiration of the two-year period.

Example 2 to paragraph (h) introductory text. Joint Venture XY receives a contract on August 10, year 1. It may receive two additional contracts through August 10, year 3. On March 19, year 2, XY receives a second contract. It receives no other contract awards through August 10, year 3 and has submitted no additional offers prior to August 10, year 3. Because two years have passed since the date of the first contract award, after August 10, year 3, XY cannot receive an additional contract award. The individual parties to XY must form a new joint venture if they want to seek and be awarded additional contracts as a joint venture.

Example 3 to paragraph (h) introductory text. Joint Venture XY receives a contract on December 15, year 1. On May 22, year 3 XY submits an offer for Solicitation S. On December 8, year 3, XY submits a novation package for contracting officer approval for

Contract C. In January, year 4 XY is found to be the apparent successful offeror for Solicitation S and the relevant contracting officer seeks to novate Contract C to XY. Because both the offer for Solicitation S and the novation package for Contract C were submitted prior to December 15 year 3, both contract award relating to Solicitation S and novation of Contract C may occur without a finding of general affiliation.

(1) *Size of joint ventures.* (i) * * *

(ii) * * * Except for sole source 8(a) awards, the joint venture must meet the requirements of § 124.513(c) and (d), § 125.8(b) and (c), § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate, at the time it submits its initial offer including price. For a sole source 8(a) award, the joint venture must demonstrate that it meets the requirements of § 124.513(c) and (d) prior to the award of the contract.

* * * * *

(2) *Ostensible subcontractors.* * * *

(3) *Receipts/employees attributable to joint venture partners.* For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, unless the proportionate share already is accounted for in receipts reflecting transactions between the concern and its joint ventures (*e.g.,* subcontracts from a joint venture entity to joint venture partners). In determining the number of employees, a concern must include in its total number of employees its proportionate share of joint venture employees. For the calculation of receipts, the appropriate proportionate share is the same percentage of receipts or employees as the joint venture partner's percentage share of the work performed by the joint venture. For the calculation of employees, the appropriate share is the same percentage of employees as the joint venture partner's percentage ownership share in the joint venture, after first subtracting any joint venture employee already accounted for in one of the partner's employee count.

Example 1 to paragraph (h)(3). Joint Venture AB is awarded a contract for $10M. The joint venture will perform 50% of the work, with A performing $2M (40% of the 50%, or 20% of the total value of the contract) and B performing $3M (60% of the 50% or 30% of the total value of the contract). Since A will perform 40% of the work done by the joint venture, its share of the revenues for the entire contract is 40%, which means that the receipts from the contract awarded to Joint Venture AB that must be included in A's receipts for size purposes are $4M. A must add $4M to its receipts for size purposes, unless its receipts already account for the $4M in transactions between A and Joint Venture AB.

(4) *Facility security clearances.* A joint venture may be awarded a contract requiring a facility security clearance where either the joint venture itself or the individual partner(s) to the joint venture that will perform the necessary security work has (have) a facility security clearance.

(i) Where a facility security clearance is required to perform primary and vital requirements of a contract, the lead small business partner to the joint venture must possess the required facility security clearance.

(ii) Where the security portion of the contract requiring a facility security clearance is ancillary to the principal purpose of the procurement, the partner to the joint venture that will perform that work must possess the required facility security clearance.

* * * * *

■ 3. Amend § 121.402 by revising the first sentence of paragraph (b)(2), and paragraphs (c)(1)(i), (c)(2)(i), and (e) to read as follows:

§ 121.402 What size standards are applicable to Federal Government Contracting programs?

* * * * *

(b) * * *

(2) A procurement is generally classified according to the component which accounts for the greatest percentage of contract value. * * *

(c) * * *

(1) * * *

(i) Assign the solicitation a single NAICS code and corresponding size standard which best describes the principal purpose of the acquisition as set forth in paragraph (b) of this section, only if the NAICS code will also best describe the principal purpose of each order to be placed under the Multiple Award Contract; or

* * * * *

(2) * * *

(i) The contracting officer must assign a single NAICS code for each order issued against a Multiple Award Contract. The NAICS code assigned to an order must be a NAICS code included in the underlying Multiple Award Contract. When placing an order under a Multiple Award Contract with multiple NAICS codes, the contracting officer must assign the NAICS code and corresponding size standard that best describes the principal purpose of each order. In cases where an agency can issue an order against multiple SINs with different NAICS codes, the contracting officer must select the single NAICS code that best represents the acquisition. If the NAICS code corresponding to the principal purpose of the order is not contained in the underlying Multiple Award Contract, the contracting officer may not use the Multiple Award Contract to issue that order.

* * * * *

(e) When a NAICS code designation or size standard in a solicitation is unclear, incomplete, missing, or prohibited, SBA may clarify, complete, or supply a NAICS code designation or size standard, as appropriate, in connection with a formal size determination or size appeal.

* * * * *

■ 4. In § 121.404:

■ a. Amend paragraph (a) by:

■ i. Revising paragraphs (a) introductory text and (a)(1); and

■ ii. Adding a paragraph heading to paragraph (a)(2);

■ b. Revising paragraph (b);

■ c. Adding a paragraph heading to paragraph (c);

■ d. Revising paragraph (d);

■ e. Adding a paragraph heading to paragraph (e) and a sentence at the end of the paragraph;

■ f. Adding a paragraph heading to paragraph (f);

■ g. Amend paragraph (g) by:

■ i. Redesignating paragraph (g)(2)(ii)(D) as paragraph (g)(2)(iii);

■ ii. Revising paragraphs (g) introductory text, (g)(2)(ii)(C) and newly redesignated paragraph(g)(2)(iii); and

■ iii. Adding paragraph (g)(2)(iv) and a new third sentence to paragraph (g)(3) introductory text; and

■ h. Adding a paragraph heading to paragraph (h).

The additions and revisions read as follows:

§ 121.404 When is the size status of a business concern determined?

(a) *Time of size*—(1) *Multiple award contracts.* With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(i) *Single NAICS.* If a single NAICS code is assigned as set forth in § 121.402(c)(1)(i), SBA determines size status for the underlying Multiple Award Contract at the time of initial offer (or other formal response to a solicitation), which includes price, based upon the size standard set forth in the solicitation for the Multiple Award Contract, unless the concern was

required to recertify under paragraph (g)(1), (2), or (3) of this section.

(A) *Unrestricted Multiple Award Contracts.* For an unrestricted Multiple Award Contract, if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for the Multiple Award Contract, it is small for goaling purposes for each order issued against the contract, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement. Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set-aside exclusively for small business (*i.e.,* small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order or Blanket Purchase Agreement. However, where the underlying Multiple Award Contract has been awarded to a pool of concerns for which small business status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set-aside exclusively for concerns in the small business pool, concerns need not recertify their status as small business concerns (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(B) *Set-aside Multiple Award Contracts.* For a Multiple Award Contract that is set aside for small business (*i.e.,* small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for the Multiple Award Contract, it is small for each order or Blanket Purchase Agreement issued against the contract, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement.

(ii) *Multiple NAICS.* If multiple NAICS codes are assigned as set forth in § 121.402(c)(1)(ii), SBA determines size status at the time a business concern submits its initial offer (or other formal response to a solicitation) which includes price for a Multiple Award Contract based upon the size standard set forth for each discrete category (*e.g.,* CLIN, SIN, Sector, FA or equivalent) for which the business concern submits an offer and represents that it qualifies as small for the Multiple Award Contract, unless the business concern was required to recertify under paragraph (g)(1), (2), or (3) of this section. If the business concern (including a joint venture) submits an offer for the entire Multiple Award Contract, SBA will determine whether it meets the size standard for each discrete category (CLIN, SIN, Sector, FA or equivalent).

(A) *Unrestricted Multiple Award Contracts.* For an unrestricted Multiple Award Contract, if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for discrete categories on the Multiple Award Contract, it is small for goaling purposes for each order issued against any of those categories, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement. Except for orders or Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or Blanket Purchase Agreement for a discrete category under an unrestricted Multiple Award Contract is set-aside exclusively for small business (*i.e.,* small business set, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order or Agreement. However, where the underlying Multiple Award Contract for discrete categories has been awarded to a pool of concerns for which small business status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set-aside exclusively for concerns in the small business pool, concerns need not recertify their status as small business concerns (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(B) *Set-aside Multiple Award Contracts.* For a Multiple Award Contract that is set aside for small business (*i.e.,* small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for discrete categories on the Multiple Award Contract, it is small for each order or Agreement issued against any of those categories, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase.

(iii) SBA will determine size at the time of initial offer (or other formal response to a solicitation), which includes price, for an order or Agreement issued against a Multiple Award Contract if the contracting officer requests a new size certification for the order or Agreement.

(2) *Agreements.* * * *

(b) *Eligibility for SBA programs.* A concern applying to be certified as a Participant in SBA's 8(a) Business Development program (under part 124, subpart A, of this chapter), as a HUBZone small business (under part 126 of this chapter), or as a women-owned small business concern (under part 127 of this chapter) must qualify as a small business for its primary industry classification as of the date of its application and, where applicable, the date the SBA program office requests a formal size determination in connection with a concern that otherwise appears eligible for program certification.

(c) *Certificates of competency.* * * *

(d) *Nonmanufacturer rule, ostensible subcontractor rule, and joint venture agreements.* Size status is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding for the following purposes: compliance with the nonmanufacturer rule set forth in § 121.406(b)(1), the ostensible subcontractor rule set forth in § 121.103(h)(4), and the joint venture agreement requirements in § 124.513(c) and (d), § 125.8(b) and (c), § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate.

(e) *Subcontracting.* * * * A prime contractor may rely on the self-certification of subcontractor provided it does not have a reason to doubt the concern's self-certification.

(f) *Two-step procurements.* * * *

(g) *Effect of size certification and recertification.* A concern that represents itself as a small business and qualifies as small at the time it submits its initial offer (or other formal response to a solicitation) which includes price is generally considered to be a small business throughout the life of that contract. Similarly, a concern that represents itself as a small business and qualifies as small after a required recertification under paragraph (g)(1), (2), or (3) of this section is generally considered to be a small business until throughout the life of that contract. Where a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business,

except that a required recertification as other than small under paragraph (g)(1), (2), or (3) of this section changes the firm's status for future options and orders. The following exceptions apply to this paragraph (g):

* * * * *

(2) * * *

(ii) * * *

(C) In the context of a joint venture that has been awarded a contract or order as a small business, from any partner to the joint venture that has been acquired, is acquiring, or has merged with another business entity.

(iii) If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award. If the merger, sale or acquisition (including agreements in principal) occurs within 180 days of the date of an offer and the offeror is unable to recertify as small, it will not be eligible as a small business to receive the award of the contract. If the merger, sale or acquisition (including agreements in principal) occurs more than 180 days after the date of an offer, award can be made, but it will not count as an award to small business.

(iv) Recertification is not required when the ownership of a concern that is at least 51% owned by an entity (*i.e.,* tribe, Alaska Native Corporation, or Community Development Corporation) changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity.

Example 1 to paragraph (g)(2)(iii). Indian Tribe X owns 100% of small business ABC. ABC wins an award for a small business set-aside contract. In year two of contract performance, X changes the ownership of ABC so that X owns 100% of a holding company XYZ, Inc., which in turn owns 100% of ABC. This restructuring does not require ABC to recertify its status as a small business because it continues to be 100% owned (indirectly rather than directly) by Indian Tribe X.

(3) * * * A contracting officer may also request size recertification, as he or she deems appropriate, prior to the 120-day point in the fifth year of a long-term multiple award contract. * * *

* * * * *

(h) *Follow-on contracts.* * * *

§ 121.406 [Amended]

■ 5. Amend § 121.406 by removing the word ''provided'' and adding in its place the word ''provide'' in paragraph (a) introductory text.

■ 6. Amend § 121.603 by adding paragraph (c)(3) to read as follows:

§ 121.603 How does SBA determine whether a Participant is small for a particular 8(a) BD subcontract?

* * * * *

(c) * * *

(3) Recertification is not required when the ownership of a concern that is at least 51% owned by an entity (*i.e.,* tribe, Alaska Native Corporation, or Community Development Corporation) changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity.

* * * * *

■ 7. Amend § 121.702 by revising paragraph (c)(6) to read as follows:

§ 121.702 What size and eligibility standards are applicable to the SBIR and STTR programs?

* * * * *

(c) * * *

(6) *Size requirement for joint ventures.* Two or more small business concerns may submit an application as a joint venture. The joint venture will qualify as small as long as each concern is small under the size standard for the SBIR program, found at § 121.702(c), or the joint venture meets the exception at § 121.103(h)(3)(ii) for two firms approved to be a mentor and protégé under SBA's All Small Mentor-Protégé Program.

* * * * *

■ 8. Amend § 121.1001 by revising paragraphs (a)(1)(iii), (a)(2)(iii), (a)(3)(iv), (a)(4)(iii), (a)(6)(iv), (a)(7)(iii), (a)(8)(iv), (a)(9)(iv), (b)(7), and (b)(12) to read as follows:

§ 121.1001 Who may initiate a size protest or request a formal size determination?

(a) * * *

(1) * * *

(iii) The SBA Government Contracting Area Director having responsibility for the area in which the headquarters of the protested offeror is located, regardless of the location of a parent company or affiliates, the Director, Office of Government Contracting, or the Associate General Counsel for Procurement Law; and

* * * * *

(2) * * *

(iii) The SBA District Director, or designee, in either the district office serving the geographical area in which the procuring activity is located or the district office that services the apparent successful offeror, the Associate Administrator for Business Development, or the Associate General Counsel for Procurement Law.

(3) * * *

(iv) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting, or the SBA's Associate General Counsel for Procurement Law; and

* * * * *

(4) * * *

(iii) The responsible SBA Government Contracting Area Director; the Director, Office of Government Contracting; the Associate Administrator, Investment Division, or the Associate General Counsel for Procurement Law.

* * * * *

(6) * * *

(iv) The SBA Director, Office of HUBZone, or designee, or the SBA Associate General Counsel for Procurement Law.

(7) * * *

(iii) The responsible SBA Government Contracting Area Director, the Director, Office of Government Contracting, the Associate Administrator for Business Development, or the Associate General Counsel for Procurement Law.

(8) * * *

(iv) The Director, Office of Government Contracting, or designee, or the Associate General Counsel for Procurement Law.

(9) * * *

(iv) The Director, Office of Government Contracting, or designee, or the Associate General Counsel for Procurement Law.

(b) * * *

(7) In connection with initial or continued eligibility for the WOSB program, the following may request a formal size determination:

(i) The applicant or WOSB/EDWOSB; or

(ii) The Director of Government Contracting or the Deputy Director, Program and Resource Management, for the Office of Government Contracting.

* * * * *

(12) In connection with eligibility for the SDVO program, the following may request a formal size determination:

(i) The SDVO business concern; or

(ii) The Director of Government Contracting or designee.

* * * * *

■ 9. Amend § 121.1004 by revising paragraph (a)(2)(ii) and adding paragraph (a)(2)(iii) to read as follows:

§ 121.1004 What time limits apply to size protests?

(a) * * *

(2) * * *

(ii) An order issued against a Multiple Award Contract if the contracting officer requested a size recertification in connection with that order; or

(iii) Except for orders or Blanket Purchase Agreements issued under any

Federal Supply Schedule contract, an order or Blanket Purchase Agreement set-aside for small business (*i.e.,* small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business) where the underlying Multiple Award Contract was awarded on an unrestricted basis.

* * * * *

■ 10. Amend § 121.1103 by revising paragraph (c)(1)(i) to read as follows:

§ 121.1103 What are the procedures for appealing a NAICS code or size standard designation?

* * * * *

(c) * * *

(1) * * *

(i) Stay the date for the closing of receipt of offers;

* * * * *

PART 124—8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

■ 11. The authority citation for part 124 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644 and Pub. L. 99–661, Pub. L. 100–656, sec. 1207, Pub. L. 101–37, Pub. L. 101–574, section 8021, Pub. L. 108–87, and 42 U.S.C. 9815.

■ 12. Amend § 124.3 by adding in alphabetical order a definition for ''Follow-on requirement or contract'' to read as follows:

§ 124.3 What definitions are important in the 8(a) BD program?

* * * * *

Follow-on requirement or contract. The determination of whether a particular requirement or contract is a follow-on includes consideration of whether the scope has changed significantly, requiring meaningful different types of work or different capabilities; whether the magnitude or value of the requirement has changed by at least 25 percent for equivalent periods of performance; and whether the end user of the requirement has changed. As a general guide, if the procurement satisfies at least one of these three conditions, it may be considered a new requirement. However, meeting any one of these conditions is not dispositive that a requirement is new. In particular, the 25 percent rule cannot be applied rigidly in all cases. Conversely, if the requirement satisfies none of these conditions, it is considered a follow-on procurement.

* * * * *

■ 13. Amend § 124.105 by revising paragraph (g) and paragraphs (i)(2) and (4) to read as follows:

§ 124.105 What does it mean to be unconditionally owned by one or more disadvantaged individuals?

* * * * *

(g) *Ownership of another current or former Participant by an immediate family member.* (1) An individual may not use his or her disadvantaged status to qualify a concern if that individual has an immediate family member who is using or has used his or her disadvantaged status to qualify another concern for the 8(a) BD program and any of the following circumstances exist:

(i) The concerns are connected by any common ownership or management, regardless of amount or position;

(ii) The concerns have a contractual relationship that was not conducted at arm's length;

(iii) The concerns share common facilities; or

(iv) The concerns operate in the same primary NAICS code and the individual seeking to qualify the applicant concern does not have management or technical experience in that primary NAICS code.

Example 1 to paragraph (g)(1). X applies to the 8(a) BD program. X is 95% owned by A and 5% by B, A's father and the majority owner in a former 8(a) Participant. Even though B has no involvement in X, X would be ineligible for the program.

Example 2 to paragraph (g)(1). Y applies to the 8(a) BD program. C owns 100% of Y. However, D, C's sister and the majority owner in a former 8(a) Participant, is acting as a Vice President in Y. Y would be ineligible for the program.

Example 3 to paragraph (g)(1). X seeks to apply to the 8(a) BD program with a primary NAICS code in plumbing. X is 100% owned by A. Z, a former 8(a) participant with a primary industry in general construction, is owned 100% by B, A's brother. For general construction jobs, Z has subcontracted plumbing work to X in the past at normal commercial rates. Subcontracting work at normal commercial rates would not preclude X from being admitted to the 8(a) BD program. X would be eligible for the program.

(2) If the AA/BD approves an application under paragraph (g)(1) of this section, SBA will, as part of its annual review, assess whether the firm continues to operate independently of the other current or former 8(a) concern of an immediate family member. SBA may initiate proceedings to terminate a firm from further participation in the 8(a) BD program if it is apparent that there are connections between the two firms that were not disclosed to the AA/BD at the time of application or that came into existence after program admittance.

* * * * *

(i) * * *

(2) Prior approval by the AA/BD is not needed where all non-disadvantaged individual (or entity) owners involved in the change of ownership own no more than a 20 percent interest in the concern both before and after the transaction, the transfer results from the death or incapacity due to a serious, long-term illness or injury of a disadvantaged principal, or the disadvantaged individual or entity in control of the Participant will increase the percentage of its ownership interest. The concern must notify SBA within 60 days of such a change in ownership.

Example 1 to paragraph (i)(2). Disadvantaged individual A owns 90% of 8(a) Participant X; non-disadvantaged individual B owns 10% of X. In order to raise additional capital, X seeks to change its ownership structure such that A would own 80%, B would own 10% and C would own 10%. X can accomplish this change in ownership without prior SBA approval. Non-disadvantaged owner B is not involved in the transaction and non-disadvantaged individual C owns less than 20% of X both before and after the transaction.

Example 2 to paragraph (i)(2). Disadvantaged individual C owns 60% of 8(a) Participant Y; non-disadvantaged individual D owns 30% of Y; and non-disadvantaged individual E owns 10% of Y. C seeks to transfer 5% of Y to E. Prior SBA approval is not needed. Although non-disadvantaged individual D owns more than 20% of Y, D is not involved in the transfer. Because the only non-disadvantaged individual involved in the transfer, E, owns less than 20% of Y both before and after the transaction, prior approval is not needed.

Example 3 to paragraph (i)(2). Disadvantaged individual A owns 85% of 8(a) Participant X; non-disadvantaged individual B owns 15% of X. A seeks to transfer 15% of X to B. Prior SBA approval is needed. Although B, the non-disadvantaged owner of X, owns less than 20% of X prior to the transaction, prior approval is needed because B would own more than 20% after the transaction.

Example 4 to paragraph (i)(2). ANC A owns 60% of 8(a) Participant X; non-disadvantaged individual B owns 40% of X. B seeks to transfer 15%

to A. Prior SBA approval is not needed. Although a non-disadvantaged individual who is involved in the transaction, B, owns more than 20% of X both before and after the transaction, SBA approval is not needed because the change only increases the percentage of A's ownership interest in X.

* * * * *

(4) Where a Participant requests a change of ownership or business structure, and proceeds with the change prior to receiving SBA approval (or where a change of ownership results from the death or incapacity of a disadvantaged individual for which a request prior to the change in ownership could not occur), SBA may suspend the Participant from program benefits pending resolution of the request. If the change is approved, the length of the suspension will be restored to the Participant's program term in the case of death or incapacity, or if the firm requested prior approval and waited 60 days for SBA approval.

* * * * *

■ 14. Amend § 124.109 by:
■ a. Revising the section heading;
■ b. Adding paragraph (a)(7);
■ c. Revising paragraph (c)(3)(ii);
■ d. Adding paragraphs (c)(3)(iv) and (c)(4)(iii)(C); and
■ e. Revising paragraphs (c)(6)(iii) and (c)(7)(ii).

The revisions and additions to read as follows:

§ 124.109 Do Indian tribes and Alaska Native Corporations have any special rules for applying to and remaining eligible for the 8(a) BD program?

(a) * * *

(7) Notwithstanding § 124.105(i), where an ANC merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the ANC and the Participant, the Participant need not request a change of ownership from SBA. The Participant must, however, notify SBA of the change within 60 days of the transfer.

* * * * *

(c) * * *

(3) * * *

(ii) A Tribe may not own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard. A Tribe may, however, own a Participant or other applicant that conducts or will conduct secondary business in the 8(a) BD program under the NAICS code which is the primary NAICS code of the applicant concern.

(A) Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same Tribe. However, a tribally-owned concern may receive a follow-on sole source 8(a) contract to a requirement that it performed through the 8(a) program (either as a competitive or sole source contract).

(B) If the primary NAICS code of a tribally-owned Participant is changed pursuant to § 124.112(e), the tribe can submit an application and qualify another firm owned by the tribe for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

Example 1 to paragraph (c)(3)(ii)(B). Tribe X owns 100% of 8(a) Participant A. A entered the 8(a) BD program with a primary NAICS code of 236115, New Single-Family Housing Construction (except For-Sale Builders). After four years in the program, SBA noticed that the vast majority of A's revenues were in NAICS Code 237310, Highway, Street, and Bridge Construction, and notified A that SBA intended to change its primary NAICS code pursuant to § 124.112(e). A agreed to change its primary NAICS Code to 237310. Once the change is finalized, Tribe X can immediately submit a new application to qualify another firm that it owns for participation in the 8(a) BD program with a primary NAICS Code of 236115.

* * * * *

(iv) Notwithstanding § 124.105(i), where a Tribe merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the Tribe and the Participant, the Participant need not request a change of ownership from SBA. The Participant must, however, notify SBA of the change within 30 days of the transfer.

(4) * * *

(iii) * * *

(C) Because an individual may be responsible for the management and daily business operations of two tribally-owned concerns, the full-time devotion requirement does not apply to tribally-owned applicants and Participants.

* * * * *

(6) * * *

(iii) The Tribe, a tribally-owned economic development corporation, or other relevant tribally-owned holding company vested with the authority to oversee tribal economic development or business ventures has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so.

(7) * * *

(ii) The officers, directors, and all shareholders owning an interest of 20% or more (other than the tribe itself) of a tribally-owned applicant or Participant must demonstrate good character (*see* § 124.108(a)) and cannot fail to pay significant Federal obligations owed to the Federal Government (*see* § 124.108(e)).

■ 15. Amend § 124.110 by revising the section heading and paragraph (e) to read as follows:

§ 124.110 Do Native Hawaiian Organizations (NHOs) have any special rules for applying to and remaining eligible for the 8(a) BD program?

* * * * *

(e) An NHO cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard. An NHO may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same NAICS code that a current Participant owned by the NHO operates in the 8(a) BD program as its primary NAICS code.

(1) Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same NHO. However, an NHO-owned concern may receive a follow-on sole source 8(a) contract to a requirement that it performed through the 8(a) program (either as a competitive or sole source contract).

(2) If the primary NAICS code of a Participant owned by an NHO is changed pursuant to § 124.112(e), the NHO can submit an application and qualify another firm owned by the NHO for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

* * * * *

■ 16. Amend § 124.111 by revising the section heading, adding paragraph

(c)(3), and revising paragraph (d) to read as follows:

§ 124.111 Do Community Development Corporations (CDCs) have any special rules for applying to and remaining eligible for the 8(a) BD program?

* * * * *

(c) * * *

(3) Notwithstanding § 124.105(i), where a CDC merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the CDC and the Participant, the Participant need not request a change of ownership from SBA. The Participant must, however, notify SBA of the change within 30 days of the transfer.

(d) A CDC cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard. A CDC may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same NAICS code that a current Participant owned by the CDC operates in the 8(a) BD program as its primary SIC code.

(1) Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same CDC. However, a CDC-owned concern may receive a follow-on sole source 8(a) contract to a requirement that it performed through the 8(a) program.

(2) If the primary NAICS code of a Participant owned by a CDC is changed pursuant to § 124.112(e), the CDC can submit an application and qualify another firm owned by the CDC for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

* * * * *

■ 17. Amend § 124.112 by revising paragraph (d)(5), redesignating paragraph (e)(2)(iv) as paragraph (e)(2)(v), and adding a new paragraph (e)(2)(iv).

The revision and addition read as follows:

§ 124.112 What criteria must a business meet to remain eligible to participate in the 8(a) BD program?

* * * * *

(d) * * *

(5) The excessive withdrawal analysis does not apply to Participants owned by Tribes, ANCs, NHOs, or CDCs where a withdrawal is made for the benefit of the Tribe, ANC, NHO, CDC or the native or shareholder community. It does, however, apply to withdrawals from a firm owned by a Tribe, ANC, NHO, or CDC that do not benefit the relevant entity or community. Thus, if funds or assets are withdrawn from an entity-owned Participant for the benefit of a non-disadvantaged manager or owner that exceed the withdrawal thresholds, SBA may find that withdrawal to be excessive. However, a non-disadvantaged minority owner may receive a payout in excess of the excessive withdrawal amount if it is a pro rata distribution paid to all shareholders (*i.e.,* the only way to increase the distribution to the Tribe, ANC, NHO or CDC is to increase the distribution to all shareholders) and it does not adversely affect the business development of the Participant.

Example 1 to paragraph (d)(5). Tribally-owned Participant X pays $1,000,000 to a non-disadvantaged manager. If that was not part of a pro rata distribution to all shareholders, that would be deemed an excessive withdrawal.

Example 2 to paragraph (d)(5). ANC-owned Participant Y seeks to distribute $550,000 to the ANC and $450,000 to non-disadvantaged individual A based on their 55%/45% ownership interests. Because the distribution is based on the pro rata share of ownership, this would not be prohibited as an excessive withdrawal unless SBA determined that Y would be adversely affected.

(e) * * *

(2) * * *

(iv) A Participant may appeal a district office's decision to change its primary NAICS code to SBA's Associate General Counsel for Procurement Law (AGC/PL) within 10 business days of receiving the district office's final determination. The AGC/PL will examine the record, including all information submitted by the Participant in support of its position as to why the primary NAICS code contained in its business plan continues to be appropriate despite performing more work in another NAICS code, and issue a final agency decision within 15 business days of receiving the appeal.

* * * * *

■ 18. Amend § 124.203 by revising the first two sentences and adding a new third sentence to read as follows:

§ 124.203 What must a concern submit to apply to the 8(a) BD program?

Each 8(a) BD applicant concern must submit information and supporting documents required by SBA when applying for admission to the 8(a) BD program. This information may include, but not be limited to, financial data and statements, copies of filed Federal personal and business tax returns, individual and business bank statements, personal history statements, and any additional information or documents SBA deems necessary to determine eligibility. Each individual claiming disadvantaged status must also authorize SBA to request and receive tax return information directly from the Internal Revenue Service. * * *

■ 19. Amend § 124.204 by adding a sentence to the end of paragraph (a) to read as follows:

§ 124.204 How does SBA process applications for 8(a) BD program admission?

(a) * * * Where during its screening or review SBA requests clarifying, revised or other information from the applicant, SBA's processing time for the application will be suspended pending the receipt of such information.

* * * * *

■ 20. Revise § 124.205 to read as follows:

§ 124.205 Can an applicant ask SBA to reconsider SBA's initial decision to decline its application?

There is no reconsideration process for applications that have been declined. An applicant which has been declined may file an appeal with SBA's Office of Hearings and Appeals pursuant to § 124.206, or reapply to the program pursuant to § 124.207.

§ 124.206 [Amended]

■ 21. Revise § 124.206 by removing and reserving paragraph (b) and redesignating paragraphs (c) and (d) as paragraphs (b) and (c), respectively.

■ 22. Revise § 124.207 to read as follows:

§ 124.207 Can an applicant reapply for admission to the 8(a) BD program?

A concern which has been declined for 8(a) BD program participation may submit a new application for admission to the program at any time after 90 days from the date of the Agency's final decision to decline. However, a concern that has been declined three times within 18 months of the date of the first

final Agency decision finding the concern ineligible cannot submit a new application for admission to the program until 12 months from the date of the third final Agency decision to decline.

§ 124.301 [Redesignated as § 124.300]

■ 23. Redesignate § 124.301 as § 124.300.

■ 24. Add new § 124.301 to read as follows:

§ 124.301 Voluntary withdrawal or voluntary early graduation.

(a) A Participant may voluntarily withdraw from the 8(a) BD program at any time prior to the expiration of its program term. Where a Participant has substantially achieved the goals and objectives set forth in its business plan, it may elect to voluntarily early graduate from the 8(a) BD program.

(b) To initiate withdrawal or early graduation from the 8(a) BD program, a Participant must notify its servicing SBA district office of its intent to do so in writing. Once the SBA servicing district office processes the request and the District Director recognizes the withdrawal or early graduation, the Participant is no longer eligible to receive any 8(a) BD program assistance.

■ 25. Amend § 124.304(d) by revising the paragraph heading and adding a sentence at the end of paragraph (d) to read as follows:

§ 124.304 What are the procedures for early graduation and termination?

* * * * *

(d) *Notice requirements and effect of decision.* * * * Once the AA/BD issues a decision to early graduate or terminate a Participant, the Participant will be immediately ineligible to receive further program assistance. If OHA overrules the AA/BD's decision on appeal, the length of time between the AA/BD's decision and OHA's decision on appeal will be added to the Participant's program term.

* * * * *

■ 26. Amend § 124.305 by:

■ a. Revising paragraph (a);

■ b. Revising the introductory text of paragraph (d);

■ c. Revising paragraph (d)(3);

■ d. Revising the introductory text of paragraph (h)(1);

■ d. Revising paragraphs (h)(1)(ii) and (iv);

■ e. Adding paragraph (h)(1)(v);

■ f. Redesignating paragraph (h)(6) as (h)(7); and

■ g. Adding a new paragraph (h)(6).

The revisions and additions read as follows:

§ 124.305 What is suspension and how is a Participant suspended from the 8(a) BD program?

(a) Except as set forth in paragraph (h) of this section, the AA/BD may suspend a Participant when he or she determines that suspension is needed to protect the interests of the Federal Government, such as where information showing a clear lack of program eligibility or conduct indicating a lack of business integrity exists, including where the concern or one of its principals submitted false statements to the Federal Government. SBA will suspend a Participant where SBA determines that the Participant submitted false information in its 8(a) BD application.

* * * * *

(d) SBA has the burden of showing that adequate evidence exists that protection of the Federal Government's interest requires suspension.

* * * * *

(3) OHA's review is limited to determining whether the Government's interests need to be protected, unless a termination action has also been initiated and the Administrative Law Judge consolidates the suspension and termination proceedings. In such a case, OHA will also consider the merits of the termination action.

* * * * *

(h)(1) Notwithstanding paragraph (a) of this section, SBA will suspend a Participant from receiving further 8(a) BD program benefits where:

* * * * *

(ii) A disadvantaged individual who is involved in controlling the day-to-day management and control of the Participant is called to active military duty by the United States, his or her participation in the firm's management and daily business operations is critical to the firm's continued eligibility, the Participant does not designate another disadvantaged individual to control the concern during the call-up period, and the Participant requests to be suspended during the call-up period;

* * * * *

(iv) Federal appropriations for one or more Federal departments or agencies have lapsed, a Participant would lose an 8(a) sole source award due to the lapse in appropriations (*e.g.,* SBA has previously accepted an offer for a sole source 8(a) award on behalf of the Participant or an agency could not offer a sole source 8(a) requirement to the program on behalf of the Participant due to the lapse in appropriations, and the Participant's program term would end during the lapse), and the Participant elects to suspend its participation in the 8(a) BD program during the lapse in Federal appropriations; or

(v) A Participant has not submitted a business plan to its SBA servicing office within 60 days after program admission.

* * * * *

(6) Where a Participant is suspended pursuant to paragraph (h)(1)(iii) or paragraph (h)(1)(v) of this section, the length of the suspension will be added to the concern's program term.

* * * * *

■ 27. Amend § 124.402 by revising paragraph (b) to read as follows:

§ 124.402 How does a Participant develop a business plan?

* * * * *

(b) *Submission of initial business plan.* Each Participant must submit a business plan to its SBA servicing office as soon as possible after program admission. SBA will suspend a Participant from receiving 8(a) BD program benefits, including 8(a) contracts, if it has not submitted its business plan to the servicing district office within 60 days after program admission.

* * * * *

■ 28. Amend § 124.501 by redesignating paragraphs (g) through (i) as paragraphs (h) through (j), respectively, by adding new paragraphs (g) and (k), and by revising newly redesignated paragraph (h) to read as follows:

§ 124.501 What general provisions apply to the award of 8(a) contracts?

* * * * *

(g) Before a Participant may be awarded either a sole source or competitive 8(a) contract, SBA must determine that the Participant is eligible for award. SBA will determine eligibility at the time of its acceptance of the underlying requirement into the 8(a) BD program for a sole source 8(a) contract, and after the apparent successful offeror is identified for a competitive 8(a) contract. Eligibility is based on 8(a) BD program criteria, including whether the Participant:

(1) Qualifies as a small business under the size standard corresponding to the NAICS code assigned to the requirement;

(2) Is in compliance with any applicable competitive business mix targets established or remedial measure imposed by § 124.509 that does not include the denial of future sole source 8(a) contracts;

(3) Complies with the continued eligibility reporting requirements set forth in § 124.112(b);

(4) Has a bona fide place of business in the applicable geographic area if the procurement is for construction;

(5) Has not received 8(a) contracts in excess of the dollar limits set forth in § 124.519 for a sole source 8(a) procurement;

(6) Has complied with the provisions of § 124.513(c) and (d) if it is seeking a sole source 8(a) award through a joint venture; and

(7) Can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in § 124.510.

(h) For a sole source 8(a) procurement, a concern must be a current Participant in the 8(a) BD program at the time of award. If a firm's term of participation in the 8(a) BD program ends (or the firm otherwise exits the program) before a sole source 8(a) contract can be awarded, award cannot be made to that firm. This applies equally to sole source orders issued under multiple award contracts. For a competitive 8(a) procurement, a firm must be a current Participant eligible for award of the contract on the initial date specified for receipt of offers contained in the solicitation as provided in § 124.507(d).

* * * * *

(k) In order to be awarded a sole source or competitive 8(a) construction contract, a Participant must have a bona fide place of business within the applicable geographic location determined by SBA. This will generally be the geographic area serviced by the SBA district office, a Metropolitan Statistical Area (MSA), or a contiguous county to (whether in the same or different state) where the work will be performed. SBA may determine that a Participant with a bona fide place of business anywhere within the state (if the state is serviced by more than one SBA district office), one or more other SBA district offices (in the same or another state), or another nearby area is eligible for the award of an 8(a) construction contract.

(1) A Participant may have bona fide places of business in more than one location.

(2) In order for a Participant to establish a bona fide place of business in a particular geographic location, the SBA district office serving the geographic area of that location must determine if the location in fact qualifies as a bona fide place of business under SBA's requirements.

(i) A Participant must submit a request for a bona fide business determination to the SBA district office servicing it. Such request may, but need not, relate to a specific 8(a) requirement. In order to apply to a specific competitive 8(a) solicitation, such request must be submitted at least 20 working days before initial offers that include price are due.

(ii) The servicing district office will immediately forward the request to the SBA district office serving the geographic area of the particular location for processing. Within 10 working days of receipt of the submission, the reviewing district office will conduct a site visit, if practicable. If not practicable, the reviewing district office will contact the Participant within such 10-day period to inform the Participant that the reviewing office has received the request and may ask for additional documentation to support the request.

(iii) In connection with a specific competitive solicitation, the reviewing office will make a determination whether or not the Participant has a bona fide place of business in its geographical area within 5 working days of a site visit or within 15 working days of its receipt of the request from the servicing district office if a site visit is not practical in that timeframe. If the request is not related to a specific procurement, the reviewing office will make a determination within 30 working days of its receipt of the request from the servicing district office, if practicable.

(A) Where SBA does not provide a determination within the identified time limit, a Participant may presume that SBA has approved its request for a bona fide place of business and submit an offer for a competitive 8(a) procurement that requires a bona fide place of business in the requested area.

(B) In order to be eligible for award, SBA must approve the bona fide place of business prior to award. If SBA has not provided a determination prior to the time that a Participant is identified as the apparent successful offeror, SBA will make the bona fide place of business determination as part of the eligibility determination set forth in paragraph (g)(4) of this section within 5 days of receiving a procuring activity's request for an eligibility determination, unless the procuring activity grants additional time for review. If, due to deficiencies in a Participant's request, SBA cannot make a determination, and the procuring activity does not grant additional time for review, SBA will be unable to verify the Participant's eligibility for award and the Participant will be ineligible for award.

(3) The effective date of a bona fide place of business is the date that the evidence (paperwork) shows that the business in fact regularly maintained its business at the new geographic location.

(4) Except as provided in paragraph (k)(2)(iii) of this section, in order for a Participant to be eligible to submit an offer for an 8(a) procurement limited to a specific geographic area, it must receive from SBA a determination that it has a bona fide place of business within that area prior to submitting its offer for the procurement.

(5) Once a Participant has established a bona fide place of business, the Participant may change the location of the recognized office without prior SBA approval. However, the Participant must notify SBA and provide documentation demonstrating an office at that new location within 30 days after the move. Failure to timely notify SBA will render the Participant ineligible for new 8(a) construction procurements limited to that geographic area.

■ 29. Amend § 124.503 by:

■ a. Removing the phrase ''in § 124.507(b)(2)'' and adding in its place the phrase ''in § 124.501(g)'' in paragraph (a)(1);

■ b. Redesignating paragraphs (e) through (j) as paragraphs (f) through (k), respectively;

■ c. Adding a new paragraph (e);

■ d. Revising newly redesignated paragraph (g);

■ e. Revising the introductory text of the newly redesignated paragraph (h);

■ f. Adding the phrase ''or BPA'' after the phrase ''BOA'', wherever it appears, in the newly redesignated paragraphs (h)(1) through (4);

■ g. Revising newly redesignated paragraph (i)(1)(iii);

■ h. Adding a sentence at the end of newly redesignated paragraph (i)(1)(iv); and

■ i. Revising newly redesignated paragraphs (i)(2)(ii) and (i)(2)(iv).

The additions and revisions read as follows:

§ 124.503 How does SBA accept a procurement for award through the 8(a) BD program?

* * * * *

(e) *Withdrawal/substitution of offered requirement or Participant.* After SBA has accepted a requirement for award as a sole source 8(a) contract on behalf of a specific Participant (whether nominated by the procuring agency or identified by SBA for an open requirement), if the procuring agency believes that the identified Participant is not a good match for the procurement—including for such reasons as the procuring agency finding the Participant non-responsible or the negotiations between the procuring agency and the Participant otherwise failing—the procuring agency may seek to substitute another Participant for the originally

identified Participant. The procuring agency must inform SBA of its concerns regarding the originally identified Participant and identify whether it believes another Participant could fulfill its needs.

(1) If the procuring agency and SBA agree that another Participant can fulfill its needs, the procuring agency will withdraw the original offering and reoffer the requirement on behalf of another 8(a) Participant. SBA will then accept the requirement on behalf of the newly identified Participant and authorize the procuring agency to negotiate directly with that Participant.

(2) If the procuring agency and SBA agree that another Participant cannot fulfill its needs, the procuring agency will withdraw the original offering letter and fulfill its needs outside the 8(a) BD program.

(3) If the procuring agency believes that another Participant cannot fulfill its needs, but SBA does not agree, SBA may appeal that decision to the head of the procuring agency pursuant to § 124.505(a)(2).

* * * * *

(g) *Repetitive acquisitions.* A procuring activity contracting officer must submit a new offering letter to SBA where he or she intends to award a follow-on or repetitive contract as an 8(a) award.

(1) This enables SBA to determine:

(i) Whether the requirement should be a competitive 8(a) award;

(ii) A nominated firm's eligibility, whether or not it is the same firm that performed the previous contract;

(iii) The affect that contract award would have on the equitable distribution of 8(a) contracts; and

(iv) Whether the requirement should continue under the 8(a) BD program.

(2) Where a procuring agency seeks to reprocure a follow-on requirement through an 8(a) contracting vehicle which is not available to all 8(a) BD Program Participants (*e.g.,* a multiple award or Governmentwide acquisition contract that is itself an 8(a) contract), and the previous/current 8(a) award was not so limited, SBA will consider the business development purposes of the program in determining how to accept the requirement.

* * * * *

(h) *Basic Ordering Agreements (BOAs) and Blanket Purchase Agreements (BPAs).* Neither a Basic Ordering Agreement (BOA) nor a Blanket Purchase Agreement (BPA) is a contract under the FAR. *See* 48 CFR 13.303 and 48 CFR 16.703(a). Each order to be issued under a BOA or BPA is an individual contract. As such, the procuring activity must offer, and SBA must accept, each order under a BOA or BPA in addition to offering and accepting the BOA or BPA itself.

* * * * *

(i)

(1) * * *

(iii) A concern awarded a task or delivery order contract or Multiple Award Contract that was set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants may generally continue to receive new orders even if it has grown to be other than small or has exited the 8(a) BD program, and agencies may continue to take SDB credit toward their prime contracting goals for orders awarded to 8(a) Participants. A procuring agency may seek to award an order only to a concern that is a current Participant in the 8(a) program at the time of the order. In such a case, the procuring agency will announce its intent to limit the award of the order to current 8(a) Participants and verify a contract holder's 8(a) BD status prior to issuing the order. Where a procuring agency seeks to award an order to a concern that is a current 8(a) Participant, a concern must be an eligible Participant in accordance with § 124.501(g) as of the initial date specified for the receipt of offers contained in the order solicitation, or at the date of award of the order if there is no solicitation.

(iv) * * * To be eligible for the award of a sole source order, a concern must be a current Participant in the 8(a) BD program at the time of award.

(2) * * *

(ii) The order must be competed exclusively among only the 8(a) awardees of the underlying multiple award contract;

* * * * *

(iv) SBA must verify that a concern is an eligible 8(a) Participant in accordance with § 124.501(g) as of the initial date specified for the receipt of offers contained in the order solicitation, or at the date of award of the order if there is no solicitation. If a concern has exited the 8(a) BD program prior to that date, it will be ineligible for the award of the order.

* * * * *

■ 30. Amend § 124.504 by:

■ a. Revising the section heading and paragraph (b);

■ b. Removing the term ''Simplified Acquisition Procedures'' and adding in its place the phrase ''the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101)'' in paragraph (c) introductory text;

■ c. Removing the word ''will'' and adding in its place the word ''may'' in paragraph (c)(1)(ii)(C);

■ d. Adding a paragraph (c)(4); and

■ e. Revising the paragraph heading for paragraph (d) and paragraphs (d)(1) introductory text and (d)(4).

The revisions and addition read as follows:

§ 124.504 What circumstances limit SBA's ability to accept a procurement for award as an 8(a) contract, and when can a requirement be released from the 8(a) BD program?

* * * * *

(b) *Competition prior to offer and acceptance.* The procuring activity competed a requirement among 8(a) Participants prior to offering the requirement to SBA and did not clearly evidence its intent to conduct an 8(a) competitive acquisition.

* * * * *

(c) * * *

(4) SBA does not typically consider the value of a bridge contract when determining whether an offered procurement is a new requirement. A bridge contract is meant to be a temporary stop-gap measure intended to ensure the continuation of service while an agency finalizes a long-term procurement approach.

(d) *Release for non-8(a) or limited 8(a) competition.* (1) Except as set forth in paragraph (d)(4) of this section, where a procurement is awarded as an 8(a) contract, its follow-on requirement must remain in the 8(a) BD program unless SBA agrees to release it for non-8(a) competition. Where a procurement will contain work currently performed under one or more 8(a) contracts, and the procuring agency determines that the procurement should not be considered a follow-on requirement to the 8(a) contract(s), the procuring agency must notify SBA that it intends to procure such specified work outside the 8(a) BD program through a requirement that it considers to be new. Additionally, a procuring agency must notify SBA where it seeks to reprocure a follow-on requirement through a pre-existing limited contracting vehicle which is not available to all 8(a) BD Program Participants and the previous/current 8(a) award was not so limited. If a procuring agency would like to fulfill a follow-on requirement outside of the 8(a) BD program, it must make a written request to and receive the concurrence of the AA/BD to do so. In determining whether to release a requirement from the 8(a) BD program, SBA will consider:

* * * * *

(4) The requirement that a follow-on procurement must be released from the

8(a) BD program in order for it to be fulfilled outside the 8(a) BD program does not apply:

(i) Where previous orders were offered to and accepted for the 8(a) BD program pursuant to § 124.503(i)(2); or

(ii) Where a procuring agency will use a mandatory source (*see* FAR Subparts 8.6 and 8.7(48 CFR subparts 8.6 and 8.7)). In such a case, the procuring agency should notify SBA at least 30 days prior to the end of the contract or order.

■ 31. Amend § 124.505 by:
■ a. Removing the word ''and'' at the end of paragraph (a)(2);
■ b. Redesignating paragraph (a)(3) as paragraph (a)(4); and
■ c. Adding new paragraph (a)(3).

The addition reads as follows:

§ 124.505 When will SBA appeal the terms or conditions of a particular 8(a) contract or a procuring activity decision not to use the 8(a) BD program?

(a) * * *

(3) A decision by a contracting officer that a particular procurement is a new requirement that is not subject to the release requirements set forth in § 124.504(d); and

* * * * *

■ 32. Amend § 124.507 by:
■ a. Revising paragraph (b)(2);
■ b. Removing paragraph (b)(3);
■ c. Redesignating paragraphs (b)(4) through (6) as paragraphs (b)(3) through (5), respectively;
■ d. Removing paragraph (c)(1);
■ e. Redesignating paragraphs (c)(2) and (3) as paragraphs (c)(1) and (2), respectively;
■ f. Revising newly redesignated paragraph (c)(1); and
■ g. Adding a new paragraph (d)(3).

The revisions and addition read as follows:

§ 124.507 What procedures apply to competitive 8(a) procurements?

* * * * *

(b) * * *

(2) SBA determines a Participant's eligibility pursuant to § 124.501(g).

* * * * *

(c) * * *

(1) *Construction competitions.* Based on its knowledge of the 8(a) BD portfolio, SBA will determine whether a competitive 8(a) construction requirement should be competed among only those Participants having a bona fide place of business within the geographical boundaries of one or more SBA district offices, within a state, or within the state and nearby areas. Only those Participants with bona fide places of business within the appropriate geographical boundaries are eligible to submit offers.

* * * * *

(d) * * *

(3) For a two-step design-build procurement to be awarded through the 8(a) BD program, a firm must be a current Participant eligible for award of the contract on the initial date specified for receipt of phase one offers contained in the contract solicitation.

■ 33. Amend § 124.509 by:
■ a. Removing the word ''maximum'' and adding in its place the words ''good faith'' in paragraph (a)(1);
■ b. Removing the words ''substantial and sustained'' and adding in their place the words ''good faith'' in paragraph (a)(2);
■ c. Revising the table in paragraph (b)(2);
■ d. Revising paragraph (d); and
■ e. Revising paragraph (e).

The revisions read as follows:

§ 124.509 What are non-8(a) business activity targets?

* * * * *

(b) * * *

TABLE 1 TO PARAGRAPH (b)

Participants year in the transitional stage	Non-8(a) business activity targets (required minimum non-8(a) revenue as a percentage of total revenue)
1	15
2	25
3	30
4	40
5	50

* * * * *

(d) *Consequences of not meeting competitive business mix targets.* (1) Beginning at the end of the first year in the transitional stage (the fifth year of participation in the 8(a) BD program), any firm that does not meet its applicable competitive business mix target for the just completed program year must demonstrate to SBA the specific efforts it made during that year to obtain non-8(a) revenue.

(2) If SBA determines that an 8(a) Participant has failed to meet its applicable competitive business mix target during any program year in the transitional stage of program participation, SBA will increase its monitoring of the Participant's contracting activity during the ensuing program year.

(3) As a condition of eligibility for new 8(a) sole source contracts, SBA may require a Participant that fails to achieve the non-8(a) business activity targets to take one or more specific actions. These include requiring the Participant to obtain management assistance, technical assistance, and/or counseling from an SBA resource partner or otherwise, and/or attend seminars relating to management assistance, business development, financing, marketing, accounting, or proposal preparation. Where any such condition is imposed, SBA will not accept a sole source requirement offered to the 8(a) BD program on behalf of the Participant until the Participant demonstrates to SBA that the condition has been met.

(4) If SBA determines that a Participant has not made good faith efforts to meet its applicable non-8(a) business activity target, the Participant will be ineligible for sole source 8(a) contracts in the current program year. SBA will notify the Participant in writing that the Participant will not be eligible for further 8(a) sole source contract awards until it has demonstrated to SBA that it has complied with its non-8(a) business activity requirements as described in paragraphs (d)(4)(i) and (ii) of this section. In order for a Participant to come into compliance with the non-8(a) business activity target and be eligible for further 8(a) sole source contracts, it may:

(i) Wait until the end of the current program year and demonstrate to SBA as part of the normal annual review process that it has met the revised non-8(a) business activity target; or

(ii) At its option, submit information regarding its non-8(a) revenue to SBA quarterly throughout the current program year in an attempt to come into compliance before the end of the current

program year. If the Participant satisfies the requirements of paragraphs (d)(2)(ii)(A) or (B) of this section, SBA will reinstate the Participant's ability to get sole source 8(a) contracts prior to its annual review.

(A) To qualify for reinstatement during the first six months of the current program year (*i.e.,* at either the first or second quarterly review), the Participant must demonstrate that it has received non-8(a) revenue and new non-8(a) contract awards that are equal to or greater than the dollar amount by which it failed to meet its non-8(a) business activity target for the just completed program year. For this purpose, SBA will not count options on existing non-8(a) contracts in determining whether a Participant has received new non-8(a) contract awards.

(B) To qualify for reinstatement during the last six months of the current program year (*i.e.,* at either the nine-month or one year review), the Participant must demonstrate that it has achieved its non-8(a) business activity target as of that point in the current program year.

Example 1 to paragraph (d)(4). Firm A had $10 million in total revenue during year 2 in the transitional stage (year 6 in the program), but failed to meet the minimum non-8(a) business activity target of 25 percent. It had 8(a) revenues of $8.5 million and non-8(a) revenues of $1.5 million (15 percent). Based on total revenues of $10 million, Firm A should have had at least $2.5 million in non-8(a) revenues. Thus, Firm A missed its target by $1 million (its target ($2.5 million) minus its actual non-8(a) revenues ($1.5 million)). Because Firm A did not achieve its non-8(a) business activity target and SBA determined that it did not make good faith efforts to obtain non-8(a) revenue, it cannot receive 8(a) sole source awards until correcting that situation. The firm may wait until the next annual review to establish that it has met the revised target, or it can choose to report contract awards and other non-8(a) revenue to SBA quarterly. Firm A elects to submit information to SBA quarterly in year 3 of the transitional stage (year 7 in the program). In order to be eligible for sole source 8(a) contracts after either its 3 month or 6 month review, Firm A must show that it has received non-8(a) revenue and/or been awarded new non-8(a) contracts totaling $1 million (the amount by which it missed its target in year 2 of the transitional stage).

Example 2 to paragraph (d)(4). Firm B had $10 million in total revenue during year 2 in the transitional stage (year 6 in the program), of which $8.5 million were 8(a) revenues and $1.5 million were non-8(a) revenues, and SBA determined that Firm B did not make good faith efforts to meet its non-8(a) business activity target. At its first two quarterly reviews during year 3 of the transitional stage (year 7 in the program), Firm B could not demonstrate that it had received at least $1 million in non-8(a) revenue and new non-8(a) awards. In order to be eligible for sole source 8(a) contracts after its 9 month or 1 year review, Firm B must show that at least 35% (the non-8(a) business activity target for year 3 in the transitional stage) of all revenues received during year 3 in the transitional stage as of that point are from non-8(a) sources.

(5) In determining whether a Participant has achieved its required non-8(a) business activity target at the end of any program year in the transitional stage, or whether a Participant that failed to meet the target for the previous program year has achieved the required level of non-8(a) business at its nine-month review, SBA will measure 8(a) support by adding the base year value of all 8(a) contracts awarded during the applicable program year to the value of all options and modifications executed during that year.

(6) SBA may initiate proceedings to terminate a Participant from the 8(a) BD program where the firm makes no good faith efforts to obtain non-8(a) revenues.

(e) *Waiver of sole source prohibition.* (1) Despite a finding by SBA that a Participant did not make good faith efforts to meet its non-8(a) business activity target, SBA may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts where a denial of a sole source contract would cause severe economic hardship on the Participant so that the Participant's survival may be jeopardized, or where extenuating circumstances beyond the Participant's control caused the Participant not to meet its non-8(a) business activity target.

(2) SBA may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when the Participant does not meet its non-8(a) business activity target where the head of a procuring activity represents to SBA that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government.

(3) The decision to grant or deny a request for a waiver is at SBA's discretion, and no appeal may be taken with respect to that decision.

(4) A waiver generally applies to a specific sole source opportunity. If SBA grants a waiver with respect to a specific procurement, the firm will be able to self-market its capabilities to the applicable procuring activity with respect to that procurement. If the Participant seeks an additional sole source opportunity, it must request a waiver with respect to that specific opportunity. Where, however, a Participant can demonstrate that the same extenuating circumstances beyond its control affect its ability to receive specific multiple 8(a) contracts, one waiver can apply to those multiple contract opportunities.

■ 34. Amend § 124.513 by revising paragraphs (c)(2) and (4), the second sentence of paragraph (c)(5), and paragraph (e) to read as follows:

§ 124.513 Under what circumstances can a joint venture be awarded an 8(a) contract?

* * * * *

(c) * * *

(2) Designating an 8(a) Participant as the managing venturer of the joint venture, and designating a named employee of the 8(a) managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the 8(a) Participant at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the 8(a) Participant if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the 8(a) Participant for purposes of performance under the joint venture.

(iii) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager;

* * * * *

(4) Stating that the 8(a) Participant(s) must receive profits from the joint venture commensurate with the work performed by the 8(a) Participant(s), or a percentage agreed to by the parties to the joint venture whereby the 8(a) Participant(s) receive profits from the

joint venture that exceed the percentage commensurate with the work performed by the 8(a) Participant(s);

(5) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

(e) *Prior approval by SBA.* (1) When a joint venture between one or more 8(a) Participants seeks a sole source 8(a) award, SBA must approve the joint venture prior to the award of the sole source 8(a) contract. SBA will not approve joint ventures in connection with competitive 8(a) awards (*but see* § 124.501(g) for SBA's determination of Participant eligibility).

(2) Where a joint venture has been established for one 8(a) contract, the joint venture may receive additional 8(a) contracts provided the parties create an addendum to the joint venture agreement setting forth the performance requirements for each additional award (and provided any contract is awarded within two years of the first award as set forth in § 121.103(h)). If an additional 8(a) contract is a sole source award, SBA must also approve the addendum prior to contract award.

* * * * *

■ 35. Amend § 124.514 by revising paragraph (b) to read as follows:

§ 124.514 Exercise of 8(a) options and modifications.

* * * * *

(b) *Priced options.* Except as set forth in § 124.521(e)(2), the procuring activity contracting officer may exercise a priced option to an 8(a) contract whether the concern that received the award has graduated or been terminated from the 8(a) BD program or is no longer eligible if to do so is in the best interests of the Government.

* * * * *

■ 36. Amend § 124.515 by revising paragraph (d) to read as follows:

§ 124.515 Can a Participant change its ownership or control and continue to perform an 8(a) contract, and can it transfer performance to another firm?

* * * * *

(d) SBA determines the eligibility of an acquiring Participant under paragraph (b)(2) of this section by referring to the items identified in § 124.501(g) and deciding whether at the time of the request for waiver (and prior to the transaction) the acquiring Participant is an eligible concern with respect to each contract for which a waiver is sought. As part of the waiver request, the acquiring concern must certify that it is a small business for the size standard corresponding to the NAICS code assigned to each contract for which a waiver is sought. SBA will not grant a waiver for any contract if the work to be performed under the contract is not similar to the type of work previously performed by the acquiring concern.

* * * * *

■ 37. Amend § 124.518 by revising paragraph (c) to read as follows:

§ 124.518 How can an 8(a) contract be terminated before performance is completed?

* * * * *

(c) *Substitution of one 8(a) contractor for another.* SBA may authorize another Participant to complete performance and, in conjunction with the procuring activity, permit novation of an 8(a) contract without invoking the termination for convenience or waiver provisions of § 124.515 where a procuring activity contracting officer demonstrates to SBA that the Participant that was awarded the 8(a) contract is unable to complete performance, where an 8(a) contract will otherwise be terminated for default, or where SBA determines that substitution would serve the business development needs of both 8(a) Participants.

■ 38. Amend § 124.519 by:
■ a. Revising paragraph (a);
■ b. Removing paragraph (c);
■ c. Redesignating paragraph (b) as paragraph (c); and
■ d. Adding a new paragraph (b).

The revision and addition read as follows:

§ 124.519 Are there any dollar limits on the amount of 8(a) contracts that a Participant may receive?

(a) A Participant (other than one owned by an Indian Tribe, ANC, NHO, or CDC) may not receive sole source 8(a) contract awards where it has received a combined total of competitive and sole source 8(a) contracts in excess of $100,000,000 during its participation in the 8(a) BD program.

(b) In determining whether a Participant has reached the limit identified in paragraph (a) of this section, SBA:

(1) Looks at the 8(a) revenues a Participant has actually received, not projected 8(a) revenues that a Participant might receive through an indefinite delivery or indefinite quantity contract, a multiple award contract, or options or modifications; and

(2) Will not consider 8(a) contracts awarded under the Simplified Acquisition Threshold.

* * * * *

■ 39. Revise § 124.520 to read as follows:

§ 124.520 Can 8(a) BD Program Participants participate in SBA's Mentor-Protégé program?

(a) An 8(a) BD Program Participant, as any other small business, may participate in SBA's All Small Mentor-Protégé Program authorized under § 125.9 of this chapter.

(b) In order for a joint venture between a protégé and its SBA-approved mentor to receive the exclusion from affiliation with respect to a sole source or competitive 8(a) contract, the joint venture must meet the requirements set forth in § 124.513(c) and (d).

■ 40. Amend § 124.521 by revising the last sentence of paragraph (e)(1) to read as follows:

§ 124.521 What are the requirements for representing 8(a) status, and what are the penalties for misrepresentation?

* * * * *

(e) *Recertification.* (1) * * * Except as set forth in paragraph (e)(2) of this section, where a concern later fails to qualify as an 8(a) Participant, the procuring agency may exercise options and still count the award as an award to a Small Disadvantaged Business (SDB).

* * * * *

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 41. The authority citation for part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657(f), and 657r.

■ 42. Amend § 125.2 by revising paragraph (e)(6)(i) and adding a new paragraph (g) to read as follows:

§ 125.2 What are SBA's and the procuring agency's responsibilities when providing contracting assistance to small businesses?

* * * * *

(e) * * *

(6) * * *

(i) Notwithstanding the fair opportunity requirements set forth in 10 U.S.C. 2304c and 41 U.S.C. 4106(c), a contracting officer may set aside orders for small businesses, eligible 8(a) Participants, certified HUBZone small business concerns, SDVO small business concerns, WOSBs, and EDWOSBs against full and open Multiple Award Contracts. In addition, a contracting officer may set aside orders for eligible 8(a) Participants, certified HUBZone small business concerns, SDVO small business concerns, WOSBs, and EDWOSBs

against total small business set-aside Multiple Award Contracts, partial small business set-aside Multiple Award Contracts, and small business reserves of Multiple Award Contracts awarded in full and open competition. Although a contracting officer can set aside orders issued under a small business set-aside Multiple Award Contract or reserve to any subcategory of small businesses, contracting officers are encouraged to review the award dollars under the Multiple Award Contract and aim to make available for award at least 50% of the award dollars under the Multiple Award Contract to all contract holders of the underlying small business set-aside Multiple Award Contract or reserve. However, a contracting officer may not further set aside orders for specific types of small business concerns against Multiple Award Contracts that are set-aside or reserved for eligible 8(a) Participants, certified HUBZone small business concerns, SDVO small business concerns, WOSBs, and EDWOSBs (*e.g.,* a contracting officer cannot set-aside an order for 8(a) Participants that are also certified HUBZone small business concerns against an 8(a) Multiple Award Contract).

* * * * *

(g) *Capabilities, past performance, and experience.* When an offer of a small business prime contractor includes a proposed team of small business subcontractors and specifically identifies the first-tier subcontractor(s) in the proposal, the head of the agency must consider the capabilities, past performance, and experience of each first tier subcontractor that is part of the team as the capabilities, past performance, and experience of the small business prime contractor if the capabilities, past performance, and experience of the small business prime does not independently demonstrate capabilities and past performance necessary for award.

■ 43. Amend § 125.3 by adding a sentence to the end of paragraph (b)(2), and by revising the first sentence of paragraph (c)(1)(viii) and paragraph (c)(1)(ix) to read as follows:

§ 125.3 What types of subcontracting assistance are available to small businesses?

* * * * *

(b) * * *

(2) * * * This applies whether the firm qualifies as a small business concern for the size standard corresponding to the NAICS code assigned to the contract, or is deemed to be treated as a small business concern by statute (*see e.g.,* 43 U.S.C. 1626(e)(4)(B)).

* * * * *

(c) * * *

(1) * * *

(viii) The contractor must provide pre-award written notification to unsuccessful small business offerors on all subcontracts over the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101) for which a small business concern received a preference.

* * *

(ix) As a best practice, the contractor may provide the pre-award written notification cited in paragraph (c)(1)(viii) of this section to unsuccessful and small business offerors on subcontracts at or below the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101) and should do so whenever practical; and

* * * * *

■ 44. Amend § 125.5 by:

■ a. Revising the third sentence of paragraph (a)(1);

■ b. Redesignating paragraphs (f)(2) and (f)(3) as paragraphs (f)(3) and (f)(4) respectively;

■ c. Adding a new paragraph (f)(2);

■ d. Removing the phrase ''$100,000 or less, or in accordance with Simplified Acquisition Threshold procedures'' and adding in its place the phrase ''Less than or equal to the Simplified Acquisition Threshold'' in paragraph (g);

■ e. Removing the phrase ''Between $100,000 and $25 million'' and adding in its place the phrase ''Above the Simplified Acquisition Threshold and less than or equal to $25 million'' in paragraph (g);

■ f. Removing the term ''$100,000'' and adding in its place ''the simplified acquisition threshold'' in paragraphs (h) and (i).

The revision and addition read as follows:

§ 125.5 What is the Certificate of Competency Program?

(a) * * *

(1) * * * The COC Program is applicable to all Government procurement actions, with the exception of 8(a) sole source awards but including Multiple Award Contracts and orders placed against Multiple Award Contracts, where the contracting officer has used any issues of capacity or credit (responsibility) to determine suitability for an award. * * *

* * * * *

(f) * * *

(2) An offeror seeking a COC has the burden of proof to demonstrate that it possesses all relevant elements of responsibility and that it has overcome the contracting officer's objection(s).

* * * * *

■ 45. Amend § 125.6 by:

■ a. Revising paragraph (a) introductory text;

■ b. Revising paragraph (a)(2)(ii)(B);

■ c. Revising Examples 2, 3 and 4 to paragraph (a)(2);

■ d. Revising the paragraph (b) introductory text; and

■ e. Adding Example 3 to paragraph (b).

The revisions and addition read as follows:

§ 125.6 What are the prime contractor's limitations on subcontracting?

(a) *General.* In order to be awarded a full or partial small business set-aside contract with a value greater than the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101), an 8(a) contract, an SDVO SBC contract, a HUBZone contract, or a WOSB or EDWOSB contract pursuant to part 127 of this chapter, a small business concern must agree that:

* * * * *

(2) * * *

(ii) * * *

(B) For a multiple item procurement where a waiver as described in § 121.406(b)(5) of this chapter is granted for one or more items, compliance with the limitation on subcontracting requirement will be determined by combining the value of the items supplied by domestic small business manufacturers or processors with the value of the items subject to a waiver. As such, as long as the value of the items to be supplied by domestic small business manufacturers or processors plus the value of the items to be supplied that are subject to a waiver account for at least 50% of the value of the contract, the limitations on subcontracting requirement is met.

* * * * *

Example 2 to paragraph (a)(2). A procurement is for $1,000,000 and calls for the acquisition of 10 items. Market research shows that nine of the items can be sourced from small business manufacturers and one item is subject to an SBA class waiver. Since 100% of the value of the contract can be procured through domestic small business manufacturers or processors plus manufacturers or processors of the item for which a waiver has been granted, the procurement should be set aside for small business. At least 50% of the value of the contract, or 50% of $1,000,000, must be supplied by one or more domestic small business manufacturers or manufacturers or processors of the one item for which

class waiver has been granted. In addition, the prime small business nonmanufacturer may act as a manufacturer for one or more items.

Example 3 to paragraph (a)(2). A contract is for $1,000,000 and calls for the acquisition of 10 items. Market research shows that only four of these items are manufactured by small businesses. The value of the items manufactured by small business is estimated to be $400,000. The contracting officer seeks and is granted contract specific waivers on the other six items. Since 100% of the value of the contract can be procured through domestic small business manufacturers or processors plus manufacturers or processors of the items for which a waiver has been granted, the procurement should be set aside for small business. At least 50% of the value of the contract, or 50% of $1,000,000, must be supplied by one or more domestic small business manufacturers or manufacturers or processors of the six items for which a contract specific waiver has been granted. In addition, the prime small business nonmanufacturer may act as a manufacturer for one or more items.

Example 4 to paragraph (a)(2). A contract is for $1,000,000 and calls for the acquisition of 10 items. Market research shows that three of the items can be sourced from small business manufacturers at this particular time, and the estimated value of these items is $300,000. There are no class waivers subject to the remaining seven items. In order for this procurement to be set aside for small business, a contracting officer must seek and be granted a contract specific waiver for one or more items totaling $200,000 (so that $300,000 plus $200,000 equals 50% of the value of the entire procurement). Once a contract specific waiver is received for one or more items, at least 50% of the value of the contract, or 50% of $1,000,000, must be supplied by one or more domestic small business manufacturers or processors or by manufacturers or processors of the items for which a contract specific waiver has been granted. In addition, the prime small business nonmanufacturer may act as a manufacturer for one or more items.

* * * * *

(b) *Mixed contracts.* Where a contract integrates any combination of services, supplies, or construction, the contracting officer shall select the appropriate NAICS code as prescribed in § 121.402(b) of this chapter. The contracting officer's selection of the applicable NAICS code is determinative as to which limitation on subcontracting and performance requirement applies. Based on the NAICS code selected, the relevant limitation on subcontracting requirement identified in paragraphs (a)(1) through (4) of this section will apply only to that portion of the contract award amount. In no case shall more than one limitation on subcontracting requirement apply to the same contract.

* * * * *

Example 3 to paragraph (b). A procuring activity is acquiring both services and general construction through a small business set-aside. The total value of the requirement is $10,000,000, with the construction portion comprising $8,000,000, and the services portion comprising $2,000,000. The contracting officer appropriately assigns a construction NAICS code to the requirement. The 85% limitation on subcontracting identified in paragraph (a)(3) would apply to this procurement. Because the services portion of the contract is excluded from consideration, the relevant amount for purposes of calculating the limitation on subcontracting requirement is $8,000,000. As such, the prime contractor cannot subcontract more than $6,800,000 to non-similarly situated entities, and the prime and/or similarly situated entities must perform at least $1,200,000.

* * * * *

■ 46. Amend § 125.8 by:
■ a. Revising paragraphs (b)(2)(ii) and (iv), the second sentence of paragraph (b)(2)(v), and paragraphs (b)(2)(xi) and (xii);
■ b. Adding a new sentence at the end of paragraph (c)(1);
■ c. Adding paragraph (c)(4); and
■ d. Revising paragraphs (e), and (h)(2).

The revisions and additions read as follows:

§ 125.8 What requirements must a joint venture satisfy to submit an offer for a procurement or sale set aside or reserved for small business?

* * * * *

(b) * * *

(2) * * *

(ii) Designating a small business as the managing venturer of the joint venture, and designating a named employee of the small business managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(A) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(B) The individual identified as the Responsible Manager of the joint venture need not be an employee of the small business at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the small business if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the small business for purposes of performance under the joint venture.

(C) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager;

* * * * *

(iv) Stating that the small business participant(s) must receive profits from the joint venture commensurate with the work performed by them, or a percentage agreed to by the parties to the joint venture whereby the small business participant(s) receive profits from the joint venture that exceed the percentage commensurate with the work performed by them, and that at the conclusion of the joint venture contract(s) and/or the termination of a joint venture, any funds remaining in the joint venture bank account shall distributed at the discretion of the joint venture members according to percentage of ownership;

(v) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

(xi) Stating that annual performance-of-work statements required by paragraph (h)(1) must be submitted to SBA and the relevant contracting officer not later than 45 days after each operating year of the joint venture; and

(xii) Stating that the project-end performance-of-work required by paragraph (h)(2) must be submitted to SBA and the relevant contracting officer no later than 90 days after completion of the contract.

* * * * *

(c) * * *

(1) * * * Except as set forth in paragraph (c)(4) of this section, the 40% calculation for protégé workshare

follows the same rules as those set forth in § 125.6 concerning supplies, construction, and mixed contracts, including the exclusion of the same costs from the limitation on subcontracting calculation (*e.g.,* cost of materials excluded from the calculation in construction contracts).

* * * * *

(4) Work performed by a similarly situated entity will not count toward the requirement that a protégé must perform at least 40% of the work performed by a joint venture.

* * * * *

(e) *Capabilities, past performance and experience.* When evaluating the capabilities, past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.

* * * * *

(h) * * *

(2) At the completion of every contract set aside or reserved for small business that is awarded to a joint venture between a protégé small business and a mentor authorized by § 125.9, and upon request by SBA or the relevant contracting officer, the small business partner to the joint venture must submit a report to the relevant contracting officer and to SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (b) of this section.

* * * * *

■ 47. Amend § 125.9 by:
■ a. Revising paragraphs (b), (c)(1)(ii), and (c)(2) introductory text;
■ b. Removing paragraph (c)(4);
■ c. Revising paragraphs (d)(1) introductory text, (d)(1)(iii) introductory text, and (d)(1)(iii)(B);
■ d. Adding paragraph (d)(6);
■ e. Removing ''(*e.g.,* management and/or technical assistance, loans and/or equity investments, cooperation on joint venture projects, or subcontracts under prime contracts being performed by the mentor)'' in paragraph (e)(1) introductory text, and adding in its place ''(*e.g.,* management and or technical assistance; loans and/or equity investments; bonding; use of equipment; export assistance; assistance as a subcontractor under prime contracts being performed by the protégé; cooperation on joint venture projects; or subcontracts under prime contracts being performed by the mentor)''.
■ f. Revising paragraphs (e)(1)(i) and (e)(5);
■ g. Redesignating paragraphs (e)(6) through (8) as paragraphs (e)(7) through (9), respectively;
■ h. Adding new paragraph (e)(6);
■ i. Revising paragraph (f);
■ j. Revising paragraph (g) introductory text;
■ k. Revising paragraph (g)(4);
■ l. Adding paragraph (g)(5); and
■ m. Revising paragraph (h)(1) introductory text.

The revisions and additions to read as follows:

§ 125.9 What are the rules governing SBA's small business mentor-protégé program?

* * * * *

(b) *Mentors.* Any concern that demonstrates a commitment and the ability to assist small business concerns may act as a mentor and receive benefits as set forth in this section. This includes other than small businesses.

(1) In order to qualify as a mentor, a concern must demonstrate that it:

(i) Is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement;

(ii) Does not appear on the Federal list of debarred or suspended contractors; and

(iii) Can impart value to a protégé firm due to lessons learned and practical experience gained or through its knowledge of general business operations and government contracting.

(2) SBA will decline an application if SBA determines that the mentor does not possess good character or a favorable financial position, employs or otherwise controls the managers of the protégé, or is otherwise affiliated with the protégé. Once approved, SBA may terminate the mentor-protégé agreement if the mentor does not possess good character or a favorable financial position, was affiliated with the protégé at time of application, or is affiliated with the protégé for reasons other than the mentor-protégé agreement or assistance provided under the agreement.

(3) In order for SBA to agree to allow a mentor to have more than one protégé at time, the mentor and proposed additional protégé must demonstrate that the added mentor-protégé relationship will not adversely affect the development of either protégé firm (*e.g.,* the second firm may not be a competitor of the first firm).

(i) A mentor that has more than one protégé cannot submit competing offers in response to a solicitation for a specific procurement through separate joint ventures with different protégés.

(ii) A mentor generally cannot have more than three protégés at one time. However, the first two mentor-protégé relationships approved by SBA between a specific mentor and a small business that has its principal office located in the Commonwealth of Puerto Rico do not count against the limit of three proteges that a mentor can have at one time.

(c) * * *

(1) * * *

(ii) Where a small business concern seeks to qualify as a protégé in a secondary NAICS code, the concern must demonstrate how the mentor-protégé relationship will help it further develop or expand its current capabilities in that secondary NAICS code. SBA will not approve a mentor-protégé relationship in a secondary NAICS code in which the small business concern has no prior experience. SBA may approve a mentor-protégé relationship where the small business concern can demonstrate that it has performed work in one or more similar NAICS codes or where the NAICS code in which the small business concern seeks a mentor-protégé relationship is a logical business progression to work previously performed by the concern.

(2) A protégé firm may generally have only one mentor at a time. SBA may approve a second mentor for a particular protégé firm where the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship, and:

* * * * *

(d) * * * (1) A protégé and mentor may joint venture as a small business for any government prime contract, subcontract or sale, provided the protégé qualifies as small for the procurement or sale. Such a joint venture may seek any type of small business contract (*i.e.,* small business set-aside, 8(a), HUBZone, SDVO, or

WOSB) for which the protégé firm qualifies (*e.g.,* a protégé firm that qualifies as a WOSB could seek a WOSB set-aside as a joint venture with its SBA-approved mentor). Similarly, a joint venture between a protégé and mentor may seek a subcontract as a HUBZone small business, small disadvantaged business, SDVO small business, or WOSB provided the protégé individually qualifies as such.

* * * * *

(iii) A joint venture between a protégé and its mentor will qualify as a small business for any procurement for which the protégé individually qualifies as small. Once a protégé firm no longer qualifies as a small business for the size standard corresponding to the NAICS code under which SBA approved its mentor-protégé relationship, any joint venture between the protégé and its mentor will no longer be able to seek additional contracts or subcontracts as a small business for any NAICS code having the same or lower size standard. A joint venture between a protégé and its mentor could seek additional contract opportunities in NAICS codes having a size standard for which the protégé continues to qualify as small. A change in the protégé's size status does not generally affect contracts previously awarded to a joint venture between the protégé and its mentor.

* * * * *

(B) For contracts with durations of more than five years (including options), where size re-certification is required under § 121.404(g)(3) of this chapter no more than 120 days prior to the end of the fifth year of the contract and no more than 120 days prior to exercising any option thereafter, once the protégé no longer qualifies as small for the size standard corresponding to the NAICS code assigned to the contract, the joint venture will not be able re-certify itself to be a small business for that contract. The rules set forth in § 121.404(g)(3) of this chapter apply in such circumstances.

* * * * *

(6) A mentor that provides a subcontract to a protégé that has its principal office located in the Commonwealth of Puerto Rico may (i) receive positive consideration for the mentor's past performance evaluation, and (ii) apply costs incurred for providing training to such protege toward the subcontracting goals contained in the subcontracting plan of the mentor.

(e) * * *

(1) * * *

(i) Specifically identify the business development assistance to be provided and address how the assistance will help the protégé enhance its growth and/or foster or acquire needed capabilities;

* * * * *

(5) The term of a mentor-protégé agreement may not exceed six years. If an initial mentor-protégé agreement is for less than six years, it may be extended by mutual agreement prior to the expiration date for an additional amount of time that would total no more than six years from its inception (*e.g.,* if the initial mentor-protégé agreement was for two years, it could be extended for an additional four years by consent of the two parties; if the initial mentor-protégé agreement was for three years, it could be extended for an additional three years by consent of the two parties). Unless rescinded in writing as a result of an SBA review, the mentor-protégé relationship will automatically renew without additional written notice of continuation or extension to the protégé firm.

(6) A protégé may generally have a total of two mentor-protégé agreements with different mentors.

(i) Each mentor-protégé agreement may last for no more than six years, as set forth in paragraph (e)(5) of this section.

(ii) If a mentor-protégé agreement is terminated within 18 months from the date SBA approved the agreement, that mentor-protégé relationship will generally not count as one of the two mentor-protégé relationships that a small business may enter as a protégé. However, where a specific small business protégé appears to enter into many short-term mentor-protégé relationships as a means of extending its program eligibility as a protégé, SBA may determine that the business concern has exhausted its participation in the mentor-protégé program and not approve an additional mentor-protégé relationship.

(iii) If during the evaluation of the mentor-protégé relationship pursuant to paragraphs (g) and (h) of this section SBA determines that a mentor has not provided the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided was not satisfactory, SBA may allow the protégé to substitute another mentor for the time remaining in the mentor-protégé agreement without counting against the two-mentor limit.

* * * * *

(f) *Decision to decline mentor-protégé relationship.* Where SBA declines to approve a specific mentor-protégé agreement, SBA will issue a written decision setting forth its reason(s) for the decline. The small business concern seeking to be a protégé cannot attempt to enter into another mentor-protégé relationship with the same mentor for a period of 60 calendar days from the date of the final decision. The small business concern may, however, submit another proposed mentor-protégé agreement with a different proposed mentor at any time after the SBA's final decline decision.

(g) *Evaluating the mentor-protégé relationship.* SBA will review the mentor-protégé relationship annually. SBA will ask the protégé for its assessment of how the mentor-protégé relationship is working, whether or not the protégé received the agreed upon business development assistance, and whether the protégé would recommend the mentor to be a mentor for another small business in the future. At any point in the mentor-protégé relationship where a protégé believes that a mentor has not provided the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided did not meet its expectations, the protégé can ask SBA to intervene on its behalf with the mentor.

* * * * *

(4) At any point in the mentor-protégé relationship where a protégé believes that a mentor has not provided the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided did not meet its expectations, the protégé can ask SBA to intervene on its behalf with the mentor.

(5) SBA may decide not to approve continuation of a mentor-protégé agreement where:

(i) SBA finds that the mentor has not provided the assistance set forth in the mentor-protégé agreement;

(ii) SBA finds that the assistance provided by the mentor has not resulted in any material benefits or developmental gains to the protégé; or

(iii) A protégé does not provide information relating to the mentor-protégé relationship, as set forth in paragraph (g).

(h) *Consequences of not providing assistance set forth in the mentor-protégé agreement.* (1) Where SBA determines that a mentor may not have provided to the protégé firm the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided may not have been satisfactory, SBA will notify the mentor of such determination and afford the mentor an opportunity to respond. The

mentor must respond within 30 days of the notification, presenting information demonstrating that it did satisfactorily provide the assistance set forth in the mentor-protégé agreement or explaining why it has not provided the agreed upon assistance and setting forth a definitive plan as to when it will provide such assistance. If the mentor fails to respond, does not adequately provide information demonstrating that it did satisfactorily provide the assistance set forth in the mentor-protégé agreement, does not supply adequate reasons for its failure to provide the agreed upon assistance, or does not set forth a definite plan to provide the assistance:

* * * * *

■ 48. Amend § 125.18 by:
■ a. Revising paragraph (a);
■ b. Removing ''(*see* §§ 125.9 and 124.520 of this chapter)'' in paragraph (b)(1)(ii) and adding in its place ''(*see* § 125.9)'';
■ c. Removing ''§ 124.520 or § 125.9 of this chapter'' in paragraph (b)(2) introductory text and adding in its place ''§ 125.9'';
■ d. Revising paragraphs (b)(2)(ii) and (iv) and the second sentence of paragraph (b)(2)(v);
■ e. Removing ''or § 124.520 of this chapter'' in paragraph (b)(3)(i);
■ f. Redesignating paragraphs (d)(1) through (4) as paragraphs (d)(2) through (5), respectively; and
■ g. Adding a new paragraph (d)(1).

The revisions and addition read as follows:

§ 125.18 What requirements must an SDVO SBC meet to submit an offer on a contract?

(a) *General.* In order for a business concern to submit an offer and be eligible for the award of a specific SDVO contract, the concern must submit the appropriate representations and certifications at the time it submits its initial offer which includes price (or other formal response to a solicitation) to the contracting officer, including, but not limited to, the fact that:

(1) It is small under the size standard corresponding to the NAICS code(s) assigned to the contract;

(2) It is an SDVO SBC; and

(3) There has been no material change in any of its circumstances affecting its SDVO SBC eligibility.

* * * * *

(b) * * *

(2) * * *

(ii) Designating an SDVO SBC as the managing venturer of the joint venture, and designating a named employee of the SDVO SBC managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(A) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(B) The individual identified as the Responsible Manager of the joint venture need not be an employee of the SDVO SBC at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the SDVO SBC if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the SDVO SBC for purposes of performance under the joint venture.

(C) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager.

* * * * *

(iv) Stating that the SDVO SBC must receive profits from the joint venture commensurate with the work performed by the SDVO SBC, or a percentage agreed to by the parties to the joint venture whereby the SDVO SBC receives profits from the joint venture that exceed the percentage commensurate with the work performed by the SDVO SBC;

(v) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

(d) *Multiple Award Contracts.* (1) *SDVO status.* With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(i) SBA determines SDVO small business eligibility for the underlying Multiple Award Contract as of the date a business concern certifies its status as an SDVO small business concern as part of its initial offer (or other formal response to a solicitation), which includes price, unless the firm was required to recertify under paragraph (e) of this section.

(A) *Unrestricted Multiple Award Contracts or Set-Aside Multiple Award Contracts for Other than SDVO.* For an unrestricted Multiple Award Contract or other Multiple Award Contract not specifically set aside for SDVO, if a business concern is an SDVO small business concern at the time of offer and contract-level recertification for the Multiple Award Contract, it is an SDVO small business concern for goaling purposes for each order issued against the contract, unless a contracting officer requests recertification as an SDVO small business for a specific order or Blanket Purchase Agreement. Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set-aside exclusively for SDVO small business, a concern must recertify that it qualifies as an SDVO small business at the time it submits its initial offer, which includes price, for the particular order or Blanket Purchase Agreement. However, where the underlying Multiple Award Contract has been awarded to a pool of concerns for which SDVO small business status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set-aside exclusively for concerns in the SDVO small business pool, concerns need not recertify their status as SDVO small business concerns (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(B) *SDVO Set-Aside Multiple Award Contracts.* For a Multiple Award Contract that is specifically set aside for SDVO small business, if a business concern is an SDVO small business at the time of offer and contract-level recertification for the Multiple Award Contract, it is an SDVO small business for each order issued against the contract, unless a contracting officer requests recertification as an SDVO small business for a specific order or Blanket Purchase Agreement.

(ii) SBA will determine SDVO small business status at the time of initial offer (or other formal response to a solicitation), which includes price, for an order or an Agreement issued against a Multiple Award Contract if the contracting officer requests a new SDVO small business certification for the order or Agreement.

* * * * *

■ 49. Amend § 125.28 by revising the section heading and adding a sentence to the end of paragraph (d)(1) to read as follows:

§ 125.28 What are the requirements for filing a service-disabled veteran-owned status protest?

* * * * *

(d) * * *

(1) * * * Except for an order or Blanket Purchase Agreement issued under any Federal Supply Schedule contract, for an order or a Blanket Purchase Agreement that is set-aside for SDVO small business under a Multiple Award Contract that is not itself set aside for SDVO small business or have a reserve for SDVO small business (or any SDVO order where the contracting officer has requested recertification of SDVO status), an interested party must submit its protest challenging the SDVO status of a concern for the order or Agreement by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.

* * * * *

PART 126—HUBZONE PROGRAM

■ 50. The authority citation for part 126 continues to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a.

§ 126.500 [Amended]

■ 51. Amend § 126.500 by removing the words ''(whether by SBA or a third-party certifier)'' in paragraph (b) introductory text.

§ 126.602 [Amended]

■ 52. Amend 126.602 in paragraph (c) by removing ''§ 126.200(a)'' and adding in its place ''§ 126.200(c)(2)(ii)''.

■ 53. Revise § 126.606 to read as follows:

§ 126.606 May a procuring activity request that SBA release a requirement from the 8(a) BD program for award as a HUBZone contract?

A procuring activity may request that SBA release an 8(a) requirement for award as a HUBZone contract under the procedures set forth in § 124.504(d).

■ 54. Amend § 126.616 by removing ''(or, if also an 8(a) BD Participant, with an approved mentor authorized by § 124.520 of this chapter)'' in paragraph (a), and by revising paragraphs (c)(2) and (c)(4) and the second sentence of paragraph (c)(5) to read as follows:

§ 126.616 What requirements must a joint venture satisfy to submit an offer and be eligible to perform on a HUBZone contract?

* * * * *

(c) * * *

(2) Designating a certified HUBZone small business concern as the managing venturer of the joint venture, and designating a named employee of the certified HUBZone small business managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the certified HUBZone small business concern at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the certified HUBZone small business concern if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the certified HUBZone small business concern for purposes of performance under the joint venture.

(iii) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager.

* * * * *

(4) Stating that the certified HUBZone small business concern must receive profits from the joint venture commensurate with the work performed by the certified HUBZone small business concern, or a percentage agreed to by the parties to the joint venture whereby the certified HUBZone small business concern receives profits from the joint venture that exceed the percentage commensurate with the work performed by the certified HUBZone small business concern;

(5) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

§ 126.618 [Amended]

■ 55. Amend § 126.618 by removing ''(or, if also an 8(a) BD Participant, under § 124.520 of this chapter)'' in paragraph (a).

■ 56. Amend § 126.801 by adding a sentence to the end of paragraph (d)(1) to read as follows:

§ 126.801 How does an interested party file a HUBZone status protest?

* * * * *

(d) * * *

(1) * * * Except for an order or Blanket Purchase Agreement issued under any Federal Supply Schedule contact, in connection with an order or an Agreement that is set-aside for a certified HUBZone small business concern under a Multiple Award Contract that is not itself set aside for certified HUBZone small business concerns or have a reserve for certified HUBZone small business concerns, (or any HUBZone set-aside order where the contracting officer has requested recertification of such status), an interested party must submit its protest challenging the HUBZone status of a concern for the order or Agreement by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order or Agreement.

* * * * *

PART 127—WOMEN–OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

■ 57. The authority citation for part 127 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), 644 and 657r.

§ 127.503 [Amended]

■ 58. Amend § 127.503 by removing paragraph (h).

■ 59. Revise § 127.504 to read as follows:

§ 127.504 What requirements must an EDWOSB or WOSB meet to be eligible for an EDWOSB or WOSB requirement?

(a) *General.* In order for a concern to submit an offer on a specific EDWOSB or WOSB set-aside requirement, the concern must qualify as a small business concern under the size standard corresponding to the NAICS code assigned to the contract, and either be a certified EDWOSB or WOSB pursuant to § 127.300, or represent that it has submitted a complete application for WOSB or EDWOSB certification to SBA or a third-party certifier and has not received a negative determination regarding that application from SBA or the third party certifier.

(1) If a concern becomes the apparent successful offeror while its application for WOSB or EDWOSB certification is pending, either at SBA or a third-party certifier, the contracting officer for the particular contract must immediately inform SBA's D/GC. SBA will then prioritize the concern's WOSB or EDWOSB application and make a

determination regarding the firm's status as a WOSB or EDWOSB within 15 calendar days from the date that SBA received the contracting officer's notification. Where the application is pending with a third-party certifier, SBA will immediately contact the third-party certifier to require the third-party certifier to complete its determination within 15 calendar days.

(2) If the contracting officer does not receive an SBA or third-party certifier determination within 15 calendar days after the SBA's receipt of the notification, the contracting officer may presume that the apparently successful offeror is not an eligible WOSB or EDWOSB and may make award accordingly, unless the contracting officer grants an extension to the 15-day response period.

(b) *Sole source EDWOSB or WOSB requirements.* In order for a concern to seek a specific sole source EDWOSB or WOSB requirement, the concern must be a certified EDWOSB or WOSB pursuant to § 127.300 and qualify as small under the size standard corresponding to the requirement being sought.

(c) *Joint ventures.* A business concern seeking an EDWOSB or WOSB contract as a joint venture may submit an offer if the joint venture meets the requirements as set forth in § 127.506.

(d) *Multiple Award Contracts.* With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(1) SBA determines EDWOSB or WOSB eligibility for the underlying Multiple Award Contract as of the date a concern certifies its status as an EDWOSB or WOSB as part of its initial offer (or other formal response to a solicitation), which includes price, unless the concern was required to recertify its status as a WOSB or EDWOSB under paragraph (f) of this section.

(i) *Unrestricted Multiple Award Contracts or Set-Aside Multiple Award Contracts for Other than EDWOSB or WOSB.* For an unrestricted Multiple Award Contract or other Multiple Award Contract not set aside specifically for EDWOSB or WOSB, if a business concern is an EDWOSB or WOSB at the time of offer and contract-level recertification for the Multiple Award Contract, it is an EDWOSB or WOSB for goaling purposes for each order issued against the contract, unless a contracting officer requests recertification as an EDWOSB or WOSB for a specific order or Blanket Purchase Agreement. Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set aside exclusively for EDWOSB or WOSB, a concern must recertify it qualifies as an EDWOSB or WOSB at the time it submits its initial offer, which includes price, for the particular order or Agreement. However, where the underlying Multiple Award Contract has been awarded to a pool of WOSB or EDWOSB concerns for which WOSB or EDWOSB status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set aside exclusively for concerns in the WOSB or EDWOSB pool, concerns need not recertify their status as WOSBs or EDWOSBs (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(ii) *EDWOSB or WOSB Set-Aside Multiple Award Contracts.* For a Multiple Award Contract that is set aside specifically for EDWOSB or WOSB, if a business concern is an EDWOSB or WOSB at the time of offer and contract-level recertification for the Multiple Award Contract, it is an EDWOSB or WOSB for each order issued against the contract, unless a contracting officer requests recertification as an EDWOSB or WOSB for a specific order or Blanket Purchase Agreement.

(2) SBA will determine EDWOSB or WOSB status at the time a business concern submits its initial offer (or other formal response to a solicitation) which includes price for an order or an Agreement issued against a Multiple Award Contract if the contracting officer requests a new EDWOSB or WOSB certification for the order or Agreement.

(e) *Limitations on subcontracting.* A business concern seeking an EDWOSB or WOSB requirement must also meet the applicable limitations on subcontracting requirements as set forth in § 125.6 of this chapter for the performance of EDWOSB or WOSB contracts (both sole source and those totally set aside for EDWOSB or WOSB), the performance of the set-aside portion of a partial set-aside contract, or the performance of orders set-aside for EDWOSB or WOSB.

(f) *Non-manufacturers.* An EDWOSB or WOSB that is a non-manufacturer, as defined in § 121.406(b) of this chapter, may submit an offer on an EDWOSB or WOSB contract for supplies, if it meets the requirements under the non-manufacturer rule set forth in § 121.406(b) of this chapter.

(g) *Ostensible subcontractor.* Where a subcontractor that is not similarly situated performs primary and vital requirements of a set-aside service contract, or where a prime contractor is unduly reliant on a small business that is not similarly situated to perform the set-aside service contract, the prime contractor is not eligible for award of a WOSB or EDWOSB contract.

(1) When the subcontractor is small for the size standard assigned to the procurement, this issue may be grounds for a WOSB or EDWOSB status protest, as described in subpart F of this part. When the subcontractor is other than small or alleged to be other than small for the size standard assigned to the procurement, this issue may be a ground for a size protest, as described at § 121.103(h)(4) of this chapter.

(2) SBA will find that a prime WOSB or EDWOSB contractor is performing the primary and vital requirements of a contract or order and is not unduly reliant on one or more non-similarly situated subcontracts where the prime contractor can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in § 125.6.

(h) *Recertification.* (1) Where a contract being performed by an EDWOSB or WOSB is novated to another business concern, the concern that will continue performance on the contract must recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) to the procuring agency, or inform the procuring agency that it does not qualify as an EDWOSB or WOSB, (or qualify as a certified EDWOSB or WOSB for a WOSB contract) within 30 days of the novation approval. If the concern cannot recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract), the agency must modify the contract to reflect the new status, and may not count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(2) Where an EDWOSB or WOSB concern that is performing a contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) to the procuring agency, or inform the procuring agency that it no longer qualifies as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a

WOSB contract). If the concern is unable to recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract), the agency must modify the contract to reflect the new status, and may not count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(3) For purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option. If the concern is unable to recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract), the agency must modify the contract to reflect the new status, and may not count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(4) A business concern that did not certify as an EDWOSB or WOSB, either initially or prior to an option being exercised, may recertify as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) for a subsequent option period if it meets the eligibility requirements at that time. The agency must modify the contract to reflect the new status, and may count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(5) Recertification does not change the terms and conditions of the contract. The limitations on subcontracting, nonmanufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(6) A concern's status will be determined at the time of a response to a solicitation for an Agreement and each order issued pursuant to the Agreement.

■ 60. Amend § 127.506 by revising paragraphs (c)(2) and (c)(4) and the second sentence of paragraph (c)(5) to read as follows:

§ 127.506 May a joint venture submit an offer on an EDWOSB or WOSB requirement?

* * * * *

(c) * * *

(2) Designating a WOSB or EDWOSB as the managing venturer of the joint venture, and designating a named employee of the WOSB or EDWOSB managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the WOSB or EDWOSB at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the WOSB or EDWOSB if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the WOSB or EDWOSB for purposes of performance under the joint venture.

(iii) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager.

* * * * *

(4) Stating that the WOSB or EDWOSB must receive profits from the joint venture commensurate with the work performed by the WOSB or EDWOSB, or a percentage agreed to by the parties to the joint venture whereby the WOSB or EDWOSB receives profits from the joint venture that exceed the percentage commensurate with the work performed by the WOSB or EDWOSB;

(5) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

■ 61. Amend § 127.603 by revising the section heading and adding a sentence to the end of paragraph (c)(1) to read as follows:

§ 127.603 What are the requirements for filing an EDWOSB or WOSB status protest?

* * * * *

(c) * * *

(1) * * * Except for an order or Blanket Purchase Agreement issued under any Federal Supply Schedule contact, for an order or a Blanket Purchase Agreement that is set-aside for EDWOSB or WOSB small business under a Multiple Award Contract that is not itself set aside for EDWOSB or WOSB small business or have a reserve for EDWOSB or WOSB small business (or any EDWOSB or WOSB order where the contracting officer has requested recertification of such status), an interested party must submit its protest challenging the EDWOSB or WOSB status of a concern for the order or Blanket Purchase Agreement by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.

* * * * *

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

■ 62. The authority citation for part 134 continues to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 634(i), 637(a), 648(l), 656(i), 657t, and 687(c); 38 U.S.C. 8127(f); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Subpart J issued under 38 U.S.C. 8127(f)(8)(B).

Subpart K issued under 38 U.S.C. 8127(f)(8)(A).

■ 63. Amend § 134.318 by adding a paragraph heading to paragraph (a) and revising paragraph (b) to read as follows:

§ 134.318 NAICS Appeals.

(a) *General.* * * *

(b) *Effect of OHA's decision.* If OHA grants the appeal (changes the NAICS code), the contracting officer must amend the solicitation to reflect the new NAICS code. The decision will also apply to future solicitations for the same supplies or services.

* * * * *

Jovita Carranza,

Administrator.

[FR Doc. 2020–19428 Filed 10–15–20; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 37, 38, 39, 42, 44, 46, 47, 49, 52, and 53

[FAR Case 2018–018; Docket No. FAR–2018–0018, Sequence No. 1]

RIN 9000–AN76

Federal Acquisition Regulation: Revision of Definition of ''Commercial Item''

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA and NASA are proposing to amend the Federal Acquisition Regulation to implement a section of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 to change the definition of ''commercial item.''

DATES: Interested parties should submit comments to the Regulatory Secretariat Division at one of the addresses shown below on or before December 14, 2020 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments in response to FAR Case 2018–018 to *https://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FAR Case 2018–018''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2018–018.'' Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2018–018'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite ''FAR case 2018–018'' in all correspondence related to this case. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 or *zenaida.delgado@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite ''FAR Case 2018–018''.

SUPPLEMENTARY INFORMATION:

I. Background

The current Federal Acquisition Regulation (FAR) definition of ''commercial item'' in FAR part 2 was established by FAR case 94–790, Acquisition of Commercial Items, published at 60 FR 48231 on September 18, 1995, which implemented the revised statutory authorities in Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355).

DoD, GSA, and NASA are proposing to amend the FAR definition of ''commercial item'' to implement section 836 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). This section separates the definition of ''commercial item'' at 41 U.S.C. 103 into the definitions of ''commercial product'' and ''commercial service,'' at 41 U.S.C. 103 and 103a. Section 836 sets the effective date of the new definitions as January 1, 2020.

Splitting the definition of ''commercial item'' into the definitions of ''commercial product'' and ''commercial service'' was a recommendation made by the independent panel created by section 809 of the NDAA for FY 2016 (Pub. L. 114–92). The panel was created to review and improve the functioning of the defense acquisition system, and eliminate any regulations found unnecessary to achieve such improvements. The panel recommended the splitting of the definition of ''commercial item'' to better ''reflect the significant roles services and commercial services play today in the DoD procurement budget.'' See recommendation on pages 29 to 30 of Volume 1 of 3 dated January 2018 of the Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, available via the internet at *https://section809panel.org/wp-content/uploads/2018/04/Sec809Panel_Vol1-Report_Jan18_REVISED_2018-03-14.pdf.*

This change resolves the issue the Section 809 Panel cites, which is that the ''acquisition workforce has faced issues with inconsistent interpretations of policy, confusion over how to identify eligible commercial products and services''. Bifurcating the definition of ''commercial item'' into ''commercial product'' and ''commercial service'' is a way to provide clarity for the acquisition workforce, which may result in greater engagement with the commercial marketplace.

It is important to note, the amendment to separate ''commercial item'' with ''commercial product'' and ''commercial service'' does not expand or shrink the universe of products or services that the Government may procure using FAR part 12, nor does it change the terms and conditions vendors must comply with.

II. Discussion and Analysis

As required by section 836 of the NDAA for FY 2019, DoD, GSA, and NASA are proposing to replace instances of commercial item(s) with commercial product(s), commercial service(s), or both commercial product(s) and commercial service(s). The following summarizes the proposed changes to the FAR:

1. Removed from FAR part 2 the definition of ''commercial item'' and replaced it with the definitions of ''commercial product,'' and ''commercial service'' from the NDAA with only the minor revisions for clarification currently in the FAR definition of ''commercial item.'' The clarification in paragraph 3(ii) of the proposed definition of ''commercial product'' has been in FAR part 2 since the definition of ''commercial item'' was incorporated by FAR case 94–790, Acquisition of Commercial Items, in 1995. Paragraphs 2(i) and 2(ii) of the proposed definition of ''commercial service'' are also long standing; they stem from a FAR change published October 22, 2001, which was revised slightly in a FAR change published June 18, 2004.

2. Replaced all instances of ''non-commercial'' and ''noncommercial'' with ''other than commercial'' as it relates to this rule. This is an editorial change and will provide consistent language throughout the FAR.

3. Removed FAR 12.102(g), and a corresponding reference at FAR 37.601(c), as obsolete. FAR 12.102(g) only applies to contracts or orders entered into before November 23, 2013.

4. Added the definition of ''established price'' at FAR 16.001 to be consistent with the term as defined at the FAR clauses at FAR 52.216–2, Economic Price Adjustment—Standard Supplies, and 52.216–3, Economic Price Adjustment-Semistandard Supplies. This is an editorial change for consistency to have the definition in both the clause and the corresponding FAR part.

5. Made conforming changes to cross references, and the following Standard Forms (SF): SF 294, Subcontracting Report for Individual Contracts; SF 1443, Contractor's Request for Progress Payment; and SF 1449, Solicitation/Contract/Order for Commercial Items. These forms are managed by the FAR Council and were identified as containing the term ''commercial item.'' This rule proposes to replace each instance of the term with ''commercial product'' or ''commercial service'' as appropriate. Also minor editorial changes were made as needed throughout the FAR. These revisions do not impact terms and conditions of commercial contracts or how the Government procures commercial products or commercial services.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule does not add any new solicitation provisions or contract clauses. This rule merely replaces the term ''commercial item(s)'' with ''commercial product(s),'' ''commercial service(s),'' ''commercial product(s) or commercial service(s),'' or ''commercial product(s) and commercial service(s)'' in the FAR including in part 52, as appropriate. It does not add any new burdens because the case does not add or change any requirements with which vendors must comply.

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 rule 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. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA do 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 (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the FAR to change the definition of ''commercial item'' by splitting it into the definitions of ''commercial product'' and ''commercial service.''

The objective is to implement section 836 of the John S. McCain NDAA for FY19 (Pub. L. 115–232). The legal basis for this rule is 40 U.S.C. 121(c), 10 U.S.C. chapter 137, and 51 U.S.C. 20113.

The proposed rule impacts all entities that do business with the Federal Government, including the over 327,458 small business registrants in the System for Award Management database. However, DoD, GSA, and NASA do not expect this proposed rule to have a significant economic impact on a substantial number of small entities because the rule is not implementing any requirements with which small entities must comply. This proposed rule splits the definition of ''commercial item'' into the definitions of ''commercial product'' and ''commercial service.'' These revisions do not impact terms and conditions of commercial contracts or how the Government procures commercial products or commercial services; it is merely editorial.

The proposed rule does not include additional, or change any existing, reporting or record keeping requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no available alternatives to the proposed rule to accomplish the desired objective of the statute.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2018–018) in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) does apply; however, the proposed changes to the FAR and the updates to the information collections do not impose new information collection burden. The changes do not impose additional, or change any existing, information collection requirements to the paperwork burden previously approved under the following OMB Control Numbers: 9000–0007, Subcontracting Plans; 9000–0018, Certification Of Independent Price Determination, Contractor Code of Business Ethics and Conduct, and Preventing Personal Conflicts of Interest; 9000–0193, FAR Part 9 Responsibility Matters; 9000–0097, Federal Acquisition Regulation Part 4 Requirements; 9000–0136, Commercial Item Acquisitions; 9000–0034, Examination of Records by Comptroller General and Contract Audit; 9000–0013, Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data; 9000–0048, Authorized Negotiators and Integrity of Unit Prices; 9000–0010, Progress Payments, SF 1443; 9000–0024, Buy American, Trade Agreements, and Duty-Free Entry; 9000–0061, Transportation Requirements; 9000–0068, Economic Price Adjustment; 9000–0070, Payments; 9000–0138, Contract Financing; 9000–0188, Combating Trafficking in Persons; 9000–0197, Use of Products and Services of Kaspersky Lab; 9000–0198, Violations of Arms Control Treaties or Agreements; and 1615–0092, E-Verify Program.

List of Subjects in 48 CFR Parts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 37, 38, 39, 42, 44, 46, 47, 49, 52, and 53

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 37, 38, 39, 42, 44, 46, 47, 49, 52, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 37, 38, 39, 42, 44, 46, 47, 49, 52, and 53 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.102 [Amended]

■ 2. Amend section 1.102 by removing from paragraph (b)(1)(i) ''commercial products and services;'' and adding

''commercial products and commercial services;'' in its place.

1.102–2 [Amended]

■ 3. Amend section 1.102–2 by removing from paragraph (a)(4) ''commercial products and services'' and adding ''commercial products and commercial services'' in its place.

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 4. Amend section 2.101 in paragraph (b)(2) by—

■ a. In the defined term ''Biobased product'' removing ''commercial or industrial product'' and adding ''commercial product or industrial product'' in its place;

■ b. In the defined term ''Commercial component'' removing ''commercial item'' and adding ''commercial product'' in its place;

■ c. In the defined term ''Commercial computer software'' removing ''commercial item'' and adding ''commercial product or commercial service'' in its place.

■ d. Removing the defined term ''Commercial item'';

■ e. In the defined term ''Commercially available off-the-shelf (COTS) item'' removing in paragraph (1)(i) ''commercial item'', and ''definition in this section'' and adding ''commercial product'' and ''definition of ''commercial product'' in this section'' in their places, respectively; and

■ f. Adding the defined terms ''Commercial product'' and ''Commercial service'' in alphabetical order to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Commercial product means—

(1) A product, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and—

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease, or license to the general public;

(2) A product that evolved from a product described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) A product that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, except for—

(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. ''Minor modifications'' means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(4) Any combination of products meeting the requirements of paragraphs (1), (2), or (3) of this definition that are of a type customarily combined and sold in combination to the general public;

(5) A product, or combination of products, referred to in paragraphs (1) through (4) of this definition, even though the product, or combination of products, is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(6) A nondevelopmental item, if the procuring agency determines the product was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments or to multiple foreign governments.

* * * * *

Commercial service means—

(1) Installation services, maintenance services, repair services, training services, and other services if—

(i) Such services are procured for support of a commercial product as defined in this section, regardless of whether such services are provided by the same source or at the same time as the commercial product; and

(ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;

(2) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services—

(i) *Catalog price* means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(ii) *Market prices* means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors;

(3) A service referred to in paragraphs (1) or (2) of this definition, even though the service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

* * * * *

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3.104–1 [Amended]

■ 5. Amend section 3.104–1 by removing from the defined term ''Contractor bid or proposal information'' in paragraph (1) ''10 U.S.C. 2306a(h)'' and ''41 U.S.C. 3501(a)(2)'' and adding ''10 U.S.C. 2306a(h)(1)'' and ''41 U.S.C. 3501(a)(1)'' in their places, respectively.

■ 6. Amend section 3.104–9 by revising the introductory text to read as follows:

3.104–9 Contract clauses.

In solicitations and contracts that exceed the simplified acquisition threshold, other than those for commercial products or commercial services, insert the clauses at—

* * * * *

3.404 [Amended]

■ 7. Amend section 3.404 by removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

■ 8. Amend section 3.502–2 by revising paragraph (i) to read as follows:

3.502–2 Subcontractor kickbacks.

* * * * *

(i) Requires each contracting agency to include in each prime contract, other than for commercial products or commercial services, exceeding $150,000, a requirement that the prime contractor shall—

* * * * *

3.502–3 [Amended]

■ 9. Amend section 3.502–3 by removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

3.503–2 [Amended]

■ 10. Amend section 3.503–2 by removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

3.1004 [Amended]

■ 11. Amend section 3.1004 by removing from paragraph (b)(1) ''commercial item'' and adding ''commercial product or commercial service'' in its place.

PART 4—ADMINISTRATIVE AND INFORMATION MATTERS

4.203 [Amended]

■ 12. Amend section 4.203 by removing from paragraph (a) ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place.

4.605 [Amended]

■ 13. Amend section 4.605 by removing from paragraph (b) ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place.

4.1103 [Amended]

■ 14. Amend section 4.1103 by removing from paragraph (a)(3) ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place.

4.1201 [Amended]

■ 15. Amend section 4.1201 by removing from paragraph (d) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

4.1202 [Amended]

■ 16. Amend section 4.1202 by removing from paragraph (a) ''commercial item solicitations'' and adding ''solicitations for commercial products or commercial services'' in its place.

4.1902 [Amended]

■ 17. Amend section 4.1902 by removing from text ''commercial items'' and adding ''commercial products or commercial services,'' in its place.

PART 5—PUBLICIZING CONTRACT ACTIONS

5.202 [Amended]

■ 18. Amend section 5.202 by removing from paragraph (a)(10) ''commercial items'' and adding ''commercial products'' in its place.

5.203 [Amended]

■ 19. Amend section 5.203 by removing from paragraphs (a), (b), and (c) ''commercial items'' and adding ''commercial products or commercial services'' in their places, respectively.

PART 6—COMPETITION REQUIREMENTS

6.001 [Amended]

■ 20. Amend section 6.001 by removing from paragraph (a) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

6.302–5 [Amended]

■ 21. Amend section 6.302–5 by removing from paragraph (a)(2)(ii) ''commercial item'' and adding ''commercial product''; and removing from paragraph (c)(3) ''brand-name commercial items'' and adding ''brand name commercial products'' in their places, respectively.

■ 22. Amend section 6.502 by—

■ a. Revising paragraph (a);

■ b. Removing from paragraph (b)(1)(i) ''commercial items'' and adding ''commercial products and commercial services'' in its place;

■ c. Removing from paragraph (b)(1)(iv) ''commercial items or'' and adding ''commercial products or commercial services, or restricting'' in its place;

■ d. Removing from paragraph (b)(2)(ii) ''commercial items'' and adding ''commercial products and commercial services'' in its place; and

■ e. Removing from paragraphs (b)(2)(v) and (b)(2)(vi) ''commercial items'' and adding ''commercial products, commercial services,'' in their places, respectively.

The revised text reads as follows:

6.502 Duties and responsibilities.

(a) Agency and procuring activity advocates for competition are responsible for—

(1) Promoting the acquisition of commercial products and commercial services;

(2) Promoting full and open competition;

(3) Challenging requirements that are not stated in terms of functions to be performed, performance required or essential physical characteristics; and

(4) Challenging barriers to the acquisition of commercial products and commercial services; and full and open competition such as unnecessarily restrictive statements of work, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses.

* * * * *

PART 7—ACQUISITION PLANNING

7.102 [Amended]

■ 23. Amend section 7.102 by removing from paragraph (a)(1) ''commercial items or, to the extent that commercial items suitable'' and adding ''commercial products or commercial services, or to the extent that commercial products suitable'' in its place.

7.103 [Amended]

■ 24. Amend section 7.103 by removing from paragraph (b) ''commercial items, or to the extent that commercial items suitable'' and adding ''commercial products or commercial services, or to the extent that commercial products suitable'' in its place.

7.105 [Amended]

■ 25. Amend section 7.105 by removing from paragraph (b)(14)(i) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

8.402 [Amended]

■ 26. Amend section 8.402 by—

■ a. Removing from paragraph (a) ''commercial supplies and services'' and adding ''commercial supplies and commercial services'' in its place; and

■ b. Removing from paragraph (f)(1) ''commercial items (part 12),'' and adding ''commercial products or commercial services (part 12),'' in its place.

PART 9—CONTRACTOR QUALIFICATIONS

9.106–1 [Amended]

■ 27. Amend section 9.106–1 by removing from paragraph (a) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

9.109–5 [Amended]

■ 28. Amend section 9.109–5 by removing from the text ''commercial items'' and adding ''commercial products or commercial services'' in its place.

9.405–2 [Amended]

■ 29. Amend section 9.405–2 by removing from paragraph (b) ''commercial items'' and adding ''commercial products'' in its place.

PART 10—MARKET RESEARCH

■ 30. Amend section 10.001 by—

■ a. Removing from paragraph (a)(2)(v) ''for a noncommercial item'' and adding ''for other than a commercial product or commercial service'' in its place;

■ b. Removing from paragraph (a)(3)(ii) ''commercial items or, to the extent commercial items suitable'' and adding ''commercial products or commercial services, or, to the extent commercial products suitable'' in its place;

■ c. Removing from paragraph (a)(3)(iii) ''commercial items'' and adding ''commercial products'' in its place;
■ d. Removing from paragraph (a)(3)(iv) ''commercial items'' and adding ''commercial products or commercial services'' in its place; and
■ e. Revising paragraph (d) to read as follows:

10.001 Policy.

* * * * *

(d) In accordance with section 826 of Public Law 110–181, see 10.003 for the requirement for a prime contractor to perform market research in contracts in excess of $5.5 million, other than contracts for the acquisition of commercial products or commercial services.

10.002 [Amended]

■ 31. Amend section 10.002 by—
■ a. Removing from paragraph (b) ''commercial items'' and adding ''commercial products, commercial services,'' in its place;
■ b. Removing from paragraph (b)(1) ''item'' and adding ''product or service'' in its place;
■ c. Removing from paragraphs (b)(1)(i)(A), (B), and (C) ''Items'' and adding ''Products or services'' in their places;
■ d. Removing from paragraph (b)(1)(ii) ''items'' and adding ''products or services'' in its place;
■ e. Removing from paragraph (c) ''indicates commercial'' and ''permit commercial'' and adding ''indicates commercial products, commercial services,'' and ''permit commercial products, commercial services,'' in their places, respectively; and
■ f. Removing from paragraph (d)(1) ''item or'' and ''commercial item'' and adding ''product or'' and ''commercial product or commercial service'' in their places, respectively.
■ 32. Amend section 10.003 by revising the text to read as follows:

10.003 Contract clause.

The contracting officer shall insert the clause at 52.210–1, Market Research, in solicitations and contracts over $5.5 million, other than solicitations and contracts for the acquisition of commercial products or commercial services.

PART 11—DESCRIBING AGENCY NEEDS

11.002 [Amended]

■ 33. Amend section 11.002 by—
■ a. Removing from paragraph (a)(2)(ii) ''commercial items, or, to the extent that commercial items suitable'' and adding ''commercial products or commercial services, or, to the extent that commercial products suitable'' in its place;
■ b. Removing from paragraph (a)(2) (iii) and (a)(2)(iv) ''commercial items'' and adding ''commercial products, commercial services,'' in their places; and
■ c. Removing from paragraph (a)(2)(v) ''commercial items or,'' and ''commercial items suitable'' and adding ''commercial products or commercial services or'' and ''commercial products suitable'' in their places, respectively.

11.302 [Amended]

■ 34. Amend section 11.302 by—
■ a. Removing from paragraph (b)(1) ''acquiring other'' and ''commercial items'' and adding ''acquiring products other'' and ''commercial products as defined in 2.101'' in their places, respectively;
■ b. Removing from paragraph (b)(2) ''commercial items'' and ''the item'' and adding ''commercial products'' and ''the product'' in their places, respectively; and
■ c. Removing from paragraph (c)(1) ''commercial items'' and adding ''commercial products'' in its place.

11.304 [Amended]

■ 35. Amend section 11.304 by removing from the text ''commercial items'' and adding ''commercial products'' in its place.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 36. Amend the part heading by removing ''COMMERCIAL ITEMS'' and adding ''COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES'' in its place.

12.000 [Amended]

■ 37. Amend section 12.000 by—
■ a. In the first sentence removing ''commercial items'' and adding ''commercial products, including commercial components, and commercial services'' in its place; and
■ b. In the second sentence removing ''commercial items'' and ''commercial items and components'' and adding ''commercial products and commercial services'' (twice) in their places, respectively.

12.001 [Amended]

■ 38. Amend section 12.001 by removing from the defined term ''Subcontract'' ''commercial items'' and adding ''commercial products or commercial services'' in its place.

12.101 [Amended]

■ 39. Amend section 12.101 by removing from paragraphs (a), (b), and (c) ''commercial items'' and adding ''commercial products, commercial services,'' in their places.

12.102 [Amended]

■ 40. Amend section 12.102 by—
■ a. Removing from paragraph (a) ''the definition of commercial items'' and adding ''the definitions of ''commercial product'' or ''commercial service'''' in its place;
■ b. Removing from paragraph (c) ''commercial items'' (twice) and adding ''commercial products or commercial services'' in their places;
■ c. Removing from paragraph (d) ''commercial item'' and adding ''commercial product'' in its place;
■ d. Removing from paragraphs (e) and (f)(1) ''commercial items'' and adding ''commercial products or commercial services'' in their places;
■ e. Removing from paragraph (f)(2) ''for an item'' and ''commercial item'' (twice) and adding ''for a product'' and ''commercial product or commercial service'' (twice) in their places, respectively; and removing from paragraph (f)(2)(i) ''see Subpart 30.2'' and adding ''see subpart 30.2'' in its place; and
■ f. Removing paragraph (g).

12.103 [Amended]

■ 41. Amend section 12.103 by removing from the text ''commercial items'' and ''12.504);'' and adding ''commercial products'' and ''12.504).'' in their places, respectively.
■ 42. Amend the subpart heading of 12.2 by removing ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place.

12.201 [Amended]

■ 43. Amend section 12.201 by removing ''commercial items'' (twice) and adding ''commercial products and commercial services'' (twice) in their places.

12.202 [Amended]

■ 44. Amend section 12.202 by—
■ a. Removing from paragraph (a) ''commercial items'' and adding ''commercial products and commercial services'' in its place;
■ b. Removing from the first sentence of paragraph (b) ''commercial items'' and ''products or services'' and adding ''commercial products or commercial services'' and ''products or commercial services'' in their places, respectively; and
■ c. Removing from the second sentence of paragraph (b) ''commercial item'' and ''type of product or service'' and adding ''commercial product or commercial service'' and ''type of commercial

product or commercial service'' in their places, respectively.

12.203 [Amended]

■ 45. Amend section 12.203 by removing from the text ''commercial items'' (three times) and adding ''commercial products and commercial services'' and ''commercial products or commercial services'' (twice) in their places, respectively.

12.204 [Amended]

■ 46. Amend section 12.204 by removing from paragraph (a) ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place.

12.205 [Amended]

■ 47. Amend section 12.205 by—
■ a. Removing from the first sentence of paragraph (a) ''product''; and removing from the second sentence of paragraph (a) ''product literature from offerors of commercial items'' and adding ''product or service literature from offerors of commercial products or commercial services'' in its place;
■ b. Removing from the first sentence of paragraph (b) ''more than one product'' and ''commercial items'' and adding ''multiple offers'' and ''commercial products or commercial services'' in their places, respectively; and removing from the second sentence of paragraph (b) ''product as a separate offer'' and adding ''offer separately'' in its place; and
■ c. Removing from paragraph (c) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

12.206 [Amended]

■ 48. Amend section 12.206 by removing from the text ''commercial items'' and adding ''commercial products and commercial services'' in its place.

12.207 [Amended]

■ 49. Amend section 12.207 by removing from paragraphs (a) and (e) ''commercial items'' and adding ''commercial products or commercial services'' in their places.
■ 50. Revise section 12.208 to read as follows:

12.208 Contract quality assurance.

Contracts for commercial products shall rely on contractors' existing quality assurance systems as a substitute for Government inspection and testing before tender for acceptance unless customary market practices for the commercial product being acquired include in-process inspection. Any in-process inspection by the Government shall be conducted in a manner consistent with commercial practice. The Government shall rely on the contractor to accomplish all inspection and testing needed to ensure that commercial services acquired conform to contract requirements before they are tendered to the Government.

12.209 [Amended]

■ 51. Amend section 12.209 by removing from the text ''commercial items'' and ''Commercial item'' and adding ''commercial products and commercial services'' and ''Commercial product and commercial service'' in their places, respectively.

12.210 [Amended]

■ 52. Amend section 12.210 by removing from the text ''commercial items'' and adding ''commercial products and commercial services'' in its place.

12.211 [Amended]

■ 53. Amend section 12.211 by removing from the text ''commercial item'' and ''commercial items'' (twice) and adding ''commercial product'' and ''commercial products'' (twice) in their places, respectively.

12.214 [Amended]

■ 54. Amend section 12.214 by—
■ a. Removing from the first sentence ''commercial items'' and adding ''commercial products or commercial services'' in its place;
■ b. Removing from the second sentence ''See 48 CFR 30.201–1'' and ''commercial items'' and adding ''See 30.201–1'' and ''commercial products or commercial services'' in their places, respectively; and
■ c. Removing from the last sentence ''in 48 CFR 30.201'' and adding ''in 30.201'' in its place.
■ 55. Amend the subpart heading of 12.3 by removing ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place.

12.300 [Amended]

■ 56. Amend section 12.300 by removing the text ''commercial items'' and adding ''commercial products and commercial services'' in its place.

12.301 [Amended]

■ 57. Amend section 12.301 by—
■ a. Removing from the heading ''commercial items'' and adding ''commercial products and commercial services'' in its place;
■ b. Removing from the introductory text of paragraph (a) and from paragraph (a)(1) ''commercial items'' and adding ''commercial products or commercial services'' in their places, respectively;
■ c. Removing from paragraph (b) ''commercial items'' (twice) and adding ''commercial products or commercial services'' in their places;
■ d. Removing from paragraphs (b)(1) and (2) ''*Commercial Items*'' and ''commercial items'' and adding ''*Commercial Products and Commercial Services*'' and ''commercial products or commercial services'' in their places; and removing from the third sentence of (b)(2) ''Subpart 1.4'' and adding ''subpart 1.4'' in its place;
■ e. Removing from paragraph (b)(3) ''*Commercial Items*'' and adding ''*Commercial Products and Commercial Services*'' in its place;
■ f. Removing from paragraphs (b)(4) ''*Commercial Items*'', ''commercial items'' (twice) and ''Part 15'' and adding ''*Commercial Products and Commercial Services*'', ''commercial products or commercial services'' (twice) and ''part 15'' in their places, respectively;
■ g. Removing from paragraph (c)(1) ''Commercial Items'' and ''commercial items'' and adding ''Commercial Products and Commercial Services'' and ''commercial products or commercial services'' in their places, respectively;
■ h. Removing from paragraph (d) ''commercial items'' (twice) and adding ''commercial products or commercial services'' in their places, respectively; and
■ i. Removing from paragraph (f) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

12.302 [Amended]

■ 58. Amend section 12.302 by—
■ a. Removing from the heading ''commercial items'' and adding ''commercial products and commercial services'' in its place;
■ b. Removing from paragraph (a) ''commercial items'' (twice) and ''Commercial Items'' (twice) and adding ''commercial products and commercial services'' (twice) and ''Commercial Products and Commercial Services'' (twice) in their places, respectively;
■ c. Removing from paragraph (b) ''*Commercial Items*'' and ''Commercial Items'' and adding ''*Commercial Products and Commercial Services*'' and ''Commercial Products and Commercial Services'' in their places, respectively; and
■ d. Removing from paragraph (c) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

12.303 [Amended]

■ 59. Amend section 12.303 by—
■ a. Removing from the introductory text ''commercial items'' and adding

''commercial products or commercial services'' in its place;
■ b. Removing from paragraph (c)(1) ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place;
■ c. Removing from paragraph (c)(3) ''and Executive Orders'' and adding ''or Executive Orders—Commercial Products and Commercial Services'' in its place; and
■ d. Removing from paragraphs (e)(1), (e)(3), and (e)(4) ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in their places, respectively.
■ 60. Amend subpart 12.4 by removing from the heading ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place.

12.401 [Amended]

■ 61. Amend section 12.401 by—
■ a. Removing from paragraph (a) ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place; and
■ b. Removing from paragraph (b) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

12.402 [Amended]

■ 62. Amend 12.402 by—
■ a. Removing from paragraph (a) ''commercial item'' and ''commercial items'' (twice) and adding ''commercial product or commercial service'' and ''commercial products or commercial services'' (twice) in their places, respectively;
■ b. Removing from paragraph (b) ''complex commercial items or commercial items used'' and adding ''complex commercial products or commercial services, or commercial products or commercial services used'' in its place; and
■ c. Removing from paragraph (c) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

12.403 [Amended]

■ 63. Amend section 12.403 by removing from paragraphs (a), (b), and (d) ''commercial items'' (four times) and adding ''commercial products or commercial services'' (four times) in their places, respectively.

12.404 [Amended]

■ 64. Amend section 12.404 by removing from paragraph (b) ''commercial items'' and adding ''commercial products'' in its place.
■ 65. Amend subpart 12.5 by removing from the heading ''Commercial Items'' and adding ''Commercial Products, Commercial Services,'' in its place.

12.500 [Amended]

■ 66. Amend section 12.500 by—
■ a. Removing from paragraph (a)(1) and (a)(2) ''commercial items'' and adding ''commercial products or commercial services'';
■ b. Removing from paragraph (a)(3) ''of COTS items'' and adding ''of commercially available off-the-shelf (COTS) items'' in its place; and
■ c. Removing from paragraph (b) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

12.501 [Amended]

■ 67. Amend section 12.501 by removing from paragraphs (a) and (b) ''commercial items'' and adding ''commercial products or commercial services'' in their places, respectively.

12.502 [Amended]

■ 68. Amend section 12.502 by—
■ a. Removing from paragraph (a) ''commercial items'' and adding ''commercial products or commercial services'' in its place; and
■ b. Removing from paragraph (b) ''commercial items or commercial components,'', ''Commercial Items'' (twice) and ''commercial items or commercial components'' and adding ''commercial products or commercial services,'', ''Commercial Products and Commercial Services'' (twice) and ''commercial products or commercial services'' in their places, respectively.

12.503 [Amended]

■ 69. Amend section 12.503 by—
■ a. Removing from the heading ''commercial items'' and adding ''commercial products and commercial services'' in its place;
■ b. Removing from paragraph (a) ''commercial items'' and adding ''commercial products or commercial services'' in its place; and
■ c. Removing from paragraphs (b) and (c) ''commercial items'' and adding ''commercial products and commercial services'' in their places, respectively.

12.504 [Amended]

■ 70. Amend section 12.504 by—
■ a. Removing from the heading ''commercial items'' and adding ''commercial products and commercial services'' in its place;
■ b. Removing from paragraph (a) ''commercial items or commercial components'' and adding ''commercial products or commercial services'' in its place;
■ c. Removing from paragraph (b) ''Subpart 22.3'' and ''commercial items or commercial components'' and adding ''subpart 22.3'' and ''commercial products or commercial services'' in their places, respectively; and
■ d. Removing from paragraph (c) ''commercial items or commercial components'' and adding ''commercial products or commercial services'' in its place.

12.505 [Amended]

■ 71. Amend section 12.505 by removing from the introductory text ''commercial items'' and adding ''commercial products'' in its place.
■ 72. Amend subpart 12.6 by removing from the heading ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place.
■ 73. Revise section 12.601 to read as follows:

12.601 General.

(a) This subpart provides optional procedures for—

(1) Streamlined evaluation of offers for commercial products or commercial services; and

(2) Streamlined solicitation of offers for commercial products or commercial services for use where appropriate.

(b) These procedures are intended to simplify the process of preparing and issuing solicitations, and evaluating offers for commercial products or commercial services consistent with customary commercial practices.
■ 74. Amend section 12.602 by—
■ a. Removing from paragraph (a) ''Commercial Items'' and ''commercial items'' and adding ''Commercial Products and Commercial Services'' and ''commercial products or commercial services'' in their places; and
■ b. Revising paragraph (b) to read as follows:

12.602 Streamlined evaluation of offers.

* * * * *

(b) Offers shall be evaluated in accordance with the criteria contained in the solicitation. For many commercial products or commercial services, the criteria need not be more detailed than technical (capability of the item offered to meet the agency need), price, and past performance. Technical capability may be evaluated by how well the proposed products or services meet the Government requirement instead of predetermined subfactors. Solicitations for commercial products or commercial services do not have to contain subfactors for technical capability when the solicitation adequately describes the intended use of the commercial product or commercial service. A technical evaluation would normally include examination of such things as product or service literature, product samples (if requested),

technical features, and warranty provisions. Past performance shall be evaluated in accordance with the procedures in section 13.106 or subpart 15.3, as applicable. The contracting officer shall ensure the instructions provided in the provision at 52.212–1, Instructions to Offerors—Commercial Products and Commercial Services, and the evaluation criteria provided in the provision at 52.212–2, Evaluation—Commercial Products and Commercial Services, are in agreement.

* * * * *

12.603 [Amended]

■ 75. Amend section 12.603 by—

■ a. Removing from the heading ''commercial items'' and adding ''commercial products or commercial services'' in its place;

■ b. Removing from paragraph (a) ''commercial items'' and adding ''commercial products or commercial services'' in its place;

■ c. Removing from paragraph (c)(2)(i) ''commercial items'' and ''Subpart 12.6'' and adding ''commercial products or commercial services'' and ''subpart 12.6'' in their places, respectively;

■ d. Removing from paragraphs (c)(2)(viii), (c)(2)(ix), (c)(2)(x) and (c)(2)(xi) ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in their places, respectively; and

■ e. Removing from paragraph (c)(2)(xii) ''Or Executive Orders-Commercial Items'' and adding ''or Executive Orders-Commercial Products and Commercial Services'' in its place.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

13.000 [Amended]

■ 76. Amend section 13.000 by removing from the text ''and commercial items'' and ''of commercial items'' (twice) and adding ''commercial products, and commercial services'' and ''of commercial products and commercial services'' (twice) in their places, respectively.

13.003 [Amended]

■ 77. Amend section 13.003 by—

■ a. Removing from paragraph (c)(1)(ii) ''commercial items'' and ''Subpart 13.5'' and adding ''commercial products or commercial services'' and ''subpart 13.5'' in their places, respectively;

■ b. Removing from paragraph (c)(2) ''commercial items'' and ''Subpart 13.5'' and adding ''commercial products and commercial services'' and ''subpart 13.5'' in their places, respectively;

■ c. Removing from paragraph (g)(1) ''threshold for'' and ''commercial items'' and adding ''threshold when acquiring'' and ''commercial products or commercial services'' in their places, respectively; and

■ d. Removing from paragraph (g)(2) ''commercial items'' and ''in Parts'' and adding ''commercial products or commercial services'' and ''in parts'' in their places, respectively.

■ 78. Amend section 13.005 by revising paragraph (b) to read as follows:

13.005 List of laws inapplicable to contracts and subcontracts at or below the simplified acquisition threshold.

* * * * *

(b) The Federal Acquisition Regulatory Council (FAR Council) will include any law enacted after October 13, 1994, that sets forth policies, procedures, requirements, or restrictions for the acquisition of property or services, on the list set forth in paragraph (a) of this section. The FAR Council may make exceptions when it determines in writing that it is in the best interest of the Government that the enactment should apply to contracts or subcontracts not greater than the simplified acquisition threshold.

* * * * *

13.105 [Amended]

■ 79. Amend section 13.105 by removing from paragraph (b) ''commercial items'' and adding ''commercial products or commercial services,'' in its place.

13.106–1 [Amended]

■ 80. Amend section 13.106–1 by removing from paragraph (b)(2) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

13.302–1 [Amended]

■ 81. Amend section 13.302–1 by removing from paragraph (a) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

13.302–4 [Amended]

■ 82. Amend section 13.302–4 by—

■ a. Removing from paragraph (a)(1) ''commercial items'' and adding ''commercial products and commercial services'' in its place; and

■ b. Removing from paragraph (a)(2) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

13.302–5 [Amended]

■ 83. Amend section 13.302–5 by removing from paragraph (d)(1) ''Commercial Items'' and ''commercial items'' and adding ''Commercial Products and Commercial Services'' and ''commercial products or commercial services'' in their places, respectively.

13.303–5 [Amended]

■ 84. Amend section 13.303–5 by removing from paragraph (b)(2) ''commercial item'' and ''Subpart 13.5'' and adding ''commercial product and commercial service'' and ''subpart 13.5'' in their places, respectively.

13.303–8 [Amended]

■ 85. Amend section 13.303–8 by removing ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place.

13.307 [Amended]

■ 86. Amend section 13.307 by—

■ a. Removing from paragraph (a) ''*Commercial items*'' and ''Commercial Items'' and adding ''*Commercial products and commercial services*'' and ''Commercial Products and Commercial Services'' in their places, respectively;

■ b. Removing from paragraph (b) ''*commercial items*'' and adding ''*commercial products and commercial services*'' in its place; and

■ c. Removing from paragraph (c) ''*commercial items*'' and adding ''*commercial products and commercial services*'' in its place.

■ 87. Amend subpart 13.5 by removing from the heading ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place.

13.500 [Amended]

■ 88. Amend section 13.500 by—

■ a. Removing from paragraph (a) ''commercial items'' and ''commercial item acquisitions'' and adding ''commercial products or commercial services'' and ''commercial acquisitions'' in their places, respectively;

■ b. Removing from paragraph (b) ''commercial items'' and adding ''commercial products and commercial services'' in its place; and

■ c. Removing from paragraphs (c)(1) and (2) ''commercial items'' and adding ''commercial products or commercial services'' in their places, respectively.

PART 14—SEALED BIDDING

14.201–1 [Amended]

■ 89. Amend section 14.201–1 by removing from paragraph (c) ''(see 4.1202(b)) or for acquisitions of commercial items'' and adding ''(see 4.1202(b)) or, for acquisitions of commercial products and commercial services'' in its place.

PART 15—CONTRACTING BY NEGOTIATION

15.204–1 [Amended]

■ 90. Amend section 15.204–1 by removing from paragraph (b) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

15.209 [Amended]

■ 91. Amend section 15.209 by removing from paragraph (b)(1)(iii) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

■ 92. Amend section 15.306 by revising paragraph (e)(2) to read as follows:

15.306 Exchanges with offerors after receipt of proposals.

* * * * *

(e) * * *

(2) Reveals an offeror's technical solution, including—

(i) Unique technology;

(ii) Innovative and unique uses of commercial products or commercial services; or

(iii) Any information that would compromise an offeror's intellectual property to another offeror;

* * * * *

15.401 [Amended]

■ 93. Amend section 15.401 by removing from the defined term ''Subcontract'', ''commercial items'' and ''41 U.S.C. 3501(a)(3)'' and adding ''commercial products or commercial services'' and ''41 U.S.C. 3501(a)(2)'' in their places, respectively.

■ 94. Amend section 15.403–1 by—

■ a. Removing from paragraph (b)(3) ''commercial item'' and ''subsection'' and adding ''commercial product or commercial service'' and ''section'' in their places, respectively;

■ b. Removing from paragraph (b)(5) ''commercial items'' and ''subsection'' and adding ''commercial products or commercial services'' and ''section'' in their places, respectively;

■ c. Revising the paragraph heading of paragraph (c)(3) and revising paragraph (c)(3)(i);

■ d. Removing from paragraphs (c)(3)(ii)(A) and (B) ''commercial items'' and adding ''commercial services'' in their places, respectively;

■ e. Revising paragraph (c)(3)(iii) introductory text;

■ f. Removing from paragraphs (c)(3)(iii)(A), (B), and (C) ''commercial item'' and adding ''commercial product'' in their places, respectively; and

■ g. Removing from paragraph (c)(3)(iv) ''for noncommercial supplies or services treated as commercial items'' and adding ''for other than commercial products or services treated as commercial products or commercial services'' in its place.

The revised text reads as follows:

15.403–1 Prohibition on obtaining certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. chapter 35).

* * * * *

(c) * * *

(3) *Commercial products and commercial services.* (i) Any acquisition that the contracting officer determines meets the commercial product or commercial service definition in 2.101, or any modification, as defined in paragraph (3)(i) of the commercial product definition, that does not change a commercial product to other than commercial, is exempt from the requirement for certified cost or pricing data. If the contracting officer determines that a product or service claimed to be commercial is not, and that no other exception or waiver applies (*e.g.,* the acquisition is not based on adequate price competition; the acquisition is not based on prices set by law or regulation; and the acquisition exceeds the threshold for the submission of certified cost or pricing data at 15.403–4(a)(1)), the contracting officer shall require submission of certified cost or pricing data.

* * * * *

(iii) The following requirements apply to minor modifications defined in paragraph (3)(ii) of the definition of a commercial product at 2.101 that do not change the commercial product to other than commercial:

* * * * *

15.403–3 [Amended]

■ 95. Amend section 15.403–3 by—

■ a. Removing from the heading of paragraph (c) ''*Commercial items*'' and adding ''*Commercial products and commercial services*'' in its place;

■ b. Removing from paragraph (c)(1) ''commercial item'' and adding ''commercial product or commercial service'' in its place;

■ c. Removing from paragraph (c)(2) ''*commercial items*'' and ''commercial items'' and adding ''*commercial products or commercial services*'' and ''commercial products or commercial services'' in their places, respectively;

■ d. Removing from paragraph (c)(2)(ii) ''commercial items'' and adding ''commercial products or commercial services'' in its place; and

■ e. Removing from paragraph (c)(2)(iii) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

15.404–1 [Amended]

■ 96. Amend section 15.404–1 by—

■ a. Removing from paragraph (a)(4) ''for commercial or non-commercial items'';

■ b. Removing from paragraph (b) ''for commercial or non-commercial items'';

■ c. Removing from the last sentence in paragraph (b)(1) ''item'';

■ d. Removing from paragraph (b)(2)(ii) introductory text ''commercial items including those ''of a type'' or requiring minor modifications'' and adding ''commercial products or commercial services including those ''of a type'', or requiring minor modifications for commercial products'' in its place;

■ e. Removing from paragraphs (b)(2)(ii)(C) and (e)(3) ''commercial items that are ''of a type'' or requiring minor modifications'' and adding ''commercial products or commercial services that are ''of a type'', or requiring minor modifications for commercial products'' in their places, respectively; and

■ f. Removing from paragraph (f)(2) ''commercial items'' and adding ''commercial products'' in its place.

15.404–2 [Amended]

■ 97. Amend section 15.404–2 by removing from paragraph (a)(2)(iii)(E) ''for an item'' and ''commercial item'' and adding ''for a product or service'' and ''commercial product or commercial service'' in their places, respectively.

15.407–2 [Amended]

■ 98. Amend section 15.407–2 by removing from paragraph (e)(1) ''commercial items'' and adding ''commercial products, commercial services'' in its place.

15.408 [Amended]

■ 99. Amend section 15.408 by—

■ a. Removing from paragraph (f)(1)(v) ''commercial items'' and adding ''commercial products and commercial services'' in its place;

■ b. Removing from paragraphs (n)(2)(i)(B)(*2*)(*iii*), (*iv*), and (*vi*) ''commercial item'' and adding ''commercial product or commercial service'' in their places, respectively;

■ c. Removing from the Table 15–2, ''*I. General Instructions*'' and ''*II. Cost Elements*'' and adding ''I. General Instructions'' and ''II. Cost Elements'' in their places, respectively;

■ d. Removing from the Table 15–2, in paragraph (II)(A)(2) in the second sentence ''commercial items'' and adding ''commercial products or commercial services'' in its place;

■ e. Removing from the Table 15–2, in paragraph (II)(A) (2) in the ninth

sentence ''commercial items'' and adding ''commercial products'' in its place; and

■ f. Removing from the Table 15–2, ''*III. Formats for Submission of Line Item Summaries*'' and adding ''III. Formats for Submission of Line Item Summaries'' in its place.

15.506 [Amended]

■ 100. Amend section 15.506 by removing from paragraph (d)(5) ''commercial items, the make and model of the item'' and adding ''commercial products, the make and model of the product'' in its place.

15.601 [Amended]

■ 101. Amend section 15.601 by revising the defined term ''Commercial item offer'' to read ''Commercial product or service offer'', and removing from that defined term ''commercial item'' and ''commercial items'' and adding ''commercial product or commercial service'' and ''commercial products or commercial services'' in their places, respectively.

15.603 [Amended]

■ 102. Amend section 15.603 by removing from paragraph (b) ''commercial item'' and adding ''commercial product or commercial service'' in its place.

PART 16—TYPES OF CONTRACTS

■ 103. Amend section 16.001 by adding in alphabetical order, the definition ''Established price'' to read as follows:

16.001 Definitions.

* * * * *

Established price means a price that—

(1) Is an established catalog or market price for a commercial product sold in substantial quantities to the general public; and

(2) Is the net price after applying any standard trade discounts offered by the contractor.

* * * * *

16.201 [Amended]

■ 104. Amend section 16.201 by removing from paragraph (a) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

16.202–2 [Amended]

■

■ 105. Amend section 16.202–2 by removing from the introductory text ''commercial items'' and adding ''commercial products or commercial services'' in its place.

16.301–3 [Amended]

■ 106. Amend section 16.301–3 by removing from paragraph (b) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

16.307 [Amended]

■ 107. Amend section 16.307 by removing from paragraph (a)(1) ''commercial item'' and adding ''commercial product or commercial service'' in its place.

16.506 [Amended]

■ 108. Amend section 16.506 by removing from paragraph (h) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

■ 109. Amend section 16.601 by—

■ a. Removing from paragraph (c)(2)(ii) ''noncommercial items'' and adding ''other than commercial products or commercial services'' in its place;

■ b. Removing from paragraph (c)(2)(iv) ''the definition of commercial items at 2.101'' and adding ''the definition of ''commercial service'' at 2.101'' in its place;

■ c. Removing from paragraph (d)(2) ''commercial items'' and adding ''commercial products and commercial services'' in its place; and

■ d. Revising the first sentence of paragraph (f)(1) and revising paragraphs (f)(2) and (f)(3).

The revised text reads as follows:

16.601 Time-and-materials contracts.

* * * * *

(f) * * *

(1) The contracting officer shall insert the provision at 52.216–29, Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition With Adequate Price Competition, in solicitations contemplating use of a time-and-materials or labor-hour type of contract for the acquisition of other than commercial products or commercial services, if the price is expected to be based on adequate price competition.

* * *

(2) The contracting officer shall insert the provision at 52.216–30, Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition without Adequate Price Competition, in solicitations for the acquisition of other than commercial products or commercial services contemplating use of a time-and-materials or labor-hour type of contract if the price is not expected to be based on adequate price competition.

(3) The contracting officer shall insert the provision at 52.216–31, Time-and-Materials/Labor-Hour Proposal Requirements—Commercial Acquisition, in solicitations contemplating use of a commercial time-and-materials or labor-hour contract.

PART 18—EMERGENCY ACQUISITIONS

18.201 [Amended]

■ 110. Amend section 18.201 by removing from paragraph (e) ''*commercial items*'' and adding ''*commercial products and commercial services*'' in its place.

18.202 [Amended]

■ 111. Amend section 18.202 by—

■ a. Removing from paragraph (c) ''commercial items'' and adding ''commercial products or commercial services'' in its place; and

■ b. Removing from paragraph (d) ''*commercial items*'' and adding ''*commercial products and commercial services*'' in its place.

PART 19—SMALL BUSINESS PROGRAMS

19.304 [Amended]

■ 112. Amend section 19.304 by removing from paragraph (b) ''Certifications-Commercial Items'' and adding ''Certifications-Commercial Products and Commercial Services'' in its place.

19.403 [Amended]

■ 113. Amend section 19.403 by removing from paragraph (a) ''Pub. L.'' and ''commercial items'' and adding ''Public Law'' and ''commercial products or commercial services'' in their places, respectively.

19.701 [Amended]

■ 114. Amend section 19.701 by removing from the defined term ''Commercial plan'' ''commercial items'' and adding ''commercial products and performance of commercial services'' in its place.

19.704 [Amended]

■ 115. Amend section 19.704 by removing from paragraph (d) ''commercial items'' and ''commercial item'' and adding ''commercial products and commercial services'' and ''commercial product or commercial service'' in their places, respectively.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.305 [Amended]

■ 116. Amend section 22.305 by removing from paragraph (b)

''commercial items'' and adding ''commercial products and commercial services'' in its place.

22.604–1 [Amended]

■ 117. Amend section 22.604–1 by removing from paragraph (a) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

22.1302 [Amended]

■ 118. Amend section 22.1302 by removing from paragraph (b) ''commercial items'' and adding ''commercial products or commercial services,'' in its place.

22.1310 [Amended]

■ 119. Amend section 22.1310 by removing from paragraph (c) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

22.1505 [Amended]

■ 120. Amend section 22.1505 by removing from paragraph (a) ''commercial items'' and ''Certifications-Commercial Items'' and adding ''commercial products or commercial services'' and ''Certifications-Commercial Products and Commercial Services'' in their places, respectively.

22.1605 [Amended]

■ 121. Amend section 22.1605 by removing from paragraph (a) ''commercial items'' and adding ''commercial products, commercial services,'' in its place.

22.1801 [Amended]

■ 122. Amend section 22.1801 by removing from the defined term ''Commercially available off-the-shelf (COTS) item'' in paragraph (1)(i) ''commercial item (as defined in paragraph (1) of the definition at 2.101'' and adding ''commercial product (as defined in paragraph (1) of the definition of ''commercial product'' at 2.101'' in its place.

22.1802 [Amended]

■ 123. Amend section 22.1802 by removing from paragraph (b)(4)(i) ''Commercial or noncommercial services'' and adding ''Services'' in its place.

22.1803 [Amended]

■ 124. Amend section 22.1803 by removing from paragraph (c)(2) ''definition of ''commercial item'' at 2.101'' and adding ''definition of ''commercial product'' at 2.101'' in its place.

PART 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

23.501 [Amended]

■ 125. Amend section 23.501 by removing from paragraph (b) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

PART 25—FOREIGN ACQUISITION

25.103 [Amended]

■ 126. Amend section 25.103 by removing from paragraph (e) ''*commercial item*'', ''commercial item'' and ''Section'' and adding ''*commercial product*'', ''commercial product'' and ''section'' in their places, respectively.

■ 25.202 [Amended]

■ 127. Amend section 25.202 by removing from paragraph (a)(4) ''*commercial item*'', ''commercial item'' and ''Section'' and adding ''*commercial product*'', ''commercial product'', and ''section'' in their places, respectively.

25.703–2 [Amended]

■ 128. Amend section 25.703–2 by—

■ a. Removing from paragraph (b) ''of this subsection'' and adding ''of this section'' in its place; and

■ b. Removing from paragraph (b)(1) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

25.1001 [Amended]

■ 129. Amend section 25.1001 by removing from paragraph (a) ''Executive Orders-Commercial Items'' and adding ''Executive Orders-Commercial Products and Commercial Services'' in its place.

25.1101 [Amended]

■ 130. Amend section 25.1101 by—

■ a. Removing from paragraph (a)(1)(i) ''Subpart'' and adding ''subpart'' in its place;

■ b. Removing from paragraph (a)(1)(ii) ''commercial item'' and adding ''commercial product'' in its place; and

■ c. Removing from paragraph (b)(1)(i)(B) ''commercial item'' and adding ''commercial product'' in its place.

■ 131. Amend section 25.1103 by revising paragraph (d) to read as follows:

25.1103 Other provisions and clauses.

* * * * *

(d) The contracting officer shall include in each solicitation for the acquisition of other than commercial products or commercial services the provision at 52.225–20, Prohibition on Conducting Restricted Business Operations in Sudan—Certification.

* * * * *

PART 26—OTHER SOCIOECONOMIC PROGRAMS

26.206 [Amended]

■ 132. Amend section 26.206 by removing from paragraph (a) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

PART 27—PATENTS, DATA, AND COPYRIGHTS

27.102 [Amended]

■ 133. Amend section 27.102 by removing from paragraph (c) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

27.201–1 [Amended]

■ 134. Amend section 27.201–1 by removing from paragraph (d) ''commercial items'' and adding ''commercial products or commercial services'' in its place, and by removing ''FAR''.

27.201–2 [Amended]

■ 135. Amend section 27.201–2 by—

■ a. Removing from paragraph (c)(1) ''commercial items'' and adding ''commercial products or the provision of commercial services'' in its place; and

■ b. Removing from paragraph (c)(2)(i) ''commercial items'' and adding ''commercial products or the provision of services that are not commercial services'' in its place.

PART 28—BONDS AND INSURANCE

28.106–4 [Amended]

■ 136. Amend section 28.106–4 by removing from paragraph (b) ''Section'', ''Pub. L.'' (twice), ''Sections'', and ''commercial items as defined in Subpart'' and adding ''section'', ''Public Law'' (twice), ''sections'', ''commercial products or commercial services as defined in subpart'' in their places, respectively.

28.106–6 [Amended]

■ 137. Amend section 28.106–6 by removing from paragraph (d) ''Pub. L.'' (twice), ''Sections'', and ''commercial items as defined in Subpart'' and adding ''Public Law'' (twice), ''sections'', and ''commercial products or commercial services as defined in subpart'' in their places, respectively.

PART 29—TAXES

29.402–3 [Amended]

■ 138. Amend section 29.402–3 by removing from paragraph (a) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

PART 30—COST ACCOUNTING STANDARDS ADMINISTRATION

30.201–5 [Amended]

■ 139. Amend section 30.201–5 by removing from the introductory text of paragraph (b)(1) ''$15,000,000'' and removing from (b)(1)(i) ''commercial items'' and adding ''$15 million'' and ''commercial products or commercial services'' in their places, respectively.

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

31.205–26 [Amended]

■ 140. Amend section 31.205–26 by removing from paragraph (f) ''commercial item'' and ''subsection is transferred'' and adding ''commercial product or commercial service'' and ''section is sold or transferred'' in their places, respectively.

PART 32—CONTRACT FINANCING

32.000 [Amended]

■ 141. Amend section 32.000 by removing from paragraph (g) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

32.002 [Amended]

■ 142. Amend section 32.002 by—
■ a. Removing from paragraph (b) ''Commercial Item'' and ''commercial items'' and adding ''Commercial Product and Commercial Service'' and ''commercial products and commercial services'' in their places, respectively;
■ b. Removing from paragraph (c)(1) ''Non-Commercial Item Purchase Financing'' and adding ''Financing for Other Than a Commercial Purchase'' in its place; and
■ c. Removing from paragraph (c)(2) ''For Non-Commercial Items'' and adding ''for Other Than Commercial Acquisitions'' in its place.

32.005 [Amended]

■ 143. Amend section 32.005 by removing from paragraph (c) ''for Non-Commercial Items'' and adding ''for Other Than Commercial Acquisitions'' in its place.
■ 144. Amend subpart 32.1 by removing from the heading ''Non-Commercial Item Purchase Financing'' and adding ''Financing for Other Than a Commercial Purchase'' in its place.

32.100 [Amended]

■ 145. Amend section 32.100 by removing from the text ''commercial items'' and adding ''commercial products or commercial services'' in its place.

32.110 [Amended]

■ 146. Amend section 32.110 by removing from paragraph (a) ''item''.
■ 147. Amend section 32.112 by removing from the heading ''contracts for noncommercial items'' and adding ''contracts other than for commercial products and commercial services'' in its place.

32.112–2 [Amended]

■ 148. Amend section 32.112–2 by removing from paragraph (a) ''Section'', ''Pub. L.'' (twice), ''Sections'' and ''contract for a noncommercial item'' and adding ''section'', ''Public Law'' (twice), ''sections'', and ''contract other than for a commercial product or commercial service'' in their places, respectively.
■ 149. Amend subpart 32.2 by removing from the heading ''Commercial Item'' and adding ''Commercial Product and Commercial Service'' in its place.

32.201 [Amended]

■ 150. Amend section 32.201 by removing from the text ''commercial items'' and adding ''commercial products or commercial services'' in its place.

32.202–1 [Amended]

■ 151. Amend section 32.202–1 by—
■ a. Removing from paragraph (a) ''commercial items'' and adding ''commercial products or commercial services'' in its place; and
■ b. Removing from paragraph (c) ''*non-commercial*'', and ''non-commercial'' (twice) and adding ''*other than commercial*'', and ''other than commercial'' (twice) in their places, respectively.

32.202–2 [Amended]

■ 152. Amend section 32.202–2 by—
■ a. Removing from the heading ''commercial item'' and adding ''commercial product and commercial service'' in its place; and
■ b. Removing from the defined term ''Commercial advance payment'' ''subsection'' and ''for Non-Commercial items'' and adding ''section'' and ''for Other Than Commercial Acquisitions'', in their places, respectively.

32.202–4 [Amended]

■ 153. Amend section 32.202–4 by removing from paragraph (a)(2) ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place.

32.206 [Amended]

■ 154. Amend section 32.206 by—
■ a. Removing from paragraph (a) ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place; and
■ b. Removing from paragraphs (b)(1)(v), (b)(2), and (c)(3)(ii) ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in their places, respectively;
■ c. Removing from paragraph (f) ''non-commercial'' and adding ''other than commercial'' in its place;
■ d. Removing from paragraph (g) ''*commercial items*'' and ''Commercial Items'' and adding ''*commercial products and commercial services*'' and ''Commercial Products and Commercial Services'' in their places, respectively; and
■ e. Removing from paragraph (g)(2) ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place.
■ 155. Amend subpart 32.4 by removing from the heading ''Non-Commercial Items'' and adding ''Other Than Commercial Acquisitions'' in its place.

32.504 [Amended]

■ 156. Amend section 32.504 by—
■ a. Removing from paragraph (a) ''item'';
■ b. Removing from paragraph (b) ''commercial item'' and adding ''commercial product or commercial service'' in its place; and
■ c. Removing from paragraph (g) ''commercial item'' and adding ''commercial product or commercial service'' in its place.

32.601 [Amended]

■ 157. Amend section 32.601 by removing from paragraphs (b)(3) and (b)(10) ''commercial item financing'' and adding ''financing of commercial products or commercial services'' in their places, respectively.

32.904 [Amended]

■ 158. Amend section 32.904 by removing from paragraph (b)(1)(ii)(B)(*4*) ''commercial item, including a brand-name commercial item for'' and adding ''commercial product or commercial service, including a brand-name commercial product for'' in its place.

32.908 [Amended]

■ 159. Amend section 32.908 by—
■ a. Removing from paragraph (c) ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place; and
■ b. Removing from paragraph (c)(1) ''commercial item'' and ''commercial

item for'' and adding ''commercial product or commercial service'' and ''commercial product for'' in their places, respectively.

PART 37—SERVICE CONTRACTING

37.601 [Amended]

■ 160. Amend section 37.601 by removing paragraph (c).

PART 38—FEDERAL SUPPLY SCHEDULE CONTRACTING

38.101 [Amended]

■ 161. Amend section 38.101 by removing from paragraph (a) ''commercial supplies and services'' and adding ''commercial supplies and commercial services'' in its place.

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

39.203 [Amended]

■ 162. Amend section 39.203 by removing from paragraph (c)(1) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

39.204 [Amended]

■ 163. Amend section 39.204 by removing from paragraph (e)(2)(ii) ''commercial items'' and ''service available'' and adding ''commercial products and commercial services'' and ''services available'' in their places, respectively.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

42.709–0 [Amended]

■ 164. Amend section 42.709–0 by removing from paragraph (b) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

42.709–6 [Amended]

■ 165. Amend section 42.709–6 by removing from the text ''commercial items'' and adding ''commercial products or commercial services'' in its place.

42.1305 [Amended]

■ 166. Amend section 42.1305 by removing from paragraph (c) ''modified-commercial items'' (twice) and adding ''modified-commercial products'' (twice) in their places, respectively.

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

44.000 [Amended]

■ 167. Amend section 44.000 by removing from paragraph (b) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

44.302 [Amended]

■ 168. Amend section 44.302 by removing from paragraph (a) ''commercial items'' and ''Part 12'' and adding ''commercial products and commercial services'' and ''part 12'' in their places, respectively.

44.303 [Amended]

■ 169. Amend section 44.303 by removing from the introductory text ''commercial items'' and adding ''commercial products and commercial services'' in its place.

■ 170. Amend subpart 44.4 by removing from the heading ''Commercial Items and Commercial Components'' and adding ''Commercial Products and Commercial Services'' in its place.

44.400 [Amended]

■ 171. Amend section 44.400 by removing from the text ''commercial items or commercial components'' and adding ''commercial products, including commercial components, or commercial services'' in its place.

44.402 [Amended]

■ 172. Amend section 44.402 by—

■ a. Removing from paragraph (a)(1) ''commercial items'' and adding ''commercial products or commercial services,'' in its place;

■ b. Removing from paragraph (a)(2) and (a)(2)(i) ''commercial items or commercial components'' and adding ''commercial products or commercial services'' in their places, respectively;

■ c. Removing from paragraph (b) ''Commercial Items'' and ''commercial items or commercial components'' and adding ''Commercial Products and Commercial Services'' and ''commercial products or commercial services'' in their places, respectively; and

■ d. Removing from paragraph (c) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

44.403 [Amended]

■ 173. Amend section 44.403 by removing from the text ''Commercial Items'' and ''commercial items'' and adding ''Commercial Products and Commercial Services'' and ''commercial products or commercial services'' in their places, respectively.

PART 46—QUALITY ASSURANCE

46.102 [Amended]

■ 174. Amend section 46.102 by—

■ a. Removing from paragraph (b) ''services tendered'' and adding ''services (including commercial services tendered'' in its place; and

■ b. Removing from paragraph (f) ''commercial items shall'' and ''commercial item'' and adding ''commercial products'' and ''commercial product'' in their places, respectively.

■ 175. Amend section 46.202–1 by revising the section including the section heading to read as follows:

46.202–1 Contracts for commercial products and commercial services.

When acquiring commercial products (see part 12), the Government shall rely on contractors' existing quality assurance systems as a substitute for Government inspection and testing before tender for acceptance unless customary market practices for the commercial product being acquired include in-process inspection. Any in-process inspection by the Government shall be conducted in a manner consistent with commercial practice. The Government shall rely on the contractor to accomplish all inspection and testing needed to ensure that commercial services acquired conform to contract requirements before they are tendered to the Government.

46.317 [Amended]

■ 176. Amend section 46.317 by removing from paragraph (b)(1) ''Commercial items'' and adding ''Commercial products and commercial services'' in its place.

■ 177. Amend section 46.706 by—

■ a. Removing from paragraph (b)(1)(iii) ''commercial items'' and adding ''commercial products and commercial services'' in its place; and

■ b. Revising paragraph (b)(5).

The revision reads as follows:

46.706 Warranty terms and conditions.

* * * * *

(b) * * *

(5) *Markings.* (i) The packaging and preservation requirements of the contract shall require the contractor to stamp or mark the supplies delivered or otherwise furnish notice with the supplies of the existence of the warranty. The purpose of the markings or notice is to inform Government personnel who store, stock, or use the supplies that the supplies are under warranty. Markings may be brief but should include—

(A) A brief statement that a warranty exists;

(B) The substance of the warranty;

(C) Its duration; and

(D) Who to notify if the supplies are found to be defective.

(ii) For commercial products (see 46.709), the contractor's trade practice

in warranty marking is acceptable if sufficient information is presented for supply personnel and users to identify warranted supplies.

* * * * *

46.709 [Amended]

■ 178. Amend section 46.709 by removing from section heading and the section ''commercial items'' and adding ''commercial products and commercial services'' in their places, respectively.

46.710 [Amended]

■ 179. Amend section 46.710 by removing from the introductory text ''commercial items'' and adding ''commercial products and commercial services'' in its place.

46.801 [Amended]

■ 180. Amend section 46.801 by removing from paragraph (a) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

PART 47—TRANSPORTATION

47.405 [Amended]

■ 181. Amend section 47.405 by removing the quote marks from the first sentence (twice), and by removing in the second sentence ''commercial items'' and adding ''commercial products'' in its place.

47.504 [Amended]

■ 182. Amend section 47.504 by removing from paragraph (d) ''commercial items or commercial components'' and adding ''commercial products, including commercial components, or commercial services'' in its place; and removing from paragraph (d)(4) ''commercial items'' and adding ''commercial products'' in its place.

47.507 [Amended]

■ 183. Amend section 47.507 by removing from paragraph (a)(3) ''*Alternate II*'' and ''commercial items'' and adding ''Alternate II'' and ''commercial products'' in their places, respectively.

PART 49—TERMINATION OF CONTRACTS

49.002 [Amended]

■ 184. Amend section 49.002 by removing from paragraph (a)(2) ''commercial item'', ''commercial items'' (twice), and ''Commercial Items'' and adding ''commercial product and commercial service'', ''commercial products and commercial services'' (twice) and ''Commercial Products and Commercial Services'' in their places, respectively.

49.501 [Amended]

■ 185. Amend section 49.501 by removing from the text ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 186. Amend section 52.203–6 by revising the date of Alternate I and removing from paragraph (b) of Alternate I ''commercial items'' and ''commercial item(s)'' and adding ''commercial products or commercial services'' and ''commercial product(s) and commercial service(s)'' in their places, respectively. The revised text reads as follows:

52.203–6 Restrictions on Subcontractor Sales to the Government.

* * * * *

Alternate I (DATE). * * *

* * * * *

■ 187. Amend section 52.203–13 by revising the date of the clause and removing from paragraph (c) ''commercial item'' and adding ''commercial product or commercial service'' in its place. The revised text reads as follows:

52.203–13 Contractor Code of Business Ethics and Conduct.

* * * * *

Contractor Code of Business Ethics and Conduct (Date)

* * * * *

■ 188. Amend section 52.203–14 by revising the date of the clause and removing from paragraph (d)(1) ''commercial item'' and adding ''commercial product or commercial service'' in its place. The revised text reads as follows:

52.203–14 Display of Hotline Poster(s).

* * * * *

Display of Hotline Poster(s) (Date)

* * * * *

■ 189. Amend section 52.204–8 by revising the date of the provision and removing from paragraph (c)(1)(xv) ''commercial items'' and adding ''commercial products or commercial services'' in its place. The revised text reads as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (Date)

* * * * *

■ 190. Amend section 52.204–21 by revising the date of the clause and removing from paragraph (c) ''commercial items'' and adding ''commercial products or commercial services'' in its place. The revised text reads as follows:

52.204–21 Basic Safeguarding of Covered Contractor Information Systems.

* * * * *

Basic Safeguarding of Covered Contractor Information Systems (Date)

* * * * *

■ 191. Amend section 52.204–23 by revising the date of the clause and removing from paragraph (d) ''commercial items'' and adding ''commercial products or commercial services'' in its place. The revised text reads as follows:

52.204–23 Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities.

* * * * *

Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities (Date)

* * * * *

■ 192. Amend section 52.204–24 by revising the date of the clause and removing from the introductory paragraph ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place. The revised text reads as follows:

52.204–24 Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.

* * * * *

Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment (Date)

* * * * *

■ 193. Amend section 52.204–25 by revising the date of the clause and removing from paragraph (e) ''commercial items'' and adding ''commercial products or commercial services'' in its place. The revised text reads as follows:

52.204–25 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

* * * * *

Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment (Date)

* * * * *

■ 194. Amend section 52.209–6 by—

■ a. Revising the date of the clause;

■ b. Revising the defined term ''Commercially available off-the-shelf (COTS)'' to read ''Commercially available off-the-shelf (COTS) item'', and removing ''item, as used'' and adding '', as used'' in its place;
■ c. Removing from paragraph (a)(1)(i) ''commercial item (as defined in paragraph (1) of the definition in'' and adding ''commercial product (as defined in paragraph (1) of the definition of ''commercial product'' in'' in its place; and
■ d. Removing from paragraph (e) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revised text reads as follows:

52.209–6 Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment.

* * * * *

Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment (Date)

* * * * *

■ 195. Amend section 52.209–13 by revising the date of the provision and removing from paragraph (a) ''commercial items as defined at FAR 2.101'' and adding ''commercial products and commercial services as defined in Federal Acquisition Regulation 2.101'' in its place.

The revised text reads as follows:

52.209–13 Violation of Arms Control Treaties or Agreements—Certification.

* * * * *

Violation of Arms Control Treaties or Agreements—Certification (Date)

* * * * *

■ 196. Amend section 52.210–1 by—
■ a. Revising the date of the clause;
■ b. Revising paragraph (a);
■ c. Revising the introductory text of paragraph (b);
■ d. Removing from the introductory text of paragraph (b)(1) ''commercial items or, to the extent commercial items'' and adding ''commercial products, commercial services, or, to the extent commercial products'' in its place; and
■ e. Removing from paragraph (b)(2) ''commercial items'' and adding ''commercial products, commercial services,'' in its place.

The revised text reads as follows:

52.210–1 Market Research.

* * * * *

Market Research (Date)

(a) Definition. As used in this clause—

Commercial product, commercial service, and *nondevelopmental item* have the meaning contained in Federal Acquisition Regulation (FAR) 2.101.

(b) Before awarding subcontracts for other than commercial acquisitions, where the subcontracts are over the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, the Contractor shall conduct market research to—

* * * * *

■ 197. Amend section 52.212–1 by—
■ a. Removing from the section and clause headings ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place;
■ b. Revising the date of the provision;
■ c. Removing from paragraph (b)(8) ''FAR 52.212–3'' and adding ''Federal Acquisition Regulation (FAR) 52.212–3'' in its place;
■ d. Removing from paragraph (e) ''subpart 4.10 of the Federal Acquisition Regulation'' and ''commercial items'' and adding ''FAR subpart 4.10'' and ''commercial products or commercial services'' in their places, respectively; and
■ e. Removing from paragraph (l)(5) ''commercial items, the make and model of the item'' and adding ''commercial products, the make and model of the product'' in its place.

The revised text reads as follows:

52.212–1 Instructions to Offerors—Commercial Products and Commercial Services.

* * * * *

Instructions to Offerors—Commercial products and Commercial Services (Date)

* * * * *

■ 198. Amend section 52.212–2 by—
■ a. Removing from the section and clause headings ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in their places; and
■ b. Revising the date of the provision.

The revised text reads as follows:

52.212–2 Evaluation—Commercial Products and Commercial Services.

* * * * *

Evaluation—Commercial Products and Commercial Services (Date)

* * * * *

■ 199. Amend section 52.212–3 by—
■ a. Removing from the section and clause headings ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in their places;
■ b. Revising the date of the provision; and
■ c. Removing from paragraph (b)(2) ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place.

The revised text reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Products and Commercial Services.

* * * * *

Offeror Representations and Certifications—Commercial Products and Commercial Services (Date)

* * * * *

■ 200. Amend section 52.212–4 by—
■ a. Removing from the section and clause headings ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in their places;
■ b. Revising the date of the clause;
■ c. Removing from paragraph (d) ''FAR'' and adding ''Federal Acquisition Regulation (FAR)'' in its place;
■ d. Removing from paragraph (i)(6)(vii) ''32.608–2 of the Federal Acquisition Regulation'' and adding ''FAR 32.608–2'' in its place;
■ e. Revising the date of Alternate I;
■ f. Removing from the introductory text of paragraph (i)(1)(ii)(A) of Alternate I ''commercial item at'' and adding ''commercial product at FAR'' in its place; and
■ g. Removing from paragraph (i)(6)(vii) of Alternate I ''32.608–2 of the Federal Acquisition Regulation'' and adding ''FAR 32.608–2'' in its place;

The revised text reads as follows:

52.212–4 Contract Terms and Conditions—Commercial Products and Commercial Services.

* * * * *

Contract Terms and Conditions—Commercial Products and Commercial Services (Date)

* * * * *

Alternate I (Date). * * *

* * * * *

■ 201. Amend section 52.212–5 by—
■ a. Removing from the section and clause headings ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place;
■ b. Revising the date of the clause;
■ c. Removing from the introductory text of paragraph (a) ''commercial items'' and adding ''commercial products and commercial services'' in its place;
■ d. Removing from paragraph (a)(2) ''(JUL 2018)'' and adding ''(Date)'' in its place;
■ e. Removing from paragraph (a)(3) ''(AUG 2020)'' and adding ''(Date)'' in its place;
■ f. Removing from the introductory text of paragraph (b) ''commercial items'' and ''[Contracting Officer check as

appropriate.]'' and adding ''commercial products and commercial services'' and ''[*Contracting Officer check as appropriate.*]'' in their places, respectively;
■ g. Removing from paragraph (b)(1) ''(OCT 1995)'' and adding ''(Date)'' in its place;
■ h. Removing from paragraph (b)(2) ''(JUN 2020)'' and adding ''(Date)'' in its place;
■ i. Removing from paragraph (b)(8) ''(JUN 2020)'' and adding ''(Date)'' in its place;
■ j. Removing from paragraph (b)(17)(i) ''(JUN 2020)'' and adding ''(Date)'' in its place;
■ k. Removing from paragraph (b)(35)(i) ''(JAN 2019)'' and adding ''(Date)'' in its place;
■ l. Removing from paragraph (b)(36) ''(OCT 2015)'' and ''commercial items'' and adding ''(Date)'' and ''commercial services'' in their places, respectively;
■ m. Removing from paragraph (b)(48) ''(MAY 2014)'' and adding ''(Date)'' in its place;
■ n. Removing from paragraph (b)(49)(i) ''(MAY 2014)'' and adding ''(Date)'' in its place;
■ o. Removing from paragraph (b)(56) ''Commercial Items'' and ''(FEB 2002)'' and adding ''Commercial Products and Commercial Services'' and ''(Date)'' in their places, respectively;
■ p. Removing from paragraph (b)(57) ''Commercial Items'' and ''(JAN 2017)'' and adding ''Commercial Products and Commercial Services'' and ''(Date)'' in their places, respectively;
■ q. Removing from paragraph (b)(63)(i) ''(FEB 2006)'' and adding ''(Date)'' in its place;
■ r. Removing from paragraph (b)(63)(iii) ''(FEB 2006)'' and adding ''(Date)'' in its place;
■ s. Removing from the introductory text of paragraph (c) ''commercial items'' and ''[Contracting Officer check as appropriate.]'' and adding ''commercial products and commercial services'' and ''[*Contracting Officer check as appropriate.*]'' in their places, respectively;
■ t. Removing from the introductory text of paragraph(e)(1) ''commercial items'' and adding ''commercial products or commercial services'' in its place;
■ u. Removing from paragraph (e)(1)(i) ''(JUN 2020)'' and adding ''(Date)'' in its place;
■ v. Removing from paragraph (e)(1)(iii) ''(JUL 2018)'' and adding ''(Date)'' in its place;
■ w. Removing from paragraph (e)(1)(iv) ''(AUG 2020)'' and adding ''(Date)'' in its place;
■ x. Removing from paragraph (e)(1)(xiii)(A) ''(JAN 2019)'' and adding ''(Date)'' in its place;
■ y. Removing from paragraph (e)(1)(xvi) ''(OCT 2015)'' and adding ''(Date)'' in its place;
■ z. Removing from paragraph (e)(1)(xxii) ''(FEB 2006)'' and adding ''(Date)'' in its place;
■ aa. Removing from paragraph (e)(2) ''May include in its subcontracts for commercial items'' and adding ''may include in its subcontracts for commercial products and commercial services'' in its place;
■ bb. Revising the date of Alternate II;
■ cc. Removing from the introductory text of paragraph (e)(1) of Alternate II ''commercial items'' and adding ''commercial products or commercial services'' in its place;
■ dd. Removing from paragraph (e)(1)(ii)(A) of Alternate II ''(**JUN 2020**)'' and adding ''(Date)'' in its place;
■ ee. Removing from paragraph (e)(1)(ii)(C) of Alternate II ''(JUL 2018)'' and adding ''(Date)'' in its place;
■ ff. Removing from paragraph (e)(1)(ii)(D) of Alternate II ''(AUG 2020)'' and adding ''(Date)'' in its place;
■ gg. Removing from paragraph (e)(1)(ii)(L)(*1*) of Alternate II ''(JAN 2019)'' and adding ''(Date)'' in its place;
■ hh. Removing from paragraph (e)(1)(ii)(O) of Alternate II ''(OCT 2015)'' and adding ''(Date)'' in its place; and
■ ii. Removing from paragraph (e)(1)(ii)(U) of Alternate II ''(FEB 2006)'' and adding ''(Date)'' in its place.

The revised text reads as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services (Date)

* * * * *

Alternate II (Date) * * *

* * * * *

■ 202. Amend section 52.213–4 by—
■ a. Removing from the section and clause headings ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in their places;
■ b. Revising the date of the clause;
■ c. Removing from paragraph (a)(1)(ii) ''(JUL 2018)'' and adding ''(Date)'';
■ d. Removing from paragraph (a)(1)(iii) ''(AUG 2020)'' and adding ''(Date)'';
■ e. Removing from paragraph (a)(2)(vi) ''(DEC 2013)'' and adding ''(Date)'';
■ f. Removing from paragraph (a)(2)(viii) ''Commercial Items'' and ''(AUG 2020)'' and adding ''Commercial Products and Commercial Services'' and ''(Date)'' in their places, respectively;
■ g. Removing from paragraph (b)(1)(viii)(A) ''(JAN 2019)'' and adding ''(Date)'';
■ h. Removing from paragraph (b)(1)(xvii) ''(MAY 2014)'' and adding ''(Date)'';
■ i. Removing from paragraph (b)(1)(xxi) ''(FEB 2006)'' and adding ''(Date)'';
■ j. Removing from paragraph (b)(2)(i) ''(JUN 2016)'' and adding ''(Date)''; and
■ k. Removing from paragraph (b)(2)(ii) ''(JUN 2020)'' and adding ''(Date)''.

The revised text reads as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services) (Date)

* * * * *

■ 203. Amend section 52.215–1 by—
■ a. Revising the date of the provision; and
■ b. Removing from paragraph (f)(11)(v) ''commercial items, the make and model of the item'' and adding ''commercial products, the make and model of the product'' in its place.

The revised text reads as follows:

52.215–1 Instructions to Offerors—Competitive Acquisition.

* * * * *

Instructions to Offerors—Competitive Acquisition (Date)

* * * * *

■ 204. Amend section 52.215–14 by—
■ a. Revising the date of the clause; and
■ b. Removing from paragraph (c) ''commercial items'', and adding ''commercial products and commercial services'' in its place.

The revised text reads as follows:

52.215–14 Integrity of Unit Prices.

* * * * *

Integrity of Unit Prices (Date)

* * * * *

■ 205. Amend section 52.215–20 by—
■ a. Revising the date of the provision; and
■ b. Removing from paragraph (a)(1)(ii) ''*Commercial item*'' and ''commercial item'' and adding ''*Commercial product and commercial service*'' and ''commercial product and commercial service'' in their places, respectively.

The revised text reads as follows:

52.215–20 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.

* * * * *

Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data (Date)

* * * * *

■ 206. Amend section 52.215–21 by—
■ a. Revising the date of the clause;
■ b. Removing from the introductory text of paragraph (a)(1)(ii) ''*commercial items*'' and adding ''*commercial products or commercial services*'' in its place;
■ c. Removing from paragraph (a)(1)(ii)(A)(*1*) ''commercial item'' and adding ''commercial product or commercial service'' in its place;
■ d. Removing from paragraph (a)(1)(ii)(A)(*2*) ''commercial item to a contract or subcontract for the acquisition of an item other than a commercial item'' and adding ''commercial product or commercial service, to a contract or subcontract for the acquisition of other than a commercial product or commercial service'' in its place;
■ e. Redesignating paragraph (a)(1)(ii)(*B*) as (a)(1)(ii)(B); and
■ f. Removing from paragraph (a)(1)(ii)(B) ''commercial item'' and adding ''commercial product and commercial service'' in its place.

The revised text reads as follows:

52.215–21 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications.

* * * * *

Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications (Date)

* * * * *

■ 207. Amend section 52.216–2 by—
■ a. Revising the date of the clause; and
■ b. Removing from paragraph (a) ''commercial item'' and adding ''commercial product'' in its place.

The revised text reads as follows:

52.216–2 Economic Price Adjustment—Standard Supplies.

* * * * *

Economic Price Adjustment—Standard Supplies (Date)

* * * * *

■ 208. Amend section 52.216–3 by—
■ a. Revising the date of the clause; and
■ b. Removing from paragraph (a) ''commercial item'' and adding ''commercial product'' in its place.

The revised text reads as follows:

52.216–3 Economic Price Adjustment—Semistandard Supplies.

* * * * *

Economic Price Adjustment—Semistandard Supplies (Date)

* * * * *

■ 209. Amend section 52.216–29 by—
■ a. Removing from the section and clause headings ''Non-Commercial Item'' and adding ''Other Than Commercial'' in their places; and
■ b. Revising the date of the provision.

The revised text reads as follows:

52.216–29 Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition With Adequate Price Competition.

* * * * *

Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition With Adequate Price Competition (Date)

* * * * *

■ 210. Amend section 52.216–30 by—
■ a. Removing from the section and clause headings ''Non-Commercial Item'' and adding ''Other Than Commercial'' in their places;
■ b. Revising the date of the provision; and
■ c. Removing from paragraph (d) ''commercial item at 2.101'' and adding '' ''commercial service'' at Federal Acquisition Regulation 2.101'' in its place.

The revised text reads as follows:

52.216–30 Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition without Adequate Price Competition.

* * * * *

Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition without Adequate Price Competition (Date)

* * * * *

■ 211. Amend section 52.216–31 by—
■ a. Removing from the section and clause headings ''Commercial Item Acquisition'' and adding ''Commercial Acquisition'' in its place; and
■ b. Revising the date of the provision.

The revised text reads as follows:

52.216–31 Time-and-Materials/Labor-Hour Proposal Requirements—Commercial Acquisition.

* * * * *

Time-and-Materials/Labor-Hour Proposal Requirements—Commercial Acquisition (Date)

* * * * *

■ 212. Amend section 52.219–9 by—
■ a. Revising the date of the clause;
■ b. Removing from paragraph (b) the defined term ''Commercial item'';
■ c. Removing from the defined term ''Commercial plan'' ''commercial items'' and adding ''commercial products and commercial services'' in its place;
■ d. Adding, in alphabetical order, the definitions ''Commercial product'' and ''Commercial service'';
■ e. Removing from paragraph (g) ''commercial items'' and ''commercial item'' and adding ''commercial products and commercial services'' and ''commercial product or commercial service'' in their places; and
■ f. Removing from paragraph (j) ''52.212–5'', ''Commercial Items'' (twice), ''commercial item'', and ''52.244–6'' and adding ''FAR 52.212–5'', ''Commercial Products and Commercial Services'' (twice), ''commercial product or commercial service'', and ''FAR 52.244–6'' in their places, respectively.

The added and revised text reads as follows:

52.219–9 Small Business Subcontracting Plan.

* * * * *

Small Business Subcontracting Plan (Date)

* * * * *

(b) * * *

Commercial product means a product that satisfies the definition of ''commercial product'' in Federal Acquisition Regulation (FAR) 2.101.

Commercial service means a service that satisfies the definition of ''commercial service'' in FAR 2.101.

* * * * *

■ 213. Amend section 52.222–50 by—
■ a. Revising the date of the clause; and
■ b. In the defined term ''Commercially available off-the-shelf (COTS) item'' in paragraph (a), removing ''means'' in the introductory paragraph, and revising paragraph (1)(i).

The revised text reads as follows:

52.222–50 Combating Trafficking in Persons.

* * * * *

Combating Trafficking in Persons (Date)

* * * * *

(a) * * *

(1) Means any item of supply (including construction material) that is-

(i) A commercial product (as defined in paragraph (1) of the definition of ''commercial product'' at Federal Acquisition Regulation (FAR) 2.101;

* * * * *

■ 214. Amend section 52.222–54 by—
■ a. Revising the date of the clause;
■ b. In the defined term ''Commercially available off-the-shelf (COTS) item'' in paragraph (a), revising paragraph (1)(i); and
■ c. Removing from paragraph (e)(1)(i) ''Commercial or noncommercial

services'' and adding ''Services'' in its place.

The revised text reads as follows:

52.222–54 Employment Eligibility Verification.

* * * * *

Employment Eligibility Verification (Date)

* * * * *

(a) * * *

(1) * * *

(i) A commercial product (as defined in paragraph (1) of the definition of ''commercial product'' at Federal Acquisition Regulation (FAR) 2.101;

* * * * *

■ 215. Amend section 52.225–1 by—

■ a. Revising the date of the clause; and

■ b. In the defined term ''Commercially available off-the-shelf (COTS) item'' in paragraph (a), revising paragraph (1)(i).

The revised text reads as follows:

52.225–1 Buy American—Supplies.

* * * * *

Buy American—Supplies (Date)

* * * * *

(a) * * *

(1) * * *

(i) A commercial product (as defined in paragraph (1) of the definition of ''commercial product'' at Federal Acquisition Regulation (FAR) 2.101;

* * * * *

■ 216. Amend section 52.225–3 by—

■ a. Revising the date of the clause; and

■ b. In the defined term ''Commercially available off-the-shelf (COTS) item'' in paragraph (a), revising paragraph (1)(i).

The revised text reads as follows:

52.225–3 Buy American—Free Trade Agreements—Israeli Trade Act.

* * * * *

Buy American—Free Trade Agreements—Israeli Trade Act (Date)

* * * * *

(a) * * *

(1) * * *

(i) A commercial product (as defined in paragraph (1) of the definition of ''commercial product'' at Federal Acquisition Regulation (FAR) 2.101;

* * * * *

■ 217. Amend section 52.225–9 by—

■ a. Revising the date of the clause;

■ b. In the defined term ''Commercially available off-the-shelf (COTS) item'' in paragraph (a), revising paragraph (1)(i); and

■ c. Removing from paragraph (b)(2) ''commercial item'' and adding ''commercial product'' in its place.

The revised text reads as follows:

52.225–9 Buy American—Construction Materials.

* * * * *

Buy American—Construction Materials (Date)

* * * * *

(a) * * *

(1) * * *

(i) A commercial product (as defined in paragraph (1) of the definition of ''commercial product'' at Federal Acquisition Regulation (FAR) 2.101;

* * * * *

■ 218. Amend section 52.225–11 by—

■ a. Revising the date of the clause;

■ b. In the defined term ''Commercially available off-the-shelf (COTS) item'' in paragraph (a), revising paragraph (1)(i); and

■ c. Removing from paragraph (b)(3) ''commercial item'' and adding ''commercial product'' in its place.

The revised text reads as follows:

52.225–11 Buy American—Construction Materials Under Trade Agreements.

* * * * *

Buy American—Construction Materials Under Trade Agreements (Date)

* * * * *

(a) * * *

(1) * * *

(i) A commercial product (as defined in paragraph (1) of the definition of ''commercial product'' at Federal Acquisition Regulation (FAR) 2.101;

* * * * *

■ 219. Amend section 52.232–7 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (b)(2) ''commercial item at 2.101'' and adding ''commercial product or commercial service in Federal Acquisition Regulation (FAR) 2.101'' in its place.

The revised text reads as follows:

52.232–7 Payments Under Time-and-Materials and Labor-Hour Contracts.

* * * * *

Payments Under Time-and-Materials and Labor-Hour Contracts (Date)

* * * * *

■ 220. Amend section 52.232–16 by—

■ a. Revising the date of the clause;

■ b. Removing from the introductory text of paragraph (j)(5) ''commercial item'' and adding ''commercial product or commercial service'' in its place; and

■ c. Removing from paragraph (j)(5)(i) ''commercial item purchase that meets the definition and standards for acquisition of commercial items in FAR Parts'' and adding ''commercial product or commercial service purchase that meets the definition and standards for acquisition of commercial products and commercial services in FAR parts'' in its place.

The revised text reads as follows:

52.232–16 Progress Payments.

* * * * *

Progress Payments (Date)

* * * * *

■ 221. Amend section 52.232–29 by—

■ a. Removing from the section and clause headings ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in their places;

■ b. Revising the date of the clause; and

■ c. Removing from paragraph (b) ''52.212–4, Contract Terms and Conditions—Commercial Items'' and adding ''Federal Acquisition Regulation (FAR) 52.212–4, Contract Terms and Conditions-Commercial Products and Commercial Services'' in its place; and

■ d. Removing from paragraph (h) ''52.232–31'' and adding ''FAR 52.232–31'' in its place.

The revised text reads as follows:

52.232–29 Terms for Financing of Purchases of Commercial Products and Commercial Services.

* * * * *

Terms for Financing of Purchases of Commercial Products and Commercial Services (Date)

* * * * *

■ 222. Amend section 52.232–30 by—

■ a. Removing from the section and clause headings ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in their places;

■ b. Revising the date of the clause; and

■ c. Removing from paragraph (g) ''52.212–4, Contract Terms and Conditions—Commercial Items'' and adding ''Federal Acquisition Regulation 52.212–4, Contract Terms and Conditions-Commercial Products and Commercial Services'' in its place.

The revised text reads as follows:

52.232–30 Installment Payments for Commercial Products and Commercial Services.

* * * * *

Installment Payments for Commercial Products and Commercial Services (Date)

* * * * *

■ 223. Amend section 52.232–31 by—

■ a. Revising the date of the provision; and

■ b. Removing from paragraph (a) ''Commercial Items, at 52.232–29'' and adding ''Commercial Products and Commercial Services, at Federal Acquisition Regulation (FAR) 52.232–29'' in its place; and

■ c. Removing from paragraph (b) ''52.232–29, Terms for Financing of

Purchases of Commercial Items, the terms of the clause at 52.232–29 shall govern'' and adding ''FAR 52.232–29, Terms for Financing of Purchases of Commercial Products and Commercial Services, the terms of the clause at FAR 52.232–29 shall govern'' in its place.

The revised text reads as follows:

52.232–31 Invitation To Propose Financing Terms.

* * * * *

Invitation To Propose Financing Terms (Date)

* * * * *

■ 224. Amend section 52.232–40 by—

■ a. Revising the date of the clause; and

■ b. Removing from paragraphs (c) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revised text reads as follows:

52.232–40 Providing Accelerated Payments to Small Business Subcontractors.

* * * * *

Providing Accelerated Payments to Small Business Subcontractors (Date)

* * * * *

■ 225. Amend section 52.242–17 by revising the introductory text. The revised text reads as follows:

52.242–17 Government Delay of Work.

As prescribed in 42.1305(c), insert the following clause:

* * * * *

■ 226. Amend section 52.244–6 by—

■ a. Removing from the section and clause headings ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place;

■ b. Revising the date of the clause;

■ c. In paragraph (a), in the defined terms ''Commercial item'' and ''commercially available off-the-shelf item'' removing ''Commercial item'' and adding ''Commercial product,'' and ''commercial service,'' in its place;

■ d. Removing from the defined term ''Subcontract'' in paragraph (a) ''commercial items'' and adding ''commercial products or commercial services'' in its place;

■ e. Removing from paragraph (b) ''commercial items'' and adding ''commercial products, commercial services,'' in its place;

■ f. Removing from the introductory text of paragraph (c)(1) ''commercial items'' and adding ''commercial products or commercial services'' in its place;

■ g. Removing from paragraph (c)(1)(i) ''(Jun 2020)'' and adding ''(Date)'' in its place;

■ h. Removing from paragraph (c)(1)(iv) ''(JUN 2016)'' and adding ''(Date)'' in its place;

■ i. Removing from paragraph (c)(1)(v) ''(JUL 2018)'' and adding ''(Date)'' in its place;

■ j. Removing from paragraph (c)(1)(vi) ''(AUG 2020)'' and adding ''(Date)'' in its place;

■ k. Removing from paragraph (c)(1)(xiv)(A) ''(JAN 2019)'' and adding ''(Date)'' in its place;

■ l. Removing from paragraph (c)(1)(xix) ''(DEC 2013)'' and adding ''(Date)'' in its place;

■ m. Removing from paragraph (c)(1)(xx) ''(FEB 2006)'' and adding ''(Date)'' in its place;

■ n. Removing from paragraph (c)(2) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revised text reads as follows:

52.244–6 Subcontracts for Commercial Products and Commercial Services.

* * * * *

Subcontracts for Commercial Products and Commercial Services (Date)

* * * * *

■ 227. Amend section 52.246–26 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (g)(1)(i) ''FAR'' and adding ''Federal Acquisition Regulation (FAR)'' in its place; and

■ c. Removing from paragraph (g)(2)(i) ''Commercial items'' and adding ''Commercial products and commercial services'' in its place. The revised text reads as follows:

52.246–26 Reporting Nonconforming Items.

* * * * *

Reporting Nonconforming Items (Date)

* * * * *

■ 228. Amend section 52.247–64 by—

■ a. Revising the date of clause;

■ b. Removing from the introductory text of paragraph (e)(4) ''commercial items'' and adding ''commercial products or commercial services'' in its place;

■ c. Revising the date of Alternate II;

■ d. Removing from the introductory text of paragraph (e)(4) of Alternate II ''commercial items'' and adding ''commercial products or commercial services'' in its place; and

■ e. Removing from paragraph (e)(4)(ii)(C) of Alternate II ''commercial items'' and adding ''commercial products'' in its place.

The revised text reads as follows:

52.247–64 Preference for Privately Owned U.S.-Flag Commercial Vessels.

* * * * *

Preference for Privately Owned U.S.-Flag Commercial Vessels (Date)

* * * * *

Alternate II (Date)

* * * * *

PART 53—FORMS

53.212 [Amended]

■ 229. Amend section 53.212 by—

■ a. Removing from the section heading ''commercial items'' and adding ''commercial products and commercial services'' in its place; and

■ b. Removing from the paragraph (''*Rev.2/2012)*'', ''*Commercial Items*'' and ''commercial items'' and adding ''(*Rev.* Date)'', ''*Commercial Products and Commercial Services*'' and ''commercial products and commercial services'' in their places, respectively.

53.213 [Amended]

■ 230. Amend section 53.213 by—

■ a. Removing from paragraph (a) ''(*Rev. 2/2012*)'' and ''*Commercial Items*'' and adding ''(*Rev.* Date)'' and ''*Commercial Products and Commercial Services*'' in their places, respectively; and

■ b. Removing from paragraph (f) ''(*Rev. 2/2012*)'' and ''*Commercial Items*'' and adding ''(*Rev.* Date)'' and ''*Commercial Products and Commercial Services*'' in their places, respectively.

53.219 [Amended]

■ 231. Amend section 53.219 by removing from the text ''(Rev. 8/2016)'' and adding ''(Rev. Date)'' in its place.

53.232 [Amended]

■ 232. Amend section 53.232 by removing from the text ''*(Jul 2009)*'' and adding ''(Date)'' in its place.

53.300 [Amended]

■ 233. Amend section 53.300 by removing from the Table 53–1 in paragraph (a) ''SF 1449 Solicitation/ Contract/Order for Commercial Items'' and adding ''SF 1449 Solicitation/ Contract/Order for Commercial Products and Commercial Services'' in its place.

[FR Doc. 2020–20142 Filed 10–14–20; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 212, 217, and 252

[Docket DARS–2020–0034]

RIN 0750–AJ81

Defense Federal Acquisition Regulation Supplement: Assessing Contractor Implementation of Cybersecurity Requirements (DFARS Case 2019–D041)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a DoD Assessment Methodology and Cybersecurity Maturity Model Certification framework in order to assess contractor implementation of cybersecurity requirements and enhance the protection of unclassified information within the DoD supply chain.

DATES: Effective November 30, 2020.

Comments on the interim rule should be submitted in writing to the address shown below on or before November 30, 2020, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2019–D041, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for ''DFARS Case 2019–D041''. Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2019–D041'' on any attached documents.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2019–D041 in the subject line of the message.

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.

FOR FURTHER INFORMATION CONTACT: Ms. Heather Kitchens, telephone 571–372–6104.

SUPPLEMENTARY INFORMATION:

I. Background

The theft of intellectual property and sensitive information from all U.S. industrial sectors due to malicious cyber activity threatens economic security and national security. The Council of Economic Advisors estimates that malicious cyber activity cost the U.S. economy between $57 billion and $109 billion in 2016. Over a ten-year period, that burden would equate to an estimated $570 billion to $1.09 trillion dollars in costs. As part of multiple lines of effort focused on the security and resiliency of the Defense Industrial Base (DIB) sector, the Department is working with industry to enhance the protection of unclassified information within the supply chain. Toward this end, DoD has developed the following assessment methodology and framework to assess contractor implementation of cybersecurity requirements, both of which are being implemented by this rule: the National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171 DoD Assessment Methodology and the Cybersecurity Maturity Model Certification (CMMC) Framework. The NIST SP 800–171 DoD Assessment and CMMC assessments will not duplicate efforts from each assessment, or any other DoD assessment, except for rare circumstances when a re-assessment may be necessary, such as, but not limited to, when cybersecurity risks, threats, or awareness have changed, requiring a re-assessment to ensure current compliance.

A. NIST SP 800–171 DoD Assessment Methodology

DFARS clause 252.204–7012, Safeguarding Covered Defense Information and Cyber Incident Reporting, is included in all solicitations and contracts, including those using Federal Acquisition Regulation (FAR) part 12 commercial item procedures, except for acquisitions solely for commercially available off-the-shelf (COTS) items. The clause requires contractors to apply the security requirements of NIST SP 800–171 to ''covered contractor information systems,'' as defined in the clause, that are not part of an IT service or system operated on behalf of the Government. The NIST SP 800–171 DoD Assessment Methodology provides for the assessment of a contractor's implementation of NIST SP 800-171 security requirements, as required by DFARS clause 252.204–7012. More information on the NIST SP 800–171 DoD Assessment Methodology is available at *https://www.acq.osd.mil/dpap/pdi/cyber/strategically_assessing_contractor_implementation_of_NIST_SP_800-171.html.*

The Assessment uses a standard scoring methodology, which reflects the net effect of NIST SP 800–171 security requirements not yet implemented by a contractor, and three assessment levels (Basic, Medium, and High), which reflect the depth of the assessment performed and the associated level of confidence in the score resulting from the assessment. A Basic Assessment is a self-assessment completed by the contractor, while Medium or High Assessments are completed by the Government. The Assessments are completed for each covered contractor information system that is relevant to the offer, contract, task order, or delivery order.

The results of Assessments are documented in the Supplier Performance Risk System (SPRS) at *https://www.sprs.csd.disa.mil/* to provide DoD Components with visibility into the scores of Assessments already completed; and verify that an offeror has a current (*i.e.,* not more than three years old, unless a lesser time is specified in the solicitation) Assessment, at any level, on record prior to contract award.

B. Cybersecurity Maturity Model Certification Framework

Building upon the NIST SP 800–171 DoD Assessment Methodology, the CMMC framework adds a comprehensive and scalable certification element to verify the implementation of processes and practices associated with the achievement of a cybersecurity maturity level. CMMC is designed to provide increased assurance to the Department that a DIB contractor can adequately protect sensitive unclassified information such as Federal Contract Information (FCI) and Controlled Unclassified Information (CUI) at a level commensurate with the risk, accounting for information flow down to its subcontractors in a multi-tier supply chain. A DIB contractor can achieve a specific CMMC level for its entire enterprise network or particular segment(s) or enclave(s), depending upon where the information to be protected is processed, stored, or transmitted.

The CMMC model consists of maturity processes and cybersecurity best practices from multiple cybersecurity standards, frameworks, and other references, as well as inputs from the broader community. The CMMC levels and the associated sets of processes and practices are cumulative. The CMMC model encompasses the basic safeguarding requirements for FCI specified in FAR clause 52.204–21, Basic Safeguarding of Covered

Contractor Information Systems, and the security requirements for CUI specified in NIST SP 800–171 per DFARS clause 252.204–7012. Furthermore, the CMMC model includes an additional five processes and 61 practices across Levels 2–5 that demonstrate a progression of cybersecurity maturity.

Level	Description
1	Consists of the 15 basic safeguarding requirements from FAR clause 52.204–21.
2	Consists of 65 security requirements from NIST SP 800–171 implemented via DFARS clause 252.204–7012, 7 CMMC practices, and 2 CMMC processes. Intended as an optional intermediary step for contractors as part of their progression to Level 3.
3	Consists of all 110 security requirements from NIST SP 800–171, 20 CMMC practices, and 3 CMMC processes.
4	Consists of all 110 security requirements from NIST SP 800–171, 46 CMMC practices, and 4 CMMC processes.
5	Consists of all 110 security requirements from NIST SP 800–171, 61 CMMC practices, and 5 CMMC processes.

In order to achieve a specific CMMC level, a DIB company must demonstrate both process institutionalization or maturity and the implementation of practices commensurate with that level. CMMC assessments will be conducted by accredited CMMC Third Party Assessment Organizations (C3PAOs). Upon completion of a CMMC assessment, a company is awarded a certification by an independent CMMC Accreditation Body (AB) at the appropriate CMMC level (as described in the CMMC model). The certification level is documented in SPRS to enable the verification of an offeror's certification level and currency (*i.e.* not more than three years old) prior to contract award. Additional information on CMMC and a copy of the CMMC model can be found at *https://www.acq.osd.mil/cmmc/index.html.*

DoD is implementing a phased rollout of CMMC. Until September 30, 2025, the clause at 252.204–7021, Cybersecurity Maturity Model Certification Requirements, is prescribed for use in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, excluding acquisitions exclusively for COTS items, if the requirement document or statement of work requires a contractor to have a specific CMMC level. In order to implement the phased rollout of CMMC, inclusion of a CMMC requirement in a solicitation during this time period must be approved by the Office of the Under Secretary of Defense for Acquisition and Sustainment.

CMMC will apply to all DoD solicitations and contracts, including those for the acquisition of commercial items (except those exclusively COTS items) valued at greater than the micro-purchase threshold, starting on or after October 1, 2025. Contracting officers will not make award, or exercise an option on a contract, if the offeror or contractor does not have current (*i.e.* not older than three years) certification for the required CMMC level. Furthermore, CMMC certification requirements are required to be flowed down to subcontractors at all tiers, based on the sensitivity of the unclassified information flowed down to each subcontractor.

II. Discussion and Analysis

A. NIST SP 800–171 DoD Assessment Methodology

This rule amends DFARS subpart 204.73, Safeguarding Covered Defense Information and Cyber Incident Reporting, to implement the NIST SP 800–171 DoD Assessment Methodology. The new coverage in the subpart directs contracting officers to verify in SPRS that an offeror has a current NIST SP 800–171 DoD Assessment on record, prior to contract award, if the offeror is required to implement NIST SP 800–171 pursuant to DFARS clause 252.204–7012. The contracting officer is also directed to include a new DFARS provision 252.204–7019, Notice of NIST SP 800–171 DoD Assessment Requirements, and a new DFARS clause 252.204–7020, NIST SP 800–171 DoD Assessment Requirements, in solicitations and contracts including solicitations using FAR part 12 procedures for the acquisition of commercial items, except for solicitations solely for the acquisition of COTS items.

The new DFARS provision 252.204–7019 advises offerors required to implement the NIST SP 800–171 standards of the requirement to have a current (not older than three years) NIST SP 800–171 DoD Assessment on record in order to be considered for award. The provision requires offerors to ensure the results of any applicable current Assessments are posted in SPRS and provides offerors with additional information on conducting and submitting an Assessment when a current one is not posted in SPRS.

The new DFARS clause 252.204–7020 requires a contractor to provide the Government with access to its facilities, systems, and personnel when it is necessary for DoD to conduct or renew a higher-level Assessment. The clause also requires the contractor to ensure that applicable subcontractors also have the results of a current Assessment posted in SPRS prior to awarding a subcontract or other contractual instruments. The clause also provides additional information on how a subcontractor can conduct and submit an Assessment when one is not posted in SPRS, and requires the contractor to include the requirements of the clause in all applicable subcontracts or other contractual instruments.

B. Cybersecurity Maturity Model Certification

This rule adds a new DFARS subpart, Subpart 204.75, Cybersecurity Maturity Model Certification (CMMC), to specify the policy and procedures for awarding a contract, or exercising an option on a contract, that includes the requirement for a CMMC certification. Specifically, this subpart directs contracting officers to verify in SPRS that the apparently successful offeror's or contractor's CMMC certification is current and meets the required level prior to making the award.

A new DFARS clause 252.204–7021, Cybersecurity Maturity Model Certification Requirements, is prescribed for use in all solicitations and contracts or task orders or delivery orders, excluding those exclusively for the acquisition of COTS items. This DFARS clause requires a contractor to: Maintain the requisite CMMC level for the duration of the contract; ensure that its subcontractors also have the appropriate CMMC level prior to awarding a subcontract or other contractual instruments; and include the requirements of the clause in all subcontracts or other contractual instruments.

The Department took into consideration the timing of the requirement to achieve a CMMC level certification in the development of this rule, weighing the benefits and risks associated with requiring CMMC level certification: (1) At time of proposal or offer submission; (2) at time of award;

or (3) after contract award. The Department ultimately adopted alternative 2 to require certification at the time of award. The drawback of alternative 1 (at time of proposal or offer submission) is the increased risk for contractors since they may not have sufficient time to achieve the required CMMC certification after the release of the Request for Information (RFI). The drawback of alternative 3 (after contract award) is the increased risk to the Department with respect to the schedule and uncertainty with respect to the case where the contractor is unable to achieve the required CMMC level in a reasonable amount of time given their current cybersecurity posture. This potential delay would apply to the entire supply chain and prevent the appropriate flow of CUI and FCI. The Department seeks public comment on the timing of contract award, to include the effect of requiring certification at time of award on small businesses.

C. Conforming Changes

This rule also amends the following DFARS sections to make conforming changes:

- Amends the list in DFARS section 212.301 of solicitation provisions and contract clauses that are applicable for the acquisition of commercial items to include the provisions and clauses included in this rule.
- Amends DFARS 217.207, Exercise of Options, to advise contracting officers that an option may only be exercised after verifying the contractor's CMMC level, when CMMC is required in the contract.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule creates the following new solicitation provision and contract clauses:

- DFARS 252.204–7019, Notice of NIST SP 800–171 DoD Assessment Requirements;
- DFARS clause 252.204–7020, NIST SP 800–171 DoD Assessment Requirements; and
- DFARS clause 252.204–7021, Cybersecurity Maturity Model Certification Requirements.

The objective of this rule is provide the Department with: (1) The ability to assess contractor implementation of NIST SP 800–171 security requirements, as required by DFARS clause 252.204–7012, Safeguarding Covered Defense Information and Cyber Incident Reporting; and (2) assurances that DIB contractors can adequately protect sensitive unclassified information at a level commensurate with the risk, accounting for information flowed down to subcontractors in a multi-tier supply chain. Flowdown of the requirements is necessary to respond to threats that reach even the lowest tiers in the supply chain. Therefore, to achieve the desired policy outcome, DoD intends to apply the new provision and clauses to contracts and subcontracts for the acquisition of commercial items and to acquisitions valued at or below the simplified acquisition threshold, but greater than the micro-purchase threshold. The provision and clauses will not be applicable to contracts or subcontracts exclusively for the acquisition of commercially available off-the-shelf items.

IV. Expected Cost Impact and Benefits

A. Benefits

The theft of intellectual property and sensitive information from all U.S. industrial sectors due to malicious cyber activity threatens U.S. economic and national security. The aggregate loss of intellectual property and certain unclassified information from the DoD supply chain can undercut U.S. technical advantages and innovation, as well as significantly increase risk to national security. This rule is expected to enhance the protection of FCI and CUI within the DIB sector.

B. Costs

A Regulatory Impact Analysis (RIA) that includes a detailed discussion and explanation about the assumptions and methodology used to estimate the cost of this regulatory action is available at *www.regulations.gov* (search for ''DFARS Case 2019–D041'' click ''Open Docket,'' and view ''Supporting Documents''). The total estimated public and Government costs (in millions) associated with this rule, calculated in perpetuity in 2016 dollars at a 7 percent discount rate, is provided as follows:

Total cost (in millions)	Public	Govt	Total
Annualized Costs	$6,500.5	$0.3	$6,500.7
Present Value Costs	92,863.6	3.7	92,867.3

The following is a breakdown of the public and Government costs and savings associated with each component of the rule:

1. NIST SP 800–171 DoD Assessments

The following is a summary of the estimated public and Government costs (in millions) associated with the NIST SP DoD Assessments, calculated in perpetuity in 2016 dollars at a 7 percent discount rate:

DoD assessments	Public	Government	Total
Annualized Costs	$6.7	$9.5	$16.3
Present Value Costs	96.1	136.2	232.3

2. CMMC Requirements

The following is a summary of the estimated public and Government costs (in millions) associated with the CMMC requirements, calculated in perpetuity in 2016 dollars at a 7 percent discount rate:

CMMC requirements	Public	Government	Total
Annualized Costs	$6,525.0	$8.9	$6,533.9
Present Value Costs	93,213.6	127.3	93,340.9

3. Elimination of Duplicate Assessments

The following is a summary of the estimated public and Government savings (in millions) associated with the elimination of duplicate assessments, calculated in perpetuity in 2016 dollars at a 7 percent discount rate:

Eliminate duplication	Public	Government	Total
Annualized Savings	-$31.2	-$18.2	-$49.4
Present Value Savings	-446.1	-259.8	-705.9

V. 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 an economically significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

The rule is not subject to the requirements if E.O. 13771, because this rule is being issued with respect to a national security function of the United States.

VII. Regulatory Flexibility Act

DoD expects this 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.* Therefore, an initial regulatory flexibility analysis has been performed and is summarized as follows:

A. Reasons for the Action

This rule is necessary to address threats to the U.S. economy and national security from ongoing malicious cyber activities, which includes the theft of hundreds of billions of dollars of U.S. intellectual property. Currently, the FAR and DFARS prescribe contract clauses intended to protect FCI and CUI within the DoD supply chain. Specifically, the clause at FAR 52.204–21, Basic Safeguarding of Covered Contractor Information Systems, is prescribed at FAR 4.1903 for use in Government solicitations and contracts and requires contractors and subcontractors to apply basic safeguarding requirements when processing, storing, or transmitting FCI in or from covered contractor information systems. The clause focuses on ensuring a basic level of cybersecurity hygiene and is reflective of actions that a prudent business person would employ.

In addition, DFARS clause 252.204–7012, Safeguarding Covered Defense Information and Cyber Incident Reporting, requires defense contractors and subcontractors to provide ''adequate security'' to store, process, or transmit CUI on information systems or networks, and to report cyber incidents that affect these systems or networks. The clause states that to provide adequate security, the Contractor shall implement, at a minimum, the security requirements in ''National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171, Protecting Controlled Unclassified Information (CUI) in Nonfederal Systems and Organizations.'' Contractors are also required to flow down DFARS Clause 252.204–7012 to all subcontracts, which involve CUI.

However, neither the FAR clause, nor the DFARS clause, provide for DoD verification of a contractor's implementation of basic safeguarding requirements or the security requirements specified in NIST SP 800–171 prior to contract award.

Under DFARS clause 252.204–7012, DIB companies self-attest that they will implement the requirements in NIST SP 800–171 upon submission of their offer. A contractor can document implementation of the security requirements in NIST SP 800–171 by having a system security plan in place to describe how the security requirements are implemented, in addition to associated plans of action to describe how and when any unimplemented security requirements will be met. As a result, the current regulation enables contractors and subcontractors to process, store, or transmit CUI without having implemented all of the 110 security requirements and without establishing enforceable timelines for addressing shortfalls and gaps.

Findings from DoD Inspector General report (DODIG–2019–105 ''Audit of Protection of DoD Controlled Unclassified Information on Contractor-Owned Networks and Systems'') indicate that DoD contractors did not consistently implement mandated system security requirements for safeguarding CUI and recommended that DoD take steps to assess a contractor's ability to protect this information. The report emphasizes that malicious actors can exploit the vulnerabilities of contractors' networks and systems and exfiltrate information related to some of the Nation's most valuable advanced defense technologies.

Although DoD contractors must include DFARS clause 252.204–7012 in subcontracts for which subcontract performance will involve covered defense information (DoD CUI), this does not provide the Department with sufficient insights with respect to the cybersecurity posture of DIB companies throughout the multi-tier supply chain for any given program or technology development effort.

Furthermore, given the size and scale of the DIB sector, the Department cannot scale its organic cybersecurity assessment capability to conduct on-site assessments of approximately 220,000 DoD contractors every three years. As a result, the Department's organic assessment capability is best suited for conducting targeted assessments for a subset of DoD contractors.

Finally, the current security requirements specified in NIST SP 800–171 per DFARS clause 252.204–7012, do not sufficiently address additional threats to include Advanced Persistent Threats (APTs).

Because of these issues and shortcomings and the associated risks to national security, the Department determined that the status quo was not acceptable and developed a two-pronged approach to assess and verify the DIB's ability to protect the FCI and CUI on its information systems or networks, which is being implemented by this rule:

- *The National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171 DoD Assessment Methodology.* A standard methodology to assess contractor implementation of the cybersecurity requirements in NIST SP 800–171,

''Protecting Controlled Unclassified Information (CUI) In Nonfederal Systems and Organizations.''

• *The Cybersecurity Maturity Model Certification (CMMC) Framework.* A DoD certification process that measures a company's institutionalization of processes and implementation of cybersecurity practices.

B. Objectives of, and Legal Basis for, the Rule

This rule establishes a requirement for contractors to have a current NIST SP 800–171 DoD Assessment and the appropriate CMMC level certification prior to contract award and during contract performance. The objective of the rule is to provide the Department with: (1) The ability to assess at a corporate-level a contractor's implementation of NIST SP 800–171 security requirements, as required by DFARS clause 252.204–7012, Safeguarding Covered Defense Information and Cyber Incident Reporting; and (2) assurances that a DIB contractor can adequately protect sensitive unclassified information at a level commensurate with the risk, accounting for information flow down to its subcontractors in a multi-tier supply chain.

1. NIST SP 800–171 DoD Assessment Methodology

In February 2019, the Under Secretary of Defense for Acquisition and Sustainment directed the Defense Contract Management Agency (DCMA) to develop a standard methodology to assess contractor implementation of the cybersecurity requirements in NIST SP 800–171 at the corporate or entity level. The DCMA Defense Industrial Base Cybersecurity Assessment Center's NIST SP 800–171 DoD Assessment Methodology is the Department's initial strategic DoD/corporate-wide assessment of contractor implementation of the mandatory cybersecurity requirements established in the contracting regulations. Results of a NIST SP 800–171 DoD Assessment reflect the net effect of NIST SP 800–171 security requirements not yet implemented by a contractor, and may be conducted at one of three assessment levels. The DoD Assessment Methodology provides the following benefits:

• *Enables Strategic Assessments at the Entity-level.* The NIST SP 800–171 DoD Assessment Methodology enables DoD to strategically assess a contractor's implementation of NIST SP 800–171 on existing contracts that include DFARS clause 252.204–7012, and to provide an objective assessment of a contractor's NIST SP 800–171 implementation status.

• *Reduces Duplicative or Repetitive Assessments of our Industry Partners.* Assessment results will be posted in the Supplier Performance Risk System (SPRS), DoD's authoritative source for supplier and product performance information. This will provide DoD Components with visibility to summary level scores, rather than addressing implementation of NIST SP 800–171 on a contract-by-contract approach. Conducting such assessments at a corporate- or entity-level, significantly reduces the need to conduct assessments at the program or contract level, thereby reducing the cost to both DoD and industry.

• *Provides a Standard Methodology for Contractors to Self-assess Their Implementation of NIST SP 800–171.* The Basic Assessment provides a consistent means for contractors to review their system security plans prior to and in preparation for either a DoD or CMMC assessment.

The NIST SP 800–171 DoD Assessment Methodology provides a means for the Department to assess contractor implementation of these requirements as the Department transitions to full implementation of the CMMC, and a means for companies to self-assess their implementation of the NIST SP 800–171 requirements prior to either a DoD or CMMC assessment.

2. The CMMC Framework

Section 1648 of the National Defense Authorization Act for Fiscal Year (FY) 2020 (Pub. L. 116–92) directs the Secretary of Defense to develop a risk-based cybersecurity framework for the DIB sector, such as CMMC, as the basis for a mandatory DoD standard. Building upon the NIST SP 800–171 DoD Assessment Methodology, the CMMC framework adds a comprehensive and scalable certification element to verify the implementation of processes and practices associated with the achievement of a cybersecurity maturity level. CMMC is designed to provide increased assurance to the Department that a DIB contractor can adequately protect sensitive unclassified information (*i.e.* FCI and CUI) at a level commensurate with the risk, accounting for information flow down to its subcontractors in a multi-tier supply chain. Implementation of the CMMC Framework is intended to solve the following policy problems:

• *Verification of a contractor's cybersecurity posture.* DFARS clause 252.204–7012 does not provide for the DoD verification of a DIB contractor's implementation of the security requirements specified in NIST SP 800–171 prior to contract award. DIB companies self-attest that they will implement the requirements in NIST SP 800–171 upon submission of their offer. Findings from DoD Inspector General report (DODIG–2019–105 ''Audit of Protection of DoD Controlled Unclassified Information on Contractor-Owned Networks and Systems'') indicate that DoD contractors did not consistently implement mandated system security requirements for safeguarding CUI and recommended that DoD take steps to assess a contractor's ability to protect this information. CMMC adds the element of verification of a DIB contractor's cybersecurity posture through the use of accredited C3PAOs. The company must achieve the CMMC level certification required as a condition of contract award.

• *Comprehensive implementation of cybersecurity requirements.* Under DFARS clause 252.204–7012, a contractor can document implementation of the security requirements in NIST SP 800–171 by having a system security plan in place to describe how the security requirements are implemented, in addition to associated plans of action to describe how and when any unimplemented security requirements will be met. The CMMC framework does not allow a DoD contractor or subcontractor to achieve compliance status through the use of plans of action. In general, CMMC takes a risk-based approach to addressing cyber threats. Based on the type and sensitivity of the information to be protected, a DIB company must achieve the appropriate CMMC level and demonstrate implementation of the requisite set of processes and practices. Although the security requirements in NIST SP 800–171 addresses a range of threats, additional requirements are needed to further reduce the risk of Advanced Persistent Threats (APTs). An APT is an adversary that possesses sophisticated levels of expertise and significant resources, which allow it to create opportunities to achieve its objectives by using multiple attack vectors (*e.g.* cyber, physical, and deception). The CMMC model includes additional processes and practices in Levels 4 and 5 that are focused on further reducing the risk of APT threats. The CMMC implementation will provide the Department with an ability to illuminate the supply chain, for the first time, at scale across the entire DIB sector. The CMMC framework requires contractors to flow down the appropriate CMMC

certification requirement to subcontractors throughout the entire supply chain. DIB companies that do not process, store, or transmit CUI, must obtain a CMMC level 1 certification. DIB companies that process, store, or transmit CUI must achieve a CMMC level 3 or higher, depending on the sensitivity of the information associated with a program or technology being developed.

• *Scale and Depth.* DoD contractors must include DFARS clause 252.204–7012 in subcontracts for which subcontract performance will involve covered defense information (DoD CUI), but this does not provide the Department with sufficient insights with respect to the cybersecurity posture of DIB companies throughout the multi-tier supply chain for any given program or technology development effort. Given the size and scale of the DIB sector, the Department cannot scale its organic cybersecurity assessment capability to conduct on-site assessments of approximately 220,000 DoD contractors every three years. As a result, the Department's organic assessment capability is best suited for conducting targeted assessments for a subset of DoD contractors that support prioritized programs and/or technology development efforts. CMMC addresses the challenges of the Department scaling its organic assessment capability by partnering with an independent, non-profit CMMC–AB that will accredit and oversee multiple third party assessment organizations (C3PAOs) which in turn, will conduct on-site assessments of DoD contractors throughout the multi-tier supply chain. DIB companies will be able to directly schedule assessments with an accredited C3PAO for a specific CMMC level. The cost of these CMMC assessments will be driven by multiple factors including market forces, the size and complexity of the network or enclaves under assessment, and the CMMC level.

• *Reduces Duplicate or Repetitive Assessments of our Industry Partners.* Assessment results will be posted in the Supplier Performance Risk System (SPRS), DoD's authoritative source for supplier and product performance information. This will provide DoD Components with visibility to CMMC certifications for DIB contractor networks and an alternative to addressing implementation of NIST SP 800–171 on a contract-by-contract approach—significantly reducing the need to conduct assessments at the program level, thereby reducing the cost to both DoD and industry.

C. Description of and Estimate of the Number of Small Entities to Which the Rule Will Apply

This rule will impact all small businesses that do business with Department of Defense, except those competing on contracts or orders that are exclusively for COTS items or receiving contracts or orders valued at or below the micro-purchase threshold.

1. The NIST SP 800–171 DoD Assessment Methodology

According to data available in the Electronic Data Access system for fiscal years (FYs) 2016, 2017, and 2018, on an annual basis DoD awards on average 485,859 contracts and orders that contain DFARS clause 252.204–7012 to 39,204 unique awardees, of which 262,509 awards (54 percent) are made to 26,468 small entities (68 percent). While there may be some entities that have contracts that contain the clause at 252.204–7012, but never process CUI and, therefore, do not have to implement NIST SP 800–171, it is not possible for DoD to estimate what fraction of unique entities fall into this category. Assuming all of these small entities have covered contractor information systems that are required to be in compliance with NIST SP 800–171, then all of these entities would be required to have, at minimum, a Basic Assessment in order to be considered for award.

The requirement for the Basic Assessment would be imposed through incorporation of the new solicitation provision and contract clause in new contracts and orders. As such, the requirement to have completed a Basic Assessment is expected to phase-in over a three-year period, thus impacting an estimated 8,823 small entities each year. It is expected that the Medium and High Assessments, on the other hand, will be conducted on a finite number of awardees each year based on the capacity of the Government to conduct these assessments. DoD estimates that 200 unique entities will undergo a Medium Assessment each year, of which 148 are expected to be small entities. High Assessments are expected to be conducted on approximately 110 unique entities each year, of which 81 are expected to be small entities. DoD Assessments are valid for three years, so small entities will be required to renew, at minimum, their basic assessment every three years in order to continue to receive DoD awards or to continue performance on contracts and orders with options. The following is a summary of the number of small entities that will be required to undergo NIST SP 800–171 DoD Assessments over a three-year period:

Assessment	Year 1	Year 2	Year 3
Basic	8,823	8,823	8,823
Medium	148	148	148
High	81	81	81

The top five NAICS code industries expected to be impacted by this rule are as follows: 541712, Research and Development in the Physical, Engineering, and Life Sciences (Except Biotechnology); 541330, Engineering Services; 236220, Commercial and Institutional Building Construction; 541519, Other Computer Related Services; and 561210, Facilities Support Services. These NAICS codes were selected based on a review of NAICS codes associated with awards that include the clause at DFARS 252.204–7012.

2. The CMMC Framework

Given the enterprise-wide implementation of CMMC, the Department developed a five-year phased rollout strategy. The rollout is intended to minimize the financial impacts to the industrial base, especially small entities, and disruption to the existing DoD supply chain. The Office of the Secretary of Defense staff is coordinating with the Military Services and Department Agencies to identify candidate contracts during the first five years of implementation that will include the CMMC requirement in the statement of work.

Prior to October 1, 2025, this rule impacts certain large and small businesses that are competing on acquisitions that specify a requirement for CMMC in the statement of work. These businesses will be required to have the stated CMMC certification level at the time of contract award. Inclusion of a CMMC requirement in a

solicitation during this time period must be approved by the USD(A&S). It is estimated that 129,810 unique entities will pursue their initial CMMC certification during the initial five-year period. By October 1, 2025, all entities receiving DoD contracts and orders, other than contracts or orders exclusively for commercially available off-the-shelf items or those valued at or below the micro-purchase threshold, will be required to have the CMMC Level identified in the solicitation, but which at minimum will be a CMMC Level 1 certification. CMMC certifications are valid for three years; therefore, large and small businesses will be required to renew their certification every three years.

Based on information from the Federal Procurement Data System (FPDS), the number of unique prime contractors is 212,657 and the number of known unique subcontractors is 8,309. Therefore, the total number of known unique prime contractors and subcontractors is 220,966, of which approximately 163,391 (74 percent) are estimated to be unique small businesses. According to FPDS, the average number of new contracts for unique contractors is 47,905 for any given year. The timeline required to implement CMMC across the DoD contractor population will be approximately 7 years. The phased rollout plan for years 1–7 for small entities is detailed below with the total number of unique DoD contractors and subcontractors specified. The rollout assumes that for every unique prime contractor there are approximately 100 unique subcontractors. Each small business represented in the table would be required to pursue recertification every three years in order to continue to do business with DoD.

Year	Level 1	Level 2	Level 3	Level 4	Level 5	Total
1	665	110	335	0	0	1,110
2	3,323	555	1,661	2	2	5,543
3	11,086	1,848	5,543	4	4	18,485
4	21,248	3,542	10,624	6	6	35,426
5	21,245	3,541	10,623	7	7	35,423
6	21,245	3,541	10,623	7	7	35,423
7	19,180	3,197	9,590	7	7	31,981
1–7	97,992	16,334	48,999	33	33	163,391

The top five NAICS code industries expected to be impacted by this rule are as follows: 541712, Research and Development in the Physical, Engineering, and Life Sciences (Except Biotechnology); 541330, Engineering Services; 236220, Commercial and Institutional Building Construction; 541519, Other Computer Related Services; and 561210, Facilities Support Services. These NAICS codes are the same as the DoD Assessment NAICS codes and were selected based on a review of NAICS codes associated with awards that include the clause at FAR 52.204–21 or DFARS 252.204–7012.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule

Details on the compliance requirements and associated costs, savings, and benefits of this rule are provided in the Regulatory Impact Analysis referenced in section IV of this preamble. The following is a summary of the compliance requirements and the estimated costs for small entities to undergo a DoD NIST SP 800–171 Assessment or obtain a CMMC certification. For both the DoD Assessment Methodology and the CMMC Framework, the estimated public costs are based on the cost for an entity to pursue each type of assessment: The Basic, Medium, or High Assessment under the DoD Assessment Methodology; or the CMMC Level 1, 2, 3, 4, or 5 certifications. The estimated costs attributed to this rule do not include the costs associated with compliance with the existing cybersecurity requirements under the clause at FAR 52.204–21 or associated with implementing NIST SP 800–171 in accordance with the clause at DFARS 252.204–7012, Safeguarding Covered Defense Information and Cyber Incident Reporting. Contractors who have been awarded a DoD contract that include these existing contract clauses should have already implemented these cybersecurity requirements and incurred the associated costs; therefore, those costs are not attributed to this rule.

1. DoD Assessment Methodology

To comply with NIST SP 800–171 a company must (1) implement 110 security requirements on their covered contractor information systems; or (2) document in a ''system security plan'' and ''plans of action'' those requirements that are not yet implemented and when the requirements will be implemented. All offerors that are required to implement NIST SP 800–171 on covered contractor information systems pursuant to DFARS clause 252.204–7012, will be required to complete a Basic Assessment and upload the resulting score to the Supplier Risk Management System (SPRS), DoD's authoritative source for supplier and product performance information. The Basic Assessment is a self-assessment done by the contractor using a specific scoring methodology that tells the Department how many security requirements have not yet been implemented and is valid for three years. A company that has fully implemented all 110 NIST SP 800–171 security requirements, would have a score of 110 to report in SPRS for their Basic Assessment. A company that has unimplemented requirements will use the scoring methodology to assign a value to each unimplemented requirement, add up those values, and subcontract the total value from 110 to determine their score.

In accordance with NIST SP 800–171, a contractor should already be aware of the security requirements they have not yet implemented and have documented plans of action for those requirements; therefore, the burden associated with conducting a self-assessment is the time burden associated with calculating the score. DoD estimates that the burden to calculate the Basic Assessment score is thirty minutes per entity at a journeyman-level-2 rate of pay (0.50 hour * $99.08/hour = $49.54/assessment)).

To submit the Basic Assessment, the contractor is required to complete 6 fields: System security plan name (if more than one system is involved); CAGE code associated with the plan; a brief description of the plan architecture; date of the assessment; total score; and the date a score of 110 will be achieved. All of this data is available from the Basic Assessment itself, the existing system security plan, and the plans of action. The contractor selects the date when the last plan of

action will be complete as the date when a score of 110 will be achieved. The burden to submit a Basic Assessment for posting in SPRS is estimated to be 15 minutes per entity at a journeyman-level-2 rate of pay (0.25 hour * $99.08/hour = $24.77/assessment)). Therefore, the total cost per assessment per entity is approximately $74.31 ($49.54 + $24.77).

The estimate for the rate of pay for both preparation and submission of the Basic Assessment is journeyman-level-2, which is an employee who has the equivalent skills, responsibilities, and experience as a General Schedule (GS) 13 Federal Government employee. While these are rather simple tasks that can reasonably be completed by a GS–11 equivalent employee, or even a GS–9 clerk, the GS–13 (or perhaps GS–11) is the most likely grade for several reasons. First, in a small company, the number of IT personnel are very limited. The employee that is available to complete this task would also have significant responsibilities for operation and maintenance of the IT system and, therefore, be at a higher grade than would otherwise be required if the only job was to prepare and submit the assessment. Second, while the calculation of the assessment is simple, the personnel who would typically have access to and understand the system security plan and plans of action in order to complete the Basic Assessment would be at the higher grade. Third, while the actual submission is a simple task, the person who would complete the assessment and submit the data in SPRS would be the person with SPRS access/responsibilities, and therefore at the higher grade. Fourth, given that proper calculation of the score and its submission may well determine whether or not the company is awarded the contract, the persons preparing and submitting the report are likely to be at a higher grade than is actually required to ensure this is done properly.

After a contract is awarded, DoD may choose to conduct a Medium or High Assessment of an offer based on the criticality of the program or the sensitivity of information being handled by the contractor. Under both the Medium and High Assessment DoD assessors will be reviewing the contractor's system security plan description of how each NIST SP 800–171 requirement is met and will identify any descriptions that may not properly address the security requirements. The contractor provides DoD access to its facilities and personnel, if necessary, and prepares for/participates in the assessment conducted by the DoD. Under a High Assessment a contractor will be asked to demonstrate their system security plan. DoD will post the results in SPRS.

For the Medium Assessment, DoD estimates that the burden for a small entity to make the system security plan and supporting documentation available for review by the DoD assessor is one hour per entity at a journeyman-level-2 rate of pay, a cost of $99.08/assessment (1 hour * $99.08/hour). It is estimated that the burden for a small entity to participate in the review and discussion of the system security plan and supporting documents with the DoD assessor is three hours, with one journeyman-level-2 and one senior-level-2 contractor employee participating in the assessment, a cost of $710.40/assessment ((3 hours * $99.08/hour = $297.24) + (3 hours * $137.72/hour = $413.16)). Assuming issues are identified by the DoD Assessor, DoD estimates that the burden for a small entity to determine and provide to DoD the date by which the issues will be resolved is one hour per entity at a journeyman-level rate of pay, a cost of $99.08/assessment (1 hour * $99.08/hour). Therefore, total estimated cost for a small entity that undergoes a Medium Assessment is $908.56/assessment ($99.08 + $710.40 + $99.08).

For the High Assessment, DoD estimates that the burden for a small entity to participate in the review and discussion of the system security plan and supporting documents to the DoD assessors is 116 hours per entity at a cost of $14,542.24/assessment. The cost estimate is based on 2 senior-level-2 employees dedicating 32 hours each, 8 senior-level-1 employees dedicating 4 hours each, and 10 journeyman-level employees dedicating 2 hours each ((2 * 32 hours * $137.72/hour = $8,814.08) + (8 * 4 hours * 117.08/hour = $3,746.56) + (10 * 2 hours * $99.08/hour = 1,981.60)). It is estimated that the burden to make the system security plan and supporting documentation available for review by the DoD assessors, prepare for demonstration of requirements implementation, and to conduct post review activities is 304 hours per entity, at a cost of $36,133.76/assessment. The cost estimate is based on 2 senior-level-2 employees dedicating 48 hours each, 8 senior-level-1 employees dedicating 16 hours each, and 10 journeyman-level employees dedicating 8 hours each ((2 * 48 hours * $137.72/hour = $13,221.12) + (8 * 16 hours * 117.08/hour = $14,986.24) + (10 * 8 hours * $99.08/hour = $7,926.40)). Therefore, total estimated cost for a small entity that undergoes a High Assessment is $50,676/assessment ($14,542.24 + $36,133.76). DoD considers this to be the upper estimate of the cost, as it assumes a very robust information technology workforce. For many smaller companies, which may not have a complex information system to manage, the information system staff will be a much more limited, and labor that can be devoted (or is necessary) to prepare for and participate in the assessment is likely to be significantly less than estimated.

The following table provides the estimated annual costs for small entities to comply with the DoD Assessment requirements of this rule. Since assessments are valid for three years, the cost per assessment has been divided by three to estimate the annual cost per entity:

Assessment	Cost/assessment	Annual cost/entity	Total unique entities	Annual cost all entities
Basic	$75	$25	26,469	$655,637
Medium	909	303	444	134,467
High	50,676	16,892	243	4,104,756
Total			27,156	4,894,860

The following table presents the average annual cost per small entity for each DoD Assessment as a percentage of the annual revenue for a small entity for four of the top five NAICS codes. The low-end of the range of annual revenues presented in the table includes the average annual revenue for smaller sized firms. The high-end of the range includes the maximum annual revenue allowed by the Small Business Administration (SBA) for a small

business, per the SBA's small business size standards published at 13 CFR 121.201. NAICS code 541712 is excluded, because it is no longer an active NAICS code and the prior size standard was based on number of employees.

NAICS code	Range of annual revenues for small businesses (in millions)	Basic assessment annual cost as % of annual revenue	Medium assessment annual cost as % of annual revenue	High assessment annual cost as % of annual revenue
541330	$5–16.5	0.0005–0.0002	0.0061–0.0018	0.3378–0.1024
236220	$10–$39.5	0.0002–0.0001	0.0030–0.0008	0.1689–0.0428
541519	$10–$30.0	0.0002–0.0001	0.0030–0.0010	0.1689–0.0563
561210	$10–$41.5	0.0002–0.0001	0.0030–0.0007	0.1689–0.0407

2. CMMC Framework

This rule adds DFARS clause 252.204–7021, Cybersecurity Maturity Model Certification Requirement, which requires the contractor to have the CMMC certification at the level required in the solicitation by contract award and maintain the required CMMC level for the duration of the contract. In order to achieve a specific CMMC level, a DIB company must demonstrate both process institutionalization or maturity and the implementation of practices commensurate with that level. A DIB contractor can achieve a specific CMMC level for its entire enterprise network or particular segment(s) or enclave(s), depending upon where the information to be protected is processed, stored, or transmitted.

The following table provides a high-level description of the processes and practices evaluated during a CMMC assessment at each level; however, more specific information on the processes and practices associated with each CMMC Level is available at *https://www.acq.osd.mil/cmmc/index.html.*

Level	Description
1	Consists of the 15 basic safeguarding requirements from FAR clause 52.204–21.
2	Consists of 65 security requirements from NIST SP 800–171 implemented via DFARS clause 252.204–7012, 7 CMMC practices, and 2 CMMC processes. Intended as an optional intermediary step for contractors as part of their progression to Level 3.
3	Consists of all 110 security requirements from NIST SP 800–171, 20 CMMC practices, and 3 CMMC processes.
4	Consists of all 110 security requirements from NIST SP 800–171, 46 CMMC practices, and 4 CMMC processes.
5	Consists of all 110 security requirements from NIST SP 800–171, 61 CMMC practices, and 5 CMMC processes.

CMMC Assessments will be conducted by C3PAOs, which are accredited by the CMMC–AB. C3PAOs will provide CMMC Assessment reports to the CMMC–AB who will then maintain and store these reports in appropriate database(s). The CMMC–AB will issue CMMC certificates upon the resolution of any disputes or anomalies during the conduct of the assessment. These CMMC certificates will be distributed to the DIB contractor and the requisite information will be posted in SPRS.

If a contractor disputes the outcome of a C3PAO assessment, the contractor may submit a dispute adjudication request to the CMMC–AB along with supporting information related to claimed errors, malfeasance, or ethical lapses by the C3PAO. The CMMC–AB will follow a formal process to review the adjudication request and provide a preliminary evaluation to the contractor and C3PAO. If the contractor does not accept the CMMC–AB preliminary finding, the contractor may request an additional assessment by the CMMC–AB staff.

The costs associated with the preparation and the conduct of CMMC Assessments assumes that a small DIB company, in general, possesses a less complex and less expansive IT and cybersecurity infrastructure and operations relative to a larger DIB company. In estimating the cost for a small DIB company to obtain a CMMC certification, DoD took into account non-recurring engineering costs, recurring engineering costs, the cost to participate in the assessment, and re-certification costs:

- Nonrecurring engineering costs consist of hardware, software, and the associated labor. The costs are incurred only in the year of the initial assessment.
- Recurring engineering costs consist of any recurring fees and associated labor for technology refresh. The recurring engineering costs associated with technology refresh have been spread uniformly over a 5-year period (*i.e.,* 20% each year as recurring engineering costs).
- Assessment costs consist of contractor support for pre-assessment preparations, the actual assessment, and any post-assessment work. These costs also include an estimate of the potential C3PAO costs for conducting CMMC Assessment, which are comprised of labor for supporting pre-assessment preparations, actual assessment, and post-assessment work, plus travel cost.
- Re-certification costs are the same as the initial certification cost.

The following is a summary of the estimated costs for a small entity to achieve certification at each CMMC Level.

i. Level 1 Certification

Contractors pursuing a Level 1 Certification should have already implemented the 15 existing basic safeguarding requirements under FAR clause 52.204–21. Therefore, there are no estimated nonrecurring or recurring engineering costs associated with CMMC Level 1.

DoD estimates that the cost for a small entity to support a CMMC Level 1 Assessment or recertification is $2,999.56:

- *Contractor Support.* It is estimated that one journeyman-level-1 employee will dedicate 14 hours to support the assessment (8 hours for pre- and post-assessment support + 6 hours for the assessment). The estimated cost is $1,166.48 (1 journeyman * $83.32/hour * 14 hours).
- *C3PAO Assessment.* It is estimated that one journeyman-level-1 employee will dedicate 19 hours to conduct the assessment (8 hours for pre- and post-assessment support + 6 hours for the assessment + 5 hours for travel). Each employee is estimated to have 1 day of per diem for travel. The estimated cost

is $1,833.08 ((1 journeyman * $83.32/hour * 19 hours = $1,583.08) + (1 employees * 1 day * $250/day = $250 travel costs)).

ii. Level 2 Certification

Contractors pursuing a Level 2 Certification should have already implemented the 65 existing NIST SP 800–171 security requirements. Therefore, the estimated engineering costs per small entity is associated with implementation of 9 new requirements (7 CMMC practices and 2 CMMC processes). The estimated nonrecurring engineering cost per entity per assessment/recertification is $8,135. The estimated recurring engineering cost per entity per year is $20,154.

DoD estimates that the cost for a small entity to support a CMMC Level 2 Assessment or recertification is $22,466.88.

- *Contractor Support.* It is estimated that two senior-level-1 employees will dedicate 48 hours each to support the assessment (24 hours for pre- and post-assessment support + 24 hours for the assessment). The estimated cost is $11,239.68 (2 senior * $117.08/hour * 48 hours).
- *C3PAO Assessment.* It is estimated that one journeyman-level-2 employee and one senior-level-1 employee will dedicate 45 hours each to conduct the assessment (16 hours for pre- and post-assessment support + 24 hours for the assessment + 5 hours for travel). Each employee is estimated to have 3 days of per diem for travel. The estimated cost is $11,227.20 ((1 senior * $117.08/hour * 45 hours = $5,268.60) + (1 journeyman * $99.08/hour * 45 hours = $4,458.60) + (2 employees * 3 days * $250/day = $1,500 travel costs)).

iii. Level 3 Certification

Contractors pursuing a Level 3 Certification should have already implemented the 110 existing NIST SP 800–171 security requirements. Therefore, the estimated engineering costs per small entity is associated with implementation 23 new requirements (20 CMMC practices and 3 CMMC processes). The estimated nonrecurring engineering cost per entity per assessment/recertification is $26,214. The estimated recurring engineering cost per entity per year is $41,666.

DoD estimates that the cost for a small entity to support a CMMC Level 3 assessment or recertification is $51,095.60.

- *Contractor Support.* It is estimated that three senior-level-1 employees will dedicate 64 hours each to support the assessment (32 hours for pre- and post-assessment support + 32 hours for the assessment). The estimated cost is $22,479.36 (3 seniors * $117.08/hour * 64 hours).
- *C3PAO Assessment.* It is estimated that one senior-level-1 employee and three journeyman-level-2 employees will dedicate 57 hours each to conduct the assessment (24 hours for pre- and post-assessment support + 32 hours for the assessment + 5 hours for travel). Each employee is estimated to have 5 days of per diem for travel. The estimated cost is $28,616.24 ((1 senior * $117.08/hour * 57 hours = $6,673.56) + (3 journeyman * $99.08/hour * 57 hours = $16,942.68) + (4 employees * 5 days * $250/day = $5,000 travel costs)).

iv. Level 4 Certification

Contractors pursuing a Level 4 Certification should have already implemented the 110 existing NIST SP 800–171 security requirements. Therefore, the estimated engineering costs per small entity is associated with implementation 50 new requirements (46 CMMC practices and 4 CMMC processes). The estimated nonrecurring engineering cost per entity per assessment/recertification is $938,336. The estimated recurring engineering cost per entity per year is $301,514.

DoD estimates that the cost for a small entity to support a CMMC Level 4 Assessment or recertification is $70,065.04.

- *Contractor Support.* It is estimated that three senior-level-2 employees will dedicate 80 hours each to support the assessment (40 hours for pre- and post-assessment support + 40 hours for the assessment). The estimated cost is $33,052.80 (3 seniors * $137.72/hour * 80 hours)
- *C3PAO Assessment.* It is estimated that one senior-level-2 employee and three journeyman-level-2 employees will dedicate 69 hours each to conduct the assessment (32 hours for pre- and post-assessment support + 48 hours for the assessment + 5 hours for travel). Each employee is estimated to have 5 days of per diem for travel, plus airfare. The estimated cost is $37,012.24 ((1 senior * $137.72/hour * 69 hours = $9502.68) + (3 journeyman * $99.08/hour * 69 hours = $20,509.56) + (4 employees * 5 days * $250/day = $5,000 travel costs) + (4 employees * $500 = $2,000 airfare)).

v. Level 5 Certification

Contractors pursuing a Level 5 Certification should have already implemented the 110 existing NIST SP 800–171 security requirements. Therefore, the estimated engineering costs per small entity is associated with implementation 66 new requirements (61 CMMC practices and 5 CMMC processes). The estimated nonrecurring engineering cost per entity per assessment/recertification is $1,230,214. The estimated recurring engineering cost per entity per year is $384,666.

DoD estimates that the cost for a small entity to support a CMMC Level 5 Assessment or recertification is $110,090.80.

- *Contractor Support.* It is estimated that four senior-level-2 employees will dedicate 104 hours each to support the assessment (48 hours for pre- and post-assessment support + 56 hours for the assessment). The estimated cost is $57,291.52 (4 senior * $137.72/hour * 104 hours).
- *C3PAO Assessment.* It is estimated that one senior-level-2 employee, two senior-level-1 employees, and one journeyman-level-2 employee will dedicate 93 hours each to conduct the assessment (32 hours for pre- and post-assessment support + 56 hours for the assessment + 5 hours for travel). Each employee is estimated to have 7 days of per diem for travel. The estimated cost is $52,799.28 ((1 senior * $137.72/hour * 93 hours = $12,807.96) + (2 senior * $117.08/hour * 93 hours = $21,776.88) + (1 journeyman * $99.08/hour * 93 hours = $9,214.44) + (4 employees * 7 days * $250/day = $7,000 travel costs) + (4 employees * $500 = $2,000 airfare)).

vi. Total Estimated Annual Costs

The following table provides a summary of the total estimated annual costs for an individual small entity to obtain each CMMC certification level. Nonrecurring engineering costs are spread over a 20-year period to determine the average annual cost per entity. Assessment costs have been spread over a 3-year period, since entities will participate in a reassessment every 3 years.

CMMC cert	Average nonrecurring engineering costs	Recurring engineering costs	Average assessment costs	Total annual assessment cost
Level 1	$0	$0	$1,000	$1,000

CMMC cert	Average nonrecurring engineering costs	Recurring engineering costs	Average assessment costs	Total annual assessment cost
Level 2	407	20,154	7,489	28,050
Level 3	1,311	41,666	17,032	60,009
Level 4	46,917	301,514	23,355	371,786
Level 5	61,511	384,666	36,697	482,874

The following table presents the average annual cost per small entity for CMMC certifications at levels 1 through 3 as a percentage of the annual revenue for a small entity for four of the top five NAICS codes. The low-end of the range of annual revenues presented in the table includes the average annual revenue for smaller sized firms. The high-end of the range includes the maximum annual revenue allowed by the SBA for a small business, per the SBA's small business size standards published at 13 CFR 121.201. NAICS code 541712 is excluded, because it is no longer an active NAICS code and the prior size standard was based on number of employees.

NAICS code	Range of annual revenues for small businesses (in millions)	CMMC level 1 annual cost as % of annual revenue	CMMC level 2 annual cost as % of annual revenue	CMMC level 3 annual cost as % of annual revenue
541330	$5–$16.5	0.0200–0.0061	0.5610–0.1700	1.2002–0.3637
236220	$10–$39.5	0.0100–0.0025	0.2805–0.0710	0.6001–0.1519
541519	$10–$30.0	0.0100–0.0033	0.2805–0.0935	0.6001–0.2000
561210	$10–$41.5	0.0100–0.0024	0.2805–0.0676	0.6001–0.1446

For CMMC certification at levels 4 and 5, the following table presents the annual cost per small entity for CMMC certification at levels 4 and 5 as a percentage of the low, average, and high annual revenues for entities that have represented themselves as small in the System for Award Management (SAM) for their primary NAICS code and are performing on contracts that could be subject to a CMMC level 4 or 5 certification requirements. The values of the low, average, and high annual revenues are based on an average of the annual receipt reported in SAM by such entities for FY16 through FY20.

FY16 thru FY20	Annual revenue of entities represented as small for primary NAICS	Level 4 certification cost as % of annual revenue	Level 5 certification cost as % of annual revenue
Low	$6.5 million	5.67	7.36
Average	$22.9 million	1.62	2.11
High	$85 million	0.43	0.56

The following is a summary of the estimated annual costs in millions for all 163,391 small entities to achieve their initial CMMC certifications (and recertifications every three years) over a 10-year period:

Year	Level 1	Level 2	Level 3	Level 4	Level 5
1	$1.99	$5.58	$39.86	$0.00	$0.00
2	9.97	30.39	211.58	2.62	3.45
3	33.25	107.20	742.65	5.84	7.67
4	65.73	232.90	1,595.23	9.67	12.66
5	73.69	314.23	2,105.53	12.93	16.91
6	96.98	414.64	2,746.50	15.18	19.82
7	123.26	509.08	3,342.95	17.43	22.74
8	73.69	421.22	2,669.25	10.58	13.68
9	96.98	450.27	2,867.60	10.72	13.90
10	123.26	483.07	3,091.56	10.86	14.13

E. Relevant Federal Rules, Which May Duplicate, Overlap, or Conflict With the Rule

The rule does not duplicate, overlap, or conflict with any other Federal rules. Rather this rule validates and verifies contractor compliance with the existing cybersecurity requirements in FAR clause 52.204–21 and DFARS clause 252.204–7012, and ensures that the entire DIB sector has the appropriate cybersecurity processes and practices in place to properly protect FCI and CUI during performance of DoD contracts.

F. Description of Any Significant Alternatives to the Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Rule on Small Entities

DoD considered and adopted several alternatives during the development of

this rule that reduce the burden on small entities and still meet the objectives of the rule. These alternatives include: (1) Exempting contracts and orders exclusively for the acquisition of commercially available off-the-shelf items; and (2) implementing a phased rollout for the CMMC portion of the rule and stipulating that the inclusion a CMMC requirement in new contracts until that time be approved by the Office of the Under Secretary of Defense for Acquisition and Sustainment. Additional alternatives were considered, however, it was determined that these other alternatives did not achieve the intended policy outcome.

1. CMMC Model and Implementation

The Regulatory Impact Analysis (RIA) referenced in section IV of this preamble estimates that the total number of unique DoD contractors and subcontractors is 220,966, with approximately 163,391 or 74% being small entities. The RIA also specifies the estimates for the percentage of all contractors and subcontractors associated with each CMMC level. These estimates indicate that the vast majority of small entities (*i.e.,* 163,325 of 163,391 or 99.96%) will be required to achieve CMMC Level 1–3 certificates during the initial rollout. The Department looked at Levels 1 through 5 to determine if there were alternatives and whether these alternatives met the intended policy outcome.

For CMMC Level 1, the practices map directly to the basic safeguarding requirements specified in the clause at FAR 52.204–21. The phased rollout estimates that the majority of small entities (*i.e.,* 97,992 of the 163,325 or 60%) will be required to achieve CMMC Level 1. The planned implementation of CMMC Level 1 adds a verification component to the existing FAR clause by including an on-site assessment by a credentialed assessor from an accredited C3PAO. The on-site assessment verifies the implementation of the required cybersecurity practices and further supports the physical identification of contractors and subcontractors in the DoD supply chain. In the aggregate, the estimated cost associated with supporting this on-site assessment and approximated C3PAO fees does not represent a cost-driver with respect to CMMC costs to small entities across levels. An alternative to an on-site assessment is for contractors to provide documentation and supporting evidence of the proper implementation of the required cybersecurity practices through a secure online portal. These artifacts would then be reviewed and checked virtually by an accredited assessor prior to the CMMC–AB issuing a CMMC Level 1 certificate. The drawback of this alternative is the inability of the contractor to interact with the C3PAO assessor in person and provide evidence directly without transmitting proprietary information. Small entities will not receive as much meaningful and interactive feedback that would be part of a Level 1 on-site assessment.

For CMMC Level 2, the practices encompass only 48 of the 110 security requirements of NIST SP 800–171, as specified in DFARS clause 252.204–7012, and 7 additional cybersecurity requirements. In addition, CMMC Level 2 includes two process maturity requirements. The phased rollout estimates that approximately 10% of small entities may choose to use Level 2 as a transition step from Level 1 to Level 3. Small entities that achieve Level 1 can seek to achieve Level 3 (without first achieving a Level 2 certification) if the necessary cybersecurity practices and processes have been implemented. The Department does not anticipate releasing new contracts that require contractors to achieve CMMC Level 2. As a result, the Department did not consider alternatives with respect to CMMC Level 2.

For CMMC Level 3, the practices encompass all the 110 security requirements of NIST SP 800–171, as specified in DFARS clause 252.204–7012, as well as 13 additional cybersecurity requirements above Level 2. In addition, CMMC Level 3 includes three process maturity requirements. These additional cybersecurity practices were incorporated based upon several considerations that included public comments from September to December 2019 on draft versions of the model, inputs from the DIB Sector Coordinating Council (SCC), cybersecurity threats, the progression of cybersecurity capabilities from Level 3 to Levels 4, and other factors. The CMMC phased rollout estimates that 48,999 of the 163,325 small entities or 30% will be required to achieve CMMC Level 3. The alternatives considered include removing a subset or all of the 20 additional practices at Level 3 or moving a subset or all of the 20 additional practices from Level 3 to Level 4. The primary drawback of these alternatives is that the cybersecurity capability gaps associated with protecting CUI will not be addressed until Level 4, which will apply to a relatively small percentage of non-small and small entities. Furthermore, the progression of cybersecurity capabilities from Level 3 to Level 4 becomes more abrupt.

For CMMC Level 4, the practices encompass the 110 security requirements of NIST SP 800–171 as specified in DFARS clause 252.204–7012 and 46 additional cybersecurity requirements. More specifically, CMMC Level 4 adds 26 enhanced security requirements above CMMC Level 3, of which 13 are derived from Draft NIST SP 800–171B. In addition, CMMC Level 4 includes four process maturity requirements. The DIB SCC and the public contributed to the specification of the other 13 enhanced security requirements. For CMMC Level 4, an alternative considered is to define a threshold for contractors to meet 15 out of the 26 enhanced security requirements. In addition, contractors will be required to meet 6 out of the 11 remaining non-threshold enhanced security requirements. This alternative implies that a contractor will have to implement 21 of the 26 enhanced security requirements as well as the associated maturity processes. A drawback of this alternative is that contractors implement a different subset of the 11 non-threshold requirements which in turn, leads to a non-uniform set of cybersecurity capabilities across those certified at Level 4.

For CMMC Level 5, the practices encompass the 110 security requirements of NIST SP 800–171 as specified in DFARS clause 252.204–7012 and 61 additional cybersecurity requirements. More specifically, CMMC Level 5 adds 15 enhanced security requirements above CMMC Level 4, of which 4 are derived from Draft NIST SP 800–171B. In addition, CMMC Level 5 includes five process maturity requirements. The DIB SCC and the public contributed to the specification of the other 11 enhanced security requirements. For CMMC Level 5, the alternative considered is to define a threshold for contractors to meet 6 out of the 15 enhanced security requirements. In addition, contractors will be required to meet 5 out of the 9 remaining non-threshold enhanced security requirements. This alternative implies that a contractor will have implemented 11 of the 15 enhanced security requirements as well as the associated maturity processes. A drawback of this alternative is that contractors implement a different subset of the 9 non-threshold requirements which in turn, leads to a non-uniform set of cybersecurity capabilities across those certified at Level 5.

2. Timing of CMMC Level Certification Requirement

In addition to evaluating the make-up of the CMMC levels, the Department

took into consideration the timing of the requirement to achieve a CMMC level certification: (1) At time of proposal or offer submission, (2) in order to receive award, or (3) post contract award. The Department ultimately adopted alternative 2 to require certification at the time of award. The drawback of alternative 1 (at time of proposal or offer submission) is the increased risk for contractors since they may not have sufficient time to achieve the required CMMC certification after the release of the Request for Information (RFI). The drawback of alternative 3 (after contract award) is the increased risk to the Department with respect to the schedule and uncertainty with respect to the case where the contractor is unable to achieve the required CMMC level in a reasonable amount of time given their current cybersecurity posture. This potential delay would apply to the entire supply chain and prevent the appropriate flow of CUI and FCI. The Department seeks public comment on the timing of contract award, to include the effect of requiring certification at time of award on small businesses.

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 2019–D041), in correspondence.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA) provides that an agency generally cannot conduct or sponsor a collection of information, and no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, unless that collection has obtained OMB approval and displays a currently valid OMB Control Number.

DoD requested, and OMB authorized, emergency processing of the collection of information tied to this rule, as OMB Control Number 0750–0004, *Assessing Contractor Implementation of Cybersecurity Requirements,* consistent with 5 CFR 1320.13.

DoD has determined the following conditions have been met:

a. The collection of information is needed prior to the expiration of time periods normally associated with a routine submission for review under the provisions of the PRA, to enable the Department to immediately begin assessing the current status of contractor implementation of NIST SP 800–171 on their information systems that process CUI.

b. The collection of information is essential to DoD's mission. The collection of information is essential to DoD's mission. The National Defense Strategy (NDS) and DoD Cyber Strategy highlight the importance of protecting the Defense Industrial Base (DIB) to maintain national and economic security. To this end, DoD requires defense contractors and subcontractors to implement the NIST SP 800–171 security requirements on information systems that handle CUI, pursuant to DFARS clause 252.204–7012. This DoD Assessment Methodology enables the Department to assess strategically, at a corporate-level, contractor implementation of the NIST SP 800–171 security requirements. Results of a NIST SP 800–171 DoD Assessment reflect the net effect of NIST SP 800–171 security requirements not yet implemented by a contractor.

c. Moreover, DoD cannot comply with the normal clearance procedures, because public harm is reasonably likely to result if current clearance procedures are followed. Authorizing collection of this information on the effective date will motivate defense contractors and subcontractors who have not yet implemented existing NIST SP 800–171 security requirements, to take action to implement the security requirements on covered information systems that process CUI, in order to protect our national and economic security interests. The aggregate loss of sensitive controlled unclassified information and intellectual property from the DIB sector could undermine U.S. technological advantages and increase risk to DoD missions.

Upon publication of this rule, DoD intends to provide a separate 60-day notice in the **Federal Register** requesting public comment for OMB Control Number 0750–0004, *Assessing Contractor Implementation of Cybersecurity Requirements.*

DOD estimates the annual public reporting burden for the information collection as follows:

a. Basic Assessment

Respondents: 13,068.
Responses per respondent: 1.
Total annual responses: 13,068.
Hours per response: .75.
Total burden hours: 9,801.

b. Medium Assessment

Respondents: 200.
Responses per respondent: 1.
Total annual responses: 200.
Hours per response: 8.
Total burden hours: 1,600.

c. High Assessment

Respondents: 110.
Responses per respondent: 1.
Total annual responses: 110.
Hours per response: 420.
Total burden hours: 46,200.

d. Total Public Burden (All Entities)

Respondents: 13,068.
Total annual responses: 13,378.
Total burden hours: 57,601.

e. Total Public Burden (Small Entities)

Respondents: 8,823.
Total annual responses: 9,023.
Total burden hours: 41,821.

The requirement to collect information from offerors and contractors regarding the status of their implementation of NIST SP 800–171 on their information systems that process CUI, is being imposed via a new solicitation provision and contract clause. Per the new provision, if an offeror is required to have implemented the NIST SP 800–171 security requirements on their information systems pursuant to DFARS clause 252.204–7012, then the offeror must have, at minimum, a current self-assessment (or Basic Assessment) uploaded to DoD's Supplier Performance Risk System, in order to be considered for award. Depending on the criticality of the acquisition program, after contract award, certain contractors may be required to participate in a Medium or High assessment to be conducted by DoD assessor. During these post-award assessments, contractors will be required to demonstrate their implementation of NIST SP 800–171 security requirements. Results of a NIST SP 800–171 DoD Assessment reflect the net effect of NIST SP 800–171 security requirements not yet implemented by a contractor.

IX. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment pursuant to 41 U.S.C. 1707(d) and FAR 1.501–3(b).

Malicious cyber actors have targeted, and continue to target, the DIB sector, which consists of over 200,000 small-to-large sized entities that support the warfighter. In particular, actors ranging from cyber criminals to nation-states continue to attack companies and organizations that comprise the Department's multi-tier supply chain including smaller entities at the lower

tiers. These actors seek to steal DoD's intellectual property to undercut the United States' strategic and technological advantage and to benefit their own military and economic development.

The Department has been focused on improving the cyber resiliency and security of the DIB sector for over a decade as evidenced by the development of minimum cybersecurity standards and the implementation of those standards in the National Institute of Standards and Technology (NIST) Special Publications (SP) and implementation of those standards in the FAR and DFARS. In 2013, DoD issued a final DFARS rule (78 FR 69273) that required contractors to implement a select number of security measures from NIST SP 800–53, Recommended Security Controls for Federal Information Systems and Organizations, to facilitate safeguarding unclassified DoD information within contractor information systems from unauthorized access and disclosure. In 2015, DoD issued an interim DFARS rule (80 FR 81472) requiring contractors that handle Controlled Unclassified Information (CUI) on their information systems to transition by December 31, 2017, from NIST SP 800–53 to NIST SP 800–171, Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations. NIST SP 800–171 was not only easier to use, but also provided security requirements that greatly increases the protections of Government information in contractor information systems once implemented. And, in 2016, the FAR Council mandated the use of FAR clause 52.204–21, Basic Safeguarding of Covered Contractor Information Systems, to require all Government contractors to implement, at minimum, some basic policies and practices to safeguard Federal Contract Information (FCI) within their information systems. Since then, the Department has been engaging with industry on improving their compliance with these exiting cybersecurity requirements and developing a framework to institutionalize cybersecurity process and practices throughout the DIB sector.

Notwithstanding the fact that these minimum cybersecurity standards have been in effect on DoD contracts since as early as 2013, several surveys and questionnaires by defense industrial associations have highlighted the DIB sector's continued challenges in achieving broad implementation of these security requirements. In a 2017 questionnaire, contractors and subcontractors that responded acknowledged implementation rates of 38% to 54% for at least 10 of the 110 security requirements of NIST SP 800–171.[1] In a separate 2018 survey, 36% of contractors who responded indicated a lack of awareness of DFARS clause 252.204–7012 and 45% of contractors acknowledged not having read NIST SP 800–171.[2] In a 2019 survey, contractors that responded rated their level of preparedness for a Defense Contract Management Agency standard assessment of contractor implementation of NIST SP 800–171 at 56%.[3] Furthermore, for the High Assessments conducted on-site by DoD to date, only 36% of contractors demonstrated implementation of all 110 of the NIST SP 800–171 security requirements.

Although these industry surveys represent a small sample of the DIB sector, the results were reinforced by the findings from DoD Inspector General report in 2019 (DODIG–2019–105 ''Audit of Protection of DoD Controlled Unclassified Information on Contractor-Owned Networks and Systems'') indicate that DoD contractors did not consistently implement mandated system security requirements for safeguarding CUI and recommended that DoD take immediate steps to assess a contractor's ability to protect this information. The report emphasizes that malicious actors can exploit the vulnerabilities of contractors' networks and systems and exfiltrate information related to some of the Nation's most valuable advanced defense technologies.

Defense contractors must begin viewing cybersecurity as a part of doing business, in order to protect themselves and to protect national security. The various industry surveys and Government assessments conducted to date illustrate the following: Absent a requirement for defense contractors to demonstrate implementation of standard cybersecurity processes and practices, cybersecurity requirements will not be fully implemented, leaving DoD and the DIB unprotected and vulnerable to malicious cyber activity. To this end, section 1648 of the NDAA for FY 2020 (Pub. L. 116–92) directed the Secretary of Defense to develop a consistent, comprehensive framework to enhance cybersecurity for the U.S. defense industrial base no later than February 1, 2020. In the Senate Armed Services Committee Report to accompany the NDAA for FY 2020, the Committee expressed concern that DIB contractors are an inviting target for our adversaries, who have been conducting cyberattacks to steal critical military technologies.

Developing a framework to enhance the cybersecurity of the defense industrial base will serve as an important first step toward securing the supply chain. Pursuant to section 1648, DoD has developed the CMMC Framework, which gives the Department a mechanism to certify the cyber posture of its largest defense contractors to the smallest firms in our supply chain, who have become primary targets of malicious cyber activity.

This rule is an important part of the cybersecurity framework,[4] and builds on the existing FAR and DFARS clause cybersecurity requirements by (1) adding a mechanism to immediately begin assessing the current status of contractor implementation of NIST SP 800–171 on their information systems that process CUI; and (2) to require contractors and subcontractors to take steps to fully implement existing cybersecurity requirements, plus additional processes and practices, to protect FCI and CUI on their information systems in preparation for verification under the CMMC Framework. There is an urgent need for DoD to immediately begin assessing where vulnerabilities in its supply chain exist and take steps to correct such deficiencies, which can be accomplished by requiring contractors and subcontractors that handle DoD CUI on their information systems to complete a NIST SP 800–171 Basic Assessment. In fact, while this rule includes a delayed effective date, contractors and subcontractors that are required to implement NIST SP 800–171 pursuant to DFARS clause 252.204–7012, are encouraged to immediately conduct and submit a self-assessment as described in this rule to facilitate the Department's assessment.

It is equally urgent for the Department to ensure DIB contractors that have not fully implemented the basic safeguarding requirements under FAR clause 52.204–21 or the NIST SP 800–171 security requirements pursuant to DFARS 252.204–7012 begin correcting these deficiencies immediately. These are cybersecurity requirements contractors and subcontractors should have already implemented (or in the

[1] Aerospace Industries Association. ''Complying with NIST 800–171.'' Fall 2017.

[2] National Defense Industrial Association (NDIA). ''Implementing Cybersecurity in DoD Supply Chains.'' White Paper. July 2018.

[3] NDIA. ''Beyond Obfuscation: The Defense Industry's Position within Federal Cybersecurity Policy.'' A Report of the NDIA Policy Department. October 2018. Page 20 and page 24.

[4] Section 1648 of the NDAA for FY 2020 mandates the formulation of ''unified cybersecurity . . . regulations . . . to be imposed on the defense industrial base for the purpose of assessing the cybersecurity of individual contractors,''

case of implementation of NIST SP 800–171, have plans of action to correct deficiencies) on information systems that handle CUI. Under the CMMC Framework, a contractor is able to achieve CMMC Level 1 Certification if they can demonstrate implementation of the basic safeguarding requirements in the FAR clause. Similarly, a contractor is able to achieve CMMC Level 3 if they can demonstrate implementation of the NIST SP 800–171 security requirements, plus some additional processes and practices. This rule ensures contractors and subcontractors focus on full implementation of existing cybersecurity requirements on their information systems and expedites the Department's ability to secure its supply chain.

For the foregoing reasons, pursuant to 41 U.S.C. 1707(d), DoD finds that urgent and compelling circumstances make compliance with the notice and comment requirements of 41 U.S.C. 1707(a) impracticable, and invokes the exception to those requirements under 41 U.S.C. 1707(d) and FAR 1.501–3(b).[5] While a public comment process will not be completed prior to the rule's effective date, DoD has incorporated feedback solicited through extensive outreach already undertaken pursuant to section 1648(d) of the NDAA for FY 2020, including through public meetings and extensive industry outreach conducted over the past year. However, pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 204, 212, 217, and 252

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204, 212, 217, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 204, 212, 217, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

[5] FAR 1.501–3(b) states that ''[a]dvance comments need not be solicited when urgent and compelling circumstances make solicitation of comments impracticable prior to the effective date of the coverage, such as when a new statute must be implemented in a relatively short period of time. In such case, the coverage shall be issued on a temporary basis and shall provide for at least a 30 day public comment period.''

PART 204—ADMINISTRATIVE MATTERS

■ 2. Amend section 204.7302 by revising paragraph (a) to read as follows:

204.7302 Policy.

(a)(1) Contractors and subcontractors are required to provide adequate security on all covered contractor information systems.

(2) Contractors required to implement NIST SP 800–171, in accordance with the clause at 252.204–7012, Safeguarding Covered Defense Information and Cyber incident Reporting, are required at time of award to have at least a Basic NIST SP 800–171 DoD Assessment that is current (*i.e.,* not more than 3 years old unless a lesser time is specified in the solicitation) (see 252.204–7019).

(3) The NIST SP 800–171 DoD Assessment Methodology is located at *https://www.acq.osd.mil/dpap/pdi/cyber/strategically_assessing_contractor_implementation_of_NIST_SP_800-171.html.*

(4) High NIST SP 800–171 DoD Assessments will be conducted by Government personnel using NIST SP 800–171A, ''Assessing Security Requirements for Controlled Unclassified Information.''

(5) The NIST SP 800–171 DoD Assessment will not duplicate efforts from any other DoD assessment or the Cybersecurity Maturity Model Certification (CMMC) (see subpart 204.75), except for rare circumstances when a re-assessment may be necessary, such as, but not limited to, when cybersecurity risks, threats, or awareness have changed, requiring a re-assessment to ensure current compliance.

* * * * *

■ 3. Revise section 204.7303 to read as follows:

204.7303 Procedures.

(a) Follow the procedures relating to safeguarding covered defense information at PGI 204.7303.

(b) The contracting officer shall verify that the summary level score of a current NIST SP 800–171 DoD Assessment (*i.e.,* not more than 3 years old, unless a lesser time is specified in the solicitation) (see 252.204–7019) for each covered contractor information system that is relevant to an offer, contract, task order, or delivery order are posted in Supplier Performance Risk System (SPRS) (*https://www.sprs.csd.disa.mil/*), prior to—

(1) Awarding a contract, task order, or delivery order to an offeror or contractor that is required to implement NIST SP 800–171 in accordance with the clause at 252.204–7012; or

(2) Exercising an option period or extending the period of performance on a contract, task order, or delivery order with a contractor that is that is required to implement the NIST SP 800–171 in accordance with the clause at 252.204–7012.

■ 4. Amend section 204.7304 by revising the section heading and adding paragraphs (d) and (e) to read as follows:

204.7304 Solicitation provisions and contract clauses.

* * * * *

(d) Use the provision at 252.204–7019, Notice of NIST SP 800–171 DoD Assessment Requirements, in all solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, except for solicitations solely for the acquisition of commercially available off-the-shelf (COTS) items.

(e) Use the clause at 252.204–7020, NIST SP 800–171 DoD Assessment Requirements, in all solicitations and contracts, task orders, or delivery orders, including those using FAR part 12 procedures for the acquisition of commercial items, except for those that are solely for the acquisition of COTS items.

■ 5. Add subpart 204.75, consisting of 204.7500 through 204.7503, to read as follows:

Subpart 204.75—Cybersecurity Maturity Model Certification

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Subpart 204.75—Cybersecurity Maturity Model Certification

204.7500 Scope of subpart.

(a) This subpart prescribes policies and procedures for including the Cybersecurity Maturity Model Certification (CMMC) level requirements in DoD contracts. CMMC is a framework that measures a contractor's cybersecurity maturity to include the implementation of cybersecurity practices and institutionalization of processes (see *https://www.acq.osd.mil/cmmc/index.html*).

(b) This subpart does not abrogate any other requirements regarding contractor physical, personnel, information, technical, or general administrative security operations governing the protection of unclassified information,

nor does it affect requirements of the National Industrial Security Program.

204.7501 Policy.

(a) The contracting officer shall include in the solicitation the required CMMC level, if provided by the requiring activity. Contracting officers shall not award a contract, task order, or delivery order to an offeror that does not have a current (*i.e.,* not more than 3 years old) CMMC certificate at the level required by the solicitation.

(b) Contractors are required to achieve, at time of award, a CMMC certificate at the level specified in the solicitation. Contractors are required to maintain a current (*i.e.,* not more than 3 years old) CMMC certificate at the specified level, if required by the statement of work or requirement document, throughout the life of the contract, task order, or delivery order. Contracting officers shall not exercise an option period or extend the period of performance on a contract, task order, or delivery order, unless the contract has a current (*i.e.,* not more than 3 years old) CMMC certificate at the level required by the contract, task order, or delivery order.

(c) The CMMC Assessments shall not duplicate efforts from any other comparable DoD assessment, except for rare circumstances when a re-assessment may be necessary such as, but not limited to when there are indications of issues with cybersecurity and/or compliance with CMMC requirements.

204.7502 Procedures.

(a) When a requiring activity identifies a requirement for a contract, task order, or delivery order to include a specific CMMC level, the contracting officer shall not—

(1) Award to an offeror that does not have a CMMC certificate at the level required by the solicitation; or

(2) Exercise an option or extend any period of performance on a contract, task order, or delivery order unless the contractor has a CMMC certificate at the level required by the contract.

(b) Contracting officers shall use Supplier Performance Risk System (SPRS) (*https://www.sprs.csd.disa.mil/*) to verify an offeror or contractor's CMMC level.

204.7503 Contract clause.

Use the clause at 252.204–7021, Cybersecurity Maturity Model Certification Requirements, as follows:

(a) Until September 30, 2025, in solicitations and contracts or task orders or delivery orders, including those using FAR part 12 procedures for the acquisition of commercial items, except for solicitations and contracts or orders solely for the acquisition of commercially available off-the-shelf (COTS) items, if the requirement document or statement of work requires a contractor to have a specific CMMC level. In order to implement a phased rollout of CMMC, inclusion of a CMMC requirement in a solicitation during this time period must be approved by OUSD(A&S).

(b) On or after October 1, 2025, in all solicitations and contracts or task orders or delivery orders, including those using FAR part 12 procedures for the acquisition of commercial items, except for solicitations and contracts or orders solely for the acquisition of COTS items.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 6. Amend section 212.301, by adding paragraphs (f)(ii)(K), (L), and (M) to read as follows:

212.301 Solicitation provisions and contract clauses for acquisition of commercial items.

* * * * *

(f) * * *

(ii) * * *

(K) Use the provision at 252.204–7019, Notice of NIST SP 800–171 DoD Assessment Requirements, as prescribed in 204.7304(d).

(L) Use the clause at 252.204–7020, NIST SP 800–171 DoD Assessment Requirements, as prescribed in 204.7304(e).

(M) Use the clause at 252.204–7021, Cybersecurity Maturity Model Certification Requirements, as prescribed in 204.7503(a) and (b).

* * * * *

PART 217—SPECIAL CONTRACTING METHODS

■ 7. Amend section 217.207 by revising paragraph (c) to read as follows:

217.207 Exercise of options.

(c) In addition to the requirements at FAR 17.207(c), exercise an option only after:

(1) Determining that the contractor's record in the System for Award Management database is active and the contractor's Data Universal Numbering System (DUNS) number, Commercial and Government Entity (CAGE) code, name, and physical address are accurately reflected in the contract document. See PGI 217.207 for the requirement to perform cost or price analysis of spare parts prior to exercising any option for firm-fixed-price contracts containing spare parts.

(2) Verifying in the Supplier Performance Risk System (SPRS) (*https://www.sprs.csd.disa.mil/*) that—

(i) The summary level score of a current NIST SP 800–171 DoD Assessment (*i.e.,* not more than 3 years old, unless a lesser time is specified in the solicitation) for each covered contractor information system that is relevant to an offer, contract, task order, or delivery order are posted (see 204.7303).

(ii) The contractor has a CMMC certificate at the level required by the contract, and that it is current (*i.e.,* not more than 3 years old) (see 204.7502).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Add sections 252.204–7019, 252.204–7020, and 252.204–7021 to read as follows:

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* * * * *

252.204–7019 Notice of NIST SP 800–171 DoD Assessment Requirements.

252.204–7020 NIST SP 800–171 DoD Assessment Requirements.

252.204–7021 Contractor Compliance with the Cybersecurity Maturity Model Certification Level Requirement.

* * * * *

252.204–7019 Notice of NIST SP 800–171 DoD Assessment Requirements.

As prescribed in 204.7304(d), use the following provision:

NOTICE OF NIST SP 800–171 DOD ASSESSMENT REQUIREMENTS (NOV 2020)

(a) *Definitions.*

Basic Assessment, Medium Assessment, and *High Assessment* have the meaning given in the clause 252.204–7020, NIST SP 800–171 DoD Assessments.

Covered contractor information system has the meaning given in the clause 252.204–7012, Safeguarding Covered Defense Information and Cyber Incident Reporting, of this solicitation.

(b) *Requirement.* In order to be considered for award, if the Offeror is required to implement NIST SP 800–171, the Offeror shall have a current assessment (*i.e.,* not more than 3 years old unless a lesser time is specified in the solicitation) (see 252.204–7020) for each covered contractor information system that is relevant to the offer, contract, task order, or delivery order. The Basic, Medium, and High NIST SP 800–171 DoD Assessments are described in the NIST SP 800–171 DoD Assessment Methodology located at *https://www.acq.osd.mil/dpap/pdi/cyber/strategically_assessing_contractor_implementation_of_NIST_SP_800-171.html.*

(c) *Procedures.* (1) The Offeror shall verify that summary level scores of a current NIST SP 800–171 DoD Assessment (*i.e.,* not more than 3 years old unless a lesser time is

specified in the solicitation) are posted in the Supplier Performance Risk System (SPRS) (*https://www.sprs.csd.disa.mil/*) for all covered contractor information systems relevant to the offer.

(2) If the Offeror does not have summary level scores of a current NIST SP 800–171 DoD Assessment (*i.e.,* not more than 3 years old unless a lesser time is specified in the solicitation) posted in SPRS, the Offeror may conduct and submit a Basic Assessment to *webptsmh@navy.mil* for posting to SPRS in the format identified in paragraph (d) of this provision.

(d) *Summary level scores.* Summary level scores for all assessments will be posted 30 days post-assessment in SPRS to provide DoD Components visibility into the summary level scores of strategic assessments.

(1) *Basic Assessments.* An Offeror may follow the procedures in paragraph (c)(2) of this provision for posting Basic Assessments to SPRS.

(i) The email shall include the following information:

(A) Cybersecurity standard assessed (*e.g.,* NIST SP 800–171 Rev 1).

(B) Organization conducting the assessment (*e.g.,* Contractor self-assessment).

(C) For each system security plan (security requirement 3.12.4) supporting the performance of a DoD contract—

(*1*) All industry Commercial and Government Entity (CAGE) code(s) associated with the information system(s) addressed by the system security plan; and

(*2*) A brief description of the system security plan architecture, if more than one plan exists.

(D) Date the assessment was completed.

(E) Summary level score (*e.g.,* 95 out of 110, NOT the individual value for each requirement).

(F) Date that all requirements are expected to be implemented (*i.e.,* a score of 110 is expected to be achieved) based on information gathered from associated plan(s) of action developed in accordance with NIST SP 800–171.

(ii) If multiple system security plans are addressed in the email described at paragraph (d)(1)(i) of this section, the Offeror shall use the following format for the report:

System security plan	CAGE codes supported by this plan	Brief description of the plan architecture	Date of assessment	Total score	Date score of 110 will achieved

(2) *Medium and High Assessments.* DoD will post the following Medium and/or High Assessment summary level scores to SPRS for each system assessed:

(i) The standard assessed (*e.g.,* NIST SP 800–171 Rev 1).

(ii) Organization conducting the assessment, *e.g.,* DCMA, or a specific organization (identified by Department of Defense Activity Address Code (DoDAAC)).

(iii) All industry CAGE code(s) associated with the information system(s) addressed by the system security plan.

(iv) A brief description of the system security plan architecture, if more than one system security plan exists.

(v) Date and level of the assessment, *i.e.,* medium or high.

(vi) Summary level score (*e.g.,* 105 out of 110, not the individual value assigned for each requirement).

(vii) Date that all requirements are expected to be implemented (*i.e.,* a score of 110 is expected to be achieved) based on information gathered from associated plan(s) of action developed in accordance with NIST SP 800–171.

(3) *Accessibility.* (i) Assessment summary level scores posted in SPRS are available to DoD personnel, and are protected, in accordance with the standards set forth in DoD Instruction 5000.79, Defense-wide Sharing and Use of Supplier and Product Performance Information (PI).

(ii) Authorized representatives of the Offeror for which the assessment was conducted may access SPRS to view their own summary level scores, in accordance with the SPRS Software User's Guide for Awardees/Contractors available at *https://www.sprs.csd.disa.mil/pdf/SPRS_Awardee.pdf.*

(iii) A High NIST SP 800–171 DoD Assessment may result in documentation in addition to that listed in this section. DoD will retain and protect any such documentation as ''Controlled Unclassified Information (CUI)'' and intended for internal DoD use only. The information will be protected against unauthorized use and release, including through the exercise of applicable exemptions under the Freedom of Information Act (*e.g.,* Exemption 4 covers trade secrets and commercial or financial information obtained from a contractor that is privileged or confidential).

(End of provision)

252.204–7020 NIST SP 800–171 DoD Assessment Requirements.

As prescribed in 204.7304(e), use the following clause:

NIST SP 800–171 DOD ASSESSMENT REQUIREMENTS (NOV 2020)

(a) *Definitions.*

Basic Assessment means a contractor's self-assessment of the contractor's implementation of NIST SP 800–171 that—

(1) Is based on the Contractor's review of their system security plan(s) associated with covered contractor information system(s);

(2) Is conducted in accordance with the NIST SP 800–171 DoD Assessment Methodology; and

(3) Results in a confidence level of ''Low'' in the resulting score, because it is a self-generated score.

Covered contractor information system has the meaning given in the clause 252.204–7012, Safeguarding Covered Defense Information and Cyber Incident Reporting, of this contract.

High Assessment means an assessment that is conducted by Government personnel using NIST SP 800–171A, Assessing Security Requirements for Controlled Unclassified Information that—

(1) Consists of—

(i) A review of a contractor's Basic Assessment;

(ii) A thorough document review;

(iii) Verification, examination, and demonstration of a Contractor's system security plan to validate that NIST SP 800–171 security requirements have been implemented as described in the contractor's system security plan; and

(iv) Discussions with the contractor to obtain additional information or clarification, as needed; and

(2) Results in a confidence level of ''High'' in the resulting score.

Medium Assessment means an assessment conducted by the Government that—

(1) Consists of—

(i) A review of a contractor's Basic Assessment;

(ii) A thorough document review; and

(iii) Discussions with the contractor to obtain additional information or clarification, as needed; and

(2) Results in a confidence level of ''Medium'' in the resulting score.

(b) *Applicability.* This clause applies to covered contractor information systems that are required to comply with the National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171, in accordance with Defense Federal Acquisition Regulation System (DFARS) clause at 252.204–7012, Safeguarding Covered Defense Information and Cyber Incident Reporting, of this contract.

(c) *Requirements.* The Contractor shall provide access to its facilities, systems, and personnel necessary for the Government to conduct a Medium or High NIST SP 800–171 DoD Assessment, as described in NIST SP 800–171 DoD Assessment Methodology at *https://www.acq.osd.mil/dpap/pdi/cyber/strategically_assessing_contractor_implementation_of_NIST_SP_800-171.html,* if necessary.

(d) *Procedures.* Summary level scores for all assessments will be posted in the Supplier Performance Risk System (SPRS) (*https://www.sprs.csd.disa.mil/*) to provide DoD

Components visibility into the summary level scores of strategic assessments.

(1) *Basic Assessments.* A contractor may submit, via encrypted email, summary level scores of Basic Assessments conducted in accordance with the NIST SP 800–171 DoD Assessment Methodology to *webptsmh@navy.mil* for posting to SPRS.

(i) The email shall include the following information:

(A) Version of NIST SP 800–171 against which the assessment was conducted.

(B) Organization conducting the assessment (*e.g.,* Contractor self-assessment).

(C) For each system security plan (security requirement 3.12.4) supporting the performance of a DoD contract—

(*1*) All industry Commercial and Government Entity (CAGE) code(s) associated with the information system(s) addressed by the system security plan; and

(*2*) A brief description of the system security plan architecture, if more than one plan exists.

(D) Date the assessment was completed.

(E) Summary level score (*e.g.,* 95 out of 110, NOT the individual value for each requirement).

(F) Date that all requirements are expected to be implemented (*i.e.,* a score of 110 is expected to be achieved) based on information gathered from associated plan(s) of action developed in accordance with NIST SP 800–171.

(ii) If multiple system security plans are addressed in the email described at paragraph (b)(1)(i) of this section, the Contractor shall use the following format for the report:

System security plan	CAGE codes supported by this plan	Brief description of the plan architecture	Date of assessment	Total score	Date score of 110 will achieved

(2) *Medium and High Assessments.* DoD will post the following Medium and/or High Assessment summary level scores to SPRS for each system security plan assessed:

(i) The standard assessed (*e.g.,* NIST SP 800–171 Rev 1).

(ii) Organization conducting the assessment, *e.g.,* DCMA, or a specific organization (identified by Department of Defense Activity Address Code (DoDAAC)).

(iii) All industry CAGE code(s) associated with the information system(s) addressed by the system security plan.

(iv) A brief description of the system security plan architecture, if more than one system security plan exists.

(v) Date and level of the assessment, *i.e.,* medium or high.

(vi) Summary level score (*e.g.,* 105 out of 110, not the individual value assigned for each requirement).

(vii) Date that all requirements are expected to be implemented (*i.e.,* a score of 110 is expected to be achieved) based on information gathered from associated plan(s) of action developed in accordance with NIST SP 800–171.

(e) *Rebuttals.* (1) DoD will provide Medium and High Assessment summary level scores to the Contractor and offer the opportunity for rebuttal and adjudication of assessment summary level scores prior to posting the summary level scores to SPRS (see SPRS User's Guide *https://www.sprs.csd.disa.mil/pdf/SPRS_Awardee.pdf*).

(2) Upon completion of each assessment, the contractor has 14 business days to provide additional information to demonstrate that they meet any security requirements not observed by the assessment team or to rebut the findings that may be of question.

(f) *Accessibility.* (1) Assessment summary level scores posted in SPRS are available to DoD personnel, and are protected, in accordance with the standards set forth in DoD Instruction 5000.79, Defense-wide Sharing and Use of Supplier and Product Performance Information (PI).

(2) Authorized representatives of the Contractor for which the assessment was conducted may access SPRS to view their own summary level scores, in accordance with the SPRS Software User's Guide for Awardees/Contractors available at *https://www.sprs.csd.disa.mil/pdf/SPRS_Awardee.pdf.*

(3) A High NIST SP 800–171 DoD Assessment may result in documentation in addition to that listed in this clause. DoD will retain and protect any such documentation as ''Controlled Unclassified Information (CUI)'' and intended for internal DoD use only. The information will be protected against unauthorized use and release, including through the exercise of applicable exemptions under the Freedom of Information Act (*e.g.,* Exemption 4 covers trade secrets and commercial or financial information obtained from a contractor that is privileged or confidential).

(g) *Subcontracts.* (1) The Contractor shall insert the substance of this clause, including this paragraph (g), in all subcontracts and other contractual instruments, including subcontracts for the acquisition of commercial items (excluding COTS items).

(2) The Contractor shall not award a subcontract or other contractual instrument, that is subject to the implementation of NIST SP 800–171 security requirements, in accordance with DFARS clause 252.204–7012 of this contract, unless the subcontractor has completed, within the last 3 years, at least a Basic NIST SP 800–171 DoD Assessment, as described in *https://www.acq.osd.mil/dpap/pdi/cyber/strategically_assessing_contractor_implementation_of_NIST_SP_800-171.html,* for all covered contractor information systems relevant to its offer that are not part of an information technology service or system operated on behalf of the Government.

(3) If a subcontractor does not have summary level scores of a current NIST SP 800–171 DoD Assessment (*i.e.,* not more than 3 years old unless a lesser time is specified in the solicitation) posted in SPRS, the subcontractor may conduct and submit a Basic Assessment, in accordance with the NIST SP 800–171 DoD Assessment Methodology, to *webptsmh@navy.mil* for posting to SPRS along with the information required by paragraph (d) of this clause.

(End of clause)

252.204–7021 Contractor Compliance with the Cybersecurity Maturity Model Certification Level Requirement.

As prescribed in 204.7503(a) and (b), insert the following clause:

CONTRACTOR COMPLIANCE WITH THE CYBERSECURITY MATURITY MODEL CERTIFICATION LEVEL REQUIREMENT (NOV 2020)

(a) *Scope.* The Cybersecurity Maturity Model Certification (CMMC) CMMC is a framework that measures a contractor's cybersecurity maturity to include the implementation of cybersecurity practices and institutionalization of processes (see *https://www.acq.osd.mil/cmmc/index.html*).

(b) *Requirements.* The Contractor shall have a current (*i.e.* not older than 3 years) CMMC certificate at the CMMC level required by this contract and maintain the CMMC certificate at the required level for the duration of the contract.

(c) *Subcontracts.* The Contractor shall—

(1) Insert the substance of this clause, including this paragraph (c), in all subcontracts and other contractual instruments, including subcontracts for the acquisition of commercial items, excluding commercially available off-the-shelf items; and

(2) Prior to awarding to a subcontractor, ensure that the subcontractor has a current (*i.e.,* not older than 3 years) CMMC certificate at the CMMC level that is appropriate for the information that is being flowed down to the subcontractor.

(End of clause)

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Federal Register
Vol. 85, No. 188
Monday, September 28, 2020

Presidential Documents

Title 3—

The President

Executive Order 13950 of September 22, 2020

Combating Race and Sex Stereotyping

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to promote economy and efficiency in Federal contracting, to promote unity in the Federal workforce, and to combat offensive and anti-American race and sex stereotyping and scapegoating, it is hereby ordered as follows:

Section 1. *Purpose*. From the battlefield of Gettysburg to the bus boycott in Montgomery and the Selma-to-Montgomery marches, heroic Americans have valiantly risked their lives to ensure that their children would grow up in a Nation living out its creed, expressed in the Declaration of Independence: ''We hold these truths to be self-evident, that all men are created equal.'' It was this belief in the inherent equality of every individual that inspired the Founding generation to risk their lives, their fortunes, and their sacred honor to establish a new Nation, unique among the countries of the world. President Abraham Lincoln understood that this belief is ''the electric cord'' that ''links the hearts of patriotic and liberty-loving'' people, no matter their race or country of origin. It is the belief that inspired the heroic black soldiers of the 54th Massachusetts Infantry Regiment to defend that same Union at great cost in the Civil War. And it is what inspired Dr. Martin Luther King, Jr., to dream that his children would one day ''not be judged by the color of their skin but by the content of their character.''

Thanks to the courage and sacrifice of our forebears, America has made significant progress toward realization of our national creed, particularly in the 57 years since Dr. King shared his dream with the country.

Today, however, many people are pushing a different vision of America that is grounded in hierarchies based on collective social and political identities rather than in the inherent and equal dignity of every person as an individual. This ideology is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans.

This destructive ideology is grounded in misrepresentations of our country's history and its role in the world. Although presented as new and revolutionary, they resurrect the discredited notions of the nineteenth century's apologists for slavery who, like President Lincoln's rival Stephen A. Douglas, maintained that our government ''was made on the white basis'' ''by white men, for the benefit of white men.'' Our Founding documents rejected these racialized views of America, which were soundly defeated on the blood-stained battlefields of the Civil War. Yet they are now being repackaged and sold as cutting-edge insights. They are designed to divide us and to prevent us from uniting as one people in pursuit of one common destiny for our great country.

Unfortunately, this malign ideology is now migrating from the fringes of American society and threatens to infect core institutions of our country. Instructors and materials teaching that men and members of certain races, as well as our most venerable institutions, are inherently sexist and racist are appearing in workplace diversity trainings across the country, even in

components of the Federal Government and among Federal contractors. For example, the Department of the Treasury recently held a seminar that promoted arguments that ''virtually all White people, regardless of how 'woke' they are, contribute to racism,'' and that instructed small group leaders to encourage employees to avoid ''narratives'' that Americans should ''be more color-blind'' or ''let people's skills and personalities be what differentiates them.''

Training materials from Argonne National Laboratories, a Federal entity, stated that racism ''is interwoven into every fabric of America'' and described statements like ''color blindness'' and the ''meritocracy'' as ''actions of bias.''

Materials from Sandia National Laboratories, also a Federal entity, for non-minority males stated that an emphasis on ''rationality over emotionality'' was a characteristic of ''white male[s],'' and asked those present to ''acknowledge'' their ''privilege'' to each other.

A Smithsonian Institution museum graphic recently claimed that concepts like ''[o]bjective, rational linear thinking,'' ''[h]ard work'' being ''the key to success,'' the ''nuclear family,'' and belief in a single god are not values that unite Americans of all races but are instead ''aspects and assumptions of whiteness.'' The museum also stated that ''[f]acing your whiteness is hard and can result in feelings of guilt, sadness, confusion, defensiveness, or fear.''

All of this is contrary to the fundamental premises underpinning our Republic: that all individuals are created equal and should be allowed an equal opportunity under the law to pursue happiness and prosper based on individual merit.

Executive departments and agencies (agencies), our Uniformed Services, Federal contractors, and Federal grant recipients should, of course, continue to foster environments devoid of hostility grounded in race, sex, and other federally protected characteristics. Training employees to create an inclusive workplace is appropriate and beneficial. The Federal Government is, and must always be, committed to the fair and equal treatment of all individuals before the law.

But training like that discussed above perpetuates racial stereotypes and division and can use subtle coercive pressure to ensure conformity of viewpoint. Such ideas may be fashionable in the academy, but they have no place in programs and activities supported by Federal taxpayer dollars. Research also suggests that blame-focused diversity training reinforces biases and decreases opportunities for minorities.

Our Federal civil service system is based on merit principles. These principles, codified at 5 U.S.C. 2301, call for all employees to ''receive fair and equitable treatment in all aspects of personnel management without regard to'' race or sex ''and with proper regard for their . . . constitutional rights.'' Instructing Federal employees that treating individuals on the basis of individual merit is racist or sexist directly undermines our Merit System Principles and impairs the efficiency of the Federal service. Similarly, our Uniformed Services should not teach our heroic men and women in uniform the lie that the country for which they are willing to die is fundamentally racist. Such teachings could directly threaten the cohesion and effectiveness of our Uniformed Services.

Such activities also promote division and inefficiency when carried out by Federal contractors. The Federal Government has long prohibited Federal contractors from engaging in race or sex discrimination and required contractors to take affirmative action to ensure that such discrimination does not occur. The participation of contractors' employees in training that promotes race or sex stereotyping or scapegoating similarly undermines efficiency in Federal contracting. Such requirements promote divisiveness in the workplace and distract from the pursuit of excellence and collaborative achievements in public administration.

Therefore, it shall be the policy of the United States not to promote race or sex stereotyping or scapegoating in the Federal workforce or in the Uniformed Services, and not to allow grant funds to be used for these purposes. In addition, Federal contractors will not be permitted to inculcate such views in their employees.

Sec. 2. *Definitions*. For the purposes of this order, the phrase:

(a) ''Divisive concepts'' means the concepts that (1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term ''divisive concepts'' also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.

(b) ''Race or sex stereotyping'' means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.

(c) ''Race or sex scapegoating'' means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.

(d) ''Senior political appointee'' means an individual appointed by the President, or a non-career member of the Senior Executive Service (or agency-equivalent system).

Sec. 3. *Requirements for the United States Uniformed Services*. The United States Uniformed Services, including the United States Armed Forces, shall not teach, instruct, or train any member of the United States Uniformed Services, whether serving on active duty, serving on reserve duty, attending a military service academy, or attending courses conducted by a military department pursuant to a Reserve Officer Corps Training program, to believe any of the divisive concepts set forth in section 2(a) of this order. No member of the United States Uniformed Services shall face any penalty or discrimination on account of his or her refusal to support, believe, endorse, embrace, confess, act upon, or otherwise assent to these concepts.

Sec. 4. *Requirements for Government Contractors*. (a) Except in contracts exempted in the manner provided by section 204 of Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity), as amended, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

''During the performance of this contract, the contractor agrees as follows:

1. The contractor shall not use any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating, including the concepts that (a) one race or sex is inherently superior to another race or sex; (b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (c) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (d) members of one race or sex cannot and should not attempt

to treat others without respect to race or sex; (e) an individual's moral character is necessarily determined by his or her race or sex; (f) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (h) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term ''race or sex stereotyping'' means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex, and the term ''race or sex scapegoating'' means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex.

2. The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under the Executive Order of September 22, 2020, entitled Combating Race and Sex Stereotyping, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

3. In the event of the contractor's noncompliance with the requirements of paragraphs (1), (2), and (4), or with any rules, regulations, or orders that may be promulgated in accordance with the Executive Order of September 22, 2020, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246, and such other sanctions may be imposed and remedies invoked as provided by any rules, regulations, or orders the Secretary of Labor has issued or adopted pursuant to Executive Order 11246, including subpart D of that order.

4. The contractor will include the provisions of paragraphs (1) through (4) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.''

(b) The Department of Labor is directed, through the Office of Federal Contract Compliance Programs (OFCCP), to establish a hotline and investigate complaints received under both this order as well as Executive Order 11246 alleging that a Federal contractor is utilizing such training programs in violation of the contractor's obligations under those orders. The Department shall take appropriate enforcement action and provide remedial relief, as appropriate.

(c) Within 30 days of the date of this order, the Director of OFCCP shall publish in the *Federal Register* a request for information seeking information from Federal contractors, Federal subcontractors, and employees of Federal contractors and subcontractors regarding the training, workshops, or similar programming provided to employees. The request for information should request copies of any training, workshop, or similar programing having to do with diversity and inclusion as well as information about the duration, frequency, and expense of such activities.

Sec. 5. *Requirements for Federal Grants*. The heads of all agencies shall review their respective grant programs and identify programs for which the agency may, as a condition of receiving such a grant, require the recipient to certify that it will not use Federal funds to promote the concepts that

(a) one race or sex is inherently superior to another race or sex; (b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (c) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (d) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (e) an individual's moral character is necessarily determined by his or her race or sex; (f) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (h) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. Within 60 days of the date of this order, the heads of agencies shall each submit a report to the Director of the Office of Management and Budget (OMB) that lists all grant programs so identified.

Sec. 6. *Requirements for Agencies*. (a) The fair and equal treatment of individuals is an inviolable principle that must be maintained in the Federal workplace. Agencies should continue all training that will foster a workplace that is respectful of all employees. Accordingly:

(i) The head of each agency shall use his or her authority under 5 U.S.C. 301, 302, and 4103 to ensure that the agency, agency employees while on duty status, and any contractors hired by the agency to provide training, workshops, forums, or similar programming (for purposes of this section, ''training'') to agency employees do not teach, advocate, act upon, or promote in any training to agency employees any of the divisive concepts listed in section 2(a) of this order. Agencies may consult with the Office of Personnel Management (OPM), pursuant to 5 U.S.C. 4116, in carrying out this provision; and

(ii) Agency diversity and inclusion efforts shall, first and foremost, encourage agency employees not to judge each other by their color, race, ethnicity, sex, or any other characteristic protected by Federal law.

(b) The Director of OPM shall propose regulations providing that agency officials with supervisory authority over a supervisor or an employee with responsibility for promoting diversity and inclusion, if such supervisor or employee either authorizes or approves training that promotes the divisive concepts set forth in section 2(a) of this order, shall take appropriate steps to pursue a performance-based adverse action proceeding against such supervisor or employee under chapter 43 or 75 of title 5, United States Code.

(c) Each agency head shall:

(i) issue an order incorporating the requirements of this order into agency operations, including by making compliance with this order a provision in all agency contracts for diversity training;

(ii) request that the agency inspector general thoroughly review and assess by the end of the calendar year, and not less than annually thereafter, agency compliance with the requirements of this order in the form of a report submitted to OMB; and

(iii) assign at least one senior political appointee responsibility for ensuring compliance with the requirements of this order.

Sec. 7. *OMB and OPM Review of Agency Training*. (a) Consistent with OPM's authority under 5 U.S.C. 4115–4118, all training programs for agency employees relating to diversity or inclusion shall, before being used, be reviewed by OPM for compliance with the requirements of section 6 of this order.

(b) If a contractor provides a training for agency employees relating to diversity or inclusion that teaches, advocates, or promotes the divisive concepts set forth in section 2(a) of this order, and such action is in violation of the applicable contract, the agency that contracted for such training shall evaluate whether to pursue debarment of that contractor, consistent with

applicable law and regulations, and in consultation with the Interagency Suspension and Debarment Committee.

(c) Within 90 days of the date of this order, each agency shall report to OMB all spending in Fiscal Year 2020 on Federal employee training programs relating to diversity or inclusion, whether conducted internally or by contractors. Such report shall, in addition to providing aggregate totals, delineate awards to each individual contractor.

(d) The Directors of OMB and OPM may jointly issue guidance and directives pertaining to agency obligations under, and ensuring compliance with, this order.

Sec. 8. *Title VII Guidance*. The Attorney General should continue to assess the extent to which workplace training that teaches the divisive concepts set forth in section 2(a) of this order may contribute to a hostile work environment and give rise to potential liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. If appropriate, the Attorney General and the Equal Employment Opportunity Commission shall issue publicly available guidance to assist employers in better promoting diversity and inclusive workplaces consistent with Title VII.

Sec. 9. *Effective Date*. This order is effective immediately, except that the requirements of section 4 of this order shall apply to contracts entered into 60 days after the date of this order.

Sec. 10. *General Provisions*. (a) This order does not prevent agencies, the United States Uniformed Services, or contractors from promoting racial, cultural, or ethnic diversity or inclusiveness, provided such efforts are consistent with the requirements of this order.

(b) Nothing in this order shall be construed to prohibit discussing, as part of a larger course of academic instruction, the divisive concepts listed in section 2(a) of this order in an objective manner and without endorsement.

(c) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its provisions to any other persons or circumstances shall not be affected thereby.

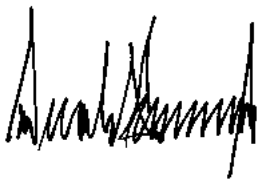
(d) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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



THE WHITE HOUSE,
September 22, 2020.

[FR Doc. 2020–21534
Filed 9–25–20; 8:45 am]
Billing code 3295–F0–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2020–0051, Sequence No. 5]

Federal Acquisition Regulation; Federal Acquisition Circular 2020–09; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of an interim rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2020–09. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC.

DATES: For effective date see the separate document, which follows.

FOR FURTHER INFORMATION CONTACT: *Farpolicy@gsa.gov* or call 202–969–4075. Please cite FAC 2020–09, FAR case 2019–009.

RULE LISTED IN FAC 2020–09

Subject	FAR case
Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment	2019–009

ADDRESSES: The FAC, including the SECG, is available via the internet at *https://www.regulations.gov.*

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR case, refer to the specific subject set forth in the document following this summary. FAC 2020–09 amends the FAR as follows:

Prohibition on Contracting With Entities Using Certain Telecommunications and Video Surveillance Services or Equipment (FAR Case 2019–009)

This second interim rule amends the Federal Acquisition Regulation to implement section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). The first interim rule was published July 14, 2020.

This rule reduces the information collection burden imposed on the public by making updates to the System for Award Management (SAM) to allow an offeror to represent annually, after conducting a reasonable inquiry, whether it uses covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services. The burden to the public is reduced by allowing an offeror that responds ''does not'' in the annual representation at 52.204–26, Covered Telecommunications Equipment or Services—Representation, or in paragraph (v)(2)(ii) of 52.212–3, Offeror Representations and Certifications—Commercial Items, to skip the offer-by-offer representation for paragraph (d)(2) within the provision at 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment. The provision at 52.204–26 requires that offerors review SAM prior to completing their required representations.

This rule applies to all acquisitions, including acquisitions at or below the simplified acquisition threshold and to acquisitions of commercial items, including commercially available off-the-shelf items. It may have a significant economic impact on a substantial number of small entities.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Federal Acquisition Circular (FAC) 2020–09 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2020–09 is effective August 27, 2020 except for FAR Case 2019–009, which is effective October 26, 2020.

Kim Herrington,

Acting Principal Director, Defense Pricing and Contracting, Department of Defense.

Jeffrey A. Koses,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

William G. Roets, II,

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4 and 52

[FAC 2020–09; FAR Case 2019–009; Docket No. FAR–2019–0009, Sequence No. 2]

RIN 9000–AN92

Federal Acquisition Regulation: Prohibition on Contracting With Entities Using Certain Telecommunications and Video Surveillance Services or Equipment

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing a second interim rule amending the Federal Acquisition Regulation (FAR) to require an offeror to represent annually, after conducting a reasonable inquiry, whether it uses covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services. The new annual representation in the provision implements a section of the John S. McCain National Defense Authorization Act for Fiscal Year 2019.

DATES: *Effective:* October 26, 2020.

Applicability: Contracting officers shall include the provision at FAR 52.204–26, Covered Telecommunications Equipment or Services-Representation—

- In solicitations issued on or after the effective date; and
- In solicitations issued before the effective date, provided award of the resulting contract(s) occurs on or after the effective date.

Comment date: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before October 26, 2020 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2019–009 via the Federal eRulemaking portal at *Regulations.gov* by searching for ''FAR Case 2019–009''. Select the link ''Comment Now'' that corresponds with FAR Case 2019–009. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2019–009'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite ''FAR Case 2019–009'' in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting.

All filers using the portal should use the name of the person or entity submitting comments as the name of their files, in accordance with the instructions below. Anyone submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referencing the specific legal authority claimed, and provide a non-confidential version of the submission.

Any business confidential information should be in an uploaded file that has a file name beginning with the characters ''BC.'' Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page. The corresponding non-confidential version of those comments must be clearly marked ''PUBLIC.'' The file name of the non-confidential version should begin with the character ''P.'' The ''BC'' and ''P'' should be followed by the name of the person or entity submitting the comments or rebuttal comments. All filers should name their files using the name of the person or entity submitting the comments. Any submissions with file names that do not begin with a ''BC'' or ''P'' will be assumed to be public and will be made publicly available through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: *Farpolicy@gsa.gov* or call 202–969–4075. Please cite FAR Case 2019–009.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Acquisition Regulations System codifies and publishes uniform policies and procedures for acquisitions by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations, which implement or supplement the FAR.

In order to combat the national security and intellectual property threats that face the United States, section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232) prohibits executive agencies from entering into, or extending or renewing, a contract with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. The statute goes into effect August 13, 2020.

''Covered telecommunications equipment or services,'' as defined in the statute, means—

- Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities);
- For the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);
- Telecommunications or video surveillance services provided by such entities or using such equipment; or
- Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

To implement section 889(a)(1)(B) of the NDAA for FY 2019, DoD, GSA, and NASA published the first interim rule at 85 FR 42665 on July 14, 2020. The first interim rule added a representation to the provision at FAR 52.204–24(d)(2), Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, which required offerors to represent on an offer-by-offer basis if the offeror ''does'' or ''does not'' use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services, and if it does, require the offeror to provide additional disclosures.

This second interim rule further implements section 889(a)(1)(B). It reduces burden on the public by allowing an offeror that represents ''does not'' in a new annual representation at FAR 52.204–26(c)(2), Covered Telecommunications Equipment or Services—Representation, or in paragraph (v)(2)(ii) of FAR 52.212–3, Offeror Representations and Certifications-Commercial Items, to skip the offer-by-offer representation within the provision at FAR 52.204–24(d)(2), Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment. Updates to the System for Award Management (SAM) were necessary to add this new annual representation and require offerors to represent annually, after conducting a reasonable inquiry, whether it uses covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services. These updates to SAM to

reduce the burden of the first interim rule were not available by the effective date of the first interim rule; therefore, these updates are being made in this interim rule.

SAM is used by anyone interested in the business of the Federal Government, including—

- Entities (contractors, Federal assistance recipients, and other potential award recipients) who need to register to do business with the Government, look for opportunities or assistance programs, or report subcontract information;
- Government contracting and grants officials responsible for activities with contracts, grants, past performance reporting and suspension and debarment activities;
- Public users searching for Government business information.

Representations and Certifications are FAR requirements that anyone wishing to apply for Federal contracts must complete. Representations and Certifications require entities to represent or certify to a variety of statements ranging from environmental rules compliance to entity size representation.

Agencies use the SAM entity registration information to verify recipient compliance with requirements. This reduces the duplicative practice of contractors filling out in full all the representations and certifications on an offer-by-offer basis. Instead the representations and certifications may be filled out annually and electronically.

Offerors shall consult SAM to validate whether the equipment or services they are using are from an entity providing equipment or services listed in the definition of ''covered telecommunications equipment or services.'' The offerors will conduct a reasonable inquiry as to whether they use covered telecommunications equipment or services or any equipment, system, or service that uses covered telecommunications equipment or services.

II. Discussion and Analysis

This second interim rule adds an annual representation to the FAR at 52.204–26, Covered Telecommunications Equipment or Services—Representation, paragraph (c)(2), which requires an offeror to represent, after conducting a reasonable inquiry, whether it ''does'' or ''does not'' use covered telecommunications equipment or services, or any equipment, system or service that uses covered telecommunications equipment or services. The commercial item equivalent is at paragraph (v)(2)(ii) of FAR 52.212–3, Offeror Representations and Certifications-Commercial Items. If an offeror represents it ''does not,'' the offer-by-offer representation at FAR 52.204–24(d)(2) is not required. If the offeror represents it ''does,'' or has not made any representation in FAR 52.204–26(c)(2) or 52.212–3(v)(2)(ii), the representation at FAR 52.204–24(d)(2) is required. The FAR 52.204–26 representation is prescribed at FAR 4.2105(c) for use in all solicitations.

The purpose of this change is to limit the requirement to represent at FAR 52.204–24(d)(2) to only offerors that use covered telecommunication equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services.

This interim rule provides procedures at FAR 4.2103 for contracting officers handling offeror representations in the provisions at FAR 52.204–24 and 52.204–26. A contracting officer may generally rely on an offeror's representation in the provisions at FAR 52.204–24 and 52.204–26 that the offeror does not use any covered telecommunication equipment or services, or use any equipment, system or service that uses covered telecommunications equipment or services, unless the contracting officer has a reason to question the representation. In such cases the contracting officer shall follow agency procedures (*e.g.,* consult the requiring activity and legal counsel).

III. Regulatory Impact Analysis Pursuant to Executive Orders 12866 and 13563

The costs and transfer impacts of section 889(a)(1)(B) are discussed in the analysis below. This analysis was developed by the FAR Council in consultation with agency procurement officials and the Office of Management and Budget (OMB). We request public comment on the costs, benefits, and transfers generated by this rule.

A. Benefits

This rule provides significant national security benefits to the general public. According to the White House article ''A New National Security Strategy for a New Era'', the four pillars of the National Security Strategy (NSS) are to protect the homeland, promote American prosperity, preserve peace through strength, and advance American influence.[1] The purpose of this rule is to align with the NSS pillar to protect the homeland, by protecting the homeland from the impact of Federal contractors using covered telecommunications equipment or services that present a national security concern.

The United States faces an expanding array of foreign intelligence threats by adversaries who are using increasingly sophisticated methods to harm the Nation.[2] Threats to the United States posed by foreign intelligence entities are becoming more complex and harmful to U.S. interests.[3] Foreign intelligence actors are employing innovative combinations of traditional spying, economic espionage, and supply chain and cyber operations to gain access to critical infrastructure, and steal sensitive information and industrial secrets.[4] The exploitation of key supply chains by foreign adversaries represents a complex and growing threat to strategically important U.S. economic sectors and critical infrastructure.[5] The increasing reliance on foreign-owned or controlled telecommunications equipment, such as hardware or software, and services, as well as the proliferation of networking technologies may create vulnerabilities in our nation's supply chains.[6] The evolving technology landscape is likely to accelerate these trends, threatening the security and economic well-being of the American people.[7]

Since the People's Republic of China possesses advanced cyber capabilities that it actively uses against the United States, a proactive cyber approach is needed to degrade or deny these threats before they reach our nation's networks, including those of the Federal Government and its contractors. China is increasingly asserting itself by stealing U.S. technology and intellectual property in an effort to erode the United States' economic and military superiority.[8] Chinese companies, including the companies identified in this rule, are legally required to cooperate with their intelligence services.[9] China's reputation for

[1] *https://www.whitehouse.gov/articles/new-national-security-strategy-new-era/.*

[2] National Counterintelligence Strategy of the United States of America 2020–2022.

[3] National Counterintelligence Strategy of the United States of America 2020–2022.

[4] National Counterintelligence Strategy of the United States of America 2020–2022.

[5] National Counterintelligence Strategy of the United States of America 2020–2022.

[6] National Counterintelligence Strategy of the United States of America 2020–2022.

[7] National Counterintelligence Strategy of the United States of America 2020–2022.

[8] National Counterintelligence Strategy of the United States of America 2020–2022.

[9] NATO Cooperative Cyber Defense Center of Excellence Report on Huawei, 5G and China as a Security Threat.

persistent industrial espionage and close collaboration between its government and industry in order to amass technological secrets presents additional threats for U.S. Government contractors.[10] Therefore, there is a risk that Government contractors using 5th generation wireless communications (5G) and other telecommunications technology from the companies covered by this rule could introduce a reliance on equipment that may be controlled by the Chinese intelligence services and the military in both peacetime and crisis.[11]

The 2019 Worldwide Threat Assessment of the Intelligence Community [12] highlights additional threats regarding China's cyber espionage against the U.S. Government, corporations, and allies. The U.S.-China Economic and Security Review Commission Staff Annual Reports [13] provide additional details regarding the United States' national security interests in China's extensive engagement in the U.S. telecommunications sector. In addition, the U.S. Senate Select Committee on Intelligence Open Hearing on Worldwide Threats [14] further elaborates on China's approach to gain access to the United States' sensitive technologies and intellectual property. The U.S. House of Representatives Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE [15] further identifies how the risks associated with Huawei's and ZTE's provision of equipment to U.S. critical infrastructure could undermine core U.S. national security interests.

Currently, Government contractors may not consider broad national security interests of the general public when they make decisions. This rule ensures that Government contractors make decisions in accordance with public national security interests, by ensuring that, pursuant to statute, they do not use covered telecommunications equipment or services that present national security concerns. This rule will also assist contractors in mitigating supply chain risks (*e.g.,* potential theft of trade secrets and intellectual property) due to the use of covered telecommunications equipment or services.

B. Risks to Industry of Not Complying With 889

As a strictly contractual matter, an organization's failure to submit an accurate representation to the Government constitutes a breach of contract that can lead to cancellation, termination, and financial consequences.

Therefore, it is important for contractors to develop a compliance plan that will allow them to submit accurate representations to the Government in the course of their offers.

C. Contractor Actions Needed for Compliance

The interim rule published at 85 FR 42665 on July 14, 2020, provides a 6 step process for compliance. This second interim rule updates the requirements for step 1 (regulatory familiarization) and step 5 (representation) by requiring familiarization with the new representation within the provision at 52.204–26 and submitting this new representation.

D. Public Costs and Savings

During the first year after publication of the rule, contractors will need to learn about the new representation in the provision at 52.204–26 and its requirements. The DOD, GSA, and NASA (collectively referred to here as the Signatory Agencies) estimate this cost by multiplying the time required to review the regulations and guidance implementing the rule by the estimated compensation of a general manager.

To estimate the burden to Federal offerors associated with complying with the rule, the percentage of Federal contractors that will be impacted was pulled from Federal databases. According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM. As of September 2019, about 74% of all SAM entities registered for all awards were awarded to entities with the primary NAICS code as small; therefore, it is assumed that out of the 387,967 unique vendors registered in SAM in February 2020, 287,096 entities are unique small entities.

We estimate that this rule will also affect businesses which become Federal contractors in the future. Based on data in SAM for FY16–FY19, the Signatory Agencies anticipate there will be an average of 79,319 [16] new entities registering annually in SAM, of which 74%, 58,696, are anticipated to be small businesses.

1. Time To Review the Rule

Below is a list of compliance activities related to regulatory familiarization that the Signatory Agencies anticipate will occur after issuance of the rule:

Familiarization with paragraph (c)(2) of FAR 52.204–26, Covered Telecommunications Equipment or Services—Representation. The Signatory Agencies assume that it will take all vendors who plan to submit an offer for a Federal award 8 [17] hours to familiarize themselves with the representation at FAR 52.204–26, Covered Telecommunications Equipment or Services—Representation. The Signatory Agencies assume that all entities registered in SAM, or 387,967 [18] entities will complete the representation as it is required in order have a current, accurate, and complete registration in SAM. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$294 million* (= 8 hours × $94.76 [19] per hour × 387,967). Of the 387,967 entities impacted by this part of the rule, it is assumed that 74% [20] or 287,096 entities are unique small entities.

In subsequent years, it is estimated that these costs will be incurred by 79,319 [21] new entrants each year. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$60 million* (= 8 hours × $94.76 per hour × 79,319) per year in subsequent years.

The total cost estimated to review the amendments to the provision and the clause is estimated to be *$294 million* in the first year after publication. In subsequent years, this cost is estimated to be *$60 million* annually. The FAR Council acknowledges that there is substantial uncertainty underlying these estimates.

2. Time To Complete the Representation 52.204–26

For the annual representation at FAR 52.204–26(c)(2), we assume that all entities registered in SAM will fill out the annual representation in order to

[10] NATO Cooperative Cyber Defense Center of Excellence Report on Huawei, 5G and China as a Security Threat.

[11] NATO Cooperative Cyber Defense Center of Excellence Report on Huawei, 5G and China as a Security Threat.

[12] *https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR—SSCI.pdf.*

[13] *https://www.uscc.gov/annual-reports/archives.*

[14] *https://www.intelligence.senate.gov/sites/default/files/hearings/CHRG-115shrg28947.pdf.*

[15] *https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=96.*

[16] This value is based on data on new registrants in *SAM.gov* on average for FY16, FY17, FY18, and FY19.

[17] The 8 hours are an assumption based on historical familiarization hours and subject matter expert judgment.

[18] According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM.

[19] The rate of $94.76 assumes an FY19 GS 13 Step 5 salary (after applying a 100% adjustment for overhead and benefits to the base rate) based on subject matter judgment.

[20] As of September 2019, about 74% of all SAM entities registered for all awards were awarded to entities with the primary NAICS code as small.

[21] This value is based on data on new registrants in *SAM.gov* on average for FY16, FY17, FY18, and FY19.

maintain a current, accurate, and complete registration in SAM. It is assumed it will take 1 [22] hour to complete the annual representation. Therefore, the Signatory Agencies assumed the cost for this portion of the rule to be *$36.8 million* (= 1 hour × $94.76 [23] per hour × 387,967 [24] entities registered in SAM).

In subsequent years, we assume that all entities that register in SAM will continue to complete the representation to ensure their SAM registration is current, accurate, and complete. Therefore, it is assumed that these costs will be incurred by the 387,967 [25] entities in SAM that are required to represent at least annually. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$36.8 million* (= 1 [26] hour × $94.76 per hour × (387,967 entities)) per year in subsequent years.

The FAR Council notes that the annual representation will likely reduce the burden on the public in cases where offerors represent ''does not'' in the annual representation at FAR 52.204–26(c)(2), Covered Telecommunications Equipment or Services—Representation or in paragraph (v)(2)(ii) of FAR 52.212–3, Offeror Representations and Certifications-Commercial Items; offerors can skip the offer-by-offer representation within the provision at FAR 52.204–24(d)(2), Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.

There is no way for the FAR Council to know how many of the annual representations at FAR 52.204–26(c)(2), Covered Telecommunications Equipment or Services—Representation or in paragraph (v)(2)(ii) of FAR 52.212–3, Offeror Representations and Certifications-Commercial Items, will include a response of ''does not'', which would allow offerors to skip the offer-by-offer representation within the provision at FAR 52.204–24(c)(2), Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.

52.204–24

In the first interim rule, this provision was required for 100% of the offers submitted. For this interim rule, the FAR Council assumes that 20% of entities will no longer have to complete the offer-by-offer representation in year 1, this would result in a cost savings of *$2.2 billion* = (3 [27] hours × $94.76 per hour × (20% * 102,792 unique entities × 378 [28] responses per entity).

In subsequent years, it is assumed that more offerors will respond ''does not'' in the annual representation and will be able to skip the offer-by-offer representation, however, the FAR Council lacks data to estimate this. The FAR Council believes that many entities will take advantage of this flexibility in order to reduce costs, and more will take advantage of the flexibility over time. Therefore, in subsequent years we believe that there will be more cost savings generated by having an annual representation. In the first interim rule, the FAR Council estimated 26% of new entrants would need to complete the offer-by-offer representation. We assume that this rule will reduce this fraction by half. This implies that in year 2 and beyond 50% of the burden calculated in the first interim rule ($2.2 billion per year) will be eliminated due to the entities each year responding ''does not'' in the annual representation and skipping the offer-by-offer representations. Therefore, the cost savings is estimated to be *$1.1 billion.*

The total cost savings of the above Public Cost Estimate by adding the annual representation in Year 1 is at least (Savings − Cost: $2,200M − 331M Cost): $1.6 billion.

The total costs of the above Cost Estimate Savings by adding the annual representation in Year 2 is at least (Savings − Cost: $1,100M − $97M): $1,003 million.

The total costs savings estimate per year by adding the annual representation in subsequent years is at least (Savings − Cost $1,100M − $97M): *$1,003 million.*

The following is a summary of the total public cost savings of this rule calculated in perpetuity at a 3 and 7-percent discount rate:

Summary (billions)	Total costs
Present Value (3%)	−$34.3
Annualized Costs (3%)	−1.0
Present Value (7%)	−15.1
Annualized Costs (7%)	−1.1

The FAR Council acknowledges that there is substantial uncertainty underlying these estimates, including elements for which an estimate is unavailable given inadequate information. As more information becomes available, including through comment in response to this notice, the FAR Council will seek to update these estimates which could increase or decrease the estimated net savings.

E. Government Cost and Savings Analysis

The FAR Council anticipates significant impact to the Government as a result of implementation of section 889(a)(1)(B) of the NDAA for FY 2019. This rule seeks to reduce the overall burden.

The primary cost to the Government will be to review the new annual representation (52.204–26(c)(2)) in SAM. However, there are anticipated savings from the reduction in the number of offer-by-offer representations (52.204–24(d)(2)).

52.204–26

For the annual representation at FAR 52.204–26(c)(2), we assume that the Government will need to review the annual representation at 52.204–26(c)(2) when the representation at 52.204–24(d)(2) has not been completed by the offeror. It is estimated 80 percent of offers received will include a completed offer-by-offer representation; therefore, an estimated 20 percent of offers received will rely on the annual representation. The average total number of awards per fiscal year is 38,854,291.[29] The number of offers received for a solicitation that results in an award varies from one to hundreds. A conservative estimate is 3 offers per award. Therefore, the Signatory Agencies estimate the total number of offers the Government receives in a year is 116,562,873. As previously stated, it is estimated that 20 percent of offers received will rely on the annual representation, or 23,312,575 (= 116,562,873*20%). At 5 minutes (.083 hour) per review the total cost for year 1 and all subsequent years is estimated to be $183.4 million (= 38,854,291 × 3 × 20% × .083 × $94.76 [30]).

[22] The hours are an assumption based on subject matter expert judgment.

[23] The rate of $94.76 assumes an FY19 GS 13 Step 5 salary (after applying a 100% adjustment for overhead and benefits to the base rate) based on subject matter judgment.

[24] According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM.

[25] This number assumes that 79,319 both enter and exit as registrants in SAM with the average number of entities registered each year are 387,967.

[26] The hours are an assumption based on subject matter expert judgment.

[27] The hours are an assumption based on subject matter expert judgment for an offer-by-offer representation.

[28] The responses per entity is calculated by dividing the average number of annual awards in FY16–19 by the average number of unique entities awarded a contract (38,854,291 awards/102,792 unique awardees = 378).

[29] Based on FY16–19 FPDS data.

[30] The rate of $95.76 assumes an FY19 GS 13 Step5 salary (after applying a 100% adjustment for

52.204–24

In the first interim rule, this provision was required for 100% of the offers submitted. For this interim rule, the FAR Council assumes that 20% of entities will no longer have to complete the offer-by-offer representation in year 1, this would result in a cost savings of *$2.2 billion* = (20% × 3 [31] hours × $94.76 per hour × 102,792 unique entities × 378 [32] responses per entity) because the Government would have to review less representations for 52.204–24.

In subsequent years, it is assumed that fewer offerors will respond ''does'' in the annual representation and will be required to complete the offer-by-offer representation, however, the FAR Council lacks data to estimate this. The FAR Council believes that many entities will take advantage of this flexibility in order to reduce costs, and more will take advantage of the flexibility over time.

This implies that in year 2 and beyond 50% of the burden calculated in the first interim rule ($2.2 billion per year) will be eliminated due to the entities each year responding ''does not'' in the annual representation and skipping the offer-by-offer representations. Therefore, the cost savings is estimated to be *$1.1 billion.*

The total cost savings of the above Government Cost Estimate by adding the annual representation in Year 1 is at least (Savings − Cost: $2,200M − 183.4M Cost): *$2 billion.*

The total cost savings of the above Government Cost Estimate Savings by adding the annual representation in Year 2 is at least (Savings − Cost: $1,100M − $183.4M): *$0.9 billion.*

The total Government cost savings estimate per year by adding the annual representation in subsequent years is at least (Savings − Cost $1,100M − $183.4M): *$0.9 billion.*

The following is a summary of the estimated Government costs savings calculated in perpetuity at a 3 and 7-percent discount rate:

Summary (billions)	Total costs
Present Value (3%)	−$31.6
Annualized Costs (3%)	−.9
Present Value (7%)	−14.1
Annualized Costs (7%)	−1.0

overhead and benefits to the base rate) based on subject matter judgement.

[31] The hours are an assumption based on subject matter expert judgment for an offer-by-offer representation.

[32] The responses per entity is calculated by dividing the average number of annual awards in FY16–19 by the average number of unique entities awarded a contract (38,854,291 awards/102,792 unique awardees = 378).

F. Analysis of Alternatives

The FAR Council could take no further regulatory action to implement this statute. However, this alternative would not provide the more efficient implementation and enforcement of the important national security measures accomplished by this rule as detailed above in section C. As a result, we reject this alternative.

IV. Specific Questions For Comment

To understand the exact scope of this impact and how this impact could be affected in subsequent rulemaking, DoD, GSA, and NASA welcome input on the following questions regarding anticipated impact on affected parties.

- What additional information or guidance do you view as necessary to effectively comply with this rule?
- What challenges do you anticipate facing in effectively complying with this rule?

V. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

In the first interim rule, the FAR Council determined that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT, commercial item contracts, and contracts for the acquisition of COTS items, from the provision of law. As the second interim rule makes only administrative changes to the process of collecting information, and does not affect the scope of applicability of the prohibition, those determinations remain applicable. This rule adds a representation to the provision at FAR 52.204–26, Covered Telecommunications Equipment or Services—Representation, in order to implement section 889(a)(1)(B) of the NDAA for FY 2019, which prohibits executive agencies from entering into, or extending or renewing, a contract with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system on or after August 13, 2020, unless an exception applies or a waiver has been granted.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to acquisitions at or below the SAT. Section 1905 generally limits the applicability of new laws when agencies are making acquisitions at or below the SAT, but provides that such acquisitions will not be exempt from a provision of law under certain circumstances, including when the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including Commercially Available Off-the-Shelf 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. Section 1906 provides that 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.

Finally, 41 U.S.C. 1907 states that acquisitions of COTS items will be exempt from a provision of law unless certain circumstances apply, including if the Administrator for Federal Procurement Policy makes a written determination and finding that would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law.

C. Determinations

In issuing the first interim rule, the FAR Council determined that it is in the best interest of the Government to apply the rule to contracts at or below the SAT and for the acquisition of commercial items, and the Administrator for Federal Procurement Policy determined that it is in the best interest of the Government to apply that rule to contracts for the acquisition of COTS items. The changes made in this rule are administrative changes to the process of collecting required information, and do not alter those determinations.

VI. 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 rule has been designated a ''significant regulatory action'' under E.O. 12866. Accordingly, the OMB has reviewed this rule. This second interim rule is a major rule under 5 U.S.C. 804.

VII. Executive Order 13771

This rule is subject to the requirements of E.O. 13771. The final rule designation, as regulatory or deregulatory under E.O. 13771, will be informed by the comments received from this interim rule. Details of estimates of costs or savings can be found in section III of this preamble.

VIII. Regulatory Flexibility Act

For the first interim rule, DoD, GSA, and NASA performed an Initial Regulatory Flexibility Analysis (IRFA).

Although the second interim rule would on aggregate reduce burdens, DoD, GSA, and NASA expect that this rule may 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.* An Initial Regulatory Flexibility Analysis (IRFA) has been performed, and is summarized as follows:

The reason for this second interim rule is to further implement section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232) by allowing offerors to represent annually whether they use any covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services.

The objective of the rule is to provide an information collection mechanism that relies on an annual representation, thereby reducing the burden of providing information, in some cases, that is required to enable agencies to determine and ensure that they are complying with section 889(a)(1)(B). The legal basis for the rule is section 889(a)(1)(B) of the NDAA for FY 2019, which prohibits executive agencies from entering into, or extending or renewing, a contract with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, on or after August 13, 2020, unless an exception applies or a waiver has been granted.

To estimate the burden to Federal offerors associated with complying with the rule, the percentage of Federal contractors that will be impacted was pulled from Federal databases. According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM. As of September 2019, about 74 percent of all SAM entities registered for all awards were awarded to entities with the primary NAICS code as small; therefore, it is assumed that out of the 387,967 unique vendors registered in SAM in February 2020, 287,096 entities are unique small entities. We assume that all entities registered in SAM will fill out the annual representation because they are required to fill it out to have a current, accurate, and complete SAM registration.

The solicitation provision at 52.204–26 is prescribed for use in all solicitations. The second interim rule adds a representation at paragraph (c)(2) which requires each vendor to represent, at least annually, that it ''does'' or ''does not'' use covered telecommunications equipment or services, or any equipment, system or service that uses covered telecommunications equipment or services. Offerors shall consult the System for Award Management (SAM) to validate whether the equipment or services they are using are from an entity providing equipment or services listed in the definition of ''covered telecommunications equipment or services.'' The offerors will conduct a reasonable inquiry as to whether they use covered telecommunications equipment or services or any equipment, system, or service that uses covered telecommunications equipment or services.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

It is not possible to establish different compliance or reporting requirements or timetables that take into account the resources available to small entities or to exempt small entities from coverage of the rule, or any part thereof. DoD, GSA, and NASA were unable to identify any alternatives that would reduce the burden on small entities and still meet the objectives of section 889.

The Regulatory Secretariat Division has submitted a copy of this IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy may be obtained from the Regulatory Secretariat Division upon request. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2019–009) in correspondence.

IX. Paperwork Reduction Act

As part of the first interim rule, the FAR Council was granted emergency processing of a collection currently approved under OMB control number 9000–0201, Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment.

In the first interim rule, the burden consisted of an offer-by-offer representation at FAR 52.204–24(d)(2) to identify whether an offeror does or does not use covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services, and a report of identified covered telecommunications equipment and services during contract performance, as required by FAR 52.204–25. In this second interim rule, the burden consists of a representation at FAR 52.204–26(c)(2) to identify whether an offeror does or does not use covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services, and a representation at FAR 52.204–24(d)(2) to identify whether an offeror uses any equipment, system, or service that uses covered telecommunications equipment or services for each offer, unless the offeror selects ''does not'' in response to the provision at FAR 52.204–26(c)(2) (or its commercial item equivalent at paragraph (v)(2)(ii) of FAR 52.212–3).

With this second interim rule, this existing collection is being revised to reflect a reduction in burden.

With this change in who must complete a representation at FAR 52.204–24(d)(2), the FAR Council has estimated the number of responses required by this provision will drop from 38,854,291 to 31,083,433. With this decrease in responses needed, the burden for 52.204–24(d)(2) is expected to decrease from $11,045,497,845 to $8,836,398,333.

The representation added by this rule at 52.204–26(c)(2) is estimated to average 1 hour (the average of the time for both positive and negative representations) per response to review the prohibitions, conduct a reasonable inquiry, and complete the representation. The representation at FAR 52.204–24(d)(2) is estimated to average 3 hours (the average of the time for both positive and negative representations) per response to review the prohibitions, conduct a reasonably inquiry, and either provide a response of ''does not'' or provide a response of ''does'' and complete the additional detailed disclosure.

As part of this interim rule, the FAR Council is soliciting comments from the public in order to:

- Evaluate whether the proposed revisions to this collection of information are necessary for the proper performance of the functions of the FAR Council, including whether the information will have practical utility;

• Evaluate the accuracy of the FAR Council's estimate of the burden of the revised collection of information, including the validity of the methodology and assumptions used;

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

• Minimize the burden of the collection of information on those who are to respond including through the use of appropriate collection techniques.

Organizations and individuals desiring to submit comments on the information collection requirements associated with this rulemaking should submit comments to the Regulatory Secretariat Division (MVCB) not later than October 26, 2020 through *http://www.regulations.gov* and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

Instructions: All items submitted must cite Information Collection 9000–0201, Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting.

X. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that notice and public procedure thereon is unnecessary.

This rule is meant to mitigate risks across the supply chains that provide hardware, software, and services to the U.S. Government and further integrate national security considerations into the acquisition process. Since section 889 of the NDAA for FY 2019 was signed on August 13, 2018, the FAR Council has been working diligently to implement the statute, which has multiple effective dates embedded in section 889. Like many countries, the United States has increasingly relied on a global industrial supply chain. As threats have increased, so has the Government's scrutiny of its contractors and their suppliers. Underlying these efforts is the concern a foreign government will be able to expropriate valuable technologies, engage in espionage with regard to sensitive U.S. Government information, and/or exploit vulnerabilities in products or services. It is worth noting this rule follows a succession of other FAR and DOD rules dealing with supply chain and cybersecurity that were further described within section VI of the first interim rule published on July 14, 2020, at 85 FR 42665.

Changes necessary to the System for Award Management (SAM) to reduce the burden of the first interim rule were not available by the effective date of the rule, so in order to decrease the burden on contractors from the first rule and increase the effectiveness of the rule, the FAR Council is publishing this second interim rule on section 889(a)(1)(B).

Implementing this rule as soon as the SAM representation is available will reduce the burden on the public and the Government to comply with the critical national security regulation. Publication of a proposed rule would delay the reduction of burden and the achievement of the national security benefits that are expected from this second interim rule.

For the foregoing reasons, pursuant to 41 U.S.C. 1707(d), the FAR Council finds that urgent and compelling circumstances make compliance with the notice and comment and delayed effective date requirements of 41 U.S.C. 1707(a) and (b) impracticable, and invokes the exception to those requirements under 1707(d).

While a public comment process will not be completed prior to the rule's effective date, the FAR Council has taken into account feedback solicited through extensive outreach already undertaken, the feedback received through the two rulemakings associated with section 889(a)(1)(A), and the feedback received so far from the first interim rule published on July 14, 2020, at 85 FR 42665. The FAR Council will also consider comments submitted in response to this interim rule in issuing a subsequent rulemaking.

List of Subjects in 48 CFR Parts 1, 4, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 4, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 4, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 2. In section 1.106 amend the table by adding in numerical order FAR segment entry ''52.204–26'' and its OMB control numbers to read as follows:

1.106 OMB approval under the Paperwork Reduction Act.

* * * * *

FAR segment	OMB control No.
* * * * *	
52.204–26	9000–0199 and 9000–0201
* * * * *	

PART 4—ADMINISTRATIVE AND INFORMATION MATTERS

■ 3. Amend section 4.2103 by revising paragraph (a)(1) to read as follows:

4.2103 Procedures.

(a) * * *

(1)(i) If the offeror selects ''does not'' in paragraphs (c)(1) and/or (c)(2) of the provision at 52.204–26 or in paragraphs (v)(2)(i) and/or (v)(2)(ii) of the provision at 52.212–3, the contracting officer may rely on the ''does not'' representation(s), unless the contracting officer has reason to question the representation. If the contracting officer has a reason to question the representation, the contracting officer shall follow agency procedures.

(ii) If the offeror selects ''does'' in paragraph (c)(1) of the provision at 52.204–26 or paragraph (v)(2)(i) of the provision at 52.212–3, the offeror will be required to complete the representation in paragraph (d)(1) of the provision at 52.204–24.

(iii) If the offeror selects ''does'' in paragraph (c)(2) of the provision at 52.204–26 or paragraph (v)(2)(ii) of the provision at 52.212–3, the offeror will be required to complete the representation in paragraph (d)(2) of the provision at 52.204–24.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 52.204–24 by revising the date of provision and the introductory text to read as follows:

52.204–24 Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.

* * * * *

Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment (Oct 2020)

The Offeror shall not complete the representation at paragraph (d)(1) of this provision if the Offeror has represented that it ''does not provide covered telecommunications equipment or services as a part of its offered products or services to the Government in the performance of any contract, subcontract, or other contractual instrument'' in paragraph (c)(1) in the provision at 52.204–26, Covered Telecommunications Equipment or Services—Representation, or in paragraph (v)(2)(i) of the provision at 52.212–3, Offeror Representations and Certifications–Commercial Items. The Offeror shall not complete the representation in paragraph (d)(2) of this provision if the Offeror has represented that it ''does not use covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services'' in paragraph (c)(2) of the provision at 52.204–26, or in paragraph (v)(2)(ii) of the provision at 52.212–3.

* * * * *

■ 5. Amend section 52.204–26 by—
■ a. Revising the date of the provision;
■ b. In paragraph (a), removing ''has'' and adding ''and ''reasonable inquiry'' have'' in its place; and
■ c. Revising paragraph (c).

The revisions read as follows:

52.204–26 Covered Telecommunications Equipment or Services—Representation.

* * * * *

Covered Telecommunications Equipment or Services—Representation (OCT 2020)

* * * * *

(c) *Representations.* (1) The Offeror represents that it [ ] does, [ ] does not provide covered telecommunications equipment or services as a part of its offered products or services to the Government in the performance of any contract, subcontract, or other contractual instrument.

(2) After conducting a reasonable inquiry for purposes of this representation, the offeror represents that it [ ] does, [ ] does not use covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services.

* * * * *

■ 6. Amend section 52.212–3 by—
■ a. Revising the date of the provision;
■ b. In paragraph (a) adding the definition ''Reasonable inquiry'' in alphabetical order;
■ c. Removing from paragraph (v) introductory text ''of Public'' and adding ''and section 889 (a)(1)(B) of Public'' in its place; and
■ d. Revising paragraph (v)(2).

The revisions and addition read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Oct 2020)

* * * * *

(a) * * *

Reasonable inquiry has the meaning provided in the clause 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

* * * * *

(v) * * *

(2) The Offeror represents that—

(i) It [ ] does, [ ] does not provide covered telecommunications equipment or services as a part of its offered products or services to the Government in the performance of any contract, subcontract, or other contractual instrument.

(ii) After conducting a reasonable inquiry for purposes of this representation, that it [ ] does, [ ] does not use covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services.

* * * * *

[FR Doc. 2020–18772 Filed 8–26–20; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2020–0051, Sequence No. 5]

Federal Acquisition Regulation; Federal Acquisition Circular 2020–09; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2020–09, which amends the Federal Acquisition Regulation (FAR). An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding this rule by referring to FAC 2020–09, which precedes this document. These documents are also available via the internet at *https://www.regulations.gov.*

DATES: August 27, 2020.

FOR FURTHER INFORMATION CONTACT: *Farpolicy@gsa.gov* or call 202–969–4075. Please cite FAC 2020–09, FAR case 2019–009.

RULE LISTED IN FAC 2020–09

Subject	FAR case
* Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment	2019–009

Nacogdoches, TX, Nacogdoches A L Mangham Jr Rgnl, NDB RWY 18, Amdt 1C, CANCELLED
Richmond, VA, Richmond Intl, ILS OR LOC RWY 2, Amdt 2C
Richmond, VA, Richmond Intl, VOR RWY 20, Amdt 1D
Bennington, VT, William H. Morse State, VOR RWY 13, Amdt 1B, CANCELLED
Springfield, VT, Hartness State (Springfield), Takeoff Minimums and Obstacle DP, Amdt 3A
Charleston, WV, Yeager, ILS OR LOC RWY 23, Amdt 31A
Powell, WY, Powell Muni, NDB RWY 31, Amdt 2C, CANCELLED

Rescinded: On July 13, 2020 (85 FR 41912), the FAA published an Amendment in Docket No. 31319 Amdt No. 3911, to Part 97 of the Federal Aviation Regulations under sections 97.37. The following entry for Jaffrey, NH effective September 10, 2020, is hereby rescinded in its entirety:

Jaffrey, NH, Jaffrey Airfield-Silver Ranch, Takeoff Minimums and Obstacle DP, Amdt 1A

Rescinded: On August 6, 2020 (85 FR 47643), the FAA published an Amendment in Docket No. 31323 Amdt No. 3915, to Part 97 of the Federal Aviation Regulations under sections 97.29, and 97.33. The following entries for El Paso, TX effective September 10, 2020, are hereby rescinded in their entirety:

El Paso, TX, El Paso Intl, ILS OR LOC RWY 22, Amdt 32E
El Paso, TX, El Paso Intl, RNAV (GPS) Y RWY 22, Orig-F
El Paso, TX, El Paso Intl, RNAV (RNP) Z RWY 22, Amdt 1B

[FR Doc. 2020–17732 Filed 8–19–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 200810–0211]

RIN 0694–AI19

Clarification of Entity List Requirements for Listed Entities When Acting as a Party to the Transaction Under the Export Administration Regulations (EAR)

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: In this final rule, the Bureau of Industry and Security (BIS) is clarifying the supplemental license requirements for parties listed on the Entity List pursuant to the Export Control Reform Act of 2018 (ECRA). Specifically, this final rule clarifies the Entity List's supplemental licensing requirements to state that these end-user controls apply to any listed entity when that entity is acting as a purchaser, intermediate or ultimate consignee, or end-user as defined in the Export Administration Regulations (EAR).

DATES: This rule is effective August 17, 2020.

FOR FURTHER INFORMATION CONTACT: Chair, End-User Review Committee, Office of the Assistant Secretary for Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–5991, Fax: (202) 482–3911, Email: *ERC@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Entity List (Supplement No. 4 to part 744 of the Export Administration Regulations (EAR)) identifies entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entities have been involved, are involved, or pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States. The EAR (15 CFR parts 730–774) impose additional license requirements on, and limit the availability of most license exceptions for, exports, reexports, and transfers (in-country) to listed entities. The license review policy for each listed entity is identified in the ''License review policy'' column on the Entity List and the impact on the availability of license exceptions is described in the relevant **Federal Register** notice adding entities to the Entity List. BIS places entities on the Entity List pursuant to part 744 (Control Policy: End-User and End-Use Based) and part 746 (Embargoes and Other Special Controls) of the EAR.

The End-User Review Committee (ERC), composed of representatives of the Departments of Commerce (Chair), State, Defense, Energy and, where appropriate, the Treasury, makes all decisions regarding additions to, removals from, or other modifications to the Entity List. The ERC makes all decisions to add an entry to the Entity List by majority vote and all decisions to remove or modify an entry by unanimous vote. The ERC approved the clarifications of the Entity List requirements in this rule, which will apply to all current entities on the Entity List and subsequent additions and modifications to the Entity List.

Clarification of Entity List Requirements

As referenced above, § 744.11(a) of the EAR sets forth supplemental license requirements applicable to exports, reexports, and transfers (in-country) to entities listed on the Entity List, which have been involved, are involved, or pose a significant risk of being or becoming involved, in activities contrary to the national security or foreign policy interests of the United States. In contrast to other provisions of the EAR (*i.e.,* §§ 740.2(a)(17), 744.15(b), and 758.1(b)(8)) that set forth restrictions applicable to exports, reexports, and transfers (in-country) to which a person listed on the Unverified List (*See:* Supplement No. 6 to part 744 of the EAR) is a *party to the transaction,* § 744.11(a) imposes supplemental license requirements on exports, reexports, and transfers (in-country) *to entities listed on the Entity List.* Prior to publication of this final rule, § 744.11 did not explicitly address circumstances in which a listed entity may be playing a role other than consignee or end-user in the transaction, *e.g.,* a purchaser or intermediate consignee.

However, since the first set of additions pursuant to § 744.11 on September 22, 2008 (73 FR 54503), Entity List rules published through 2019 typically included a sentence in the Background section of the rules that described the Entity List license requirements and limitations on the use of license exceptions. The purpose of this sentence was to alert exporters, reexporters, and transferors that BIS intended these requirements to apply to those listed entities when acting as any party to the transaction. The sentence specified that,

> The license requirements apply to any transaction in which items are to be exported, reexported, or transferred (in-country) to any of the persons or in which such persons act as purchaser, intermediate consignee, ultimate consignee, or end-user.

Since 2019, BIS has evaluated how to revise the EAR to better clarify that Entity List license requirements, as specified on the Entity List, are intended to apply to listed entities regardless of their role as a party to a transaction.

This final rule amends the regulatory text to clarify that Entity List license requirements apply to entities on the Entity List, not only when they are party to a transaction as either an ultimate consignee or end-user, but also when they are party as a purchaser or intermediate consignee.

Consistent with the authority granted under § 4812(c) of ECRA, BIS is amending §§ 744.11 and 744.16 of the EAR and the introductory text of the Entity List in Supplement No. 4 to part 744 to specify that the Entity List

requirements apply to all entities involved in a transaction subject to the EAR as described in § 748.5(c)–(f) of the EAR. These changes will make clear for exporters, reexporters, and transferors the scope of the Entity List's licensing requirements to effect the purpose of the Entity List.

As BIS has noted in the answers to frequently asked questions on its website, freight forwarders and other ''intermediate consignees'' may have access to items subject to the EAR, which creates a risk of diversion when such entities are listed on the Entity List. Similarly, a ''purchaser'' may coordinate all aspects of the purchase of items subject to the EAR from specifying the exporter, reexporter, or transferor, including designating the ultimate consignee who will receive the goods, to specifying the logistical arrangements made to effect delivery of the items to the ultimate consignee. Accordingly, when a person is listed on the Entity List, that person's participation as a purchaser or intermediate consignee in an export, reexport, or transfer (in-country) of items subject to the EAR presents a risk that the person's involvement in a transaction may circumvent the basis for their inclusion on the Entity List.

These clarifications to the Entity List requirements align with other end-user controls under the EAR. Specifically, as noted above, this language revision is consistent with EAR controls pursuant to § 744.15(b), which set forth restrictions applicable to exports, reexports, and transfers (in-country) involving persons listed on the Unverified List. BIS has determined that aligning the language of the Entity List and Unverified List requirements should ease the compliance burden on exporters, reexporters, and transferors because it will eliminate any confusion in interpretation of these two end-user control lists.

Changes Made to the EAR

In this final rule, BIS is revising § 744.11(a) of the EAR to specify that supplemental license requirements for entities included on the Entity List apply regardless of the role that the listed entity has in the transaction (*i.e.,* purchaser, intermediate consignee, ultimate consignee or end-user). The definitions of ''purchaser,'' ''intermediate consignee,'' ''ultimate consignee,'' and ''end-user'' are defined in § 748.5(c)–(f) and part 772 of the EAR.

Also in § 744.11(a), BIS is removing text indicating that the scope of the license requirements apply only to an entity listed on the Entity List ''in an entry that contains a reference to this section.'' BIS is removing this text because it is not consistent with the current practice of including references in Entity List entries to other parts of the EAR that set forth the scope of the supplemental license requirements and license review policies applicable to those entities. This final rule also makes conforming changes to the remainder of § 744.11.

BIS is also revising § 744.16(a) of the EAR, which similarly clarifies that the supplemental license requirements applicable to exports, reexports, and transfers (in-country) to *entities listed on the Entity List,* including on the basis of other sections of parts 744 (*e.g.,* §§ 744.2, 744.3, and 744.4) and 746. In keeping with the revision to § 744.11(a) described above, BIS is also clarifying that the license requirement described in § 744.16(a) applies whenever an entity listed on the Entity List is a party to the transaction as defined in § 748.5(c)–(f) of the EAR.

Finally, BIS is replacing the reference to ''items listed in an entry on the Entity List'' in § 744.16(a) of the EAR with a reference to the License Requirement column on the Entity List. BIS is making this change because the License Requirement column describes which items subject to the EAR require a license when an entity involved in a transaction is listed on the Entity List.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA), 50 U.S.C. 4801–4852. ECRA provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 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. This rule has been determined to be not significant for purposes of Executive Order 12866. This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves collections previously approved by OMB under control number 0694–0088, Simplified Network Application Processing System, which includes, among other things, license applications and carries a burden estimate of 42.5 minutes for a manual or electronic submission. BIS expects this rule will slightly increase the number of license applications required to be submitted to BIS each year by clarifying that the existing Entity List requirements apply to exports, reexports, and transfers (in-country) in which an entity listed on the Entity List acts as any party to the transaction, which will now include when the listed entity is a purchaser or intermediate consignee. BIS estimates the total number of additional license applications will not exceed 25 per year, for a total increase in public burden under OMB control number 0694–0088 of no more than 17 hours and 40 minutes per year. Any comments regarding the collection of information associated with this rule, including suggestions for reducing the burden, may be sent to Jasmeet K. Seehra, Office of Management and Budget (OMB), by email to *Jasmeet_K._Seehra@omb.eop.gov,* or online at *https://www.reginfo.gov/public/do/PRAMain.*

3. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

4. Pursuant to § 1762 of the Export Control Reform Act of 2018 (50 U.S.C. 4801–4852), which was included in the John S. McCain National Defense Authorization Act for Fiscal Year 2019, this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date.

5. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* are not applicable. Accordingly, no

regulatory flexibility analysis is required and none has been prepared.

List of Subjects in 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

Accordingly, part 744 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 744—CONTROL POLICY: END-USE AND END-USER BASED

■ 1. The authority citation for part 744 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of September 19, 2019, 84 FR 49633 (September 20, 2019); Notice of November 12, 2019, 84 FR 61817 (November 13, 2019).

■ 2. Section 744.11 is amended by revising paragraph (a) to read as follows:

§ 744.11 License requirements that apply to entities acting contrary to the national security or foreign policy interests of the United States.

* * * * *

(a) *License requirement, availability of license exceptions, and license application review policy.* A license is required, to the extent specified on the Entity List, to export, reexport, or transfer (in-country) any item subject to the EAR when an entity that is listed on the Entity List is a party to the transaction as described in § 748.5(c) through (f). License exceptions may not be used unless authorized in the Entity List entry for the entity that is party to the transaction. Applications for licenses required by this section will be evaluated as stated in the Entity List entry for the entity that is party to the transaction, in addition to any other applicable review policy stated elsewhere in the EAR.

* * * * *

■ 3. Section 744.16 is amended by revising paragraph (a) to read as follows:

§ 744.16 Entity List.

* * * * *

(a) *License requirements.* In addition to the license requirements for items specified on the Commerce Control List (CCL), you may not, without a license from BIS, export, reexport, or transfer (in-country) any items included in the License Requirement column of an entity's entry on the Entity List (supplement No. 4 to this part) when that entity is a party to a transaction as described in § 748.5(c) through (f) of the EAR. The specific license requirement for each listed entity is identified in the license requirement column on the Entity List in Supplement No. 4 to this part.

* * * * *

■ 4. Supplement No. 4 to part 744 is amended by revising the introductory text of the supplement to read as follows:

Supplement No. 4 to Part 744—Entity List

This Supplement lists certain entities subject to license requirements for specified items under this part 744 and part 746 of the EAR. License requirements for these entities include exports, reexports, and transfers (in-country) unless otherwise stated. A license is required, to the extent specified on the Entity List, to export, reexport, or transfer (in-country) any item subject to the EAR when an entity that is listed on the Entity List is a party to the transaction as described in § 748.5(c) through (f). This list of entities is revised and updated on a periodic basis in this Supplement by adding new or amended notifications and deleting notifications no longer in effect.

* * * * *

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2020–17908 Filed 8–17–20; 2:30 pm]

BILLING CODE 3510–33–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 426

[Docket No. SSA–2020–0002]

RIN 0960–AI47

Improved Agency Guidance Documents

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: This final rule explains our process for issuing guidance documents under Executive Order (E.O.) 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents.'' We will follow this process when we issue future guidance documents that meet the criteria set forth in the E.O. and the Office of Management and Budget's (OMB) guidance on the E.O.

DATES: This final rule will be effective September 21, 2020.

FOR FURTHER INFORMATION CONTACT: Jennifer Dulski, Office of Regulations and Reports Clearance, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 966–2341. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION: On October 9, 2019, President Trump issued E.O. 13891.[1] E.O. 13891 mandates that agencies, consistent with applicable law, finalize regulations, or amend existing regulations as necessary, to explain the process for issuing guidance documents as defined by the E.O. We are publishing this final rule to fulfill E.O. 13891's requirements.

As defined in E.O. 13891, guidance documents are agency statements of general applicability, intended to have future effect on the behavior of regulated parties, that set forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation. Unless the document falls within an enumerated exclusion to this definition,[2] any document that satisfies this definition would qualify as a guidance document, regardless of name or format.

The documents that we issue include Program Operations Manual System (POMS) instructions; the Hearings, Appeals and Litigation Law (HALLEX) manual; Social Security Rulings (SSR); and Acquiescence Rulings.[3] Most of the documents that we issue do not qualify as guidance documents under E.O. 13891; however, some may. We will use

[1] 84 FR 55235, available at: *https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents.*

[2] E.O. 13891 section 2 (b) lists the following as exclusions to the definition of guidance document: (i) Rules promulgated pursuant to notice and comment under section 553 of title 5, United States Code, or similar statutory provisions; (ii) rules exempt from rulemaking requirements under section 553(a) of title 5, United States Code; (iii) rules of agency organization, procedure, or practice; (iv) decisions of agency adjudications under section 554 of title 5, United States Code, or similar statutory provisions; (v) internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties; and (vi) internal executive branch legal advice or legal opinions addressed to executive branch officials. See 84 FR at 55235–36.

[3] See *other written guidelines* in 20 CFR 404.1602 and 416.1002 for more information about POMS and SSRs. See 20 CFR 402.35 for information about where we publish SSRs and ARs. See 20 CFR 404.985 and 416.1485 for more information about ARs. Additionally, our POMS instructions are publicly available at *https://secure.ssa.gov/poms.nsf/Home?readform,* our HALLEX manual is publicly available at *https://www.ssa.gov/OP_Home/hallex/hallex.html,* and our SSRs and ARs are publicly available at *https://www.ssa.gov/OP_Home/rulings/rulings.html.*

Federal Register
Vol. 85, No. 158
Friday, August 14, 2020

Presidential Documents

Title 3—

The President

Executive Order 13944 of August 6, 2020

Combating Public Health Emergencies and Strengthening National Security by Ensuring Essential Medicines, Medical Countermeasures, and Critical Inputs Are Made in the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* The United States must protect our citizens, critical infrastructure, military forces, and economy against outbreaks of emerging infectious diseases and chemical, biological, radiological, and nuclear (CBRN) threats. To achieve this, the United States must have a strong Public Health Industrial Base with resilient domestic supply chains for Essential Medicines, Medical Countermeasures, and Critical Inputs deemed necessary for the United States. These domestic supply chains must be capable of meeting national security requirements for responding to threats arising from CBRN threats and public health emergencies, including emerging infectious diseases such as COVID–19. It is critical that we reduce our dependence on foreign manufacturers for Essential Medicines, Medical Countermeasures, and Critical Inputs to ensure sufficient and reliable long-term domestic production of these products, to minimize potential shortages, and to mobilize our Nation's Public Health Industrial Base to respond to these threats. It is therefore the policy of the United States to:

(a) accelerate the development of cost-effective and efficient domestic production of Essential Medicines and Medical Countermeasures and have adequate redundancy built into the domestic supply chain for Essential Medicines, Medical Countermeasures, and Critical Inputs;

(b) ensure long-term demand for Essential Medicines, Medical Countermeasures, and Critical Inputs that are produced in the United States;

(c) create, maintain, and maximize domestic production capabilities for Critical Inputs, Finished Drug Products, and Finished Devices that are essential to protect public safety and human health and to provide for the national defense; and

(d) combat the trafficking of counterfeit Essential Medicines, Medical Countermeasures, and Critical Inputs over e-commerce platforms and from third-party online sellers involved in the government procurement process.

I am therefore directing each executive department and agency involved in the procurement of Essential Medicines, Medical Countermeasures, and Critical Inputs (agency) to consider a variety of actions to increase their domestic procurement of Essential Medicines, Medical Countermeasures, and Critical Inputs, and to identify vulnerabilities in our Nation's supply chains for these products. Under this order, agencies will have the necessary flexibility to increase their domestic procurement in appropriate and responsible ways, while protecting our Nation's service members, veterans, and their families from increases in drug prices and without interfering with our Nation's ability to respond to the spread of COVID–19.

Sec. 2. *Maximizing Domestic Production in Procurement.* (a) Agencies shall, as appropriate, to the maximum extent permitted by applicable law, and in consultation with the Commissioner of Food and Drugs (FDA Commissioner) with respect to Critical Inputs, use their respective authorities under section 2304(c) of title 10, United States Code; section 3304(a) of title 41,

United States Code; and subpart 6.3 of the Federal Acquisition Regulation, title 48, Code of Federal Regulations, to conduct the procurement of Essential Medicines, Medical Countermeasures, and Critical Inputs by:

(i) using procedures to limit competition to only those Essential Medicines, Medical Countermeasures, and Critical Inputs that are produced in the United States; and

(ii) dividing procurement requirements among two or more manufacturers located in the United States, as appropriate.

(b) Within 90 days of the date of this order, the Director of the Office of Management and Budget (OMB), in consultation with appropriate agency heads, shall:

(i) review the authority of each agency to limit the online procurement of Essential Medicines and Medical Countermeasures to e-commerce platforms that have:

(A) adopted, and certified their compliance with, the applicable best practices published by the Department of Homeland Security in its Report to the President on ''Combating Trafficking in Counterfeit and Pirated Goods,'' dated January 24, 2020; and

(B) agreed to permit the Department of Homeland Security's National Intellectual Property Rights Coordination Center to evaluate and confirm their compliance with such best practices; and

(ii) report its findings to the President.

(c) Within 90 days of the date of this order, the head of each agency shall, in consultation with the FDA Commissioner, develop and implement procurement strategies, including long-term contracts, consistent with law, to strengthen and mobilize the Public Health Industrial Base in order to increase the manufacture of Essential Medicines, Medical Countermeasures, and Critical Inputs in the United States.

(d) No later than 30 days after the FDA Commissioner has identified, pursuant to section 3(c) of this order, the initial list of Essential Medicines, Medical Countermeasures, and Critical Inputs, the United States Trade Representative shall, to the extent permitted by law, take all appropriate action to modify United States Federal procurement product coverage under all relevant Free Trade Agreements and the World Trade Organization Agreement on Government Procurement to exclude coverage of Essential Medicines, Medical Countermeasures, and Critical Inputs. The United States Trade Representative shall further modify United States Federal procurement product coverage, as appropriate, to reflect updates by the FDA Commissioner. After the modifications to United States Federal procurement coverage take effect, the United States Trade Representative shall make any necessary, corresponding modifications of existing waivers under section 301 of the Trade Agreements Act of 1979. The United States Trade Representative shall notify the President, through the Director of OMB, once it has taken the actions described in this subsection.

(e) No later than 60 days after the FDA Commissioner has identified, pursuant to section 3(c) of this order, the initial list of Essential Medicines, Medical Countermeasures, and Critical Inputs, and notwithstanding the public interest exception in subsection (f)(i)(1) of this section, the Secretary of Defense shall, to the maximum extent permitted by applicable law, use his authority under section 225.872–1(c) of the Defense Federal Acquisition Regulation Supplement to restrict the procurement of Essential Medicines, Medical Countermeasures, and Critical Inputs to domestic sources and to reject otherwise acceptable offers of such products from sources in Qualifying Countries in instances where considered necessary for national defense reasons.

(f) Subsections (a), (d), and (e) of this section shall not apply:

(i) where the head of the agency determines in writing, with respect to a specific contract or order, that (1) their application would be inconsistent with the public interest; (2) the relevant Essential Medicines, Medical Countermeasures, and Critical Inputs are not produced in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality; or (3) their application would cause the cost of the procurement to increase by more than 25 percent, unless applicable law requires a higher percentage, in which case such higher percentage shall apply;

(ii) with respect to the procurement of items that are necessary to respond to any public health emergency declared under section 319 of the Public Health Service Act (42 U.S.C. 247d), any major disaster or emergency declared under the Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*), or any national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*).

(g) To the maximum extent permitted by law, any public interest determination made pursuant to section 2(f)(i)(1) of this order shall be construed to maximize the procurement and use of Essential Medicines and Medical Countermeasures produced in the United States.

(h) The head of an agency who makes any determination pursuant to section 2(f)(i) of this order shall submit an annual report to the President, through the Director of OMB and the Assistant to the President for Trade and Manufacturing Policy, describing the justification for each such determination.

Sec. 3. *Identifying Vulnerabilities in Supply Chains.* (a) Within 180 days of the date of this order, the Secretary of Health and Human Services, through the FDA Commissioner and in consultation with the Director of OMB, shall take all necessary and appropriate action, consistent with law, to identify vulnerabilities in the supply chain for Essential Medicines, Medical Countermeasures, and Critical Inputs and to mitigate those vulnerabilities, including by:

(i) considering proposing regulations or revising guidance on the collection of the following information from manufacturers of Essential Medicines and Medical Countermeasures as part of the application and regulatory approval process:

(A) the sources of Finished Drug Products, Finished Devices, and Critical Inputs;

(B) the use of any scarce Critical Inputs; and

(C) the date of the last FDA inspection of the manufacturer's regulated facilities and the results of such inspection;

(ii) entering into written agreements, pursuant to section 20.85 of title 21, Code of Federal Regulations, with the National Security Council, Department of State, Department of Defense, Department of Veterans Affairs, and other interested agencies, as appropriate, to disclose records regarding the security and vulnerabilities of the supply chains for Essential Medicines, Medical Countermeasures, and Critical Inputs;

(iii) recommending to the President any changes in applicable law that may be necessary to accomplish the objectives of this subsection; and

(iv) reviewing FDA regulations to determine whether any of those regulations may be a barrier to domestic production of Essential Medicines, Medical Countermeasures, and Critical Inputs, and by advising the President whether such regulations should be repealed or amended.

(b) The Secretary of Health and Human Services, through the FDA Commissioner, shall take all appropriate action, consistent with applicable law, to:

(i) accelerate FDA approval or clearance, as appropriate, for domestic producers of Essential Medicines, Medical Countermeasures, and Critical

Inputs, including those needed for infectious disease and CBRN threat preparedness and response;

(ii) issue guidance with recommendations regarding the development of Advanced Manufacturing techniques;

(iii) negotiate with countries to increase site inspections and increase the number of unannounced inspections of regulated facilities manufacturing Essential Medicines, Medical Countermeasures, and Critical Inputs; and

(iv) refuse admission, as appropriate, to imports of Essential Medicines, Medical Countermeasures, and Critical Inputs if the facilities in which they are produced refuse or unreasonably delay an inspection.

(c) Within 90 days of the date of this order, and periodically updated as appropriate, the FDA Commissioner, in consultation with the Director of OMB, the Assistant Secretary for Preparedness and Response in the Department of Health and Human Services, the Assistant to the President for Economic Policy, and the Director of the Office of Trade and Manufacturing Policy, shall identify the list of Essential Medicines, Medical Countermeasures, and their Critical Inputs that are medically necessary to have available at all times in an amount adequate to serve patient needs and in the appropriate dosage forms.

(d) Within 180 days of the date of this order, the Secretary of Defense, in consultation with the Director of OMB, shall take all necessary and appropriate action, consistent with law, to identify vulnerabilities in the supply chain for Essential Medicines, Medical Countermeasures, and Critical Inputs necessary to meet the unique needs of the United States Armed Forces and to mitigate the vulnerabilities identified in subsection (a) of this section. The Secretary of Defense shall provide to the Secretary of Health and Human Services, the FDA Commissioner, the Director of OMB, and the Director of the Office of Trade and Manufacturing Policy a list of defense-specific Essential Medicines, Medical Countermeasures, and Critical Inputs that are medically necessary to have available for defense use in adequate amounts and in appropriate dosage forms. The Secretary of Defense shall, as appropriate, periodically update this list.

Sec. 4. *Streamlining Regulatory Requirements.* Consistent with law, the Administrator of the Environmental Protection Agency shall take all appropriate action to identify relevant requirements and guidance documents that can be streamlined to provide for the development of Advanced Manufacturing facilities and the expeditious domestic production of Critical Inputs, including by accelerating siting and permitting approvals.

Sec. 5. *Priorities and Allocation of Essential Medicines, Medical Countermeasures, and Critical Inputs.* The Secretary of Health and Human Services shall, as appropriate and in accordance with the delegation of authority under Executive Order 13603 of March 16, 2012 (National Defense Resources Preparedness), use the authority under section 101 of the Defense Production Act of 1950, as amended (50 U.S.C. 4511), to prioritize the performance of Federal Government contracts or orders for Essential Medicines, Medical Countermeasures, or Critical Inputs over performance of any other contracts or orders, and to allocate such materials, services, and facilities as the Secretary deems necessary or appropriate to promote the national defense.

Sec. 6. *Reporting.* (a) No later than December 15, 2021, and annually thereafter, the head of each agency shall submit a report to the President, through the Director of OMB and the Assistant to the President for Trade and Manufacturing Policy, detailing, for the preceding three fiscal years:

(i) the Essential Medicines, Medical Countermeasures, and Critical Inputs procured by the agency;

(ii) the agency's annual itemized and aggregated expenditures for all Essential Medicines, Medical Countermeasures, and Critical Inputs;

(iii) the sources of these products and inputs; and

(iv) the agency's plan to support domestic production of such products and inputs in the next fiscal year.

(b) Within 180 days of the date of this order, the Secretary of Commerce shall submit a report to the Director of OMB, the Assistant to the President for National Security Affairs, the Director of the National Economic Council, and the Director of the Office of Trade and Manufacturing Policy, describing any change in the status of the Public Health Industrial Base and recommending initiatives to strengthen the Public Health Industrial Base.

(c) To the maximum extent permitted by law, and with the redaction of any information protected by law from disclosure, each agency's report shall be published in the *Federal Register* and on each agency's official website.

Sec. 7. *Definitions.* As used in this order:

(a) ''Active Pharmaceutical Ingredient'' has the meaning set forth in section 207.1 of title 21, Code of Federal Regulations.

(b) ''Advanced Manufacturing'' means any new medical product manufacturing technology that can improve drug quality, address shortages of medicines, and speed time to market, including continuous manufacturing and 3D printing.

(c) ''API Starting Material'' means a raw or intermediate material that is used in the manufacturing of an API, that is incorporated as a significant structural fragment into the structure of the API, and that is determined by the FDA Commissioner to be relevant in assessing the safety and effectiveness of Essential Medicines and Medical Countermeasures.

(d) ''Critical Inputs'' means API, API Starting Material, and other ingredients of drugs and components of medical devices that the FDA Commissioner determines to be critical in assessing the safety and effectiveness of Essential Medicines and Medical Countermeasures.

(e) ''Essential Medicines'' are those Essential Medicines deemed necessary for the United States pursuant to section 3(c) of this order.

(f) ''Finished Device'' has the meaning set forth in section 820.3(l) of title 21, Code of Federal Regulations.

(g) ''Finished Drug Product'' has the meaning set forth in section 207.1 of title 21, Code of Federal Regulations.

(h) ''Healthcare and Public Health Sector'' means the critical infrastructure sector identified in Presidential Policy Directive 21 of February 12, 2013 (Critical Infrastructure Security and Resilience), and the National Infrastructure Protection Plan of 2013.

(i) An Essential Medicine or Medical Countermeasure is ''produced in the United States'' if the Critical Inputs used to produce the Essential Medicine or Medical Countermeasures are produced in the United States and if the Finished Drug Product or Finished Device, are manufactured, prepared, propagated, compounded, or processed, as those terms are defined in section 360(a)(1) of title 21, United States Code, in the United States.

(j) ''Medical Countermeasures'' means items that meet the definition of ''qualified countermeasure'' in section 247d–6a(a)(2)(A) of title 42, United States Code; ''qualified pandemic or epidemic product'' in section 247d–6d(i)(7) of title 42, United States Code; ''security countermeasure'' in section 247d–6b(c)(1)(B) of title 42, United States Code; or personal protective equipment described in part 1910 of title 29, Code of Federal Regulations.

(k) ''Public Health Industrial Base'' means the facilities and associated workforces within the United States, including research and development facilities, that help produce Essential Medicines, Medical Countermeasures, and Critical Inputs for the Healthcare and Public Health Sector.

(l) ''Qualifying Countries'' has the meaning set forth in section 225.003, Defense Federal Acquisition Regulation Supplement.

Sec. 8. *Rule of Construction.* Nothing in this order shall be construed to impair or otherwise affect:

(a) the ability of State, local, tribal, or territorial governments to timely procure necessary resources to respond to any public health emergency declared under section 319 of the Public Health Service Act (42 U.S.C. 247d), any major disaster or emergency declared under the Stafford Act (42 U.S.C. 5121 *et seq.*), or any national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*);

(b) the ability or authority of any agency to respond to the spread of COVID–19; or

(c) the authority of the Secretary of Veterans Affairs to take all necessary steps, including those necessary to implement the policy set forth in section 1 of this order, to ensure that service members, veterans, and their families continue to have full access to Essential Medicines at reasonable and affordable prices.

Sec. 9. *Severability.* If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of any of its other provisions to any other persons or circumstances shall not be affected thereby.

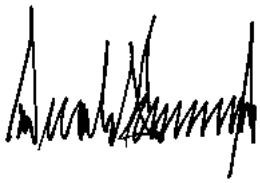
Sec. 10. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

(ii) the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

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

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



THE WHITE HOUSE,
August 6, 2020.

[FR Doc. 2020–18012
Filed 8–13–20; 11:15 am]
Billing code 3295–F0–P

Federal Register
Vol. 85, No. 152
Thursday, August 6, 2020

Presidential Documents

Title 3—

The President

Executive Order 13940 of August 3, 2020

Aligning Federal Contracting and Hiring Practices With the Interests of American Workers

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* It is the policy of the executive branch to create opportunities for United States workers to compete for jobs, including jobs created through Federal contracts. These opportunities, particularly in regions where the Federal Government remains the largest employer, are especially critical during the economic dislocation caused by the 2019 novel coronavirus (COVID–19) pandemic. When employers trade American jobs for temporary foreign labor, for example, it reduces opportunities for United States workers in a manner inconsistent with the role guest-worker programs are meant to play in the Nation's economy.

Sec. 2. *Review of Contracting and Hiring Practices.* (a) The head of each executive department and agency (agency) that enters into contracts shall review, to the extent practicable, performance of contracts (including subcontracts) awarded by the agency in fiscal years 2018 and 2019 to assess:

(i) whether contractors (including subcontractors) used temporary foreign labor for contracts performed in the United States, and, if so, the nature of the work performed by temporary foreign labor on such contracts; whether opportunities for United States workers were affected by such hiring; and any potential effects on the national security caused by such hiring; and

(ii) whether contractors (including subcontractors) performed in foreign countries services previously performed in the United States, and, if so, whether opportunities for United States workers were affected by such offshoring; whether affected United States workers were eligible for assistance under the Trade Adjustment Assistance program authorized by the Trade Act of 1974; and any potential effects on the national security caused by such offshoring.

(b) The head of each agency that enters into contracts shall assess any negative impact of contractors' and subcontractors' temporary foreign labor hiring practices or offshoring practices on the economy and efficiency of Federal procurement and on the national security, and propose action, if necessary and as appropriate and consistent with applicable law, to improve the economy and efficiency of Federal procurement and protect the national security.

(c) The head of each agency shall, in coordination with the Director of the Office of Personnel Management, review the employment policies of the agency to assess the agency's compliance with Executive Order 11935 of September 2, 1976 (Citizenship Requirements for Federal Employment), and section 704 of the Consolidated Appropriations Act, 2020, Public Law 116–93.

(d) Within 120 days of the date of this order, the head of each agency shall submit a report to the Director of the Office of Management and Budget summarizing the results of the reviews required by subsections (a) through (c) of this section; recommending, if necessary, corrective actions that may be taken by the agency and timeframes to implement such actions; and proposing any Presidential actions that may be appropriate.

Sec. 3. *Measures to Prevent Adverse Effects on United States Workers.* Within 45 days of the date of this order, the Secretaries of Labor and Homeland Security shall take action, as appropriate and consistent with applicable law, to protect United States workers from any adverse effects on wages and working conditions caused by the employment of H–1B visa holders at job sites (including third-party job sites), including measures to ensure that all employers of H–1B visa holders, including secondary employers, adhere to the requirements of section 212(n)(1) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)).

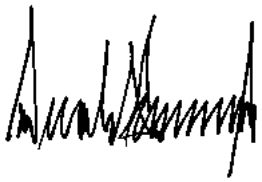
Sec. 4. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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



THE WHITE HOUSE,
August 3, 2020.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4, 13, 39, and 52

[FAC 2020–08; FAR Case 2019–009; Docket No. FAR–2019–0009, Sequence No. 1]

RIN 9000–AN92

Federal Acquisition Regulation: Prohibition on Contracting With Entities Using Certain Telecommunications and Video Surveillance Services or Equipment

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are amending the Federal Acquisition Regulation (FAR) to implement section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232).

DATES:

Effective: August 13, 2020.

Applicability: Contracting officers shall include the provision at FAR 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment and clause at FAR 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment as prescribed—

- In solicitations issued on or after August 13, 2020, and resultant contracts; and
- In solicitations issued before August 13, 2020, provided award of the resulting contract(s) occurs on or after August 13, 2020.

Contracting officers shall modify, in accordance with FAR 1.108(d), existing indefinite delivery contracts to include the FAR clause for future orders, prior to placing any future orders.

If exercising an option or modifying an existing contract or task or delivery order to extend the period of performance, contracting officers shall include the clause. When exercising an option, agencies should consider modifying the existing contract to add the clause in a sufficient amount of time to both provide notice for exercising the option and to provide contractors with adequate time to comply with the clause.

The contracting officer shall include the provision at 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, in all solicitations for an order, or notices of intent to place an order, including those issued before the effective date of this rule, under an existing indefinite delivery contract.

Comment date: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before September 14, 2020 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2019–009 via the Federal eRulemaking portal at *Regulations.gov* by searching for ''FAR Case 2019–009''. Select the link ''Comment Now'' that corresponds with FAR Case 2019–009. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2019–009'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite FAR Case 2019–009, in all correspondence related to this case. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting.

All filers using the portal should use the name of the person or entity submitting comments as the name of their files, in accordance with the instructions below. Anyone submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referencing the specific legal authority claimed, and provide a non-confidential version of the submission.

Any business confidential information should be in an uploaded file that has a file name beginning with the characters ''BC.'' Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page. The corresponding non-confidential version of those comments must be clearly marked ''PUBLIC.'' The file name of the non-confidential version should begin with the character ''P.'' The ''BC'' and ''P'' should be followed by the name of the person or entity submitting the comments or rebuttal comments. All filers should name their files using the name of the person or entity submitting the comments. Any submissions with file names that do not begin with a ''BC'' or ''P'' will be assumed to be public and will be made publicly available through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: *Farpolicy@gsa.gov* or call 202–969–4075. Please cite ''FAR Case 2019–009.''

SUPPLEMENTARY INFORMATION:

I. Background

Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019 (Pub. L. 115–232) prohibits executive agencies from entering into, or extending or renewing, a contract with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. The provision goes into effect August 13, 2020.

The statute covers certain telecommunications equipment and services produced or provided by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of those entities) and certain video surveillance products or telecommunications equipment and services produced or provided by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of those entities). The statute is not limited to contracting with entities that use end-products produced by those companies; it also covers the use of any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

Section 889 has two key sections, Section 889(a)(1)(A) and Section(a)(1)(B). Section (a)(1)(A) went into effect via FAR Case 2018–017 at 84 FR 40216 on August 13, 2019. The 889(a)(1)(A) rule does the following:

- It amends the FAR to include the 889(a)(1)(A) prohibition, which prohibits agencies from procuring or obtaining equipment or services that use covered telecommunications equipment or services as a substantial or essential component or critical technology. (FAR 52.204–25)
- It requires every offeror to represent prior to award whether or not it will

provide covered telecommunications equipment or services and, if so, to furnish additional information about the covered telecommunications equipment or services. (FAR 52.204–24)

• It mandates that contractors report (within one business day) any covered telecommunications equipment or services discovered during the course of contract performance. (FAR 52.204–25)

In order to decrease the burden on contractors, the FAR Council published a second interim rule for 889(a)(1)(A), at 84 FR 68314 on December 13, 2019. This rule allows an offeror that represents ''does not'' in the annual representation at FAR 52.204–26 to skip the offer-by-offer representation within the provision at FAR 52.204–24.

The FAR Council will address the public comments received on both previous interim rules in a subsequent rulemaking. In addition, each agency has the opportunity under 889(a)(1)(A) to issue agency-specific procedures (as they do for any acquisition-related requirement). For example, GSA issued a FAR deviation [1] where GSA categorized risk to eliminate the representations for low and medium risk GSA-funded orders placed under GSA indefinite-delivery contracts. For agency-specific procedures, please consult with the requiring agency.

This rule implements 889(a)(1)(B) and requires submission of a representation with each offer that will require all offerors to represent, after conducting a reasonable inquiry, whether covered telecommunications equipment or services are used by the offeror. DoD, GSA, and NASA recognize that some agencies may need to tailor the approach to the information collected based on the unique mission and supply chain risks for their agency.

In order to reduce the information collection burden imposed on offerors subject to the rule, DoD, GSA, and NASA are currently working on updates to the System for Award Management (SAM) to allow offerors to represent annually after conducting a reasonable inquiry. Only offerors that provide an affirmative response to the annual representation would be required to provide the offer-by-offer representation in their offers for contracts and for task or delivery orders under indefinite-delivery contracts. Similar to the initial rule for section 889(a)(1)(A), that was published as an interim rule on August 13, 2019 and was followed by a second interim rule on December 13, 2019 to update the System for Award Management, the FAR Council intends to publish a subsequent rulemaking once the updates are ready in SAM.

Overview of the Rule

This rule implements section 889 (a)(1)(B) and applies to Federal contractors' use of covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. The rule seeks to avoid the disruption of Federal contractor systems and operations that could in turn disrupt the operations of the Federal Government, which relies on contractors to provide a range of support and services. The exfiltration of sensitive data from contractor systems arising from contractors' use of covered telecommunications equipment or services could also harm important governmental, privacy, and business interests. Accordingly, due to the privacy and security risks associated with using covered telecommunications equipment or services as a substantial or essential component or critical technology of any system, the prohibition applies to any use that meets the threshold described above.

It amends the following sections of the FAR:

• FAR subpart 4.21, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

• The provision at 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.

• The contract clause at 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

Definitions Discussed in This Rule

This rule does not change the definition adopted in the first interim rule of ''critical technology,'' which was included in the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) (Section 1703 of Title XVII of the NDAA for FY 2019, Pub. L. 115–232, 50 U.S.C. 4565(a)(6)(A)). The rule does not change the definitions of ''Covered foreign country,'' ''Covered telecommunications equipment or services,'' and ''Substantial or essential component.'' The term offeror will continue to refer to only the entity that executes the contract.

This rule also adds new definitions for ''backhaul,'' ''interconnection arrangements,'' ''reasonable inquiry,'' and ''roaming,'' to provide clarity regarding when an exception to the prohibition applies. These terms are not currently defined in Section 889 or within the FAR. These definitions were developed based on consultation with subject matter experts as well as analyzing existing telecommunications regulations and case law.[2]

The FAR Council is considering as part of finalization of this rulemaking with an effective date no later than August 13, 2021, to expand the scope to require that the prohibition at 52.204–24(b)(2) and 52.204–25(b)(2) applies to the offeror and any affiliates, parents, and subsidiaries of the offeror that are domestic concerns, and expand the representation at 52.204–24(d)(2) so that the offeror represents on behalf of itself and any affiliates, parents, and subsidiaries of the offeror that are domestic concerns, as to whether they use covered telecommunications equipment or services. Section IV of this rule is requesting specific feedback regarding the impact of this potential change, as well as other pertinent policy questions of interest, in order to inform finalization of this and potential future subsequent rulemakings.

II. Discussion and Analysis

To implement section 889(a)(1)(B), the contract clause at 52.204–25 was amended to prohibit agencies ''from entering into a contract, or extending or renewing a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system,'' unless an exception applies or a waiver is granted. This prohibition applies at the prime contract level to an entity that uses any equipment, system, or service that itself uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, regardless of whether that usage is in performance of work under a Federal contract.

The 52.204–25 prohibition under section 889(a)(1)(A) will continue to flow down to all subcontractors; however, as required by statute the prohibition for section 889(a)(1)(B) will not flow down because the prime contractor is the only ''entity'' that the agency ''enters into a contract'' with, and an agency does not directly ''enter into a contract'' with any subcontractors, at any tier.

The rule also adds text in subpart 13.2, Actions at or Below the Micro-

[1] *https://www.acquisition.gov/gsa-deviation/supply-chain-aug13.*

[2] *See FiberTower Spectrum Holdings, LLC* v. *F.C.C.,* 782 F.3d 692, 695 (D.C. Cir. 2015); *Worldcall Interconnect, Inc.* v. *Fed. Commc'ns Comm'n,* 907 F.3d 810, 814 (Nov. 15, 2018).

Purchase Threshold, to address section 889(a)(1)(B) with regard to micro-purchases. The prohibition will apply to all FAR contracts, including micro-purchase contracts.

Representation Requirements

Representations and Certifications are requirements that anyone wishing to apply for Federal contracts must complete. They require entities to represent or certify to a variety of statements ranging from environmental rules compliance to entity size representation.

Similar to the previous rule for section 889(a)(1)(A), that was published as an interim rule on August 13, 2019, and was followed by a second interim rule on December 13, 2019, that updated the System for Award Management (SAM), the FAR Council is in the process of making updates to SAM requiring offerors to represent whether they use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services within the meaning of this rule. This rule will add a new OMB Control Number to the list at FAR 1.106 of OMB approvals under the Paperwork Reduction Act. Offerors will consult SAM to validate whether they use equipment or services listed in the definition of ''covered telecommunications equipment or services'' (see FAR 4.2101).

An entity may represent that it does not use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services within the meaning of this rule, if a reasonable inquiry by the entity does not reveal or identify any such use. A reasonable inquiry is an inquiry designed to uncover any information in the entity's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity. A reasonable inquiry need not include an internal or third-party audit.

Grants

Grants are not part of this FAR based regulation and are handled separately. Please note guidance on Section 889 for grants, which are not covered by this rule, was posted for comment at *https://www.federalregister.gov/documents/2020/01/22/2019-28524/guidance-for-grants-and-agreements.*

Agency Waiver Process

Under certain circumstances, section 889(d)(1) allows the head of an executive agency to grant a one-time waiver from 889(a)(1)(B) on a case-by-case basis that will expire no later than August 13, 2022. Executive agencies must comply with the prohibition once the waiver expires. The executive agency will decide whether or not to initiate the formal waiver process based on market research and feedback from Government contractors during the acquisition process, in concert with other internal factors. The submission of an offer will mean the offeror is seeking a waiver if the offeror makes a representation that it uses covered telecommunications equipment or services as a substantial or essential component of a system, or as critical technology as part of any system and no exception applies. Once an offeror submits its offer, the contracting officer will first have to decide if a waiver is necessary to make an award and then request the offeror to provide: (1) A compelling justification for the additional time to implement the requirements under 889(a)(1)(B), for consideration by the head of the executive agency in determining whether to grant a waiver; (2) a full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the entity's supply chain; and (3) a phase-out plan to eliminate such covered telecommunications equipment or services from the entity's systems. This does not preclude an offeror from submitting this information with their offer, in advance of a contracting officer decision to initiate the formal waiver request through the head of the executive agency.

Since the formal waiver is initiated by an executive agency and the executive agency may not know if covered telecommunications equipment or service will be used as part of the supply chain until offers are received, a determination of whether a waiver should be considered may not be possible until offers are received and the executive agency analyzes the representations from the offerors.

Given the extent of information necessary for requesting a waiver, the FAR Council anticipates that any waiver would likely take at least a few weeks to obtain. Where mission needs do not permit time to obtain a waiver, agencies may reasonably choose not to initiate one and to move forward and make award to an offeror that does not require a waiver.

Currently, FAR 4.2104 directs contracting officers to follow agency procedures for initiating a waiver request. Since a waiver is based on the agency's judgment concerning particular uses of covered telecommunications equipment or services, a waiver granted for one agency will not necessarily shed light on whether a waiver is warranted in a different procurement with a separate agency. This agency waiver process would be the same for both new and existing contracts. If a waiver is granted, with respect to particular use of covered telecommunications equipment or services, the contractor will still be required to report any additional use of covered telecommunications equipment or services discovered or identified during contract performance in accordance with 52.204–25(d).

Before granting a waiver, the agency must: (1) Have designated a senior agency official for supply chain risk management, responsible for ensuring the agency effectively carries out the supply chain risk management functions and responsibilities described in law, regulation, and policy; additionally this senior agency official will serve as the primary liaison with the Federal Acquisition Security Council (FASC); (2) establish participation in an information-sharing environment when and as required by the FASC to facilitate interagency sharing of relevant supply chain risk information; and (3) notify and consult with the Office of the Director of National Intelligence (ODNI) on the issue of the waiver request: The agency may only grant the waiver request after consulting with ODNI and confirming that ODNI does not have existing information suggesting that the waiver would present a material increase in risk to U.S. national security. Agencies may satisfy the consultation requirement by making use of one or more of the following methods as made available to agencies by ODNI (as appropriate): Guidance, briefings, best practices, or direct inquiry. If the agency has met the three conditions enumerated above and intends to grant the waiver requested, the agency must notify the ODNI and the FASC 15 days prior to granting the waiver, and provide notice to the appropriate Congressional committees within 30 days of granting the waiver. The notice must include:

(1) An attestation by the agency that granting of the waiver would not, to the agency's knowledge having conducted the necessary due diligence as directed by statute and regulation, present a material increase in risk to U.S. national security; and

(2) The required full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the entity's supply chain; and

(3) The required phase-out plan to eliminate covered telecommunications or video surveillance equipment or services from the entity's systems.

The laydown described above must include a description of each category of covered telecommunications or video surveillance equipment or services discovered after a reasonable inquiry, as well as each category of equipment, system, or service used by the entity in which such covered technology is found after such an inquiry.

In the case of an emergency, including a declaration of major disaster, in which prior notice and consultation with the ODNI and prior notice to the FASC is impracticable and would severely jeopardize performance of mission-critical functions, the head of an agency may grant a waiver without meeting the notice and consultation requirements to enable effective mission critical functions or emergency response and recovery. In the case of a waiver granted in response to an emergency, the head of an agency granting the waiver must make a determination that the notice and consultation requirements are impracticable due to an emergency condition, and within 30 days of award, notify the ODNI, the FASC, and Congress of the waiver issued under emergency circumstances.

The provision of a waiver does not alter or amend any other requirements of U.S. law, including any U.S. export control laws and regulations or protections for sensitive sources and methods. In particular, any waiver issued pursuant to these regulations is not authorization by the U.S. Government to export, reexport, or transfer (in-country) items subject to the Export Administration or International Traffic in Arms Regulations (15 CFR 730–774 and 22 CFR 120–130, respectively).

Director of National Intelligence Waiver

The statute also permits the Director of National Intelligence (DNI) to provide a waiver if the Director determines one is in the national security interests of the United States.[3] The statute does not include an expiration date for the DNI waiver. This authority is separate and distinct from that granted to an agency head as outlined above.

ODNI Categorical Scenarios

Additionally, the ODNI, in consultation with the FASC, will issue on an ongoing basis, for use in informing agency waiver decisions, guidance describing categorical uses or commonly-occurring use scenarios where presence of covered telecommunications equipment or services is likely or unlikely to pose a national security risk.

Other Technical Changes

The solicitation provision at 52.204–24 has two representations, one for 889(a)(1)(A) and one for 889(a)(1)(B). This rule adds the representation for 889(a)(1)(B). The solicitation provision at 52.204–24 also has two disclosure sections, one for 889(a)(1)(A) and one for 889(a)(1)(B). This rule adds the disclosure section for 889(a)(1)(B) with separate reporting elements depending on whether the procurement is for equipment, services related to item maintenance, or services not associated with item maintenance. The reporting elements within the disclosure are different for each category because the information needed to identify whether the prohibition applies varies for these three types of procurements. This rule also administratively renumbers the paragraphs under the disclosure section. Finally, this rule will add cross-references in FAR parts 39, Acquisition of Information Technology, and to the coverage of the section 889 prohibition at FAR subpart 4.21.

Expected Impact of This Rule

The FAR Council recognizes that this rule could impact the operations of Federal contractors in a range of industries—including in the health-care, education, automotive, aviation, and aerospace industries; manufacturers that provide commercially available off-the-shelf (COTS) items; and contractors that provide building management, billing and accounting, and freight services. The rule seeks to minimize disruption to the mission of Federal agencies and contractors to the maximum extent possible, consistent with the Federal Government's ability to ensure effective implementation and enforcement of the national security measures imposed by Section 889. As set forth in Section III.C below, the FAR Council recognizes the substantial benefits that will result from this rule.

To date, there is limited information on the extent to which the various industries will be impacted by this rule implementing the statutory requirements of section 889. To better understand the potential impact of section 889 (a)(1)(B), DoD hosted a public meeting on March 2, 2020 (See 85 FR 7735) to facilitate the Department's planning for the implementation of Section 889(a)(1)(B).

NASA also hosted a Section 889 industry engagement event on January 30, 2020, to obtain additional information on the impact this prohibition will have on NASA contractors' operations and their ability to support NASA's mission.

In addition, the FAR Council hosted a public meeting on July 19, 2019, and GSA hosted an industry engagement event on November 6, 2019 (*https://interact.gsa.gov/FY19NDAASection889*) to gather additional information on how section 889 could affect GSA's business and supply chain. The presentations are located at *https://interact.gsa.gov/FY19NDAASection889.*

Please note presentations and comments from the public meetings are *not* considered public comments on this rule.

The FAR Council notes this rule is one of a series of actions with regard to section 889 and the impact and costs to all industry sectors, including COTS items manufacturers, resellers, consultants, etc. is not well understood and is still being assessed. For example, in a filing to the Federal Communications Commission, the Rural Wireless Association estimated that at least 25% of its carriers would be impacted.[4]

In addition, while the rule will be effective as of August 13, 2020, the FAR Council is seeking public comment, including, as indicated below, on the potential impact of the rule on the affected industries. After considering the comments received, a final rule will be issued, taking into account and addressing the public comments. *See* 41 U.S.C. 1707.

Industry Costs for New Representation and Scope of Section 889(a)(1)(B)

The statute includes two exceptions at 889 (a)(2)(A) and (B). The exception at 889(a)(2)(A) allows the head of executive agency to procure with an entity ''to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements.'' The exception at 889(a)(2)(B) allows an entity to procure ''telecommunications equipment that cannot route or redirect user data traffic or [cannot] permit visibility into any user data or packets that such equipment transmits or otherwise handles.'' The exception allowing for procurement of services that connect to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements applies only to a Government agency that is contracting with an entity to provide a service. Therefore, the exception does

[3] Sec. 889(d)(2).

[4] *https://ecfsapi.fcc.gov/file/12080817518045/FY%202019%20NDAA%20Reply%20Comments%20-%20FINAL.pdf.*

not apply to a contractor's use of a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements. As a result, the Federal Government is prohibited from contracting with a contractor that uses covered telecommunications equipment or services to obtain backhaul services from an internet service provider, unless a waiver is granted.

III. Regulatory Impact Analysis Pursuant to Executive Orders 12866 and 13563

The costs and transfer impacts of section 889(a)(1)(B) are discussed in the analysis below. This analysis was developed by the FAR Council in consultation with agency procurement officials and OMB. We request public comment on the costs, benefits, and transfers generated by this rule.

A. Risks to Industry of Not Complying With 889

As a strictly contractual matter, an organization's failure to submit an accurate representation to the Government constitutes a breach of contract that can lead to cancellation, termination, and financial consequences.

Therefore, it is important for contractors to develop a compliance plan that will allow them to submit accurate representations to the Government in the course of their offers.

B. Contractor Actions Needed for Compliance

Adopting a robust, risk-based compliance approach will help reduce the likelihood of noncompliance. During the first year that 889(a)(1)(B) is in effect, contractors and subcontractors will need to learn about the provision and its requirements as well as develop a compliance plan. The FAR Council assumes the following steps would most likely be part of the compliance plan developed by any entity.

1. *Regulatory Familiarization.* Read and understand the rule and necessary actions for compliance.

2. *Corporate Enterprise Tracking.* The entity must determine through a reasonable inquiry whether the entity itself uses ''covered telecommunications'' equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. This includes examining relationships with any subcontractor or supplier for which the prime contractor has a Federal contract and uses the supplier or subcontractor's ''covered telecommunications'' equipment or services as a substantial or essential component of any system. A reasonable inquiry is an inquiry designed to uncover any information in the entity's possession—primarily documentation or other records—about the identity of the producer or provider of covered telecommunications equipment or services used by the entity. A reasonable inquiry need not include an internal or third-party audit.

3. *Education.* Educate the entity's purchasing/procurement, and materials management professionals to ensure they are familiar with the entity's compliance plan.

4. *Cost of Removal (if the entity independently decides to).* Once use of covered equipment and services is identified, implement procedures if the entity decides to replace existing covered telecommunications equipment or services and ensure new equipment and services acquired for use by the entity are compliant.

5. *Representation.* Provide representation to the Government regarding whether the entity uses covered telecommunications equipment and services and alert the Government if use is discovered during contract performance.

6. *Cost to Develop a Phase-out Plan and Submit Waiver Information.* For entities for which a waiver will be requested, (1) develop a phase-out plan to phase-out existing covered telecommunications equipment or services, and (2) provide waiver information to the Government to include the phase-out plan and the complete laydown of the presence of the covered telecommunications equipment or services.

C. Benefits

This rule provides significant national security benefits to the general public. According to the White House article ''A New National Security Strategy for a New Era'', the four pillars of the National Security Strategy (NSS) are to protect the homeland, promote American prosperity, preserve peace through strength, and advance American influence.[5] The purpose of this rule is to align with the NSS pillar to protect the homeland, by protecting the homeland from the impact of Federal contractors using covered telecommunications equipment or services that present a national security concern.

The United States faces an expanding array of foreign intelligence threats by adversaries who are using increasingly sophisticated methods to harm the Nation.[6] Threats to the United States posed by foreign intelligence entities are becoming more complex and harmful to U.S. interests.[7] Foreign intelligence actors are employing innovative combinations of traditional spying, economic espionage, and supply chain and cyber operations to gain access to critical infrastructure, and steal sensitive information and industrial secrets.[8] The exploitation of key supply chains by foreign adversaries represents a complex and growing threat to strategically important U.S. economic sectors and critical infrastructure.[9] The increasing reliance on foreign-owned or controlled telecommunications equipment, such as hardware or software, and services, as well as the proliferation of networking technologies may create vulnerabilities in our nation's supply chains.[10] The evolving technology landscape is likely to accelerate these trends, threatening the security and economic well-being of the American people.[11]

Since the People's Republic of China possesses advanced cyber capabilities that it actively uses against the United States, a proactive cyber approach is needed to degrade or deny these threats before they reach our nation's networks, including those of the Federal Government and its contractors. China is increasingly asserting itself by stealing U.S. technology and intellectual property in an effort to erode the United States' economic and military superiority.[12] Chinese companies, including the companies identified in this rule, are legally required to cooperate with their intelligence services.[13] China's reputation for persistent industrial espionage and close collaboration between its government and industry in order to amass technological secrets presents additional threats for U.S. Government contractors.[14] Therefore, there is a risk

[5] *https://www.whitehouse.gov/articles/new-national-security-strategy-new-era/.*

[6] National Counterintelligence Strategy of the United States of America 2020–2022.

[7] National Counterintelligence Strategy of the United States of America 2020–2022.

[8] National Counterintelligence Strategy of the United States of America 2020–2022.

[9] National Counterintelligence Strategy of the United States of America 2020–2022.

[10] National Counterintelligence Strategy of the United States of America 2020–2022.

[11] National Counterintelligence Strategy of the United States of America 2020–2022.

[12] National Counterintelligence Strategy of the United States of America 2020–2022.

[13] NATO Cooperative Cyber Defense Center of Excellence Report on Huawei, 5G and China as a Security Threat.

[14] NATO Cooperative Cyber Defense Center of Excellence Report on Huawei, 5G and China as a Security Threat.

that Government contractors using 5th generation wireless communications (5G) and other telecommunications technology from the companies covered by this rule could introduce a reliance on equipment that may be controlled by the Chinese intelligence services and the military in both peacetime and crisis.[15]

The 2019 Worldwide Threat Assessment of the Intelligence Community[16] highlights additional threats regarding China's cyber espionage against the U.S. Government, corporations, and allies. The U.S.-China Economic and Security Review Commission Staff Annual Reports[17] provide additional details regarding the United States' national security interests in China's extensive engagement in the U.S. telecommunications sector. In addition, the U.S. Senate Select Committee on Intelligence Open Hearing on Worldwide Threats[18] further elaborates on China's approach to gain access to the United States' sensitive technologies and intellectual property. The U.S. House of Representatives Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE[19] further identifies how the risks associated with Huawei's and ZTE's provision of equipment to U.S. critical infrastructure could undermine core U.S. national-security interests.

Currently, Government contractors may not consider broad national security interests of the general public when they make decisions. This rule ensures that Government contractors keep public national security interests in mind when making decisions, by ensuring that, pursuant to statute, they do not use covered telecommunications equipment or services that present national security concerns. This rule will also assist contractors in mitigating supply chain risks (*e.g.* potential theft of trade secrets and intellectual property) due to the use of covered telecommunications equipment or services.

D. Public Costs

During the first year after publication of the rule, contractors will need to learn about the provisions and its requirements. The DOD, GSA, and NASA (collectively referred to here as the Signatory Agencies) estimate this cost by multiplying the time required to review the regulations and guidance implementing the rule by the estimated compensation of a general manager.

To estimate the burden to Federal offerors associated with complying with the rule, the percentage of Federal contractors that will be impacted was pulled from Federal databases. According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM. As of September 2019, about 74% of all SAM entities registered for all awards were awarded to entities with the primary NAICS code as small; therefore, it is assumed that out of the 387,967 unique vendors registered in SAM in February 2020, 287,096 entities are unique small entities. According to data from the Federal Procurement Data System (FPDS), as of February 2020, there was an average of 102,792 unique Federal awardees for FY16–FY19, of which 73%, 75,112, are unique small entities. Based on data in SAM for FY16–FY19, the Signatory Agencies anticipates there will be an average of 79,319[20] new entities registering annually in SAM, of which 74%, 57,956, are anticipated to be small businesses.

We estimate that this rule will also affect businesses which become Federal contractors in the future. As stated above, we estimate that there are 79,319[21] new entrants per year.

1. Time To Review the Rule

Below is a list of compliance activities related to regulatory familiarization that the Signatory Agencies anticipate will occur after issuance of the rule:

a. *Familiarization with FAR 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.* The Signatory Agencies assume that it will take all vendors who plan to submit an offer for a Federal award 20[22] hours to familiarize themselves with the amendment to the offer-by-offer representation at 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment. The Signatory Agencies assume that all entities registered in SAM, or 387,967[23] entities, plan to submit an offer for a Federal award, since there is no data available on number of offerors for Federal awards. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$735 million* (= 20 hours × $94.76[24] per hour × 387,967). Of the 387,967 entities impacted by this part of the rule, it is assumed that 74%[25] or 287,096 entities are unique small entities.

In subsequent years, these costs will be incurred by 79,319[26] new entrants each year. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$150 million* (= 20 hours × $94.76 per hour × 79,319) per year in subsequent years.

b. *Familiarization with FAR 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.* The Signatory Agencies estimate that it will take all vendors who plan to submit an offer for a Federal award 8[27] hours to familiarize themselves with the amendment to the clause at 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment. The average number of unique awardees for FY16–FY19, or 102,792[28] entities, will be impacted by this part of the rule, assuming all entities awarded Federal contracts would have to familiarize themselves with the clause. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$78 million* (= 8 hours × $94.76 per hour × 102,792). Of the 102,792 unique Federal awardees assumed to be impacted by this part of the rule, 73% or 75,038, are unique small entities.

In subsequent years, these costs are estimated will be incurred by 26%[29] of new entrants, or 20,623 entities because it is assumed that 26% of new entrants will be awarded a Federal contract and will be required to familiarize

[15] NATO Cooperative Cyber Defense Center of Excellence Report on Huawei, 5G and China as a Security Threat.

[16] *https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf.*

[17] *https://www.uscc.gov/annual-reports/archives.*

[18] *https://www.intelligence.senate.gov/sites/default/files/hearings/CHRG-115shrg28947.pdf.*

[19] *https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=96.*

[20] This value is based on data on new registrants in *SAM.gov* on average for FY16, FY17, FY18, and FY19.

[21] This value is based on data on new registrants in *SAM.gov* for FY19 and FY20.

[22] The 20 hours are an assumption based on historical familiarization hours and subject matter expert judgment.

[23] According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM.

[24] The rate of $94.76 assumes an FY19 GS 13 Step 5 salary (after applying a 100% burden to the base rate) based on subject matter judgment.

[25] As of September 2019, about 74% of all SAM entities registered for all awards were awarded to entities with the primary NAICS code as small.

[26] This value is based on data on new registrants in *SAM.gov* on average for FY16, FY17, FY18, and FY19.

[27] The 8 hours is an assumption based on historical familiarization hours and subject matter expert judgment.

[28] As of February 2020, there was an average of 102,792 unique Federal awardees for FY16–FY19.

[29] The percentage of 26% is the percentage of active entities registered in *SAM.gov* in FY20 that were awarded contracts.

themselves with the clause. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$15.6 million* (= 8 hours × $94.76 per hour × 20,623) per year in subsequent years.

The total cost estimated to review the amendments to the provision and the clause is estimated to be *$813 million* in the first year after publication. In subsequent years, this cost is estimated to be *$166 million* annually. The FAR Council acknowledges that there is substantial uncertainty underlying these estimates.

2. Time To Establish a Corporate Enterprise Tracking Tool and Verify Covered Telecom Is Not Used Within the Corporation or by the Corporation and Ensure There Are No Future Buys

In order to complete the representation, the entity must determine, by conducting a reasonable inquiry whether the entity itself uses ''covered telecommunications'' equipment or services. This includes a relationship with any subcontractor or supplier in which the prime contractor has a Federal contract and uses the supplier or subcontractor's ''covered telecommunications equipment or services'' regardless of whether that usage is in performance of work under a Federal contract. The Signatory Agencies do not have reliable data to form an estimate as to the processes vendors will adopt to conduct a reasonable inquiry or the costs, in time and other resources, for conducting such an inquiry. The Signatory Agencies intend to evaluate any information on this topic in the comments submitted by the public.

3. Time To Complete Corporate-Wide Training on Compliance Plan

The Signatory Agencies estimate that most entities have already begun to understand the impact of Section 889 (a)(1)(A) and have already educated the appropriate personnel to that part of the prohibition. Section 889 (a)(1)(B) requires a more robust training of the organization's compliance plan, which include business partners that are outside of the typical ''covered telecommunications equipment or services'' purchases; such as day-day office supplies. The Signatory Agencies estimate that it will take all vendors at least 4 [30] hours of training to ensure personnel understand the organization's compliance plan for tracking partners that procure ''covered telecommunications equipment and services'' that may be indirectly related to their respective business activities. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$147 million* (= 4 hours × $94.76 per hour × 387,967).

Of the 387,967 [31] entities impacted by this part of the rule, it is assumed that 74% or 287,096 entities are unique small entities.

In subsequent years, we assume that 50% [32] of the 79,319 [33] new entrants will incur these costs. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$15 million* (= 4 hours × $94.76 per hour× 50% × 79,319) per year in subsequent years. The FAR Council acknowledges that there is substantial uncertainty underlying these estimates.

4. Time To Remove and Replace Existing Equipment or Services (if Contractor Decides to) in Order To Be Eligible for a Federal Contract

Data on the extent of the presence of the covered telecommunications equipment and services in the global supply chain is extremely limited, as is information as to the costs of removing and replacing covered equipment or services where it does exist. Furthermore, no data exists as to how many entities will receive a 2-year waiver from executive agency heads or a non-time-limited waiver from the ODNI. Accordingly, the Signatory Agencies are unable to form any estimate of the costs of this rule with regard to removing and replacing existing equipment and services. The Signatory Agencies intend to evaluate any information provided on this topic in comments submitted by the public.

5. Time To Complete the Representation

52.204–24

For the offer-by-offer representation at FAR 52.204–24 the Signatory Agencies assumed the cost for this portion of the rule to be *$11 billion* (= 3 [34] hours × $94.76 per hour × 102,792 unique entities × 378 [35] responses per entity).

In subsequent years, we assume that 26% [36] of new entrants will complete an offer and need to complete the offer-by-offer representation. Therefore, these costs will be incurred by 26% of the 79,319 [37] new entrants each year. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$2.2 billion* (= 3 hours × $94.76 per hour × 26% × 79,319 × 378 responses per entity) per year in subsequent years.

The FAR Council notes that these costs are based on offer-by-offer representations; upon completion of the updates to SAM, offerors will be able to make annual representations, which is anticipated to reduce the burden.

52.204–25

FAR 52.204–25 requires a written report in cases where a contractor (or subcontractor to whom the clause has been flowed down) identifies or receives notification from any source that an entity in the supply chain uses any covered telecommunications equipment or services. The signatory agencies estimate that 5% [38] of the unique entities awarded a contract (5,140) will submit approximately 5 [39] written reports annually pursuant to FAR 52.204–25. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$7.3 million* (= 3 hours × $94.76 per hour × 5,140 entities × 5 responses per entity) per year in subsequent years.

In subsequent years, we assume that half of the entities impacted in year 1 will incur these costs for 52.204–25. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$3.6 million* (= 3 hours × $94.76 per hours 2,570 entities × 5 responses per entity) per year in subsequent years.

The total estimated burden for the representation and the clause for year one is *$11 billion.* The total annual cost for both representations in subsequent years is calculated as: *$2.2 billion.* The FAR Council acknowledges that there is substantial uncertainty underlying these estimates.

[30] The hours are an assumption based on subject matter expert judgment.

[31] According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM.

[32] The 50% value is an assumption based on subject matter expert judgment. In the absence, to be conservative, it assumes that 50% of new entrants will decide to perform corporate-wide training.

[33] This value is based on data on new registrants in *SAM.gov* on average for FY16, FY17, FY18, and FY19.

[34] The hours are an assumption based on subject matter expert judgment.

[35] The responses per entity is calculated by dividing the average number of annual awards in FY16–19 by the average number of unique entities awarded a contract (38,854,291 awards/102,792 unique awardees = 378).

[36] The percentage of 26% is the percentage of active entities registered in *SAM.gov* in FY20 that were awarded contracts.

[37] This value is based on data on new registrants in *SAM.gov* on average for FY16, FY17, FY18, and FY19.

[38] The 5% value was derived from subject matter expert judgment.

[39] The 5 reports value was derived from subject matter expert judgment.

6. Time To Develop a Full and Complete Laydown and Phase-Out Plan To Support Waiver Requests

The calculation at #2 above captures the time to develop a full and complete laydown. There is no way to accurately estimate the time required for offerors to develop a phase-out plan or the number of offerors for which a waiver will be requested.

The total cost of the above Public Cost Estimate in Year 1 is at least: *$12 billion.*

The total cost of the above Cost Estimate in Year 2 is at least: *$2.4 billion.*

The total cost estimate per year in subsequent years is at least: *$2.4 billion.*

The following is a summary of the estimated costs calculated in perpetuity at a 3 and 7-percent discount rate:

Summary (billions)	Total costs
Present Value (3%)	$89
Annualized Costs (3%)	2.7
Present Value (7%)	43
Annualized Costs (7%)	3

The FAR Council acknowledges that there is substantial uncertainty underlying these estimates, including elements for which an estimate is unavailable given inadequate information. As more information becomes available, including through comment in response to this notice, the FAR Council will seek to update these estimates which could very likely increase the estimated costs.

E. Government Cost Analysis

The FAR Council anticipates significant impact to the Government as a result of this rule. These impacts will appear as higher costs, reduced competition, and inability to meet some mission needs. These costs are justified in light of the compelling national security objective that this rule will advance.

The primary cost to the Government will be to review the representations and to process the waiver request. The cost to review the representations uses the same variables as the cost to the public to fill out the representation resulting in a total cost to the Government of $11 billion as the hourly rate, hours to review, and number of representations are the same as the industry calculations. The other cost to the Government, is the cost to review the written reports required by the clause and the calculation uses the same variables as the cost to the public to complete the report, resulting in a total cost to the Government of $7.3 million.

Higher Costs and Reduced Competition: It is anticipated that at least three factors will each lead to the Government paying higher prices for services and products it buys: (1) Contractors will pass along some of the new costs of compliance; (2) due to anticipated compliance costs, some contractors will choose to exit the Federal market, particularly for commercial services and products and a reduced level of competition would increase prices; and (3) the risk of commercial firms choosing not to do business with the Government may be heightened in areas of high technological innovation such as digital services. In recent years, DoD and GSA, among other Departments and agencies, have placed particular emphasis on recruiting non-traditional contractors to provide emerging tech services and this rule could discourage innovative technology firms from competing on Federal Government contracts.

It is also anticipated that many Federal contractors may need to hire or contract for consultants to aid them in reviewing and updating their supply chains. Market principles suggest that this may increase the costs for such experts, making it more difficult for small businesses to afford them.

Inability to Meet Mission Needs: The Government uses Competition in Contracting Act exceptions (FAR subpart 6.3) to use sole source acquisitions to meet agency needs. These acquisitions would be impacted as offerors will also be subject to the section 889 requirements. There are industries where the Government makes up a small portion of the total market. There may be markets where the vendors will choose to no longer do business with the Government; leaving no sources to meet those specific requirements for the Government. This will reduce agencies' abilities to satisfy some mission needs.

The total cost of the above Government Cost Estimate in Year 1 is: *$11 billion.*

The total cost of the above Cost Estimate in Year 2 is: *$2.2 billion.*

The total cost estimate per year in subsequent years is: *$2.2 billion.*

The following is a summary of the estimated costs calculated in perpetuity at a 3 and 7-percent discount rate:

Summary (billions)	Total costs
Present Value (3%)	$82.5
Annualized Costs (3%)	2.5
Present Value (7%)	40
Annualized Costs (7%)	2.8

F. Analysis of Alternatives

Alternative 1: The FAR Council could take no regulatory action to implement this statute. However, this alternative would not provide any implementation and enforcement of the important national security measures imposed by the law. Moreover, the general public would not experience the benefits of improved national security resulting from the rule as detailed above in Section C. As a result, we reject this alternative.

Alternative 2: The FAR Council could provide uniform procedures for how agency waivers must be initiated and processed. The statute provides this waiver authority to the head of each executive agency. Each executive agency operates a range of programs that have unique mission needs as well as unique security concerns and vulnerabilities. Since the waiver approval process will be based on each agency's judgment concerning particular use cases, standardizing the waiver process across agencies is not feasible. We believe that this alternative would not be able to best serve the public, as it would lead to inefficient waiver determinations at agencies whose ideal waiver process differs from the best possible uniform approach. As a result, we reject this alternative.

IV. Specific Questions for Comment

To understand the exact scope of this impact and how this impact could be affected in subsequent rulemaking, DoD, GSA, and NASA welcome input on the following questions regarding anticipated impact on affected parties.

- To what extent do you currently use any equipment, system, or service that itself uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system?

○ The FAR Council is considering as part of finalization of this rulemaking to expand the scope to require that the prohibition at 52.204–24(b)(2) and 52.204–25(b)(2) applies to the offeror and any affiliates, parents, and subsidiaries of the offeror that are domestic concerns, and expand the representation at 52.204–24(d)(2) so that the offeror represents on behalf of itself and any affiliates, parents, and subsidiaries of the offeror that are domestic concerns, as to represent whether they use covered telecommunications equipment or services. If the scope of rule was extended to cover affiliates, parents, and subsidiaries of the offeror that are domestic concerns, how would that

impact your ability to comply with the prohibition?

- To the extent you use any equipment, system or service that uses covered telecommunications equipment or services, how much do you estimate it would cost if you decide to cease such use to come into compliance with the rule?
- To what extent do you have insight into existing systems and their components?
- What equipment and services need to be checked to determine whether they include any covered telecommunications equipment or services?
  - What are the best processes and technology to use to identify covered telecommunications equipment or services?
  - Are there automated solutions?
- What are the challenges involved in identifying uses of covered telecommunications equipment or services (domestic, foreign and transnational) that would be prohibited by the rule?
- Do you anticipate use of any products or services that are unrelated to a service provided to the Federal Government and connects to the facilities of a third-party (*e.g.* backhaul, roaming, or interconnection arrangements) that uses covered telecommunications equipment or services?
- To what extent do you currently have direct control over existing equipment, systems, or services in use (*e.g.,* physical security systems) and their components, as contrasted with contracting for equipment, systems, or services that are used by you within meaning of the statute yet provided by a separate entity (*e.g.,* landlords)? How long will it take if you decide to remove and replace covered telecommunications equipment or services that your company uses?
- When a company identifies covered telecommunications equipment or services, what are the steps to take if you decide to replace the equipment or services?
  - What do companies do if their factory or office is located in foreign country where covered telecommunications equipment or services are prevalent and alternative solutions may be unavailable?
  - What are some best practices (*e.g.,* sourcing strategies) or technologies that can assist companies with replacing covered telecommunications equipment or services?
- Are there specific use cases in the supply chain where it would not be feasible to cease use of equipment, system(s), or services that use covered telecommunications equipment and services? Please be specific in explaining why cessation of use is not feasible.
  - Will the requirement to comply with this rule impact your willingness to offer goods and services to the Federal Government? Please be specific in describing the impact (*e.g.,* what types of products or services may no longer be offered, or offered in a modified form, and why)
  - The FAR Council recognizes there could be further costs associated with this rule (*e.g.* lost business opportunities, having to relocate a building in foreign country where there is no market alternative). What are they?
  - What additional information or guidance do you view as necessary to effectively comply with this rule?
  - What other challenges do you anticipate facing in effectively complying with this rule?
- Do you have data on the extent of the presence of covered telecommunications equipment or services? If so, please provide that data.
- Do you have data on the fully burdened cost to remove and replace covered telecommunications equipment or services, if that is a decision that you decide to make? If so, please provide that data and identify how you would revise the estimated costs in the cost analysis.

V. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule does not add any new provisions or clauses. The rule does not change the applicability of existing provisions or clauses to contracts at or below the SAT and contracts for the acquisition of commercial items, including COTS items. The rule is updating the provision at FAR 52.204–24 and the clause at FAR 52.204–25 to implement section 889(a)(1)(B).

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to acquisitions at or below the simplified acquisition threshold (SAT). Section 1905 generally limits the applicability of new laws when agencies are making acquisitions at or below the SAT, but provides that such acquisitions will not be exempt from a provision of law under certain circumstances, including when, as in this case, the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including Commercially Available Off-the-Shelf 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. Section 1906 provides that 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.

Finally, 41 U.S.C. 1907 states that acquisitions of commercially available off-the-shelf (COTS) items will be exempt from a provision of law unless certain circumstances apply, including if the Administrator for Federal Procurement Policy makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law.

C. Determinations

The FAR Council has determined that it is in the best interest of the Government to apply the rule to contracts at or below the SAT and for the acquisition of commercial items. The Administrator for Federal Procurement Policy has determined that it is in the best interest of the Government to apply this rule to contracts for the acquisition of COTS items.

While the law does not specifically address acquisitions of commercial items, including COTS items, there is an unacceptable level of risk for the Government in contracting with entities that use equipment, systems, or services that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. This level of risk is not alleviated by the fact that the equipment or service being acquired has been sold or offered for sale to the general public, either in the same form or a modified form as sold to the Government (*i.e.,* that it is a commercial item or COTS item), nor by the small size of the purchase (*i.e.,* at or below the SAT).

VI. Interim Rule Determination and Executive Orders 12866, 13563, and 13771

A determination has been made under the authority of the Secretary of Defense (DoD), Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling circumstances necessitate that this interim rule go into effect earlier than 60 days after its publication date.

Since Section 889 of the NDAA was signed on August 13, 2018, the FAR Council has been working diligently to implement the statute, which has multiple effective dates embedded in Section 889. Like many countries, the United States has increasingly relied on a global industrial supply chain. As threats have increased, so has the Government's scrutiny of its contractors and their suppliers. Underlying these efforts is the concern a foreign government will be able to expropriate valuable technologies, engage in espionage with regard to sensitive U.S. Government information, and/or exploit vulnerabilities in products or services. It is worth noting this rule follows a succession of other FAR and DOD rules dealing with supply chain and cybersecurity.

Government agencies are already authorized to exclude certain contractors and products from specified countries. For example, Section 515 of the Consolidated Appropriations Act of 2014 required certain non-DoD agencies to conduct a supply chain risk assessment before acquiring high- or-moderate-impact information systems. The relevant agencies are required to conduct the supply chain risk assessments in conjunction with the FBI to determine whether any cyber-espionage or sabotage risk associated with the acquisition of these information systems exist, with a focus on cyber threats from companies ''owned, directed, or subsidized by the People's Republic of China.''

More recently, U.S. intelligence agencies raised concerns that Kaspersky Lab executives were closely tied to the Russian government, and that a Russian cybersecurity law would compel Kaspersky to help Russian intelligence agencies conduct espionage. As a result, DHS issued a Binding Operational Directive effectively barring civilian Government agencies from using the software. In the FY 2018 NDAA, Congress prohibited the entire U.S. Government from using products and services from Kaspersky or related entities. In June 2018, this prohibition was implemented as an interim rule across the U.S. Government by FAR 52.204–23.

Section 889 differs from the previous efforts in substantial ways. Unlike the blanket prohibition on agency use of goods and services from Kaspersky Labs, the prohibitions in Section 889 apply to multiple companies, and apply with slightly different characterizations to products and services from the various named companies. Additionally, section 889 contains carve-outs under which the prohibitions do not apply, further complicating interpretation and implementation of rulemaking. Finally, section 889 contains distinct prohibitions related to contracting, with the first applying to products and services purchased for use by the Government, and the second applying to use of the covered telecommunications equipment or services by contractors. Given the various provisions of Section 889, including the focus in the (a)(1)(A) prohibition on addressing risk to the Government's own use of covered telecommunications equipment and services and the shorter time period available to implement that prohibition, the FAR Council first developed and published at 84 FR 40216 on August 13, 2019, FAR Case 2018–017 to implement that prohibition. As discussed in the background section of this rule, that rule focused on products and services sold to the Government (directly or indirectly through a prime contract). Changes necessary to the System for Award Management to reduce the burden of the rule were not available by the effective date of the first rule, so in order to decrease the burden on contractors from this first rule, the FAR Council published a second interim rule on Section 889(a)(1)(A) at 84 FR 68314 on December 13, 2019. After the publication of this second rule, the FAR Council accelerated its ongoing work on the provisions of Section 889(a)(1)(B). Section 889(a)(1)(B) focuses on the Federal Government's ability to contract with companies that use the covered products or services at the requisite threshold.

Given the expansiveness and complexity of Section 889(a)(1)(B), this rule required substantial up-front analysis. As described elsewhere in the rule, all three signatory agencies held public meetings to hear directly from industry on concerns with this rule, with the first occurring in July of 2019 and the most recent occurring in March of 2020. The rule was prepared in part in the spring of 2020 as the nation began shutdown due to the COVID–19 pandemic and work across the Government was diverted to respond to the national emergency; the concentration of all available resources on the response to the pandemic very significantly delayed the Government's ability to finish the rule. These factors have left the FAR Council with insufficient time to publish the rule with 60 days before the legislatively established effective date of August 13, 2020, or to complete full public notice and comment before the rule becomes effective. As noted, however, the agencies are seeking public comment on this interim rule and will consider and address those comments.

Having an implementing regulation in place by the effective date is critically important to avoid confusion, uncertainty, and potentially substantial legal consequences for agencies and the vendor community. The statute requires contractors to identify the use of covered telecommunications equipment and services in their operations and the prohibitions will take effect on August 13, 2020. If they did so without an implementing regulation in place, contractors would have no guidance as to how to comply with the requirements of Section 889(a)(1)(B), leading to situations where contractors could refuse to contract with the Government over fears that lack of compliance could yield claims for breach of contract, or claims under the False Claims Act. Concerns of this sort were expressed during the outreach conducted by the FAR Council, with contractors expressing confusion as to the scope of the statutory prohibition, and asking for explicit guidance regarding what is required to comply with the requirement; this guidance is provided by the rule in the form of instructions regarding a reasonable inquiry and what must be represented to the Government. Absent coverage in the FAR to implement these requirements in a uniform manner as of the effective date, agencies would also be forced to implement the statute on their own, absent that unifying guidance, leading to rapidly divergent implementation paths, and creating substantial additional confusion and duplicative costs for the regulated contracting community. Publication of a proposed rule under these circumstances, while providing some indication of the direction the Government intended to take, would not provide sufficient clarity or certainty to avoid these consequences, given the complexity of the subject rule.

For the foregoing reasons, pursuant to 41 U.S.C. 1707(d), the FAR Council finds that urgent and compelling circumstances make compliance with

the notice and comment and delayed effective date requirements of 41 U.S.C. 1707(a) and (b) impracticable, and invokes the exception to those requirements under 1707(d). While a public comment process will not be completed prior to the rule's effective date, the FAR Council has incorporated feedback solicited through extensive outreach already undertaken, including through public meetings conducted over the course of nine months, and the feedback received through the two rulemakings associated with Section 889(a)(1)(A). The FAR Council will also consider comments submitted in response to this interim rule in issuing a subsequent rulemaking.

This interim rule is economically significant for the purposes of Executive Orders 12866 and 13563. This rule is not subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because the benefit-cost analysis demonstrates that the regulation is anticipated to improve national security as its primary direct benefit. This rule is meant to mitigate risks across the supply chains that provide hardware, software, and services to the U.S. Government and further integrate national security considerations into the acquisition process.

The Office of Information and Regulatory Affairs (OIRA) has determined that this is a major rule under the Congressional Review Act (CRA) (5 U.S.C. 804(2)). Under the CRA (5 U.S.C. 801(a)(3)), a major rule generally may not take effect until 60 days after a report on the rule is received by Congress. As a result of the factors identified above, the FAR Council has insufficient time to prepare and complete a full public notice and comment rulemaking proceeding and to timely complete a final rule prior to the effective date of August 13, 2020. Because of the substantial additional impact to the regulated community if the rule is not in place on the effective date, the FAR Council has found good cause to forego notice and public procedure, the Council also determines, pursuant to 5 U.S.C. 808(2), that this interim rule will take effect on August 13, 2020.

Pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA expect that this rule may 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.* An Initial Regulatory Flexibility Analysis (IRFA) has been performed, and is summarized as follows:

The reason for this interim rule is to implement section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232).

The objective of the rule is to provide an information collection mechanism that relies on an offer-by-offer representation that is required to enable agencies to determine and ensure that they are complying with section 889(a)(1)(B).

The legal basis for the rule is section 889(a)(1)(B) of the NDAA for FY 2019, which prohibits the Government from entering into, or extending or renewing, a contract with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, on or after August 13, 2020, unless an exception applies or a waiver has been granted. This prohibition applies to an entity that uses at the prime contractor level any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, regardless of whether that usage is in performance of work under a Federal contract. This prohibition does not flow-down to subcontractors.

This collection includes a burden for requiring an offeror to represent if it ''does'' or ''does not'' use any equipment, system, or service that uses covered telecommunications equipment or services.

The representation requirement being added to the FAR provision at 52.204–24 will be included in all solicitations, including solicitations for contracts with small entities and is an offer-by-offer representation. A data set was generated from the Federal Procurement Data System (FPDS) for FY 2016, 2017, 2018 and 2019 for use in estimating the number of small entities affected by this rule.

The FPDS data indicates that the Government awarded contracts to an average of 102,792 unique entities, of which 75,112 (73 percent) were small entities. DoD, GSA, and NASA estimate that the representation at 52.204–24 will impact all unique entities awarded Government contracts, of which 75,112 are small entities.

This rule amends the solicitation provision at 52.204–24 to require all vendors to represent on an offer-by-offer basis, that it ''does'' or ''does not'' use any covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services and if it does to provide an additional disclosure.

If the offeror selects ''does'' in the representation at 52.204–24(d)(2), the offeror is required to further disclose, per paragraph (e), substantial detail regarding the basis for selecting ''does'' in the representation.

This rule will impact some small businesses and their ability to provide Government services at the prime contract level, since some small entities lack the resources to efficiently update their supply chain and information systems, which may be useful to comply with the prohibition.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

The FAR Council intends to publish a subsequent rulemaking to allow offerors, including small entities, to represent annually in the System for Award Management (SAM) after conducting a reasonable inquiry. Only offerors that provide an affirmative response to the annual representation would be required to provide the offer-by-offer representation at 52.204–24(d)(2). The annual representation is anticipated to reduce the burden on small entities.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2019–009) in correspondence.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA) provides that an agency generally cannot conduct or sponsor a collection of information, and no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, unless that collection has obtained OMB approval and displays a currently valid OMB Control Number.

DoD, GSA, and NASA requested, and OMB authorized, emergency processing of the collection of information involved in this rule, consistent with 5 CFR 1320.13. DoD, GSA, and NASA have determined the following conditions have been met:

a. The collection of information is needed prior to the expiration of time periods normally associated with a routine submission for review under the provisions of the PRA, because the prohibition in section 889(a)(1)(B) goes into effect on August 13, 2020.

b. The collection of information is essential to the mission of the agencies to ensure the Federal Government complies with section 889(a)(1)(B) on the statute's effective date in order to protect the Government supply chain

from risks posed by covered telecommunications equipment or services.

c. Moreover, DoD, GSA, and NASA cannot comply with the normal clearance procedures because public harm is reasonably likely to result if current clearance procedures are followed. Authorizing collection of this information on the effective date will ensure that agencies do not enter into, extend, or renew contracts with any entity that uses equipment, systems, or services that use telecommunications equipment or services from certain named companies as a substantial or essential component or critical technology as part of any system in violation of the prohibition in section 889(a)(1)(B).

DoD, GSA, and NASA intend to provide a separate 60-day notice in the **Federal Register** requesting public comment on the information collections contained within this rule under OMB Control Number 9000–0201.

The annual public reporting burden for this collection of information is estimated as follows:

Agency: DoD, GSA, and NASA.
Type of Information Collection: New Collection.
Title of Collection: Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.
FAR Clause: 52.204–24.
Affected Public: Private Sector—Business.
Total Estimated Number of Respondents: 102,792.
Average Responses per Respondents: 378.
Total Estimated Number of Responses: 38,854,291.
Average Time (for both positive and negative representations) per Response: 3 hours.
Total Annual Time Burden: 116,562,873.

Agency: DoD, GSA, and NASA.
Type of Information Collection: New Collection.
Title of Collection: Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.
FAR Clause: 52.204–25.
Affected Public: Private Sector—Business.
Total Estimated Number of Respondents: 5,140.
Average Responses per Respondents: 5.
Total Estimated Number of Responses: 25,700.
Average Time per Response: 3 hours.
Total Annual Time Burden: 77,100.

Agency: DoD, GSA, and NASA.
Type of Information Collection: New Collection.
Title of Collection: Waiver from Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.
FAR Clause: 52.204–25.
Affected Public: Private Sector—Business.
Total Estimated Number of Respondents: 20,000.
Average Responses per Respondents: 1.
Total Estimated Number of Responses: 20,000.
Average Time per Response: 160 hours.
Total Annual Time Burden: 3,200,000.

The public reporting burden for this collection of information consists of a representation to identify whether an offeror uses covered telecommunications equipment or services for each offer as required by 52.204–24 and reports of identified use of covered telecommunications equipment or services as required by 52.204–25. The representation at 52.204–24 is estimated to average 3 hours per response to review the prohibitions, research the source of the product or service, and complete the additional detailed disclosure, if applicable. Reports required by 52.204–25 are estimated to average 3 hours per response, including the time for reviewing definitions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the report.

If the Government seeks a waiver from the prohibition, the offeror will be required to provide a full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the entity's supply chain and a phase-out plan to eliminate such covered telecommunications equipment or services from the offeror's systems. There is no way to estimate the total number of waivers at this time. For the purposes of complying with the PRA analysis, the FAR Council estimates 20,000 waivers; however there is no data for the basis of this estimate. This estimate may be higher or lower once the rule is in effect.

The subsequent 60-day notice to be published by DoD, GSA, and NASA will invite public comments.

List of Subjects in 48 CFR Parts 1, 4, 13, 39, and 52

Government procurement.

William F. Clark,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA are amending 48 CFR parts 1, 4, 13, 39, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 4, 13, 39, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 2. In section 1.106 amend the table by revising the entries for ''4.21'', ''52.204–24'' and ''52.204–25'' to read as follows:

1.106 OMB approval under the Paperwork Reduction Act.

* * * * *

FAR segment	OMB control No.
* * * * *	
4.21	9000–0199 and 9000–0201.
* * * * *	
52.204–24	9000–0199 and 9000–0201.
52.204–25	9000–0199 and 9000–0201
* * * * *	

PART 4—ADMINISTRATIVE AND INFORMATION MATTERS

4.2100 [Amended]

■ 3. Amend section 4.2100 by removing ''paragraph (a)(1)(A)'' and adding ''paragraphs (a)(1)(A) and (a)(1)(B)'' in its place.

■ 4. Amend section 4.2101 by adding in alphabetical order the definitions ''Backhaul'', ''Interconnection arrangements'', ''Reasonable inquiry'' and ''Roaming'' to read as follows:

4.2101 Definitions.

* * * * *

Backhaul means intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (*e.g.,* connecting cell phones/towers to the core telephone network). Backhaul can be wireless (*e.g.,* microwave) or wired (*e.g.,* fiber optic, coaxial cable, Ethernet).

* * * * *

Interconnection arrangements means arrangements governing the physical connection of two or more networks to allow the use of another's network to hand off traffic where it is ultimately delivered (*e.g.,* connection of a customer of telephone provider A to a customer of telephone company B) or sharing data and other information resources.

Reasonable inquiry means an inquiry designed to uncover any information in the entity's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity that excludes the need to include an internal or third-party audit.

Roaming means cellular communications services (*e.g.,* voice,

video, data) received from a visited network when unable to connect to the facilities of the home network either because signal coverage is too weak or because traffic is too high.

* * * * *

■ 5. Amend section 4.2102 by revising paragraphs (a) and (c) to read as follows:

4.2102 Prohibition.

(a) Prohibited equipment, systems, or services.

(1) On or after August 13, 2019, agencies are prohibited from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (b) of this section applies or the covered telecommunications equipment or services are covered by a waiver described in 4.2104.

(2) On or after August 13, 2020, agencies are prohibited from entering into a contract, or extending or renewing a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (b) of this section applies or the covered telecommunications equipment or services are covered by a waiver described in 4.2104. This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract.

* * * * *

(c) *Contracting Officers.* Unless an exception at paragraph (b) of this section applies or the covered telecommunications equipment or service is covered by a waiver described in 4.2104, Contracting Officers shall not—

(1) Procure or obtain, or extend or renew a contract (*e.g.,* exercise an option) to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system; or

(2) Enter into a contract, or extend or renew a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

* * * * *

■ 6. Amend section 4.2103 by revising paragraph (a)(2) to read as follows:

4.2103 Procedures.

(a) * * *

(2)(i) If the offeror selects ''will not'' in paragraph (d)(1) of the provision at 52.204–24 or ''does not'' in paragraph (d)(2) of the provision at 52.204–24, the contracting officer may rely on the representations, unless the contracting officer has reason to question the representations. If the contracting officer has a reason to question the representations, the contracting officer shall follow agency procedures.

(ii) If an offeror selects ''will'' in paragraph (d)(1) of the provision at 52.204–24, the offeror must provide the information required by paragraph (e)(1) of the provision at 52.204–24, and the contracting officer shall follow agency procedures.

(iii) If an offeror selects ''does'' in paragraph (d)(2) of the provision at 52.204–24, the offeror must complete the disclosure at paragraph (e)(2) of the provision at 52.204–24, and the contracting officer shall follow agency procedures.

* * * * *

■ 7. Amend section 4.2104 by revising paragraphs (a)(1) introductory text and (a)(2), and adding paragraphs (a)(3) and (4) to read as follows:

4.2104 Waivers.

(a) * * *

(1) *Waiver.* The waiver may be provided, for a period not to extend beyond August 13, 2021 for the prohibition at 4.2102(a)(1), or beyond August 13, 2022 for the prohibition at 4.2102(a)(2), if the Government official, on behalf of the entity, seeking the waiver submits to the head of the executive agency—

* * * * *

(2) *Executive agency waiver requirements for the prohibition at 4.2102(a)(2).* Before the head of an executive agency can grant a waiver to the prohibition at 4.2102(a)(2), the agency must—

(i) Have designated a senior agency official for supply chain risk management, responsible for ensuring the agency effectively carries out the supply chain risk management functions and responsibilities described in law, regulation, and policy;

(ii) Establish participation in an information-sharing environment when and as required by the Federal Acquisition Security Council (FASC) to facilitate interagency sharing of relevant acquisition supply chain risk information;

(iii) Notify and consult with the Office of the Director of National Intelligence (ODNI) on the waiver request using ODNI guidance, briefings, best practices, or direct inquiry, as appropriate; and

(iv) Notify the ODNI and the FASC 15 days prior to granting the waiver that it intends to grant the waiver.

(3) *Waivers for emergency acquisitions.*

(i) In the case of an emergency, including a declaration of major disaster, in which prior notice and consultation with the ODNI and prior notice to the FASC is impracticable and would severely jeopardize performance of mission-critical functions, the head of an agency may grant a waiver without meeting the notice and consultation requirements under 4.2104(a)(2)(iii) and 4.2104(a)(2)(iv) to enable effective mission critical functions or emergency response and recovery.

(ii) In the case of a waiver granted in response to an emergency, the head of an agency granting the waiver must—

(A) Make a determination that the notice and consultation requirements are impracticable due to an emergency condition; and

(B) Within 30 days of award, notify the ODNI and the FASC of the waiver issued under emergency conditions in addition to the waiver notice to Congress under 4.2104(a)(4).

(4) *Waiver notice.*

(i) For waivers to the prohibition at 4.2102(a)(1), the head of the executive agency shall, not later than 30 days after approval—

(A) Submit in accordance with agency procedures to the appropriate congressional committees the full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain; and

(B) The phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.

(ii) For waivers to the prohibition at 4.2102(a)(2), the head of the executive agency shall, not later than 30 days after approval submit in accordance with agency procedures to the appropriate congressional committees—

(A) An attestation by the agency that granting of the waiver would not, to the agency's knowledge having conducted the necessary due diligence as directed by statute and regulation, present a material increase in risk to U.S. national security;

(B) The full and complete laydown of the presences of covered

telecommunications or video surveillance equipment or services in the relevant supply chain, to include a description of each category of covered technology equipment or services discovered after a reasonable inquiry, as well as each category of equipment, system, or service used by the entity in which such covered technology is found after conducting a reasonable inquiry; and

(C) The phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 8. Amend section 13.201 by redesignating paragraph (j) as (j)(1) and adding paragraph (j)(2) to read as follows:

13.201 General.

* * * * *

(j)(1) * * *

(2) On or after August 13, 2020, agencies are prohibited from entering into a contract, or extending or renewing a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception applies or a waiver is granted (see subpart 4.21). This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract.

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

■ 9. Amend section 39.101 by redesignating paragraph (f) as (f)(1) and adding paragraph (f)(2) to read as follows:

39.101 Policy.

* * * * *

(f)(1) * * *

(2) On or after August 13, 2020, agencies are prohibited from entering into a contract, or extending or renewing a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception applies or a waiver is granted (see subpart 4.21). This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Revise section 52.204–24 to read as follows:

52.204–24 Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.

As prescribed in 4.2105(a), insert the following provision:

Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment (AUG 2020)

The Offeror shall not complete the representation at paragraph (d)(1) of this provision if the Offeror has represented that it ''does not provide covered telecommunications equipment or services as a part of its offered products or services to the Government in the performance of any contract, subcontract, or other contractual instrument'' in the provision at 52.204–26, Covered Telecommunications Equipment or Services—Representation, or in paragraph (v) of the provision at 52.212–3, Offeror Representations and Certifications–Commercial Items.

(a) *Definitions.* As used in this provision-

Backhaul, covered telecommunications equipment or services, critical technology, interconnection arrangements, reasonable inquiry, roaming, and *substantial or essential component* have the meanings provided in the clause 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

(b) *Prohibition.* (1) Section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) prohibits the head of an executive agency on or after August 13, 2019, from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. Nothing in the prohibition shall be construed to—

(i) Prohibit the head of an executive agency from procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

(ii) Cover telecommunications equipment that cannot route or redirect user data traffic or cannot permit visibility into any user data or packets that such equipment transmits or otherwise handles.

(2) Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) prohibits the head of an executive agency on or after August 13, 2020, from entering into a contract or extending or renewing a contract with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract. Nothing in the prohibition shall be construed to—

(i) Prohibit the head of an executive agency from procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

(ii) Cover telecommunications equipment that cannot route or redirect user data traffic or cannot permit visibility into any user data or packets that such equipment transmits or otherwise handles.

(c) *Procedures.* The Offeror shall review the list of excluded parties in the System for Award Management (SAM) (*https://www.sam.gov*) for entities excluded from receiving federal awards for ''covered telecommunications equipment or services.''

(d) *Representations.* The Offeror represents that—

(1) It [ ] will, [ ] will not provide covered telecommunications equipment or services to the Government in the performance of any contract, subcontract or other contractual instrument resulting from this solicitation. The Offeror shall provide the additional disclosure information required at paragraph (e)(1) of this section if the Offeror responds ''will'' in paragraph (d)(1) of this section; and

(2) After conducting a reasonable inquiry, for purposes of this representation, the Offeror represents that—

It [ ] does, [ ] does not use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services. The Offeror shall provide the additional disclosure information required at paragraph (e)(2) of this section if the Offeror responds ''does'' in paragraph (d)(2) of this section.

(e) *Disclosures.* (1) Disclosure for the representation in paragraph (d)(1) of this provision. If the Offeror has responded ''will'' in the representation in paragraph (d)(1) of this provision, the Offeror shall provide the following information as part of the offer:

(i) For covered equipment—

(A) The entity that produced the covered telecommunications equipment (include entity name, unique entity identifier, CAGE code, and whether the entity was the original equipment manufacturer (OEM) or a distributor, if known);

(B) A description of all covered telecommunications equipment offered (include brand; model number, such as OEM number, manufacturer part number, or wholesaler number; and item description, as applicable); and

(C) Explanation of the proposed use of covered telecommunications equipment and any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b)(1) of this provision.

(ii) For covered services—

(A) If the service is related to item maintenance: A description of all covered

telecommunications services offered (include on the item being maintained: Brand; model number, such as OEM number, manufacturer part number, or wholesaler number; and item description, as applicable); or

(B) If not associated with maintenance, the Product Service Code (PSC) of the service being provided; and explanation of the proposed use of covered telecommunications services and any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b)(1) of this provision.

(2) Disclosure for the representation in paragraph (d)(2) of this provision. If the Offeror has responded ''does'' in the representation in paragraph (d)(2) of this provision, the Offeror shall provide the following information as part of the offer:

(i) For covered equipment—

(A) The entity that produced the covered telecommunications equipment (include entity name, unique entity identifier, CAGE code, and whether the entity was the OEM or a distributor, if known);

(B) A description of all covered telecommunications equipment offered (include brand; model number, such as OEM number, manufacturer part number, or wholesaler number; and item description, as applicable); and

(C) Explanation of the proposed use of covered telecommunications equipment and any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b)(2) of this provision.

(ii) For covered services—

(A) If the service is related to item maintenance: A description of all covered telecommunications services offered (include on the item being maintained: Brand; model number, such as OEM number, manufacturer part number, or wholesaler number; and item description, as applicable); or

(B) If not associated with maintenance, the PSC of the service being provided; and explanation of the proposed use of covered telecommunications services and any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b)(2) of this provision.

(End of provision)

■ 11. Amend section 52.204–25 by—

■ a. Revising the date of the clause;

■ b. In paragraph (a), adding in alphabetical order the definitions ''Backhaul'', ''Interconnection arrangements'', ''Reasonable inquiry'' and ''Roaming'';

■ c. Revising paragraph (b); and

■ d. Removing from paragraph (e) ''this paragraph (e)'' and adding ''this paragraph (e) and excluding paragraph (b)(2)'' in its place.

The revisions read as follows:

52.204–25 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

* * * * *

Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment (AUG 2020)

(a) * * *

Backhaul means intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (*e.g.,* connecting cell phones/towers to the core telephone network). Backhaul can be wireless (*e.g.,* microwave) or wired (*e.g.,* fiber optic, coaxial cable, Ethernet).

* * * * *

Interconnection arrangements means arrangements governing the physical connection of two or more networks to allow the use of another's network to hand off traffic where it is ultimately delivered (*e.g.,* connection of a customer of telephone provider A to a customer of telephone company B) or sharing data and other information resources.

Reasonable inquiry means an inquiry designed to uncover any information in the entity's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity that excludes the need to include an internal or third-party audit.

Roaming means cellular communications services (*e.g.,* voice, video, data) received from a visited network when unable to connect to the facilities of the home network either because signal coverage is too weak or because traffic is too high.

* * * * *

(b) *Prohibition.* (1) Section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) prohibits the head of an executive agency on or after August 13, 2019, from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. The Contractor is prohibited from providing to the Government any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (c) of this clause applies or the covered telecommunication equipment or services are covered by a waiver described in FAR 4.2104.

(2) Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) prohibits the head of an executive agency on or after August 13, 2020, from entering into a contract, or extending or renewing a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (c) of this clause applies or the covered telecommunication equipment or services are covered by a waiver described in FAR 4.2104. This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract.

* * * * *

■ 12. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraphs (a)(3) and (e)(1)(iv) ''AUG 2019'' and adding ''AUG 2020'' in their places, respectively;

■ c. Revising the date of Alternate II; and

■ d. In Alternate II, amend paragraph (e)(1)(ii)(D) by removing ''AUG 2019'' and adding ''AUG 2020'' in its place.

The revisions read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (AUG 2020)

* * * * *

Alternate II (AUG 2020). * * *

* * * * *

■ 13. Amend section 52.213–4 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (a)(1)(iii) ''AUG 2019'' and adding ''AUG 2020'' in its place; and

■ c. Removing from paragraph (a)(2)(viii) ''JUN 2020'' and adding ''AUG 2020'' in its place.

The revision reads as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (AUG 2020)

* * * * *

■ 14. Amend section 52.244–6 by—

■ a. Revising the date of the clause; and

■ b. Removing from paragraph (c)(1)(vi) ''AUG 2019'' and adding ''AUG 2020'' in its place.

The revision reads as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (AUG 2020)

* * * * *

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BILLING CODE 6820–EP–P

(b) * * *

Qualifying offeror, as used in 13.106–1 and 15.304, means an offeror that is determined to be a responsible source, submits a technically acceptable proposal that conforms to the requirements of the solicitation, and the contracting officer has no reason to believe would be likely to offer other than fair and reasonable pricing (10 U.S.C. 2305(a)(3)(D)).

* * * * *

PART 4—ADMINISTRATIVE AND INFORMATION MATTERS

■ 3. Amend section 4.1005–2 by revising paragraph (a)(2) to read as follows:

4.1005–2 Exceptions.

(a) * * *

(2) *Indefinite-delivery indefinite-quantity (IDIQ) and requirements contracts.* (i) IDIQ and requirements contracts may omit the quantity at the line item level for the base award provided that the total contract minimum and maximum, or the estimate, respectively, is stated.

(ii) Multiple-award IDIQ contracts awarded using the procedures at 13.106–1(a)(2)(iv)(A) or 15.304(c)(1)(ii)(A) may omit price or cost at the line item or subline item level for the contract award, provided that the total contract minimum and maximum is stated (see 16.504(a)(1)).

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 4. Amend section 13.106–1 by revising paragraph (a)(2) to read as follows:

13.106–1 Soliciting competition.

(a) * * *

(2)(i) When soliciting quotations or offers, the contracting officer shall notify potential quoters or offerors of the basis on which award will be made (price alone or price and other factors, *e.g.,* past performance and quality).

(ii) Contracting officers are encouraged to use best value.

(iii) Solicitations are not required to state the relative importance assigned to each evaluation factor and subfactor, nor are they required to include subfactors.

(iv) In accordance with 10 U.S.C. 2305(a)(3), for DoD, NASA, and the Coast Guard—

(A) The contracting officer may choose not to include price or cost as an evaluation factor for award when a solicitation—

(*1*) Has an estimated value above the simplified acquisition threshold;

(*2*) Will result in multiple-award contracts (see subpart 16.5) that are for the same or similar services; and

(*3*) States that the Government intends to make an award to each and all qualifying offerors (see 2.101).

(B) If the contracting officer chooses not to include price or cost as an evaluation factor for the contract award, in accordance with paragraph (a)(2)(iv)(A) of this section, the contracting officer shall consider price or cost as one of the factors in the selection decision for each order placed under the contract.

(C) The exception in paragraph (a)(2)(iv)(A) of this section shall not apply to solicitations for multiple-award contracts that provide for sole source orders pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

PART 15—CONTRACTING BY NEGOTIATION

■ 5. Amend section 15.304 by revising paragraph (c)(1) and paragraph (e) introductory text to read as follows:

15.304 Evaluation factors and significant subfactors.

* * * * *

(c) * * *

(1)(i) Price or cost to the Government shall be evaluated in every source selection (10 U.S.C. 2305(a)(3)(A)(ii) and 41 U.S.C. 3306(c)(1)(B)) (also see part 36 for architect-engineer contracts), subject to the exception listed in paragraph (c)(1)(ii)(A) of this section for use by DoD, NASA, and the Coast Guard.

(ii) In accordance with 10 U.S.C. 2305(a)(3), for DoD, NASA, and the Coast Guard—

(A) The contracting officer may choose not to include price or cost as an evaluation factor for award when a solicitation—

(*1*) Has an estimated value above the simplified acquisition threshold;

(*2*) Will result in multiple-award contracts (see subpart 16.5) that are for the same or similar services; and

(*3*) States that the Government intends to make an award to each and all qualifying offerors (see 2.101).

(B) If the contracting officer chooses not to include price or cost as an evaluation factor for the contract award, in accordance with paragraph (c)(1)(ii)(A) of this section, the contracting officer shall consider price or cost as one of the factors in the selection decision for each order placed under the contract.

(C) The exception in paragraph (c)(1)(ii)(A) of this section shall not apply to solicitations for multiple-award contracts that provide for sole source orders pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

* * * * *

(e) Unless the exception at paragraph (c)(1)(ii)(A) of this section applies, the solicitation shall also state, at a minimum, whether all evaluation factors other than cost or price, when combined, are—

* * * * *

PART 16—TYPES OF CONTRACTS

16.504 [Amended]

■ 6. Amend section 16.504 by removing from paragraph (c)(1)(ii)(B)(*5*) ''is less than the simplified'' and adding ''is at or below the simplified'' in its place.

■ 7. Amend section 16.505 by adding paragraph (b)(2)(i)(G); and removing from paragraph (b)(2)(ii)(B)(*10*) ''(b)(2)(i)(A) through (E) of'' and adding ''(b)(2)(i)(A) through (E) and (G) of'' in its place.

The addition reads as follows:

16.505 Ordering.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(G) For DoD, NASA, and the Coast Guard, the order satisfies one of the exceptions permitting the use of other than full and open competition listed in 6.302 (10 U.S.C. 2304c(b)(5)). The public interest exception shall not be used unless Congress is notified in accordance with 10 U.S.C. 2304(c)(7).

* * * * *

[FR Doc. 2020–12764 Filed 7–1–20; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 14, 15, 30, and 52

[FAC 2020–07; FAR Case 2018–005; Item IV; Docket No. FAR–2018–0006, Sequence No. 1]

RIN 9000–AN69

Federal Acquisition Regulation: Modifications to Cost or Pricing Data Requirements

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 to increase the threshold for requiring certified cost or pricing data.

DATES:

Effective: August 3, 2020.

Applicability: In the case of a change or modification made to a prime contract that was entered into before July 1, 2018, the threshold for obtaining certified cost or pricing data remains $750,000, with the following exception. Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract without requiring consideration to reflect a $2 million threshold for obtaining certified cost or pricing data from subcontractors. Similarly for sealed bidding, upon request by a contractor, the contracting officer shall modify the contract without requiring consideration to replace the relevant clause. (See FAR 14.201–7(c)(1)(ii) and 15.408).

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 or *zenaida.delgado@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAC 2020–07, FAR Case 2018–005.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule on October 2, 2019, at 84 FR 52428, to increase the threshold for requesting certified cost or pricing data from $750,000 to $2 million for contracts entered into after June 30, 2018. The threshold for Cost Accounting Standards applicability is required by 41 U.S.C. 1502(b)(1)(B) to be the same threshold as the one for requesting certified cost or pricing data.

This FAR change implements section 811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115–91) that amends 10 U.S.C. 2306a and 41 U.S.C. 3502. Cost or Pricing Data: Truth in Negotiations, 10 U.S.C. 2306a, and Required cost or pricing data and certification, 41 U.S.C. 3502, require that the Government obtain certified cost or pricing data for certain contract actions listed at 15.403–4(a)(1), such as negotiated contracts, certain subcontracts and certain contract modifications. Two respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments is provided as follows:

A. Summary of Changes

There are no changes as a result of comments on the proposed rule.

B. Analysis of Public Comments

Comment: One respondent opposed the proposed rule and believed it will result in higher prices to the Government.

Response: This FAR change is required to implement section 811 of the NDAA for FY 2018 that amends 10 U.S.C. 2306a and 41 U.S.C. 3502.

Comment: One respondent suggested revision of FAR 15.403–4(a)(3) to reflect the $2 million threshold for both prime contracts and subcontracts entered into on and after July 1, 2018, to ensure consistency across the entire Truth in Negotiations Act certification process.

Response: The Councils cannot accept the suggestion because it is not consistent with the statute being implemented.

C. Other Changes

Some changes included in the proposed rule are no longer necessary because of publication of the final rule under FAR Case 2018–007, FAC 2020–006, on May 6, 2020, effective June 5, 2020.

III. Expected Impact of the Final Rule and Proposed Cost Savings

DoD, GSA, and NASA have performed a regulatory cost analysis on this rule. The following is a summary of the estimated public and Government cost savings. This rule will impact large and small businesses which currently compete on solicitations issued using FAR part 15 negotiation procedures and are valued between $750,000 and $2 million as these firms will no longer be required to submit certified cost or pricing data between those amounts. In addition, because of the comparable increase in the cost accounting standards threshold, fewer contractors will be required to comply with FAR clauses that implement the cost accounting standards. The following is a summary of the estimated cost savings calculated in 2016 dollars at a 7-percent discount rate and in perpetuity:

Summary	Public	Government	Total
Present Value Cost Savings	−$588,988,385	−$90,669,628	−$679,658,013
Annualized Cost Savings	−41,229,187	−6,346,874	−47,576,061
Annualized Value Cost Savings as of 2016 if Year 1 is 2020	−31,453,549	−4,841,999	−36,295,548

To access the full Regulatory Cost Analysis for this rule, go to the Federal eRulemaking Portal at *www.regulations.gov,* search for ''FAR Case 2018–005,'' click ''Open Docket,'' and view ''Supporting Documents.''

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

The changes are not applicable to contracts at or below the simplified acquisition threshold or to contracts for the acquisition of commercial items.

V. 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 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, is 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.

VI. Executive Order 13771

This final rule is considered to be an E.O. 13771 deregulatory action. The total annualized value of the cost

savings is −$36,295,548 (as of 2016 if Year 1 is 2020). Details on the estimated cost savings can be found in section III of this preamble.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This rule is required to implement section 811 of the National Defense Authorization Act for Fiscal Year 2018 which amends 10 U.S.C. 2306a and 41 U.S.C. 3502 to increase the threshold for requesting certified cost or pricing data from $750,000 to $2 million. The threshold for Cost Accounting Standards applicability is required by 41 U.S.C. 1502(b)(1)(B) to be the same threshold as the one for requesting certified cost or pricing data.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

This rule will impact small entities who compete on solicitations issued using FAR part 15, Contracting by Negotiation, valued between $750,000 and $2 million. It also impacts subcontracts and contract modifications, including those contracts awarded under sealed bidding procedures, valued between $750,000 and $2 million. Offerors and contractors under the revised threshold will no longer be required to submit ''certified cost or pricing data'' and will now submit ''data other than certified cost or pricing data,'' which takes less time to prepare.

In order to calculate the savings due to the increased threshold, the same FY 2016 Federal Procurement Data System (FPDS) data was utilized that was used to calculate information collection burdens associated with submission of certified cost or pricing data and of data other than certified cost or pricing data under the Office of Management and Budget (OMB) Control Number 9000–0013, which was cleared in January 2018. For contracts and orders awarded using FAR part 15 that were valued between $750,000 and $2 million, reflecting the actions impacted by the increase in the threshold, there were 2,697 contract awards/orders issued, 636 modifications to contracts or orders, an estimated 1,288 subcontracts awarded, and 592 subcontract modifications. Of these responses, 3,364 were from small entities. Of the 1,871 small entities that were awarded contracts or issued orders, 1,501 were unique small entities (about 1.25 contracts/orders per small entity). We estimate a comparable ratio of actions to entities in the other categories. This ratio is less than the overall ratio of actions to entities because this is just a small slice of the total range covered by the information collection clearance. The cost accounting standards do not apply to small entities, therefore that threshold change only affects other than small entities.

The rule does not include additional reporting or record keeping requirements.

There are no available alternatives to the rule to accomplish the desired objective of the statute. However, the impact on small entities will be beneficial, as it will relieve them of the requirement to provide certified cost or pricing data when the acquisition is less than $2 million. Instead, in most cases they would submit data other than certified cost or pricing data which is estimated to save 40 hours of labor effort and related cost savings for each submission not requiring certification.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) does apply. The rule contains information collection requirements. OMB has cleared this information collection requirement under OMB Control Numbers: 9000–0013, Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, and 9000–0129, Cost Accounting Standards Administration. No comments were received on the revision to OMB Control Number 9000–0013 that was provided in the proposed rule. The annual reporting burden under OMB Control Number 9000–0129 was revised using the $2 million threshold; a 30-day notice was published on October 8, 2019, at 84 FR 53727.

List of Subjects in 48 CFR Parts 14, 15, 30, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 14, 15, 30, and 52 as set forth below:

■ 1. The authority citation for parts 14, 15, 30, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 14—SEALED BIDDING

■ 2. Amend section 14.201–7 by revising paragraph (c)(1) to read as follows:

14.201–7 Contract clauses.

* * * * *

(c)(1) When contracting by sealed bidding, the contracting officer shall—

(i) Insert the clause at 52.214–28, Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed the threshold for submission of certified cost or pricing data at 15.403–4(a)(1); or

(ii) Upon request of a contractor in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract without requiring consideration to replace clause 52.214–28, Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding, with its Alternate I.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

■ 3. Amend section 15.403–4 by—

■ a. Revising the third sentence of paragraph (a)(1) introductory text;

■ b. Revising the second sentence of paragraph (a)(1)(iii) introductory text; and

■ c. Adding paragraph (a)(3).

The revisions and addition read as follows:

15.403–4 Requiring certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. chapter 35).

(a)(1) * * * The threshold for obtaining certified cost or pricing data is $750,000 for prime contracts awarded before July 1, 2018, and $2 million for prime contracts awarded on or after July 1, 2018. * * *

* * * * *

(iii) * * * Price adjustment amounts must consider both increases and decreases (*e.g.,* a $500,000 modification resulting from a reduction of $1,500,000 and an increase of $1,000,000 is a $2,500,000 pricing adjustment exceeding the $2,000,000 threshold). * * *

* * * * *

(3) Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract, without requiring consideration, to reflect a $2 million threshold for obtaining certified cost or pricing data on subcontracts entered on and after July 1, 2018. See 15.408.

* * * * *

■ 4. Amend section 15.408 by revising paragraphs (d) and (e) to read as follows:

15.408 Solicitation provisions and contract clauses.

* * * * *

(d) *Subcontractor Certified Cost or Pricing Data.* The contracting officer shall—

(1) Insert the clause at 52.215–12, Subcontractor Certified Cost or Pricing Data, in solicitations and contracts

when the clause prescribed in paragraph (b) of this section is included; or

(2) Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract without requiring consideration, to replace clause 52.215–12, Subcontractor Certified Cost or Pricing Data, with its Alternate I.

(e) *Subcontractor Certified Cost or Pricing Data—Modifications.* The contracting officer shall—

(1) Insert the clause at 52.215–13, Subcontractor Certified Cost or Pricing Data—Modifications, in solicitations and contracts when the clause prescribed in paragraph (c) of this section is included; or

(2) Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract without requiring consideration, to replace clause 52.215–13, Subcontractor Certified Cost or Pricing Data—Modifications, with its Alternate I.

* * * * *

PART 30—COST ACCOUNTING STANDARDS ADMINISTRATION

30.201–4 [Amended]

■ 5. Amend section 30.201–4, in paragraph (b)(1), by removing ''$750,000'' and adding ''$2 million'' in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Amend section 52.214–28 by—
■ a. Removing from the clause prescription ''14.201–7(c)'' and adding ''14.201–7(c)(1)(i)'' in its place; and
■ b. Adding Alternate I.

The addition reads as follows:

52.214–28 Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding.

* * * * *

Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding (May 2020)

* * * * *

Alternate I (AUG 20). As prescribed in 14.201–7(c)(1)(ii), substitute the following paragraph (b) in place of paragraph (b) of the basic clause:

(b) Unless an exception under FAR 15.403–1(b) applies, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), as part of the subcontractor's proposal in accordance with FAR 15.408, Table 15–2 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price)—

(1) Before modifying any subcontract that was awarded prior to July 1, 2018, involving a pricing adjustment expected to exceed $750,000; or

(2) Before awarding any subcontract expected to exceed $2 million on or after July 1, 2018, or modifying any subcontract that was awarded on or after July 1, 2018, involving a pricing adjustment expected to exceed $2 million.

■ 7. Amend section 52.215–12 by—
■ a. Removing from the clause prescription ''15.408(d)'' and adding ''15.408(d)(1)'' in its place; and
■ b. Adding Alternate I.

The addition reads as follows:

52.215–12 Subcontractor Certified Cost or Pricing Data.

* * * * *

Subcontractor Certified Cost or Pricing Data (May 2020)

* * * * *

Alternate I (AUG 20). As prescribed in 15.408(d)(2), substitute the following paragraph (a) in place of paragraph (a) of the basic clause:

(a) Unless an exception under FAR 15.403–1 applies, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR 15.408, Table 15–2 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price)—

(1) Before modifying any subcontract that was awarded prior to July 1, 2018, involving a pricing adjustment expected to exceed $750,000; or

(2) Before awarding any subcontract expected to exceed $2 million on or after July 1, 2018, or modifying any subcontract that was awarded on or after July 1, 2018, involving a pricing adjustment expected to exceed $2 million.

■ 8. Amend section 52.215–13 by—
■ a. Removing from the clause prescription ''15.408(e)'' and adding ''15.408(e)(1)'' in its place; and
■ b. Adding Alternate I.

The addition reads as follows:

52.215–13 Subcontractor Certified Cost or Pricing Data—Modifications.

* * * * *

Subcontractor Certified Cost or Pricing Data—Modifications (May 2020)

* * * * *

Alternate I (AUG 20). As prescribed in 15.408(e)(2), substitute the following paragraphs (a), (b), and (d) for paragraphs (a), (b), and (d) of the basic clause:

(a) The requirements of paragraphs (b) and (c) of this clause shall—

(1) Become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403–4(a)(1); and

(2) Be limited to such modifications.

(b) Unless an exception under FAR 15.403–1 applies, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR 15.408, Table 15–2 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price)—

(1) Before modifying any subcontract that was awarded prior to July 1, 2018, involving a pricing adjustment expected to exceed $750,000; or

(2) Before modifying any subcontract that was awarded on or after July 1, 2018, involving a pricing adjustment expected to exceed $2 million.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract that exceeds $2 million.

52.230–2 [Amended]

■ 9. Amend section 52.230–2 by removing from the clause prescription ''30.201–4(a)'' and adding ''30.201–4(a)(1)'' in its place.

52.230–4 [Amended]

■ 10. Amend section 52.230–4 by removing from the clause prescription ''30.201–4(c)'' and adding ''30.201–4(c)(1)'' in its place.

52.230–5 [Amended]

■ 11. Amend section 52.230–5 by removing from the clause prescription ''30.201–4(e)'' and adding ''30.201–4(e)(1)'' in its place.

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■ (a) Revising the date of the provision; and
■ (b) Removing from paragraph (h)(4) introductory text ''$3,500'' and adding ''the threshold at 9.104–5(a)(2)'' in its place.

The revision reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Aug 2020)

* * * * *

[FR Doc. 2020–12763 Filed 7–1–20; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 13, 15, and 16

[FAC 2020–07; FAR Case 2017–010; Item III; Docket No. FAR–2017–0010; Sequence No. 1]

RIN 9000–AN54

Federal Acquisition Regulation: Evaluation Factors for Multiple-Award Contracts

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017.

DATES: *Effective:* August 3, 2020.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949 or *michaelo.jackson@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2020–07, FAR Case 2017–010.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 83 FR 48271 on September 24, 2018, to implement section 825 of the NDAA for FY 2017 (Pub. L. 114–328). Section 825 of the NDAA for FY 2017 amends 10 U.S.C. 2305(a)(3) to modify the requirement to consider price or cost as an evaluation factor for the award of certain multiple-award task-order contracts issued by DoD, NASA, and the Coast Guard. Section 825 provides that, at the Government's discretion, solicitations for multiple-award contracts that will be awarded for the same or similar services and state the Government intends to award a contract to each qualifying offeror do not require price or cost as an evaluation factor for contract award. This exception does not apply to solicitations for multiple-award contracts that provide for sole-source orders pursuant to 8(a) of the Small Business Act (15 U.S.C. 637(a)). When price or cost is not evaluated during contract award, the contracting officer shall consider price or cost as a factor for the award of each order under the contract. In accordance with statute, the rule specifies that, when using the authority of section 825, the solicitation must be for the ''same or similar services.'' This language aligns with the guidance at FAR 16.504(c)(1)(i), which requires contracting officers, to the maximum extent practicable, to give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources. By ensuring that a solicitation using the authority of section 825 is for the ''same or similar services,'' the contracting officer will avoid situations in which awardees specialize exclusively in one or a few areas within the statement of work, thus creating the likelihood that orders in those areas will be awarded on a sole-source basis (FAR 16.504(c)(1)(ii)(A)) and, in turn, negating the purpose of the statute to obtain price competition at the task order level–where service requirements are apt to be more definite and offers more meaningfully comparable.

Section 825 also amends 10 U.S.C. 2304c(b) to add the exceptions for the use of other than full and open competition found in FAR 6.302 to the list of exceptions to the fair opportunity process at FAR 16.505(b)(2) when placing an order under a multiple-award contract. Contracting officers shall still follow all of the applicable justification documentation, approval, and posting requirements of part 16.5 when providing an exception to the fair opportunity process and using one of the exceptions of FAR 6.302.

Five respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. No significant changes were made to the rule as a result of public comments. Changes were made to the final rule to clarify the intent of section 825 and the rule text, as a result of public comments. A change is made in the final rule to make the guidance in FAR subpart 4.10 consistent with section 825. A change is made to a sentence in FAR 16.504 to make the text consistent with the policy in FAR part 13. Changes were made to the format of the rule text to enhance readability. The definition of ''qualifying offeror'' is moved from FAR 13.106–1 and FAR 15.304 to FAR part 2. Discussion of the edits and comments are provided as follows:

A. Summary of Changes

FAR subpart 4.10, Uniform Use of Line Items, is amended to align guidance on the information required for a contract line item with usage of the rule. Currently, FAR 4.1005 requires price or cost to be included for each contract line item or subline item. In order to conform the subpart with section 825, the rule amends FAR 4.1005–2 to permit the omission of cost or price at the contract line item or subline item level when awarding multiple-award IDIQ contracts in accordance with the authority of section 825, provided that a total contract minimum and maximum is stated, in accordance with FAR subpart 16.5. This addition does not change the intent of the rule; instead, it conforms internal Government procedures to facilitate use of the rule.

In FAR subpart 16.5, section 16.504, Indefinite-Delivery Contracts, is amended to make the policy for the use of the multiple-award approach consistent with the policy in FAR part 13. Currently, FAR 16.504(c)(1)(ii)(B)(5) states that contracting officers must not use the multiple award approach if the estimated value of the contract is ''less than'' the simplified acquisition threshold (SAT). This statement was included in FAR 16.504 to comply with the policy in FAR 13.003, which requires the use of simplified acquisition procedures (SAP), to the maximum extent practicable, for purchases not exceeding the SAT. This rule changes the text of FAR 16.504 from ''less than'' the SAT to ''at or below'' the SAT, to be consistent with the policy of FAR part 13. Paragraph (G) at FAR 16.505(b)(2)(i) of the proposed

rule added the exceptions permitting other than full and open competition to the list of exceptions to the fair opportunity process.

At FAR 13.106–1(a)(2)(iv), paragraph (A) of the proposed rule is restructured stating the action contracting officers may take when using the authority of section 825, and adding subparagraphs (1)–(3), identifying the requirements a solicitation must meet before a contracting officer can take the action in paragraph (A); at paragraph (C), the definition of ''qualifying offeror'' is deleted and moved to part 2, with the addition of text clarifying the parts to which the definition is applicable; and the text of renumbered subparagraph (B) was modified to use the statutory language that ''if'' price or cost was not an evaluation factor for award, as opposed to ''whether or not'' price or cost was evaluated. Similar changes are made at FAR 15.304(c)(1)(ii). These revisions simply clarify the intent, readability, and applicability of the rule and section 825.

B. Analysis of Public Comments

Comment: A respondent expressed concern that the rule is not compliant with the implementing statute, because the rule does not include the term ''qualifying offeror,'' as used in section 825.

Response: The definition of ''qualifying offeror'' is taken directly from the statute and included in the final rule at FAR 2.101, 13.106–1(a)(2)(iv)(A)(3), and 15.304(c)(1)(ii)(A)(3). This requirement helps to ensure there will be sufficient contract holders submitting offers for task orders.

Comment: A respondent advised that use of the term ''head of the agency'' in section 825 makes the statute impractical for use by the contracting community, because the ''head of the agency'' does not typically issue solicitations. The respondent recommended amending the statutory language to implement section 825 effectively.

Response: Section 825 is implemented in the FAR effectively without a change to the statutory language. Unless otherwise stated in statute, the head of the agency may delegate procurement responsibilities to another officer or official in the same agency (see FAR 1.108(b)). FAR 1.102–4(b) further requires decision-making authority to be delegated to the lowest level within the FAR System, consistent with law. As section 825 does not prohibit delegation by the head of the agency, this rule delegates this authority to the contracting officer in accordance with FAR 1.108(b) and 1.102–4(b).

Comment: A respondent advised that the definition of a ''qualifying offer'' in the rule does not align with the statute. The rule requires that the proposal be ''technically acceptable,'' which is not required by the statute.

Response: The section 825 definition of a ''qualifying offeror'' includes language that the offeror ''submits a proposal that conforms to the requirements of the solicitation.'' The rule refers to a ''qualifying offeror'' as an offeror that ''submits a technically acceptable proposal that conforms to the solicitation.'' The terms ''technically acceptable'' and ''conforms'' have different meanings to Government contracting personnel. A proposal can conform to the requirements for the solicitation (*e.g.,* meeting a required page limit or proposal format), but not demonstrate that the offeror can meet the stated technical requirements (*e.g.,* having necessary certifications or offering the requisite services) of the Government. This clarification ensures contracting officers, when using the authorities in section 825, also evaluate whether a proposal meets the minimum technical requirements stated in the solicitation.

Comment: A respondent expressed concern that the rule is requiring the evaluation of price or cost in every source selection at FAR 15.304(c)(1)(i).

Response: FAR 15.304(c)(1) currently states that price or cost shall be evaluated in every source selection conducted under the negotiated acquisition procedures of FAR part 15. The cited language was already in the FAR. The rule relocates the text at FAR 15.304(c)(1) to a new subparagraph (i) with a reference to the new subparagraph (ii)(A), which includes the exception to considering price or cost when DoD, NASA, or the Coast Guard are using the authority of section 825.

Comment: A respondent suggested that the rule be expanded to include the authority granted under section 876 of the NDAA for FY 2019.

Response: Section 876 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 amends Title 41 of United States Code to provide executive agencies with the discretionary authority not to include price as an evaluation factor in certain solicitations for multiple-award and Federal Supply Schedule contracts, when specific conditions are met. Section 825 amends Title 10 of the U.S.C. to implement a similar, but not the same, authority for DoD, NASA, and the Coast Guard. The authority and applicability of these sections are different; as such, FAR Case 2018–014, Increasing Task Order Level Competition, implements section 876.

Comment: A respondent requested clarification regarding the inclusion of language that limits the application of the rule to multiple-award task-order contracts with a value above the simplified acquisition threshold (SAT).

Response: Currently, FAR 16.504(c)(1)(ii)(B)(5) does not permit the use of a multiple-award approach if the total estimated value of the IDIQ contract is less than the SAT; therefore, the rule applies the authority of section 825 to solicitations valued above the SAT. Additionally, this rule changes the text of FAR 16.504 from ''less than'' the SAT to ''at or below'' the SAT, to be consistent with the policy of FAR part 13, which requires the use of SAP for acquisitions valued at or below the SAT.

Comment: A respondent expressed support for establishing fair and reasonable rates at the time of contract award. The respondent recommends modifying the rule to require an evaluation of fair and reasonable pricing when awarding an IDIQ contract. The respondent advises that establishing maximum thresholds for price or cost at the time of contract award would still allow for competition at the task-order level, while assuring that the Government will subsequently receive fair and reasonably priced offers for requirements at the task- and delivery-order level. Another respondent expressed concern about the increased time and labor to be expended by a contracting officer placing an order under a multi-agency contract (MAC) awarded using the authority of section 825, as certain pricing information will no longer be available to support market research activities and associated acquisition decisions.

Response: The rule implements the intent of the statute. Section 825 provides DoD, NASA, and Coast Guard contracting officers with the ability not to include price or cost as an evaluation factor in certain solicitations for multiple-award contracts, if specific conditions are met. When determining whether to use the authority of section 825 or place an order under a resulting contract, a contracting officer must consider all of the circumstances and available information relating to the acquisition to decide the most appropriate procurement approach. Contracting officers are not required to use the authority of section 825 and may, instead, use the current solicitation, evaluation, and award procedures, which require that price be determined fair and reasonable prior to contract award.

In regard to the applicability of the rule to MACs, a MAC is a task-order or delivery-order contract established by one agency for use by Government agencies to obtain supplies and services, consistent with the Economy Act. This rule applies to multiple award contracts, which are: Contracts issued under the Multiple Award Schedule (MAS) authority described in FAR part 38; multiple-award task-order or delivery-order contracts issued in accordance with FAR subpart 16.5; or other indefinite-delivery indefinite-quantity contracts entered into with two or more sources pursuant to the same solicitation. A multiple award contract may also be a MAC, but the two terms are not interchangeable in identifying the same set of contracts. To avoid any potential confusion when applying section 825, some paragraphs of the rule text are renumbered to reinforce their applicability to section 825 and make the text more readable.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule does not contain any solicitation provisions or contract clauses that apply to contracts at or below the SAT, or contracts for the acquisition of commercial items, including commercially available off-the-shelf items.

IV. Expected Cost Savings

Currently, contracting officers must evaluate price or cost as a factor in the selection decision for both the award of the multiple-award contract and each order placed against the multiple-award contract. When applied to applicable multiple-award solicitations, this rule alleviates offerors' need to gather and analyze internal cost or pricing information or propose a price or cost for each line item in the solicitation. Subsequently, contracting officers do not need to review, analyze, and determine in writing that the proposed costs and prices are fair and reasonable for the award of the multiple-award contracts. When used, this rule impacts all offerors responding to a solicitation for a multiple-award contract for the same or similar services issued by the DoD, NASA, or the Coast Guard.

The Government has performed a regulatory cost analysis on this rule. The following is a summary of the estimated public cost savings in millions, which are calculated in 2016 dollars at a 7 percent discount rate:

Present Value Costs	−$4,813,740
Annualized Costs	−336,962
Annualized Value Costs as of 2016 if Year 1 is 2019	−275,061

To access the full regulatory cost analysis for this rule, go to the Federal eRulemaking Portal at *www.regulations.gov,* search for ''FAR case 2017–010,'' click ''Open Docket,'' and view ''Supporting Documents.''

V. Executive Orders 12866 and 13563

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.

VI. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866. However, this rule is considered to be a deregulatory action. Details on the estimated cost savings can be found in Section IV of this rule.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this 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, a Final Regulatory Flexibility Analysis (FRFA) has been prepared and is summarized as follows:

The reason for this action is to implement section 825 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328). The objective of this rule is to permit contracting officers to omit price or cost as an evaluation factor for award in certain solicitations for multiple-award contracts, if certain conditions are met. When applied to applicable multiple-award solicitations, this rule alleviates offerors' need to gather and analyze internal cost or pricing information or propose a price or cost for each line item in the solicitation.

No public comments were received in response to the initial regulatory flexibility analysis.

DoD, GSA, and NASA do not have data on the total number of small business entities that respond to multiple-award solicitations for the same or similar services. However, the Federal Procurement Data System (FPDS) provides information on the number of small business entities that received an award resulting from a multiple-award solicitation for services issued by DoD, NASA, and the Coast Guard. According to data from FPDS for FY 2015 through 2017, DoD, NASA, and the Coast Guard awarded an average of 1,905 multiple-award indefinite-delivery indefinite-quantity (IDIQ) contracts for services, and of those 1,905 contracts, an average of 1,292 contracts were awarded to 1,144 unique small business entities annually. The Government expects the number of small business entities impacted by the rule to be slightly larger than this estimate, as the data does not capture the small business entities that submit offers to applicable solicitations, but do not receive an award. This rule impacts all entities that submit offers in response to multiple-award solicitations for services that utilize the authority of section 825 issued by DoD, NASA, and the Coast Guard.

This rule does not include any new reporting, recordkeeping, or other compliance requirements. There are no known significant alternative approaches to the rule that would meet the requirements of the applicable statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. 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 2, 4, 13, 15, and 16

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 13, 15, and 16 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 13, 15, and 16 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. In section 2.101, amend paragraph (b) by adding the defined term ''Qualifying offeror'' in alphabetical order to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

Qualifying offeror, as used in 13.106–1 and 15.304, means an offeror that is determined to be a responsible source, submits a technically acceptable proposal that conforms to the requirements of the solicitation, and the contracting officer has no reason to believe would be likely to offer other than fair and reasonable pricing (10 U.S.C. 2305(a)(3)(D)).

* * * * *

PART 4—ADMINISTRATIVE AND INFORMATION MATTERS

■ 3. Amend section 4.1005–2 by revising paragraph (a)(2) to read as follows:

4.1005–2 Exceptions.

(a) * * *

(2) *Indefinite-delivery indefinite-quantity (IDIQ) and requirements contracts.* (i) IDIQ and requirements contracts may omit the quantity at the line item level for the base award provided that the total contract minimum and maximum, or the estimate, respectively, is stated.

(ii) Multiple-award IDIQ contracts awarded using the procedures at 13.106–1(a)(2)(iv)(A) or 15.304(c)(1)(ii)(A) may omit price or cost at the line item or subline item level for the contract award, provided that the total contract minimum and maximum is stated (see 16.504(a)(1)).

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 4. Amend section 13.106–1 by revising paragraph (a)(2) to read as follows:

13.106–1 Soliciting competition.

(a) * * *

(2)(i) When soliciting quotations or offers, the contracting officer shall notify potential quoters or offerors of the basis on which award will be made (price alone or price and other factors, *e.g.,* past performance and quality).

(ii) Contracting officers are encouraged to use best value.

(iii) Solicitations are not required to state the relative importance assigned to each evaluation factor and subfactor, nor are they required to include subfactors.

(iv) In accordance with 10 U.S.C. 2305(a)(3), for DoD, NASA, and the Coast Guard—

(A) The contracting officer may choose not to include price or cost as an evaluation factor for award when a solicitation—

(*1*) Has an estimated value above the simplified acquisition threshold;

(*2*) Will result in multiple-award contracts (see subpart 16.5) that are for the same or similar services; and

(*3*) States that the Government intends to make an award to each and all qualifying offerors (see 2.101).

(B) If the contracting officer chooses not to include price or cost as an evaluation factor for the contract award, in accordance with paragraph (a)(2)(iv)(A) of this section, the contracting officer shall consider price or cost as one of the factors in the selection decision for each order placed under the contract.

(C) The exception in paragraph (a)(2)(iv)(A) of this section shall not apply to solicitations for multiple-award contracts that provide for sole source orders pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

PART 15—CONTRACTING BY NEGOTIATION

■ 5. Amend section 15.304 by revising paragraph (c)(1) and paragraph (e) introductory text to read as follows:

15.304 Evaluation factors and significant subfactors.

* * * * *

(c) * * *

(1)(i) Price or cost to the Government shall be evaluated in every source selection (10 U.S.C. 2305(a)(3)(A)(ii) and 41 U.S.C. 3306(c)(1)(B)) (also see part 36 for architect-engineer contracts), subject to the exception listed in paragraph (c)(1)(ii)(A) of this section for use by DoD, NASA, and the Coast Guard.

(ii) In accordance with 10 U.S.C. 2305(a)(3), for DoD, NASA, and the Coast Guard—

(A) The contracting officer may choose not to include price or cost as an evaluation factor for award when a solicitation—

(*1*) Has an estimated value above the simplified acquisition threshold;

(*2*) Will result in multiple-award contracts (see subpart 16.5) that are for the same or similar services; and

(*3*) States that the Government intends to make an award to each and all qualifying offerors (see 2.101).

(B) If the contracting officer chooses not to include price or cost as an evaluation factor for the contract award, in accordance with paragraph (c)(1)(ii)(A) of this section, the contracting officer shall consider price or cost as one of the factors in the selection decision for each order placed under the contract.

(C) The exception in paragraph (c)(1)(ii)(A) of this section shall not apply to solicitations for multiple-award contracts that provide for sole source orders pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

* * * * *

(e) Unless the exception at paragraph (c)(1)(ii)(A) of this section applies, the solicitation shall also state, at a minimum, whether all evaluation factors other than cost or price, when combined, are—

* * * * *

PART 16—TYPES OF CONTRACTS

16.504 [Amended]

■ 6. Amend section 16.504 by removing from paragraph (c)(1)(ii)(B)(*5*) ''is less than the simplified'' and adding ''is at or below the simplified'' in its place.

■ 7. Amend section 16.505 by adding paragraph (b)(2)(i)(G); and removing from paragraph (b)(2)(ii)(B)(*10*) ''(b)(2)(i)(A) through (E) of'' and adding ''(b)(2)(i)(A) through (E) and (G) of'' in its place.

The addition reads as follows:

16.505 Ordering.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(G) For DoD, NASA, and the Coast Guard, the order satisfies one of the exceptions permitting the use of other than full and open competition listed in 6.302 (10 U.S.C. 2304c(b)(5)). The public interest exception shall not be used unless Congress is notified in accordance with 10 U.S.C. 2304(c)(7).

* * * * *

[FR Doc. 2020–12764 Filed 7–1–20; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 14, 15, 30, and 52

[FAC 2020–07; FAR Case 2018–005; Item IV; Docket No. FAR–2018–0006, Sequence No. 1]

RIN 9000–AN69

Federal Acquisition Regulation: Modifications to Cost or Pricing Data Requirements

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

and described educational media and programming.

For these reasons, the Secretary waives the requirements in 34 CFR 75.250, which prohibit project periods exceeding five years, as well as the requirements in 34 CFR 75.261(a) and (c)(2), which allow the extension of a project period only if the extension does not involve the obligation of additional Federal funds. This waiver allows the Department to issue a one-time FY 2020 continuation award to each of the five currently funded 84.327C projects.

Any activities carried out during the year of this continuation award will be consistent with, or a logical extension of, the scope, goals, and objectives of the grantees' applications as approved in the FY 2015 competition. The requirements for continuation awards are set forth in 34 CFR 75.253.

Waiver of Delayed Effective Date

The Administrative Procedure Act requires that a substantive rule must be published at least 30 days before its effective date, except as otherwise provided for good cause (5 U.S.C. 553(d)(3)). A delayed effective date would be contrary to public interest by creating a gap in production of described and captioned educational programming and delays in the availability of programming for children with disabilities. Therefore, the Secretary waives the delayed effective date provision for good cause.

Regulatory Flexibility Act Certification

The Secretary certifies that the waiver and extension of the project periods will not have a significant economic impact on a substantial number of small entities. The only entities that will be affected by the waiver and extension of the project periods are the current grantees. Additionally, the extension of an existing project period imposes minimal compliance costs, and the activities required to support the additional year of funding will not impose additional regulatory burdens or require unnecessary Federal supervision.

Paperwork Reduction Act of 1995

This waiver and extension of the project periods does not contain any information collection requirements.

Intergovernmental Review

These programs are subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance. This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* 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 (PDF). 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.

Mark Schultz,

Commissioner, Rehabilitation Services Administration. Delegated the authority to perform the functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Service.

[FR Doc. 2020–12954 Filed 7–1–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Parts 60–1, 60–300, and 60–741

RIN 1250–AA08

Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors: TRICARE Providers

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule.

SUMMARY: The U.S. Department of Labor's (DOL's or Department's) Office of Federal Contract Compliance Programs (OFCCP) publishes this final rule to amend its regulations pertaining to its authority over TRICARE health care providers. The final rule is intended to increase access to care for uniformed service members and veterans and to provide certainty for health care providers who serve TRICARE beneficiaries. It is also anticipated that this final rule will result in cost savings for TRICARE providers. In a reconsideration of its legal position, the final rule provides that OFCCP lacks authority over Federal health care providers who participate in TRICARE. In the alternative, the final rule establishes a national interest exemption from Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 for health care providers with agreements to furnish medical services and supplies to individuals participating in TRICARE. Thus, even if OFCCP had authority over Federal health care providers who participate in TRICARE (which this rule clarifies it does not), OFCCP has determined that special circumstances in the national interest justify granting the exemption as it would improve uniformed service members' and veterans' access to medical care, more efficiently allocate OFCCP's limited resources for enforcement activities, and provide greater uniformity, certainty, and notice for health care providers participating in TRICARE. Under the final rule, OFCCP will retain authority over health care providers participating in TRICARE if they hold a separate covered Federal contract or subcontract that is not for providing health care services under TRICARE. TRICARE providers that fall outside of OFCCP's authority under this final rule remain subject to all other Federal, state, and local laws prohibiting discrimination and providing for equal employment opportunity.

DATES: This regulation is effective August 31, 2020.

FOR FURTHER INFORMATION CONTACT: Tina Williams, Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C–3325, Washington, DC 20210. Telephone: (202) 693–0104 (voice) or (202) 693–1337 (TTY).

SUPPLEMENTARY INFORMATION:

I. Executive Summary

On November 6, 2019, OFCCP issued a notice of proposed rulemaking (NPRM) to clarify the scope of OFCCP's authority [1] under Executive Order

[1] OFCCP often refers to the scope of its authority to enforce equal employment opportunity

11246, as amended (E.O. 11246),[2] Section 503 of the Rehabilitation Act of 1973, as amended (Section 503),[3] and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA);[4] and, to dispel any legal uncertainty, and further the national interest by explicitly exempting certain health care providers from OFCCP's enforcement activities. Specifically, in the E.O. 11246, VEVRAA, and Section 503 regulations, OFCCP would revise its definition of ''subcontractor''—meaning subcontractors regulated by OFCCP—to exclude health care providers with agreements to furnish medical services and supplies to individuals participating in TRICARE.

During the 30-day comment period, OFCCP received sixteen comments on the proposed rule.[5] Comments came from a wide variety of organizations, including health care providers, contractor associations, civil rights organizations, state attorneys general, and members of Congress. The comments addressed various aspects of the NPRM. These comments were considered thoroughly and are addressed in the discussion that follows. Where appropriate, this preamble reproduces some of the portions of the preamble to the proposed rule for ease of reference and to facilitate discussion of the public comments.

This final rule adopts in large part the reasoning and proposed regulatory text as set forth in the NPRM. It concludes that removing TRICARE health providers from OFCCP's authority is appropriate and consistent with previously enacted legislation on the issue and in the national interest.

This final rule is an E.O. 13771 deregulatory action because it is expected to reduce compliance costs and potentially the cost of litigation for regulated entities.

II. Legal Authority

Federal law requires government contractors to refrain from discriminating on the basis of race, sex, and other grounds.[6] Additionally, government contractors must take affirmative action to ensure equal employment opportunity.[7] OFCCP, situated in the Department of Labor, enforces these contracting requirements. OFCCP requires government contractors to furnish information about their affirmative action programs (AAPs) and related employment records and data so OFCCP can ascertain compliance with the laws it enforces.[8]

OFCCP enforces three equal employment opportunity laws that apply to covered Federal contractors: E.O. 11246, Section 503, and VEVRAA. In 1965, President Lyndon B. Johnson signed E.O. 11246, which (as amended) prohibits discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, and national origin, as well as discrimination against applicants or employees because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations. Congress covered disability as a protected class through Section 503 of the Rehabilitation Act in 1973. Congress also covered veterans through the Vietnam Era Veterans' Readjustment Assistance Act of 1974, which prohibits discrimination on the basis of veteran status. All three laws also require Federal contractors to take affirmative steps to ensure equal employment opportunity in their employment practices.

OFCCP has rulemaking authority under all three laws.[9] Additionally, OFCCP has authority to exempt a contract from E.O. 11246, VEVRAA, and Section 503 if the Director of OFCCP determines that special circumstances in the national interest require doing so.[10] OFCCP's regulations allow the Director to grant national interest exemptions to groups or categories of contracts where he or she finds it impracticable to act upon each request for an exemption individually or where the exemption will substantially contribute to convenience in the administration of the laws.[11] These categorical exemptions follow the principle that an agency, whenever permitted, need not ''continually . . . relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding'' that ''could invite favoritism, disunity, and inconsistency.'' [12] These long-standing regulatory provisions allowing for categorical national interest exemptions are owed deference.[13] The provision permitting categorical exemption from E.O. 11246 was part of the original notice-and-comment regulation that implemented the Order, and has been in place for over fifty years.[14] The provisions permitting categorical exemptions from VEVRAA and Section 503 are patterned similarly and have been in place for decades as well.[15] Additionally, E.O. 11246's predecessor, E.O. 10925, contained a similarly-worded exemption provision which was implemented through a regulation providing a substantially similar categorical exemption.[16] OFCCP has granted categorical exemptions in the national interest in the past.[17] OFCCP also may exercise prosecutorial discretion in determining its enforcement priorities.[18]

requirements as its *jurisdiction.* For this final rule, OFCCP believes the word *authority* is more precise, since OFCCP does not have adjudicative power.

[2] E.O. 11246, 30 FR 12319 (Sept. 24, 1965).

[3] 29 U.S.C. 793.

[4] 38 U.S.C. 4212.

[5] One of these comments was found to be non-responsive to the NPRM.

[6] As used in this preamble, the term *contractor* includes, unless otherwise indicated, federal government contractors and subcontractors. When used in reference to E.O. 11246, it also includes federally assisted construction contractors and subcontractors.

[7] *See* E.O. 11246, section 202(1); 29 U.S.C. 793(a); 38 U.S.C. 4212(a)(1); 41 CFR 60–1.40, –2.1 through –2.17; *id.* –60–300.40 through –300.45; *id.* –60–741.40 through –741.47.

[8] E.O. 11246, section 202(6); 41 CFR 60–1.4(a)(6), –1.43; *id.* –60–300.40(d), –300.81; *id.* –60–741.40(d), –741.81; *see also Chrysler Corp.* v. *Brown,* 441 U.S. 281, 286 (1979).

[9] E.O. 11246 section 201; 38 U.S.C. 4212(a)(2); 29 U.S.C. 793(a); E.O. 11758, § 2; Sec'y Order 7–2009, 74 FR 58834 (Nov. 13, 2009).

[10] E.O. 11246 section 204; E.O. 11758 §§ 2–3, as amended; 29 U.S.C. 793(c)(1); 41 CFR 60–300.4(b)(1). E.O. 11246 refers to an ''exemption'' while VEVRAA and Section 503 use the term ''waiver.'' This final rule uses the term ''exemption'' to refer to both.

[11] 41 CFR 60–1.5(b)(1), –300.4(b)(1), –741.4(b)(1).

[12] *Heckler* v. *Campbell,* 461 U.S. 458, 467 (1983); *see also Lopez* v. *Davis,* 531 U.S. 230, 243–44 (2001); *Am. Hosp. Ass'n* v. *NLRB,* 499 U.S. 606, 612 (1991) (''[E]ven if a statutory scheme requires individualized determinations, the decision maker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority.'' (discussing *Campbell,* 461 U.S. at 467; *FPC* v. *Texaco, Inc.,* 377 U.S. 33, 41–44 (1964); *United States* v. *Storer Broad. Co.,* 351 U.S. 192, 205 (1956)).

[13] *Cf., e.g., United States* v. *Cleveland Indians Baseball Co.,* 532 U.S. 200, 220 (2001) (''We do not resist according such deference in reviewing an agency's steady interpretation of its own 61-year-old regulation implementing a 62-year-old statute. Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.'') (quoting *Cottage Sav. Ass'n* v. *Commissioner,* 499 U.S. 554, 561 (1991)).

[14] *See* 33 FR 7804, 7807 (May 28, 1968); *see also* 33 FR 3000, 3003 (Feb. 15, 1968) (notice of proposed rulemaking).

[15] *See* 39 FR 20566, 20568 (June 11, 1974); 41 FR 26386, 26387 (June 25, 1976).

[16] *See* E.O. 10925 section 303; 41 CFR 60–1.3(b)(1) (1962).

[17] *See* OFCCP, COVID–19 National Interest Exemption, *https://www.dol.gov/agencies/ofccp/national-interest-exemption* (last accessed April 23, 2020); OFCCP, Hurricane Recovery National Interest Exemptions, *https://www.dol.gov/ofccp/hurricanerecovery.htm* (last accessed April 23, 2020).

[18] *See* 5 U.S.C. 701(a)(2); *Heckler* v. *Chaney,* 470 U.S. 821, 831 (1985); *Andrews* v. *Consol. Rail Corp.,* 831 F.2d 678, 687 (7th Cir. 1987); *Clementson* v. *Brock,* 806 F.2d 1402, 1404–05 (9th Cir. 1986); *Carroll* v. *Office of Fed. Contract Compliance Programs, U.S. Dep't of Labor,* 235 F. Supp. 3d 79, 84 (D.D.C. 2017).

III. Administrative and Regulatory Background

A. Overview of OFCCP's Areas of Authority

E.O. 11246, VEVRAA, and Section 503 apply to entities holding covered government contracts and subcontracts.[19] OFCCP has authority to enforce the requirements of these three laws and their implementing regulations. Contractors agree to those requirements in the equal opportunity clauses included in their contracts with the Federal Government, clauses which also require contractors to ''flow down'' these requirements to any subcontractors. The text of these clauses is set forth in E.O. 11246 section 202 and the implementing regulations for all three programs, and is also found in part 52 of title 48 of the Code of Federal Regulations, which contains the Federal Acquisition Regulation's standard contract clauses.[20] Federal law provides that these clauses ''shall be considered to be part of every contract and subcontract required by [law] to include such a clause.'' [21] This is true ''whether or not the [equal opportunity clause] is physically incorporated in such contracts.'' [22] Persons who have no contractual (or subcontractual) relationship with the Federal Government, however, have no obligation to adhere to OFCCP's substantive requirements.[23]

OFCCP's regulations define ''government contract'' as any agreement or modification thereof between a department or agency of the Federal Government and any person for the purchase, sale, or use of personal property or nonpersonal services.[24] Agreements pertaining to programs or activities receiving Federal financial assistance, however, are not considered covered contracts, nor are other noncontract government programs or activities.[25] Federally assisted construction contracts, however, do come within OFCCP's authority under E.O. 11246.[26]

As defined in regulation, a covered ''contract'' includes a ''contract or a subcontract.'' [27] A prime contract is an agreement with the Federal Government agency itself. A ''subcontract'' is

> any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):
>
> (1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or
>
> (2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.[28]

Although, in general, organizations holding a contract or subcontract as defined are covered under E.O. 11246, Section 503, and VEVRAA, some exemptions apply. Contractors that hold only contracts below OFCCP's basic monetary thresholds are exempt.[29] Certain affirmative action requirements only apply depending on the type and dollar value of the contract held as well as the contractor's number of employees.[30] The regulations also exempt some categories of contracts under certain circumstances or for limited purposes, including those involving work performed outside the United States; certain contracts with state or local governments; contracts with religious corporations, associations, educational institutions or societies; educational institutions owned in whole or in part by a particular religion or religious organization; and contracts involving work on or near an Indian reservation.[31]

Additionally, as discussed earlier in this final rule, OFCCP has authority to exempt entities and categories of entities from E.O. 11246, VEVRAA, and Section 503 if the Director of OFCCP determines that special circumstances in the national interest require doing so.[32]

B. Overview of Prior Treatment of Health Care Providers Participating in TRICARE

OFCCP has audited health care providers who are government contractors, and it will continue to do so under this final rule.[33] Provided below is a brief overview of TRICARE and developments regarding OFCCP's interpretations and practice regarding its authority over health care providers participating in TRICARE.

1. Background on TRICARE

TRICARE is the Federal health care program serving uniformed service members, retirees, and their families.[34] TRICARE is managed by the Defense Health Agency, which contracts with managed care support contractors to administer each TRICARE region. The managed care support contractors enter into agreements with individual and institutional health care providers in order to create provider networks for fee-for-service, preferred-provider, and health maintenance organization (HMO)-like programs. Fee-for-service plans reimburse beneficiaries or the health care provider for the cost of covered services. The TRICARE HMO-like program involves beneficiaries generally agreeing to use military treatment facilities and designated civilian providers and to follow certain managed care rules and procedures to obtain covered services.

2. OFCCP and Health Care Providers Participating in TRICARE

In 2007, OFCCP for the first time in litigation asserted enforcement authority over a health care provider based solely on the hospital's delivery of medical care to TRICARE beneficiaries. The provider in this case, a hospital in Florida, disagreed with OFCCP's view, and OFCCP initiated enforcement proceedings in 2008 under the caption *OFCCP* v. *Florida Hospital of Orlando.* In 2010, an administrative law judge (ALJ) found for the agency.[35]

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[19] *See* E.O. 11246 section 202; 29 U.S.C. 793(a); 38 U.S.C. 4212(a)(1).

[20] *See* 48 CFR 52.222–26, –35, –36.

[21] 41 CFR 60–14(e), –741.5(e), –250.5(e).

[22] *Id.*

[23] *See* 41 CFR 60–1.1 (''The regulations in this part apply to all contracting agencies of the Government and to contractors and subcontractors who perform under Government contracts, to the extent set forth in this part.''); *see also id.* –300.1(b), –741.1(b).

[24] *Id.* 60–1.3, –300.2(n), –741.2(k).

[25] *See id.* 60–1.1, –300.1(b), –741.4(a). Programs and activities receiving federal financial assistance must comply with various other nondiscrimination laws, including Title VI of the Civil Rights Act of 1964 (prohibiting discrimination on the basis of race, color, or national origin) and Section 504 of the Rehabilitation Act of 1973 (prohibiting discrimination on the basis of disability).

[26] 41 CFR 60–1.1.

[27] *Id.* 60–1.3, –300.2, –741.2.

[28] *Id.* 60–1.3, –300.2(x), –741.2(x).

[29] *Id.* 60–1.5(a)(1), –300.4(a)(1), –741.4(a)(1). E.O. 11246's basic obligations apply to businesses holding a government contract in excess of $10,000, or government contracts which have, or can reasonably be expected to have, an aggregate total value exceeding $10,000 in a 12-month period. E.O. 11246 also applies to government bills of lading, depositories of federal funds in any amount, and to financial institutions that are issuing and paying agents for U.S. Savings Bonds. Section 503 applies to federal contractors and subcontractors with contracts in excess of $15,000. VEVRAA applies to federal contractors and subcontractors with contracts of $150,000 or more. The coverage thresholds under Section 503 and VEVRAA increased from those listed in the statutes and OFCCP's regulations in accordance with the inflationary adjustment requirements in 41 U.S.C. 1908. *See* 80 FR 38293 (July 2, 2015); 75 FR 53129 (Aug. 30, 2010).

[30] 41 CFR 60–1.40, –300.40, –741.40.

[31] *See id.* 60–1.5, –300.4, –741.4.

[32] E.O. 11246, section 204; 29 U.S.C. 793(c)(1); 41 CFR 60–300.4(b)(1).

[33] As noted throughout this final rule, health care providers who are prime government contractors, or who hold subcontracts apart from their provider relationship to a government health care program included in this rule, would remain under OFCCP's authority.

[34] *See* 32 CFR 199.17(a).

[35] *OFCCP* v. *Fla. Hosp. of Orlando,* No. 2009–OFC–00002, 2010 WL 8453896 (ALJ Oct. 18, 2010).

In December 2010—soon after the ALJ's decision in *Florida Hospital*—OFCCP issued a new directive on health care providers that superseded previous directives.[36] Directive 293 asserted that OFCCP had authority over certain health care providers participating in TRICARE and other government health care programs.

Congress responded the next year. The National Defense Authorization Act for Fiscal Year 2012 (NDAA) included a provision addressing the maintenance of the adequacy of provider networks under the TRICARE program and TRICARE health care providers as purported Government subcontractors. Sec. 715 of the NDAA provided that, for the purpose of determining whether network providers under TRICARE provider network agreements are Government subcontractors, a TRICARE managed care support contract that includes the requirement to establish, manage, or maintain a network of providers may not be considered to be a contract for the performance of health care services or supplies on the basis of such requirement.[37]

In April 2012, 16 months after it had been issued, OFCCP formally rescinded Directive 293.[38] Meanwhile, the *Florida Hospital* litigation continued. Six months after OFCCP formally rescinded Directive 293, in October 2012, the Department's Administrative Review Board (ARB or Board) held that the NDAA's amendment to the TRICARE statute precluded OFCCP from asserting authority over the Florida hospital.[39] The Board dismissed OFCCP's administrative complaint against the hospital. Four of the five judges agreed that the hospital did not satisfy the second prong of OFCCP's regulatory definition of ''subcontract.'' Two judges, Judge Corchado and Judge Royce, would have found for the agency on the basis of the first prong of the regulatory definition of ''subcontract.'' [40]

The Board subsequently granted OFCCP's request for reconsideration. This time, a three-judge majority ruled for the agency. In July 2013, the Board concluded that the Florida hospital at issue satisfied the first prong of the agency's regulatory definition of ''subcontract.'' [41] The Department's ARB remanded to the ALJ, however, to determine whether TRICARE constituted Federal financial assistance outside OFCCP's jurisdiction. Judge Igasaki and Judge Edwards dissented on the basis of their original opinion in the Board's first decision. They concluded that ''the enactment of Section 715 of the NDAA removes OFCCP's jurisdiction under either Prong One or Prong Two based on the specific contract at issue in this case.'' [42]

While the remand of *Florida Hospital* was pending, Congress introduced legislation to exempt all health care providers from OFCCP's enforcement activities and held a hearing regarding OFCCP's enforcement activities.[43] The Secretary of Labor at the time, in a letter to the leaders of the House Committee on Education and the Workforce and the Subcommittee on Workforce Protection, stated that the leaders ''ha[d] made clear that, in [their] judgment, Congress intended to eliminate entirely OFCCP's jurisdiction over TRICARE subcontractors.'' [44] The Secretary's letter proposed that ''in lieu of legislative action,'' OFCCP would ''exercise prosecutorial discretion over the next five years to limit its enforcement activities with regard to TRICARE subcontractors.'' [45]

In May 2014, OFCCP issued Directive 2014–01, establishing a five-year moratorium on enforcement of affirmative action obligations for health care providers deemed to be TRICARE subcontractors.[46] OFCCP also administratively closed its open compliance reviews of contractors covered by the moratorium, which resulted in the dismissal of the *Florida Hospital* case.[47] On May 18, 2018, OFCCP issued Directive 2018–02, a two-year extension of the previous moratorium.[48] Pursuant to this Directive, the moratorium will expire on May 7, 2021. OFCCP explained that it extended the moratorium out of concern that the approaching expiration of the moratorium and accompanying uncertainty over the applicability of the laws OFCCP enforces might contribute to the difficulties veterans and uniformed service members face when accessing health care. The Directive also explained that the extension would provide additional time to receive feedback from stakeholders. The Directive extended the scope of the moratorium to cover providers participating in the Department of Veterans Affairs' health benefits programs.[49]

IV. Discussion of Public Comments

A. Length of Comment Period

Some commenters criticized the 30-day comment period as impermissibly short. For example, a women's civil rights organization, on behalf of five other civil rights organizations, commented that a 30-day comment period was inconsistent with the APA and applicable executive orders and provided insufficient time given the ''breadth and substance of the information sought.'' The organization also stated that a 30-day comment period is inconsistent with a November 18, 2019 report by DOL's Office of Inspector General regarding rulemaking.

A group of state attorneys general commented that ''executive agencies have followed a presumption that a minimum of sixty days is necessary to provide the affected public with a meaningful opportunity to comment on proposed agency regulations[.]'' A member of Congress commented that ''[a]pproximately 86 percent of rules (12 out of 14) proposed by OFCCP since 2000 have afforded the public an initial comment period of approximately 60 days and has even been extended in several instances.''

These commenters also requested an extension to the comment period. After considering their requests, the Department determined that the original 30-day comment period provided adequate time for the public to comment on the proposed rule. Notably, the Administrative Procedure Act (APA) does not set forth a mandatory minimum time for public comments, but rather more generally requires an ''opportunity to participate in the rule making through submission of written

[36] *See* OFCCP, Directive 293, Coverage of Health Care Providers and Insurers (Dec. 16, 2010) (rescinded Apr. 25, 2012).

[37] Public Law 112–81 section 715, 125 Stat. 1298, 1477 (2011), codified at 10 U.S.C. 1097b(a)(3).

[38] *See* Notice of Rescission No. 301 (Apr. 25, 2012).

[39] *OFCCP* v. *FLA. Hosp. of Orlando,* No. 11–011, 2012 WL 5391420 (ARB Oct. 19, 2012).

[40] Judge Brown concluded that the question about the first prong was not properly before the Board.

[41] *OFCCP* v. *Fla. Hosp. of Orlando,* No. 11–011, 2013 WL 3981196 (ARB July 22, 2013).

[42] *Id.* at *25 (Igasaki & Edwards, JJ., dissenting).

[43] H.R. 3633, Protecting Health Care Providers from Increased Administrative Burdens Act, Hearing Before the Subcomm. On Workforce Protections of the H. Comm. on Educ. & the Workforce, 113th Cong. (Mar. 13, 2014) [hereinafter ''2014 Hearing'']].

[44] *Id.* at 3–5 (Sec'y of Labor Thomas E. Perez, Letter to Congressional Leaders, Mar. 11, 2014).

[45] *Id.* at 4.

[46] OFCCP, Directive 2014–01, TRICARE Subcontractor Enforcement Activities (May 7, 2014).

[47] *OFCCP* v. *Fla. Hosp. of Orlando,* No. 2009–OFC–00002 (ALJ Apr. 1, 2014).

[48] OFCCP, Directive 2018–02, TRICARE Subcontractor Enforcement Activities (May 18, 2018).

[49] *Id.* at 1 n.1.

data, views, or arguments.'' [50] Thirty-day public comment periods are broadly viewed as permissible under the APA, particularly where, as here, the proposal is fairly straightforward and is not detailed or highly technical in nature.[51]

B. Reconsidering OFCCP's Authority Over TRICARE Providers

Since bringing the *Florida Hospital* case over a decade ago, and as reiterated in its 2014 and 2018 moratoria, OFCCP has held the position that it holds authority over TRICARE providers. In preparing this final rule, OFCCP has carefully examined the authorities it administers, its legal position as stated in litigation and repeated public statements and guidance, the decisions in *Florida Hospital,* Congress's recent actions, and comments received in response to the NPRM. OFCCP has concluded that its recent assertions of authority over TRICARE providers warrant reconsideration.

Some commenters agreed that Section 715 of the 2012 NDAA removed OFCCP's authority over TRICARE providers. For example, an employer association commented that ''the NDAA specifies that an agreement to provide health care services cannot be necessary to the establishment or maintenance of a health care network; under OFCCP's regulatory definitions, this means that such an agreement cannot be a subcontract.'' [52] Likewise, a consortium of federal contractors and subcontractors commented that ''the proper interpretation of the NDAA excludes TRICARE providers from the definition of [']subcontractor[']' pursuant to the OFCCP's regulations.''

Other commenters disagreed. An LGBT rights organization contended that the ARB correctly held in *Florida Hospital* that the NDAA did not remove OFCCP's authority. A women's civil rights organization, on behalf of seventeen other civil rights organizations, commented that ''[t]he legislative history of Section 715 supports'' the ARB's decision in *Florida Hospital.* Specifically, the organization commented that an earlier draft of the NDAA included language that more clearly removed OFCCP's authority under both prongs of the subcontractor definition; this language was not included in the final bill. One member of Congress expressed the opinion that the ''enacted language, and the express rejection of language stating network providers are not considered subcontractors in the Senate-passed provision, demonstrates that Congress intended to create a narrow exception in certain instances—not a wholesale exemption.''

Other commenters noted the salutary effect the rule change will have on the provision of health care services. A Catholic health care network wrote that it ''concurs that the proposed regulation amendment will accomplish the intended goal, and will ultimately increase or improve uniformed service members' and veterans' access to medical care.'' A consortium of federal contractors and subcontractors commented that ''[a]n express regulatory provision eliminating coverage for health care providers that provide supplies or services to TRICARE beneficiaries would remove this uncertainty and provide much needed clarity for this industry.'' Finally, a group of three members of Congress commented that the proposed rule ''will increase access to health care services for TRICARE beneficiaries.''

OFCCP considered these comments. For the reasons set forth below, OFCCP interprets the 2012 NDAA to remove OFCCP's authority over TRICARE providers, and it is a proper use of OFCCP's regulatory authority to reconsider its previous position and conform its regulations to that legislative effort.

When OFCCP issued Directive 293, asserting authority over these health care providers, Congress reacted quickly by enacting Section 715 of the 2012 NDAA. ''Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.'' *N. Haven Bd. of Ed.* v. *Bell,* 456 U.S. 512, 535 (1982) (internal quotation marks omitted). OFCCP's history in this area shows the opposite with regard to TRICARE providers.

The text and surrounding context of section 715 itself make clear that Congress sought to reverse OFCCP's assertion of authority over TRICARE providers. The section states, ''For the purpose of determining whether network providers''—*e.g.,* hospitals and physicians—''are subcontractors . . . , a TRICARE managed care support contract that includes the requirement to establish, manage, or maintain a network of providers may not be considered to be a contract for the performance of health care services on the basis of such requirement.'' The ARB held in *Florida Hospital* that it could nonetheless deem a health care provider a subcontractor where the TRICARE regional administrator could not ''fulfill its contract to create an integrated health delivery system without the services from network providers like Florida Hospital.'' [53] But, upon reconsideration, OFCCP now believes the dissenting opinion in *Florida Hospital* gave the better reading of the statute. The dissent explained that because the ''managed care prime contract . . . includes the requirement to maintain a network of providers, OFCCP's jurisdiction is removed. Under Section 715, the subcontract is no longer a 'subcontract' under [OFCCP's regulatory definition] because the element of the contract that is 'necessary to the performance of any one or more contracts' involves the provisions of health care network provider services to TRICARE beneficiaries.'' [54] The dissent's reading would prevent the statute from becoming a nullity—since the purpose of creating a provider network is to provide health care.

Some commenters raised section 715's legislative history. The predominating fact in the legislative history of section 715 is that Congress enacted it in response to OFCCP's express claim of authority over TRICARE providers. A construction of the statute that would render it a nullity would not be consistent with congressional intent in light of this historical context. Further, little can be drawn from the legislative history noted by commenters, especially the vague Statement of Administration Policy.[55] At best, it shows that (i) an earlier draft of the bill could have exempted TRICARE providers from OFCCP authority even if they held other, unrelated federal contracts, and (ii) the language was revised to clarify that TRICARE providers would not be subject to OFCCP by virtue of their TRICARE agreements, but could still be subject to OFCCP if they held other agreements outside of TRICARE.

[50] 5 U.S.C. 553(c); *see also Phillips Petroleum Co.* v. *U.S. E.P.A.,* 803 F.2d 545, 559 (10th Cir. 1986) (''The opportunity to participate is all the APA requires. There is no requirement concerning how many days the [agency] must allow for comment or that the [agency] must re-open the comment period at the request of one of the participants.'').

[51] *See, e.g., Conn. Light & Power Co.* v. *Nuclear Regulatory Comm'n.,* 673 F.2d 525, 534 (D.C. Cir. 1982) (upholding a thirty-day comment period even though the ''technical complexity'' of the regulation was ''such that a somewhat longer comment period might have been helpful''); *see also Conference of State Bank Supervisors* v. *Office of Thrift Supervision,* 792 F. Supp. 837, 844 (D.D.C. 1992) (upholding the sufficiency of a thirty-day comment period).

[52] This organization also commented that the 2018 VA Mission Act, 38 U.S.C. 1703A(i)(1), provides additional statutory support to OFCCP's position.

[53] *Fla. Hosp.,* 2013 WL 3981196, at *19.

[54] *Id.* at *29.

[55] *See* Statement of Administration Policy, Executive Office of the Pres., Office of Mgmt. & Budget, S. 1867—National Defense Authorization Act for FY 2012 (Nov. 17, 2011), *obamawhitehouse.archives.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf.*

For these reasons, after careful consideration, OFCCP has reconsidered its position and now concludes that it does not have authority over TRICARE providers.

C. Establishing a National Interest Exemption for Health Care Providers Participating in TRICARE

OFCCP believes that lasting certainty for TRICARE health care providers and patients is in the national interest. Therefore, through this final rule OFCCP is also establishing, as an alternative, an exemption from E.O. 11246, Section 503, and VEVRAA for health care providers with agreements to furnish medical services and supplies to individuals participating in TRICARE. Nothing in this action is intended to interfere with OFCCP's vital mission of enforcing equal employment opportunity in organizations that contract with the government. OFCCP will retain authority over a health care provider participating in such a network or arrangement if the health care provider holds a separate covered Federal contract or subcontract. But as explained below, OFCCP believes that there are several reasons why special circumstances in the national interest warrant an exemption for TRICARE health care providers who do not hold such separate contracts.

First, OFCCP is concerned that the prospect of exercising authority over TRICARE providers is affecting or will affect the government's ability to provide health care to uniformed service members, veterans, and their families. Congressional inquiries and testimony, as well as amicus filings in the *Florida Hospital* litigation, and comments received in response to the NPRM, have brought to OFCCP's attention the risk that health care providers may be declining to participate in Federal health care programs that serve members of the military and veterans because of the presumed costs of compliance with OFCCP's regulations.[56] The former president of a TRICARE managed care support contractor testified that he feared they would lose smaller providers in their network because of the administrative costs and burdens associated with OFCCP's requirements, and he predicted that it would make it ''much more difficult to build and retain provider networks.'' [57] TRICARE managed care support contractors similarly stated in an amicus brief that subjecting TRICARE providers to OFCCP's requirements would ''make the already difficult task of finding health care professionals willing to act as network providers even more difficult.'' [58] A partner of a law firm testified that he has seen health care provider clients choose not to participate in TRICARE and in other programs because of the costs of compliance.[59] The American Hospital Association also testified that some hospitals may decline to participate out of concern that they could be found to be Federal contractors.[60]

Providers' decisions not to participate may exacerbate the well-documented difficulties that uniformed service members, veterans, and their families have accessing health care.[61] The unique nature of the health care system heightens OFCCP's concern about the refusal of providers to participate in health care programs for uniformed service members and veterans. Creating adequate networks of providers is a critical component of ensuring access to health care. These networks need to offer comprehensive services and cover all geographical areas where beneficiaries reside. An inadequate network may mean that beneficiaries are unable to obtain urgent and life-saving treatment. The willingness of health care providers to participate in TRICARE is thus especially important.

OFCCP requested comments from stakeholders to help it more thoroughly evaluate the potential impact of OFCCP compliance on uniformed service members' and veterans' health care provider networks. In particular, OFCCP sought comments from health care providers regarding the impact of potential Federal subcontractor status on their decision to participate in health care programs for uniformed service members and veterans. These comments are discussed later in this section.

Second, OFCCP believes that an exemption is in the national interest because pursuing enforcement efforts against TRICARE providers is not the best use of its and providers' resources. Given the history in this area, such attempts—which would occur in the absence of this final rule—could again meet with protracted litigation and unclear ultimate results: The *Florida Hospital* case proceeded for seven years and would have continued for some time into the future had it not been voluntarily dismissed. OFCCP believes its limited resources are better spent elsewhere, and it would be unreasonable to impose substantial compliance costs on health care providers when the legal justification for doing so would be open to challenge in light of the language in the NDAA and the question left unresolved in *Florida Hospital* as to whether TRICARE constitutes Federal financial assistance.

Third, OFCCP believes an exemption would be in the national interest because it would provide uniformity and certainty in the health care community with regard to legal obligations concerning participation in TRICARE. OFCCP conducts a case-by-case inquiry as to whether a particular entity is a covered subcontractor. The proposed exemption would dispense with an agreement-by-agreement analysis and the attendant uncertainty, legal costs, and litigation risk. Providers could choose to furnish medical services to beneficiaries of different types of TRICARE programs without hiring costly lawyers and performing time-intensive contract analysis to determine, as best they can, whether they are a subcontractor or simply a provider.

This exception would also harmonize OFCCP's approach with that of the Department of Defense. OFCCP is the office charged with administering and enforcing its authorities, but comity between agencies is desirable whenever possible, reduces confusion for the

[56] 2014 Hearing, *supra* note 43; Examining Recent Actions by the Office of Federal Contract Compliance Programs, Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Education and the Workforce, 113th Cong. (2013) [hereinafter 2013 Hearing]; Reviewing the Impact of the Office of Federal Contract Compliance Programs' Regulatory and Enforcement Actions, Hearing Before the Subcomm. on Health, Emp't, Labor & Pensions of the H. Comm. on Educ. & the Workforce, 112th Cong. (2012).

[57] 2014 Hearing, *supra* note 43, at 24–26, 46–47, 149 (Prepared Statement and Testimony of Thomas Carrato, President, Health Net Federal Services).

[58] Amicus Brief of Humana Military Health Services, Inc., Health Net Federal Services, LLC, and TriWest Healthcare Alliance dated May 2, 2012, at 9, *Fla. Hosp.,* 2013 WL 3981196; *see also* Amicus Brief of Human Military Health Services, Inc., Health Net Federal Services, LLC, and TriWest Healthcare Alliance dated December 29, 2010, at 2, *Fla. Hosp.,* 2013 WL 3981196 (''Subjecting the network providers to Federal affirmative action requirements will make it more difficult for the [TRICARE managed care support] contractors to find and retain providers willing to sign network agreements due to the added compliance requirements.'').

[59] 2014 Hearing, *supra* note 43, at 34–35, 47 (Statement and Testimony of David Goldstein, Shareholder, Littler Mendelson P.C.).

[60] *Id.* at 17–18 (Prepared Statement of the American Hospital Association); 2013 Hearing, *supra* note 56, at 139 (Testimony of Curt Kirschner, Partner, Jones Day, on behalf of the American Hospital Association).

[61] *See, e.g.,* Government Accountability Office Report, GAO–18–361, TRICARE Surveys Indicate Nonenrolled Beneficiaries' Access to Care Has Generally Improved (Mar. 2018), *available at https://www.gao.gov/assets/700/690964.pdf.* The GAO found that, although there has been a slight improvement in TRICARE beneficiaries' access to care, 29 percent of nonenrolled beneficiaries still reported that they experienced problems finding a civilian provider. Nonenrolled beneficiaries are those that have not enrolled in TRICARE Prime, which is a managed care option that that mostly relies on military hospitals and clinics to provide care.

public, and helps ensure evenhanded and efficient administration of the law. The Department of Defense stated in the *Florida Hospital* litigation that ''it would be impossible to achieve the TRICARE mission of providing affordable health care for our nation's active duty and retired military members and their families'' if all TRICARE providers were subject to OFCCP's requirements.[62] The Department of Defense also classifies TRICARE as Federal financial assistance in DoD Directive 1020.1.[63] A unified approach should reduce confusion for the public and assist coordination in regulating government contracts in the health care field.[64]

As noted earlier, of course, the uniformed service members and veterans' health care providers discussed here would still be subject to OFCCP's authority if they are prime contractors or have a covered subcontract with a government contractor. For example, a teaching hospital that participates as a TRICARE provider but that also has a research contract with the Federal Government would still be considered a covered contractor subject to OFCCP authority.

Several commenters supported a national interest exemption. For example, a veteran's health care organization wrote that it ''urges the adoption of the National Interest Exemption as described'' in the NPRM. An employer association commented that it ''agrees with the points OFCCP offers in support of its National Interest Exemption rationale'' because the high cost of compliance ''take[s] time away from patient care'' and causes providers to ''simply not participate in TRICARE.'' A consortium of federal contractors and subcontractors commented that complying with OFCCP's requirements ''can exponentially increase an organization's operating expenses. . . . [T]he prospect of complying with these additional regulatory burdens will discourage many valuable and important health care providers from becoming TRICARE providers.'' A Catholic health care network commented that the proposed rule ''would ultimately provide the desired outcome'' of increasing access to health care for veterans.

Other commenters opposed a national interest exemption. For example, a women's civil rights organization, on behalf of seventeen other civil rights organizations, disagreed that the NPRM's rationales support the exemption. The organization viewed as anecdotal OFCCP's concerns that compliance requirements are unduly burdensome for TRICARE providers. A member of Congress commented that past exemptions have been issued only in response to ''earthquakes, wildfires, flooding, and hurricanes'' and that there were no such special circumstances here because there is no underlying natural disaster. Finally, an LGBT rights organization commented that the ''federal government must be in the business of eradicating discrimination'' and that the proposed rule falls short of this mandate.

OFCCP agrees with the comments supporting a national interest exemption as an alternative basis for relieving TRICARE providers from complying with OFCCP's legal obligations. For the reasons discussed in this section, the Director of OFCCP has determined that the exemption proposed in the NPRM is justified by special circumstances in the national interest because it will increase access to care for uniformed service members and veterans, allow OFCCP to better allocate its resources, and provide uniformity and certainty for the government and for TRICARE health care providers. OFCCP's conclusions are not supported by insufficient evidence, as one commenter alleged, but rather are supported by evidence which includes Congressional testimony, evidence generated in the *Florida Hospital* litigation, and comments received in response to the NPRM. Finally, OFCCP's authority to issue national interest exemptions is not limited only to circumstances involving natural disasters. E.O. 11246, VEVRAA, Section 503, and the implementing regulations of all three laws grant OFCCP broad authority to issue exemptions.[65]

The Director of OFCCP has also determined that the requirements have been met for granting an exemption to a group or category of contracts. Since there are tens of thousands of providers that may be eligible for the exemption, it would be impracticable for OFCCP to act upon each provider's request individually and issuing a group exemption will substantially contribute to convenience in the administration of the laws.[66]

A women's civil rights organization, on behalf of seventeen other civil rights organizations, commented that OFCCP lacks the legal authority to ''authorize a categorical exemption of the sort'' described in this final rule. The organization argued that E.O. 11246 only allows for categorical exemptions in specifically enumerated circumstances, none of which apply in the instant case. However, as discussed above, the applicable regulations authorize the Director of OFCCP to exempt groups or categories of contracts when it would be impracticable for OFCCP to act on individual requests and where a group exemption would substantially contribute to the convenience in the administration of the laws. *See* 41 CFR 60–1.5(b)(1), –300.4(b)(1), –741.4(b)(1); *see also supra* discussion at sections II (Legal Authority), III.A (Overview of OFCCP's Areas of Authority).

D. OFCCP's Authority Over FEHBP

In the NPRM, OFCCP requested comments on whether health care providers participating in the Federal Employees Health Benefits Program (FEHBP) should not be covered by OFCCP's authority.[67] OFCCP was interested in comments from stakeholders and health care providers that serve federal employees, such as FEHBP, about the impact of OFCCP's requirements and if there is difficulty attracting and retaining participating providers. In the past, some stakeholders have indicated that other government health care programs may face difficulties similar to TRICARE.

Some commenters supported exempting FEHBP. An association of health care organizations commented that many hospitals participate in both TRICARE and FEHBP and that health care providers ''could drop out of FEHBP networks to preserve their TRICARE exemption, and access to care

[62] *OFCCP* v. *Fla. Hosp. of Orlando,* No. 2009–OFC–002, 2010 WL 8453896, at *2 (ALJ Oct. 18, 2010).

[63] *See* Dep't of Defense, Directive 1020.1, Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of Defense, ¶ E1.1.2.21 (Mar. 31, 1982).

[64] Note that this regulation would not affect health care entities' obligations under Title VII of the Civil Rights Act or other civil rights laws enforced by other agencies.

[65] *See* notes 10 to 18.

[66] 41 CFR 60–1.5(b)(1), –300.4(b)(1), –741.4(b)(1).

[67] FEHBP serves civilian federal employees, annuitants, and their dependents. 5 U.S.C. 8901 *et seq.* The program is administered by the U.S. Office of Personnel Management. FEHBP offers two general types of plans: Fee-for-service plans and HMO plans. The Department's Administrative Review Board held OFCCP did not have authority over a health care provider based on a reimbursement agreement with a health insurance carrier offering a fee-for-service FEHBP plan, but did have authority over a health care provider's agreement to provide services pursuant to a FEHBP HMO plan. *See OFCCP* v. *UPMC Braddock,* No. 08–048, 2009 WL 1542298 (ARB May 29, 2009), *aff'd, UPMC Braddock* v. *Harris,* 934 F. Supp. 2d 238 (D.D.C. 2013), *vacated as moot, UPMC Braddock* v. *Perez,* 584 F. App'x 1 (D.C. Cir. 2014); *In re Bridgeport Hosp.,* No. 00–023, 2003 WL 244810 (ARB Jan. 31, 2003).

for the federal employee population could be affected.'' An association of independent health care plans commented that ''a uniform OFCCP exemption for FEHB, similar to what is being proposed for TRICARE, would remove a potential barrier to provider contracting . . . .'' A consortium of federal contractors and subcontractors commented that ''[a] uniform rule that applies to health care providers involved in federal government health care programs is necessary to avoid legal uncertainty for the medical field.'' A group of three members of Congress commented that the House Committee on Education and Labor held hearings in 2014 on legislation that would have removed OFCCP's jurisdiction over FEHBP.[68] The testimony given during this hearing called on OFCCP to clarify which FEHBP plans require participating providers to be classified as subcontractors; asserted that Department of Defense and Office of Personnel Management regulations do not classify FEHBP participants as federal contractors; and noted the willingness of the then-Secretary of Labor to continue discussing enforcement of FEHBP participants. Congress did not ultimately pass legislation affecting OFCCP's authority over FEHBP.

Other commenters opposed exempting FEHBP providers. A women's civil rights organization, on behalf of several other civil rights organizations, commented that the NPRM failed to provide the terms or substance of an FEHBP exemption and that ''[a]ny regulation addressing other providers must be the subject of its own notice and comment rulemaking.''

None of the comments received in response to the NPRM identified a legal basis to retain or disclaim jurisdiction over FEHBP providers. Accordingly, OFCCP does not adopt any regulatory change related to FEHBP providers. OFCCP has, however, carefully considered comments regarding the benefits of a uniform approach to all government health care plans and will consider additional sub-regulatory guidance as necessary.

E. OFCCP's Authority Over Veterans Administration Health Benefits Programs

OFCCP received several comments requesting that it also remove from its authority health care service agreements between the U.S. Department of Veterans Affairs (VA) and various health care entities, including Veteran's Care Agreements (VCAs). Several commenters cited broad policy-based concerns. For example, a Lutheran health care provider that has several legacy contracts with the Veteran's Administration commented that it faces increased financial burdens preparing OFCCP compliance reports: ''the added cost and regulatory oversight explains why compliance as a federal contractor is a constraint that requires us to carefully consider each contract we enter into with the Veteran's Administration.'' An association of long-term and post-acute care providers commented that ''[t]he result [of government regulations] has been limited long-term care options for veterans in their local communities, with some veterans having to choose between obtaining needed long-term care services in a distant VA facility and remaining near loved ones in their community.'' A long-term health care provider that has entered into VCAs commented that ''the ability to maintain the data requirements of an Affirmative Action plan would be burdensome and tedious for our facilities to maintain.''

Some of these commenters also cited specific types of agreements they believed should be excluded from OFCCP's authority, and provided some legal rationale for this belief. Specifically, three commenters sought to have OFCCP exclude Veterans Care Agreements from its authority.[69] Two of these commenters also wanted additional types of VA agreements excluded from OFCCP's authority, specifically citing Community Care Networks and legacy VA contracts.'' A final commenter supported excluding Veterans Affairs health benefits program providers generally from OFCCP's authority. As discussed below, OFCCP disagrees that there is a statutory basis for excluding these arrangements from OFCCP's authority entirely, but many of these arrangements do fall under the moratorium on enforcement that was announced in an OFCCP directive issued in May 2018.

The Veterans Care Agreements (VCAs) referenced by the commenters are arrangements created pursuant to the 2018 VA MISSION Act.[70] The 2018 VA MISSION Act was intended generally to provide veterans with better access to care in a number of ways, and VCAs were one of the new arrangements created under the law for that purpose.[71] The inclusion of VCAs in the 2018 VA MISSION Act gave VA the authority to enter into these arrangements to address gaps in care that may arise in hospital care, medical services, and/or extended care services. VCAs are executed when specific care is needed but cannot be obtained within the current VA provider networks. These agreements are intended to be used in limited circumstances when the care necessary for treatment is either insufficient or non-existent.

Some of the commenters raising this issue asserted that statutory language in the 2018 VA MISSION Act divests OFCCP of jurisdiction over VCAs because the Act states that such agreements are not ''contracts.'' [72] However, there is an exception to this provision within the same subsection of the statute which provides that entities that enter into VCAs remain subject to ''all laws that protect against employment discrimination or that otherwise ensure equal employment opportunities.'' [73] Accordingly, the statutory language of the 2018 VA MISSION Act, standing alone, does not serve to remove these agreements from OFCCP's authority.

Two commenters likewise requested that OFCCP remove from its authority VA Community Care Networks (CCNs). Though the term CCN is not consistently defined, the term as used by the commenters generally refers to a third-party network manager that is a prime contractor with VA. However, the CCN is a contract to create a network of providers and coordinate the provision of care, but is not a contract for the provision of care itself. Thus, it is distinguishable from the TRICARE providers that this final rule removes from OFCCP's authority. Rather, CCNs are typical, competitively bid Federal contracts, and unlike with the 2018 VA MISSION Act and VCAs, there is no statutory language defining the arrangements as non-contractual.

In addition to advocating for an exemption to extend to VCAs and CCNs, one commenter urged the exemption of ''legacy VA contracts'' as well. Though this term is somewhat vague, our understanding based on discussions

[68] 2014 Hearing, *supra* note 43.

[69] We note that a fourth commenter supported the TRICARE exemption without asking to expand it; however, they defined TRICARE as a VCA. This is inaccurate, as TRICARE and VCAs are entirely separate programs administered by different agencies. VCAs are agreements entered into by the VA, while TRICARE is a separate and distinct health care program under the Department of Defense (DoD).

[70] 38 U.S.C. 1703A.

[71] *See https://missionact.va.gov/* (last accessed April 23, 2020).

[72] *See* 38 U.S.C. 1703A(i)(1) (''A Veterans Care Agreement may be authorized by the Secretary or any Department official authorized by the Secretary, and such action shall not be treated as . . . a Federal contract for the acquisition of goods or services for purposes of any provision of Federal law governing Federal contracts for the acquisition of goods or services . . .'').

[73] *Id.* at 1703A(i)(2)(B)(ii).

with VA is that the commenter might be referring to any of various procurement instruments used by VA in recent years, prior to when VA began utilizing VCAs and its current generation of third-party administrator contracts, the aforementioned CCNs. Some of those procurement instruments are conventional procurement contracts. VA's previous generation of third-party administrator contracts, which are sometimes called Patient-Centered Community Care, or ''PC3,'' contracts, is one example. Generally, these agreements, like CCNs, are competitively bid Federal contracts without statutory exemptions, and thus there is no statutory basis for OFCCP to disclaim authority. However, to the extent that the comment intended ''legacy VA contracts'' to refer to Choice Provider Agreements, authorized by the Veterans Access, Choice, and Accountability Act of 2014, section 101(d) of that law provided that such agreements were specifically exempted from OFCCP jurisdiction.[74]

In sum, with the exception of any remaining Choice Provider Agreements, the existing statutory framework does not provide support for removing VA health benefits contracts from OFCCP's authority. However, OFCCP has previously taken action with regard to such VA health benefit provider (VAHBP) agreements when it issued Directive 2018–02 in May 2018. That directive, which extended the moratorium on the review of TRICARE health care providers originally issued in 2014, expanded the moratorium on scheduling to include these VAHBP agreements.[75] Consistent with the handling of FEHBP, OFCCP will consider additional subregulatory guidance as necessary to provide certainty and clarity to the status of VAHBPs.

Accordingly, after a full review of the comments, OFCCP adopts this final rule incorporating the provisions proposed in the NPRM.

[74] Public Law 113–146, 101(d) (2014) (''During the period in which such entity furnishes care or services pursuant to this section, such entity may not be treated as a Federal contractor or subcontractor by the Office of Federal Contract Compliance Programs of the Department of Labor by virtue of furnishing such care or services.''). We note that the VA no longer has authority to enter into these Choice Provider Agreements given subsequent revisions to the Veterans Choice Act.

[75] OFCCP Directive 2018–02, TRICARE Subcontractor Enforcement Activities (May 18, 2018), available at *https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_02.html* (last accessed April 20, 2020).

IX. Section-by-Section Analysis

Section 60–1.3 Definitions

OFCCP proposed adding a sub-paragraph to the definition of subcontract in the E.O. 11246 regulations noting that a subcontract does not include an agreement between a health care provider and health organization pursuant to which the health care provider agrees to furnish health care services or supplies to beneficiaries of TRICARE. OFCCP also proposed adding definitions of ''agreement,'' ''health care provider,'' and ''health organization.'' For the reasons set forth above, the final rule adopts these changes as proposed in the NPRM.

Section 60–300.2 Definitions

OFCCP proposed adding a sub-paragraph to the definition of subcontract in the VEVRAA regulations noting that a subcontract does not include an agreement between a health care provider and health organization pursuant to which the health care provider agrees to furnish health care services or supplies to beneficiaries of TRICARE. OFCCP also proposed adding definitions of ''agreement,'' ''health care provider,'' and ''health organization.'' For the reasons set forth above, the final rule adopts these changes as proposed in the NPRM.

Section 60–741.2 Definitions

OFCCP proposed adding a sub-paragraph to the definition of subcontract in the Section 503 regulations noting that a subcontract does not include an agreement between a health care provider and health organization pursuant to which the health care provider agrees to furnish health care services or supplies to beneficiaries of TRICARE. OFCCP also proposed adding definitions of ''agreement,'' ''health care provider,'' and ''health organization.'' For the reasons set forth above, the final rule adopts these changes as proposed in the NPRM.

Regulatory Analysis

E.O. 12866 (Regulatory Planning and Review) and E.O. 13563 (Improving Regulation and Regulatory Review)

Under E.O. 12866, the U.S. Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of E.O. 12866 and OMB review. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866. The Office of Management and Budget has determined that this final rule is a significant action under E.O. 12866 and has reviewed the final rule. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA designated that this rule is not a ''major rule,'' as defined by 5 U.S.C. 804(2).

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

The Need for the Regulation

The regulatory changes in this final rule are needed to provide clarity regarding OFCCP's authority over health care providers that provide services and supplies under TRICARE, improve uniformed service members' and veterans' access to medical care, more efficiently allocate OFCCP's limited resources for enforcement activities, and provide greater uniformity, certainty, and notice for health care providers participating in TRICARE. The final rule is intended to address concerns regarding the risk that health care providers may be declining to participate in TRICARE, which reduces the availability of medical services for uniformed service members, veterans, and their families. OFCCP is exempting health care providers with agreements to furnish medical services and supplies to individuals participating in TRICARE

from E.O. 11246, Section 503, and VEVRAA.

Discussion of Impacts

In this section, OFCCP presents a summary of the costs and savings associated with the changes in this final rule. In line with recent assessments of other rulemakings, the agency has determined that either a Human Resources Manager (SOC 11–3121) or a Lawyer (SOC 23–1011) would review the rule. OFCCP estimates that 50 percent of the reviewers would be human resources managers and 50 percent would be in-house counsel. Thus, the mean hourly wage rate reflects a 50/50 split between human resources managers and lawyers. The mean hourly wage of a human resources manager is $62.29 and the mean hourly wage of a lawyer is $69.86.[76] Therefore, the average hourly wage rate is $66.08 (($62.29 + $69.86)/2). OFCCP adjusted this wage rate to reflect fringe benefits such as health insurance and retirement benefits, as well as overhead costs such as rent, utilities, and office equipment. The agency used a fringe benefits rate of 46 percent[77] and an overhead rate of 17 percent,[78] resulting in a fully loaded hourly compensation rate of $107.71 ($66.08 + ($66.08 × 46 percent) + ($66.08 × 17 percent). The estimated labor cost to contractors is reflected in Table 1, below.

TABLE 1—LABOR COST

Major occupational groups	Average hourly wage rate	Fringe benefit rate	Overhead rate	Fully loaded hourly compensation
Human Resources Managers and Lawyers	$66.08	46%	17%	$107.71

Public Comments

In this section, OFCCP addresses the public comments specifically received on the Regulatory Impact Analysis. The agency received three comments on the Regulatory Impact Analysis.

One commenter, a Lutheran health care provider, addressed their reluctance to enter into contracts with the Veteran's Administration and stated, ''In some cases, we have reluctantly entered into these agreements because of the regulatory burden but have done so because we want to honor veterans who live close to one of our facilities.''

Some commenters criticized OFCCP for not sufficiently analyzing the effect that removing OFCCP's authority over TRICARE providers will have on the provision of health care services. For example, a women's civil rights organization, on behalf of seventeen other civil rights organizations, commented that ''OFCCP makes no accounting for the costs to workers of loss of protections against discrimination and the increase in vulnerability to discrimination in the absence of OFCCP's systemic enforcement activities. It does not seek to quantify or otherwise address the ways in which discriminatory harassment and exploitation of health care workers can compromise patient care.'' A member of Congress echoed this concern, noting that a 2005 employment survey found that ''more than 60 percent of surveyed physicians, primarily women and minorities, reported experiencing workplace discrimination.'' However, the commenters provided no data that would allow for quantitative cost estimations of this final rule.

Cost of Regulatory Familiarization

OFCCP acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis the estimated time it takes for contractors to review and understand the instructions for compliance. To minimize the burden, OFCCP will publish compliance assistance materials including, fact sheets and responses to ''Frequently Asked Questions.'' OFCCP may also host webinars for the contractor community that will describe the new requirements and conduct listening sessions to identify any specific challenges contractors believe they face, or may face, when complying with the requirements.

OFCCP believes that a human resources manager or lawyer at each health care contractor establishment or firm within its authority will be responsible for understanding or becoming familiar with the new requirements. The agency estimates that it will take a minimum of 30 minutes (½ hour) for the human resources manager or lawyer to read the final rule, read the compliance assistance materials provided by OFCCP, or participate in an OFCCP webinar to learn more about the new requirements. Consequently, the estimated burden for rule familiarization is 43,654 hours (87,308 establishments × ½ hour).[79] OFCCP calculates the total estimated cost of rule familiarization as $4,701,972 (43,654 hours × $107.71/hour) in the first year, which amounts to a 10-year annualized cost of $535,160 at a discount rate of 3 percent ($6.13 per health care contractor firm) or $625,659 at a discount rate of 7 percent ($7.17 per health care contractor firm). Table 2, below, reflects the estimated regulatory familiarization costs for the final rule.

TABLE 2—REGULATORY FAMILIARIZATION COST

Total number of health care contractor establishments	87,308.
Time to review rule	30 minutes.
Human Resources Managers and Lawyers, fully loaded hourly compensation	$107.71.
Regulatory familiarization cost in the first year	$4,701,972.
Annualized cost with 3 percent discounting	$535,160.
Annualized cost per health care contractor with 3 percent discounting	$6.13.
Annualized cost with 7 percent discounting	$625,659.

[76] BLS, Occupational Employment Statistics, Occupational Employment and Wages, May 2019, *https://www.bls.gov/oes/current/oes_nat.htm* (last accessed April 3, 2020).

[77] BLS, Employer Costs for Employee Compensation, *https://www.bls.gov/ncs/data.htm* (last accessed March 17, 2020). Wages and salaries averaged $24.86 per hour worked in 2018, while benefit costs averaged $11.52, which is a benefits rate of 46 percent.

[78] Cody Rice, U.S. Environmental Protection Agency, ''Wage Rates for Economic Analyses of the Toxics Release Inventory Program,'' (June 10, 2002), *https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005* (last accessed March 17, 2020).

[79] The determination of the estimated number of health care contractor establishments is discussed under Cost Savings, below.

TABLE 2—REGULATORY FAMILIARIZATION COST—Continued

Annualized cost per health care contractor with 7 percent discounting	$7.17.

The rule does not impose any additional costs because it adds no new requirements.

Cost Savings

While the final rule does not impose any additional costs, the Department does anticipate cost savings as it reconsiders OFCCP's authority over health care providers with agreements to furnish medical services and supplies to individuals participating in TRICARE, and in the alternative, proposes a national interest exemption from E.O. 11246, VEVRAA, and Section 503 for these health care providers, thus eliminating any requirements associated with developing, updating, and maintaining AAPs. As explained further below, the agency cannot quantify the cost savings due to lack of data on how many contractors may be obligated to maintain an AAP under contracts that are not exempted by this final rule. However, the information that follows sets forth relevant evidence and other helpful data that can be used to help assess cost savings as a result of changes in the final rule.

To estimate the number of Federal contractors potentially impacted by the final rule, OFCCP identified the number of health care providers participating in TRICARE.[80] The agency further refined this universe to those entities with 50 or more employees, since the greatest burdens associated with the E.O. 11246, VEVRAA, and Section 503 requirements are associated with developing, updating, and maintaining AAPs.[81] OFCCP then determined the rate of compliance using OFCCP's compliance evaluation data from Fiscal Years 2012 through 2019. The data show that approximately 95 percent of health care providers scheduled for an OFCCP compliance evaluation during that period submitted their AAPs when requested and the remaining 5 percent submitted their AAPs after receiving a show cause notice. The scheduled health care providers included a range of contractors having from 50 to more than 501 employees.

OFCCP identified the number of health care providers in the U.S. Census Bureau's Statistics of U.S. Businesses, using North American Industry Classification System (NAICS) 621, 622, and 623. There are 722,291 health care providers of which 29.2 percent or 210,909 have 50 or more employees.[82]

The Department of Defense's annual report to Congress stated that there were 155,500 TRICARE Primary Care Network Providers and 143,500 TRICARE Specialist Network Providers in FY2019.[83] OFCCP estimates that 29.2 percent of these providers have 50 or more employees. The agency believes that 87,308 providers ((155,500 + 143,500) × 29.2%)) are potentially impacted by the final rule.

Calculating cost savings is made more difficult because the savings may depend on whether the health care provider is still obligated to maintain an AAP under other contracts. Such obligations may come from many additional sources. For example, the health care provider would still be required to maintain an AAP if the provider qualified as a Federal contractor due to activities outside what is covered by this final rule or if the provider contracts with states that mandate AAPs for certain employers.[84] Therefore, the estimate of affected TRICARE providers may overstate the number of entities that would actually realize cost savings as a result of this final rule.

The rule amends § 60–1.3 to note that a subcontract does not include an agreement between a health care provider and a health organization pursuant to which the health care provider agrees to furnish services to beneficiaries of TRICARE. The clarification and amendment results in a cost savings, as some affected contractors would no longer be required to comply with E.O. 11246 requirements and to engage in such activities as creating, updating, or maintaining AAPs or providing notifications to employees, subcontractors, or unions. OFCCP's currently approved Information Collection Request (ICR) for its supply and service program (OMB Control No. 1250–0003) estimates an average of 91.44 hours per contractor to comply with the E.O. 11246 requirements.

The rule amends § 60–300.2 to note that a subcontract does not include an agreement between a health care provider and a health organization pursuant to which the health care provider agrees to furnish services to beneficiaries of TRICARE. The clarification and amendment results in a cost savings, as some affected contractors would no longer be required to comply with VEVRAA requirements and to engage in such activities as creating, updating, or maintaining AAPs, listing job opportunity notices with the local or state employment service delivery systems, or providing notifications to employees, subcontractors, or unions. OFCCP's currently approved ICR for its VEVRAA requirements (OMB Control No. 1250–0004) estimates an average of 16.86 hours per contractor to comply with the VEVRAA requirements.

The rule amends § 60–741.2 to note that a subcontract does not include an agreement between a health care provider and a health organization pursuant to which the health care provider agrees to furnish services to beneficiaries of TRICARE. The clarification and amendment results in a cost savings, as some affected contractors would no longer be required to comply with Section 503 requirements and to engage in such activities as creating, updating, or maintaining AAPs, or providing notifications to employees, subcontractors, or unions. OFCCP's currently approved ICR for its Section 503 requirements (OMB Control No. 1250–0005) estimates an average of 7.92 hours per contractor to comply with the Section 503 requirements.

Summary of Transfer and Benefits

E.O. 13563 recognizes that some rules have benefits that are difficult to

[80] OFCCP considered using its most recent EEO–1 numbers to conduct this analysis, but the reporting requirements are limited to prime contractors and first tier subcontractors. However, OFCCP's universe includes all tiers of subcontractors that meet the jurisdictional thresholds. Using EEO–1 data would underestimate the impact of the final rule. Thus, OFCCP relied upon the analysis described herein.

[81] The requirement to develop AAPs is based on having 50 or more employees and having a contract that meets specific thresholds. OFCCP does not have information regarding the value of the contracts or financial agreements. Thus, the estimated number of establishments may be overstated as it may include establishments that have contracts of less than $50,000 (E.O. 11246 and Section 503) or have contracts of less than $150,000 (VEVRAA).

[82] Number of Firms, Number of Establishments, Employment, and Annual Payroll by Enterprise Employment Size for the United States, All Industries: 2017, *https://www2.census.gov/programs-surveys/susb/tables/2017/us_6digitnaics_2017.xlsx?#* (last accessed April 3, 2020).

[83] Evaluation of TRICARE Programs, Fiscal Year 2019, Report to Congress, *https://www.health.mil/Military-Health-Topics/Access-Cost-Quality-and-Safety/Health-Care-Program-Evaluation/Annual-Evaluation-of-the-TRICARE-Program* (last accessed April 3, 2020).

[84] *https://ballotpedia.org/Federal_and_state_affirmative_action_and_anti-discrimination_laws* (last accessed March 17, 2020).

quantify or monetize but are nevertheless important, and states that agencies may consider such benefits. This rule has equity and fairness benefits, which are explicitly recognized in E.O. 13563.

The final rule is designed to achieve these benefits by providing clear guidance to contractors, and increasing contractor understanding of OFCCP's authority as it relates to heath care providers. If the final rule decreases the confusion of Federal contractors, this impact most likely represents a transfer of value to taxpayers (if contractor fees decrease because they do not need to engage third party representatives to interpret OFCCP's requirements).

Alternative Discussion

A women's civil rights organization, on behalf of seventeen other civil rights organizations, commented that an extension of the current moratorium would be a more preferable policy than a ''categorical regulatory exclusion of TRICARE providers.'' OFCCP disagrees with this comment. In proposing this rule, the Department considered a non-regulatory alternative: issuing moratoria or other sub-regulatory guidance in which OFCCP would exercise enforcement discretion and not schedule compliance evaluations of certain health care providers. The Department rejects this alternative, as it would result in much greater uncertainty among the regulated entities. Also, as discussed earlier in the preamble, the 2014 and 2018 moratoria were premised on OFCCP's conclusion that it had authority over TRICARE providers. An extension of the current moratorium is not feasible because OFCCP has concluded it does not have the legal authority to regulate TRICARE providers.

Regulatory Flexibility Act and E.O. 13272 (Consideration of Small Entities)

The agency did not receive any public comments on the Regulatory Flexibility Analysis.

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the business organizations and governmental jurisdictions subject to regulation.'' Public Law 96–354. The Act requires the consideration for the impact of a regulation on a wide range of small entities including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a final rule would have a significant economic impact on a substantial number of small entities.[85] If the determination is that it would, then the agency must prepare a regulatory flexibility analysis as described in the RFA.[86]

However, if an agency determines that a final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. *See* 5 U.S.C. 605. The certification must include a statement providing the factual basis for this determination and the reasoning should be clear. OFCCP does not expect this final rule to have a significant economic impact on a substantial number of small entities. The annualized cost at a discount rate of seven percent for rule familiarization is $7.17 per entity ($50.33 in the first year) which is far less than one percent of the annual revenue of the smallest of the small entities affected by this final rule. Therefore, OFCCP certifies that this final rule will not have a significant impact on a substantial number of small affected entities.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the Department consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.5(b)(2)(vi)), an agency may not collect or sponsor the collection of information or impose an information collection requirement unless the information collection instrument displays a currently valid OMB control number. OFCCP has determined that there is no new requirement for information collection associated with this final rule. The information collection requirements contained in the existing E.O. 11246, VEVRAA, and Section 503 regulations are currently approved under OMB Control No. 1250–0003 (OFCCP Recordkeeping and Reporting Requirements—Supply and Service), OMB Control No. 1250–0004 (OFCCP Recordkeeping and Reporting Requirements—38 U.S.C. 4212, Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended), and OMB Control No. 1250–0005 (OFCCP Recordkeeping and Reporting Requirements—Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 703). Consequently, this final rule does not require review by the Office of Management and Budget under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

E.O. 13132 (Federalism)

OFCCP has reviewed this final rule in accordance with E.O. 13132 regarding federalism, and has determined that it does not have ''federalism implications.'' 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.''

E.O. 13175 (Consultation and Coordination With Indian Tribal Governments)

This final rule does not have tribal implications under E.O. 13175 that require a tribal summary impact statement. The final rule does not 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.

List of Subjects

41 CFR Part 60–1

Administrative practice and procedure, Equal employment opportunity, Government contracts, Reporting and recordkeeping requirements.

41 CFR Part 60–300

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Individuals with disabilities, Investigations, Reporting and recordkeeping requirements, Veterans.

41 CFR Part 60–741

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Individuals with disabilities, Investigations, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, OFCCP amends 41 CFR parts 60–1, 60–300, and 60–741 as follows:

[85] *See* 5 U.S.C. 603.

[86] *Id.*

PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

■ 1. The authority citation for part 60–1 continues to read as follows:

Authority: Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964–1965 Comp., p. 339, as amended by E.O. 11375, 32 FR 14303, 3 CFR, 1966–1970 Comp., p. 684, E.O. 12086, 43 FR 46501, 3 CFR, 1978 Comp., p. 230, E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258 and E.O. 13672, 79 FR 42971.

Subpart A—Preliminary Matters; Equal Opportunity Clause; Compliance Reports

■ 2. In § 60–1.3, revise the definition of ''Subcontract'' to read as follows:

§ 60–1.3 Definitions.

* * * * *

Subcontract. (1) Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(i) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or

(ii) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed; and

(2) Does not include an agreement between a health care provider and a health organization under which the health care provider agrees to provide health care services or supplies to natural persons who are beneficiaries under TRICARE.

(i) An agreement means a relationship between a health care provider and a health organization under which the health care provider agrees to provide health care services or supplies to natural persons who are beneficiaries under TRICARE.

(ii) A health care provider is a physician, hospital, or other individual or entity that furnishes health care services or supplies.

(iii) A health organization is a voluntary association, corporation, partnership, managed care support contractor, or other nongovernmental organization that is lawfully engaged in providing, paying for, insuring, or reimbursing the cost of health care services or supplies under group insurance policies or contracts, medical or hospital service agreements, membership or subscription contracts, network agreements, health benefits plans duly sponsored or underwritten by an employee organization or association of organizations and health maintenance organizations, or other similar arrangements, in consideration of premiums or other periodic charges or payments payable to the health organization.

* * * * *

PART 60–300—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS REGARDING DISABLED VETERANS, RECENTLY SEPARATED VETERANS, ACTIVE DUTY WARTIME OR CAMPAIGN BADGE VETERANS, AND ARMED FORCES SERVICE MEDAL VETERANS

■ 3. The authority citation for part 60–300 continues to read as follows:

Authority: 29 U.S.C. 793; 38 U.S.C. 4211 and 4212; E.O. 11758 (3 CFR, 1971–1975 Comp., p. 841).

Subpart A—Preliminary Matters, Equal Opportunity Clause

■ 4. In § 60–300.2, revise paragraph (x) to read as follows:

§ 60–300.2 Definitions.

* * * * *

(x) *Subcontract.* (1) Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(i) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or

(ii) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed; and

(2) Does not include an agreement between a health care provider and a health organization under which the health care provider agrees to provide health care services or supplies to natural persons who are beneficiaries under TRICARE.

(i) An agreement means a relationship between a health care provider and a health organization under which the health care provider agrees to provide health care services or supplies to natural persons who are beneficiaries under TRICARE.

(ii) A health care provider is a physician, hospital, or other individual or entity that furnishes health care services or supplies.

(iii) A health organization is a voluntary association, corporation, partnership, managed care support contractor, or other nongovernmental organization that is lawfully engaged in providing, paying for, insuring, or reimbursing the cost of health care services or supplies under group insurance policies or contracts, medical or hospital service agreements, membership or subscription contracts, network agreements, health benefits plans duly sponsored or underwritten by an employee organization or association of organizations and health maintenance organizations, or other similar arrangements, in consideration of premiums or other periodic charges or payments payable to the health organization.

* * * * *

PART 60–741—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS REGARDING INDIVIDUALS WITH DISABILITIES

■ 5. The authority citation for part 60–741 continues to read as follows:

Authority: 29 U.S.C. 705 and 793; E.O. 11758 (3 CFR, 1971–1975 Comp., p. 841).

Subpart A—Preliminary Matters, Equal Opportunity Clause

■ 6. In § 60–741.2, revise paragraph (x) to read as follows:

§ 60–741.2 Definitions.

* * * * *

(x) *Subcontract.* (1) Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(i) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or

(ii) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed; and

(2) Does not include an agreement between a health care provider and a health organization under which the health care provider agrees to provide health care services or supplies to natural persons who are beneficiaries under TRICARE.

(i) An agreement means a relationship between a health care provider and a health organization under which the health care provider agrees to provide health care services or supplies to natural persons who are beneficiaries under TRICARE.

(ii) A health care provider is a physician, hospital, or other individual

or entity that furnishes health care services or supplies.

(iii) A health organization is a voluntary association, corporation, partnership, managed care support contractor, or other nongovernmental organization that is lawfully engaged in providing, paying for, insuring, or reimbursing the cost of health care services or supplies under group insurance policies or contracts, medical or hospital service agreements, membership or subscription contracts, network agreements, health benefits plans duly sponsored or underwritten by an employee organization or association of organizations and health maintenance organizations, or other similar arrangements, in consideration of premiums or other periodic charges or payments payable to the health organization.

* * * * *

Signed at Washington, DC on May 27, 2020.

Craig E. Leen,

Director, Office of Federal Contract Compliance Programs.

[FR Doc. 2020–11934 Filed 7–1–20; 8:45 am]

BILLING CODE 4510–45–P

GENERAL SERVICES ADMINISTRATION

41 CFR parts 300–3, 300–70, 300–80, 300–90, 301–10, 301–11, 301–13, 301–52, 301–70, 301–72, 301–73, 301–74, 301–75, Appendix A to Chapter 301, Appendix B to Chapter 301, Appendix E to Chapter 301, parts 302–1, 302–4, 302–5, 302–7, 302–8, 304–2, and 304–6

[FTR Case 2020–TA–01; Docket No. GSA–FTR–2020–0008, Sequence No. 1]

Federal Travel Regulation; Technical Amendments

AGENCY: Office of Government-wide Policy (OGP), General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: GSA is amending the Federal Travel Regulation (FTR) to make necessary editorial changes.

DATES: This rule is effective August 3, 2020.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Jill Denning, Program Analyst, Office of Government-wide Policy, at 202–208–7642. Contact the Regulatory Secretariat Division (MVCB), 1800 F Street NW, 2nd Floor, Washington, DC 20405, 202–501–4755, for information pertaining to status or publication schedules. Please cite FTR Case 2020–TA–01, Technical Amendments.

SUPPLEMENTARY INFORMATION:

A. Background

The General Services Administration is issuing a final rule to make technical amendments to various provisions of the Federal Travel Regulation. These technical amendments correct hyperlinks in accordance with Office of Management and Budget Memorandum M–15–13 ''Policy to Require Secure Connections across Federal websites and Web Services'' (June 5, 2015), format discrepancies, update legal citations, and make miscellaneous/editorial revisions.

B. 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 final rule is not a significant regulatory action, and therefore, is not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. GSA has further determined that this final rule is not a major rule under 5 U.S.C. 804.

C. Executive Order 13771

This final rule is not subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because it is related to agency organization, management, or personnel and is not a significant regulatory action under E.O. 12866.

D. Regulatory Flexibility Act

This final rule will not 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.* This final rule is also exempt from the Administrative Procedures Act pursuant to 5 U.S.C. 553(a)(2) because this final rule involves matters relating to agency management or personnel.

E. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FTR do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.*

F. Small Business Regulatory Enforcement Fairness Act

This final rule is also exempt from Congressional review prescribed under 5 U.S.C. 801. This final rule is not a major rule under 5 U.S.C. 804.

List of Subjects

41 CFR Parts 300–3, 300–80, 301–11, 301–52, 301–74, 301–75, Appendices A, B, and E to Chapter 301; and Parts 302–1, 302–4, 302–5, 302–7, 302–8, 304–2, and 304–6

Government employees, Travel and transportation expenses.

41 CFR Parts 300–70, 300–90

Government employees, Reporting and recordkeeping requirements, Travel and transportation expenses.

41 CFR Part 301–10

Common carriers, Government employees, Government property, Travel and transportation expenses.

41 CFR Part 301–13

Government employees, Individuals with disabilities, Travel and transportation expenses.

41 CFR Part 301–70

Administrative practice and procedure, Government employees, Individuals with disabilities, Travel and transportation expenses.

41 CFR Part 301–72

Common carriers, Government employees, Travel and transportation expenses.

41 CFR Parts 301–73

Government contracts, Travel and transportation expenses.

Emily W. Murphy,

Administrator.

For reasons set forth in the preamble, GSA amends 41 CFR parts 300–3, 300–70, 300–80, 300–90, 301–10, 301–11, 301–13, 301–52, 301–70, 301–72, 301–73, 301–74, 301–75, appendix A to Chapter 301, appendix B to Chapter 301, appendix E to Chapter 301, parts 302–1, 302–4, 302–5, 302–7, 302–8, 304–2, and 304–6 as set forth below:

PART 300–3—GLOSSARY OF TERMS

■ 1. The authority citation for 41 CFR part 300–3 continues to read as follows:

Authority: 5 U.S.C. 5707; 40 U.S.C. 121(c); 49 U.S.C. 40118; 5 U.S.C. 5738; 5 U.S.C. 5741–5742; 20 U.S.C. 905(a); 31 U.S.C. 1353;

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA–2020–0040]

RIN 3245–AH54

Business Loan Program Temporary Changes; Paycheck Protection Program—Certain Eligible Payroll Costs

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted on its website an interim final rule relating to the implementation of Sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act) (published in the **Federal Register** on April 15, 2020). Section 1102 of the Act temporarily adds a new product, titled the ''Paycheck Protection Program,'' to the U.S. Small Business Administration's (SBA's) 7(a) Loan Program. Subsequently, SBA issued a number of interim final rules implementing the Paycheck Protection Program. This interim final rule supplements the previously posted interim final rules by providing additional guidance on certain eligible payroll costs.

DATES:

Effective Date: The provisions in this interim final rule are effective June 26, 2020.

Comment Date: Comments must be received on or before July 30, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0040 through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please send an email to *ppp-ifr@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, have been implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, have been implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the CARES Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency.

Section 1102 of the CARES Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the ''Paycheck Protection Program.'' Section 1106 of the CARES Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP).

On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116–139), which provided additional funding and authority for the PPP. On June 5, 2020, the President signed the Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act) (Pub. L. 116–142), which changed provisions of the PPP relating to the maturity of PPP loans, the deferral of PPP loan payments, and the forgiveness of PPP loans.

This interim final rule addresses payroll costs that may be included on a PPP loan application submitted by certain boat owners or operators that are engaged in catching fish or other forms of aquatic animal life (fishing boat owners) and that have hired one or more crewmembers who are regarded as independent contractors or otherwise self-employed for certain federal tax purposes under 26 U.S.C. 3121(b)(20) of the Internal Revenue Code (the Code). A crewmember may be described in Section 3121(b)(20) of the Code if the fishing boat on which he or she works has an operating crew that is normally made up of fewer than 10 individuals and the crewmember receives as compensation for his or her work a share of the boat's catch or of the proceeds from the sale of the catch, in an amount that depends on the amount of the catch. Such a crewmember generally may not receive additional cash remuneration or other compensation for his or her services with respect to the fishing boat. A fishing boat owner must report compensation paid to such a crewmember on Box 5 of IRS Form 1099–MISC. The First Interim Final Rule, posted on April 2, 2020, provided that because independent contractors have the ability to apply for a PPP loan on their own, they do not count for purposes of another applicant's PPP loan calculation. 85 FR 20811, 20813 (April 15, 2020). Because crewmembers described in Section 3121(b)(20) of the Code are treated as independent contractors or otherwise self-employed for certain federal tax purposes, fishing boat owners have faced uncertainty about whether to report payments to such crewmembers as a payroll cost on their PPP loan applications.

On April 14, 2020, SBA, in consultation with Treasury, posted an interim final rule explaining that the self-employment income of the general active partners of a partnership could be reported as a payroll cost, up to $100,000 annualized, on a PPP loan application filed by or on behalf of the partnership.[1] 85 FR 21747, 21748 (April 20, 2020). The Administrator, in consultation with the Secretary, has determined that the relationship of a fishing boat owner and a crewmember described in Section 3121(b)(20) of the Code is analogous to a joint venture or partnership. For example, the fishing boat owner and crewmembers each contribute labor or resources to a common commercial enterprise, and the owner and crewmembers share in the enterprise's profits. In order to

[1] Guidance describing how to calculate partnership PPP loan amounts and defining the self-employment income of partners was posted on April 24, 2020 (*see* How to Calculate Maximum Loan Amounts, Question 4, at *https://www.sba.gov/sites/default/files/2020-06/How-to-Calculate-Loan-Amounts-508_0.pdf*).

harmonize SBA's interim final rule regarding partnerships with SBA's interim final rule described above regarding independent contactors, the Administrator, in consultation with the Secretary, has determined that in the event of a conflict (*i.e.,* a case where one or more partners in a partnership are treated as independent contractors for tax purposes), the rules regarding partnership will govern. Accordingly, as described below, this interim final rule (1) provides that a fishing boat owner may include compensation reported on Box 5 of Form 1099–MISC and paid to a crewmember described in Section 3121(b)(20) as a payroll cost in its PPP loan application, and (2) addresses a fishing boat owner's eligibility to obtain loan forgiveness of payroll costs paid to a crewmember who has obtained his or her own PPP loan.

II. Comments and Immediate Effective Date

This interim final rule is effective without advance notice and public comment because Section 1114 of the CARES Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. In addition, SBA has determined that there is good cause for dispensing with advance public notice and comment on the grounds that that it would be contrary to the public interest. Specifically, advance public notice and comment would defeat the purpose of this interim final rule given that SBA's authority to guarantee PPP loans expires on June 30, 2020. These same reasons provide good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act (APA). *See* 5 U.S.C. 553(b)(B). Although this interim final rule is effective on or before date of filing, comments are solicited from interested members of the public on all aspects of the interim final rule, including Section III below. These comments must be submitted on or before July 30, 2020. The SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program—Additional Guidance on Certain Eligible Payroll Costs

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under a new 7(a) loan program titled the ''Paycheck Protection Program.'' Loans guaranteed under the Paycheck Protection Program (PPP) will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness. The purpose of this interim final rule is to provide additional guidance concerning payroll costs that may be reported in connection with certain PPP loan and loan forgiveness applications.

1. Calculation of Payroll Costs of Certain Fishing Boat Owners

May fishing boat owners include payroll costs in their PPP loan applications that are attributable to crewmembers described in Section 3121(b)(20) of the Internal Revenue Code?

Yes. The Administrator, in consultation with the Secretary, has determined that the relationship of a crewmember described in Section 3121(b)(20) of the Internal Revenue Code (Code) and a fishing boat owner or operator (fishing boat owner) is analogous to a joint venture or partnership for purposes of the PPP. As a result, a fishing boat owner may include compensation reported on Box 5 of IRS Form 1099–MISC and paid to a crewmember described in Section 3121(b)(20) of the Code, up to $100,000 annualized, as a payroll cost in its PPP loan application. The Administrator, in consultation with the Secretary, has determined that this treatment is appropriate to effectuate the purposes of the CARES Act to provide assistance to eligible PPP borrowers, including business concerns that operate as partnerships, affected by the COVID–19 emergency.

2. Calculation of Certain Payroll Costs Eligible for Loan Forgiveness

May a fishing boat owner include as payroll costs in its application for loan forgiveness any compensation paid to a crewmember who received his or her own PPP loan and is seeking forgiveness for amounts of compensation the crewmember received for performing services described in Section 3121(b)(20) of the Code with respect to that owner's fishing boat?

No. If a fishing boat crewmember obtains his or her own PPP loan and seeks forgiveness of that loan based in part on compensation from a particular fishing boat owner, the fishing boat owner cannot also obtain PPP loan forgiveness based on compensation paid to that same crewmember. This restriction applies only if the crewmember is performing services described in Section 3121(b)(20) of the Code for the particular fishing boat owner. The Administrator, in consultation with the Secretary, has determined that this restriction is necessary to prevent fishing boat owners and crewmembers from claiming forgiveness for the same payroll costs (for the owner's PPP loan, the compensation to a specific crewmember; for the crewmember's PPP loan, the compensation from the owner to that crewmember). As a result, only the crewmember's PPP loan is eligible for forgiveness, and the owner may not obtain forgiveness for any payroll costs paid to the crewmember. The fishing boat owner is responsible for determining whether any of its crewmembers during the covered period for loan forgiveness received their own PPP loans. Due to the increased risk of duplicate payroll costs, PPP loans to fishing boat owners are more likely to be subject to an SBA loan review.

3. Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA's website at *www.sba.gov.* Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in Section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to Section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are ''small entities.'' Similarly, for purposes of the RFA, individual persons are not small entities.

The requirement to conduct a regulatory impact analysis does not apply if the head of the agency ''certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, ''along with a statement providing the factual basis for such certification.'' If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b).

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Act, Ch.1. p.9.* Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,

Administrator.

[FR Doc. 2020–14128 Filed 6–26–20; 11:15 am]

BILLING CODE 8026–03–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0164; Airspace Docket No. 20–ASO–3]

RIN 2120–AA66

Amendment of Class D Airspace and Revocation of Class E Airspace; Bogue, NC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class D airspace by updating the geographic coordinates, and removes Class E airspace extending upward from 700 feet above the surface at Bogue Field Marine Corps Auxiliary Field, Bogue, NC, at the request of the US Marine Corps. Class E airspace is no longer required, as there are no instrument approaches into Bogue Field MCALF. This action also replaces the outdated term Airport/Facility Directory with the term Chart Supplement in the legal description of associated Class D airspace. This action enhances the safety and management of controlled airspace within the national airspace system.

DATES: Effective 0901 UTC, September 10, 2020. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11D, Airspace Designations and Reporting Points, and subsequent amendments can be viewed on line at *http://www.faa.gov/air_traffic/publications/*. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11D at NARA, email *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html*.

FOR FURTHER INFORMATION, CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends Class D airspace and removes Class E airspace extending upward from 700 feet above the surface at Bogue Field MCALF, Bogue, NC, due to the airspace no longer being necessary.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (85 FR 14809, March 16, 2020) for Docket No. FAA–2020–0164 to amend Class D airspace by updating the geographic coordinates, and remove Class E airspace extending upward from 700 feet above the surface at Bogue Field Marine Corps Auxiliary Field, Bogue, NC as the airport has no instrument approaches. Therefore, the Class E airspace is no longer necessary. This action enhances the safety and management of controlled airspace within the national airspace system.

Interested parties were invited to participate in this rulemaking effort by

the applicant's or co-applicant's ethnicity, race, sex, and age as ''not applicable'' if the applicant or co-applicant is not a natural person. For these reasons, the Bureau will not count first-lien originations reported in HMDA data for which both the applicant's and co-applicant's ethnicity, race, sex, and age *all* are reported as follows: (1) The applicant's ethnicity is reported as ''Not applicable'' (HMDA Code 4); (2) the applicant's race is reported as ''Not applicable'' (HMDA Code 7); (3) the applicant's sex is reported as ''Not applicable'' (HMDA Code 4); (4) the applicant's age is reported as ''Not applicable'' (HMDA Code 8888); (5) the co-applicant's ethnicity is reported as ''Not applicable'' (HMDA Code 4) *or* ''No co-applicant'' (HMDA Code 5); (6) the co-applicant's race is reported as ''Not applicable'' (HMDA Code 7) *or* ''No co-applicant'' (HMDA Code 8); (7) the co-applicant's sex is reported as ''Not applicable'' (HMDA Code 4) *or* ''No co-applicant'' (HMDA Code 5); *and* (8) the co-applicant's age is reported as ''Not applicable'' (HMDA Code 8888) *or* ''No co-applicant'' (HMDA Code 9999).

The underserved counties list, using the HMDA data described above, can be found on the Bureau's public website at *https://www.consumerfinance.gov/policy-compliance/guidance/mortgage-resources/rural-and-underserved-counties-list/,* where, consistent with past practice, the list is made available along with historical lists.

C. Legal Authority

The Bureau is issuing this interpretive rule based on its authority to interpret Regulation Z, including under section 1022(b)(1) of the Dodd-Frank Act, which authorizes guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial laws.[5]

By operation of TILA section 130(f), no provision of TILA sections 130, 108(b), 108(c), 108(e), or 112 imposing any liability applies to any act done or omitted in good faith in conformity with this interpretive rule, notwithstanding that after such act or omission has occurred, the interpretive rule is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[6]

II. Effective Date

Because this rule is solely interpretive, it is not subject to the 30-day delayed effective date for substantive rules under section 553(d) of the Administrative Procedure Act.[7] Therefore, this rule is effective on June 26, 2020, the same date that it is published in the **Federal Register**.

III. Regulatory Requirements

This rule articulates the Bureau's interpretation of Regulation Z and TILA. As an interpretive rule, it is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[8] Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[9]

The Bureau has determined that this interpretive rule does not impose any new requirements or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[10]

IV. Congressional Review Act

Pursuant to the Congressional Review Act,[11] the Bureau will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

V. Signing Authority

The Director of the Bureau, having reviewed and approved this document, is delegating the authority to electronically sign this document to Laura Galban, a Bureau Federal Register Liaison, for purposes of publication in the **Federal Register**.

Dated: June 23, 2020.

Laura Galban,

Federal Register Liaison, Bureau of Consumer Financial Protection.

[FR Doc. 2020–13801 Filed 6–25–20; 8:45 am]

BILLING CODE 4810–AM–P

[5] 12 U.S.C. 5512(b)(1). The relevant provisions of Regulation Z form part of Federal consumer financial law. 12 U.S.C. 5481(12)(O), (14).

[6] 15 U.S.C. 1640(f).

[7] 5 U.S.C. 553(d).

[8] 5 U.S.C. 553(b).

[9] 5 U.S.C. 603(a), 604(a).

[10] 44 U.S.C. 3501 *et seq.*

[11] 5 U.S.C. 801 *et seq.*

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket No. SBA–2020–0039]

RIN 3245–AH53

Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Eligibility Revisions to First Interim Final Rule

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted on its website an interim final rule relating to the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act) (published in the **Federal Register** on April 15, 2020). Section 1102 of the Act temporarily adds a new product, titled the ''Paycheck Protection Program,'' to the U.S. Small Business Administration's (SBA's) 7(a) Loan Program. Subsequently, SBA issued a number of interim final rules implementing the Paycheck Protection Program. On June 12, 2020, SBA posted on its website an interim final rule revising the interim final rule published in the **Federal Register** on April 15, 2020 by changing the eligibility requirement related to felony convictions of applicants or owners of the applicant. This interim final rule further revises SBA's interim final rule published in the **Federal Register** on April 15, 2020, by further changing that eligibility requirement.

DATES:

Effective date: The provisions in this interim final rule are effective June 24, 2020.

Comment date: Comments must be received on or before July 27, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0039, through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please send an email to *ppp-ifr@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all states, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, have been implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, have been implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency.

Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the ''Paycheck Protection Program.'' Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program.

On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116–139), which provided additional funding and authority for the PPP. On June 5, 2020, the President signed the Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act) (Pub. L. 116–142), which changed provisions of the PPP relating to the maturity of PPP loans, the deferral of PPP loan payments, and the forgiveness of PPP loans.

II. Comments and Immediate Effective Date

This interim final rule is effective without advance notice and public comment because section 1114 of the CARES Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. In addition, SBA has determined that there is good cause for dispensing with advance public notice and comment on the grounds that that it would be contrary to the public interest. Specifically, advance public notice and comment would defeat the purpose of this interim final rule given that SBA's authority to guarantee PPP loans expires on June 30, 2020. These same reasons provide good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act (APA). Although this interim final rule is effective on or before date of filing, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before July 27, 2020. The SBA will consider these comments, comments received on the interim final rule posted on SBA's website April 2, 2020 (the First Interim Final Rule) and published in the **Federal Register** on April 15, 2020, comments received on the interim final rule posted on SBA's website June 12, 2020 and published in the **Federal Register** on June 18, 2010, and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program—Additional Eligibility Revisions to First Interim Final Rule (85 FR 20811)

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and businesses affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under a new 7(a) loan program titled the ''Paycheck Protection Program.'' Loans guaranteed under the Paycheck Protection Program (PPP) will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness. The purpose of this interim final rule is to make further changes to the First Interim Final Rule, posted on SBA's website on April 2, 2020, and published in the **Federal Register** on April 15, 2020 (85 FR 20811), as amended by the interim final rule posted on SBA's website on June 12, 2020 and published in the **Federal Register** on June 18, 2020 (85 FR 36717). The First Interim Final Rule, as amended, should be interpreted consistent with the frequently asked questions (FAQs) regarding the PPP that are posted on SBA's website [1] and the other interim final rules issued regarding the PPP.[2]

1. Changes to the First Interim Final Rule

Eligibility Requirements

The First Interim Final Rule provided, among other things, that a PPP loan will not be approved if an owner of 20 percent or more of the equity of the applicant has been convicted of a felony within the last five years. On June 12, 2020, the First Interim Final Rule was amended after the Administrator, in consultation with the Secretary of the Treasury (the Secretary), determined that a shorter timeframe for felonies that do not involve fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance is more consistent with Congressional intent to provide relief to small businesses and also promotes the important policies underlying the First Step Act of 2018 (Pub. L. 115–391).

Upon further consideration, and in consultation with the Secretary, the Administrator has determined that two additional modifications to the First Interim Final Rule are appropriate to ensure a consistent approach to applicants with criminal histories. First, the First Interim Final Rule provided that an applicant is ineligible for a PPP loan if an owner of 20 percent or more of the equity of the applicant is presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction. The Administrator has determined that this restriction should be limited to pending criminal charges for felony offenses, which aligns with the Administrator's prior determination that only felony convictions (but not convictions for other types of offenses) will limit an applicant's eligibility for the PPP, subject to the time periods specified above. Second, the First Interim Final Rule provided that an applicant was ineligible for a PPP loan if an owner of 20 percent or more of the equity of the applicant is on probation

[1] *See https://www.sba.gov/document/support--faq-lenders-borrowers.*

[2] *See https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program.*

or on parole. The Administrator has determined that this restriction should be limited to individuals whose probation or parole commenced within the time periods specified above—*i.e.,* within the last five years for any felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance, and within the last one year for other felonies. Applying these time limitations to the probation and parole restriction aligns with the Administrator's prior determination to apply the identical time limitations to felony convictions. Moreover, aligning the time limitations applicable to these restrictions is consistent with Congressional intent to provide relief to small businesses and also promotes the important policies underlying the First Step Act of 2018 (Pub. L. 115–391). This amendment does not affect the rule regarding applicants that are presently suspended, debarred, or proposed for debarment, which remains effective. Therefore, Part III.2.b.iii. of the First Interim Final Rule (85 FR 20811, 20812) is revised to read as follows:

b. Could I be ineligible even if I meet the eligibility requirements in (a) above?

You are ineligible for a PPP loan if, for example:

* * * * *

iii. An owner of 20 percent or more of the equity of the applicant is presently incarcerated or, for any felony, presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of, pleaded guilty or nolo contendere to, or commenced any form of parole or probation (including probation before judgment) for, a felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance within the last five years or any other felony within the last year; or

* * * * *

Under the First Interim Final Rule, as amended, an applicant is ineligible if an owner of 20 percent or more of its equity is presently incarcerated. In considering this amended Interim Final Rule the Administrator, in consultation with the Secretary, has determined that this restriction on eligibility remains appropriate because the operations of small business concerns present a greater danger of becoming impaired when their owners are incarcerated. As a result, they may have greater difficulty repaying their loans and present a greater credit risk. Although PPP loans may be forgiven under section 1106 of the CARES Act, PPP loans may only be forgiven in cases where borrowers can document that the proceeds were expended in accordance with the requirements of section 1106. In situations where the proceeds have not been used appropriately, and the loans, accordingly, cannot be forgiven, the borrowers' ability to repay the loans remains an important consideration. In addition, ineligibility for businesses whose owners are currently incarcerated will help prevent misuse of PPP loan funds, irrespective of loan forgiveness considerations.

Under the First Interim Final Rule, as amended, an applicant is also ineligible if an owner of 20 percent or more of its equity is, for any felony, subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction. Individuals charged with felonies are at risk of imprisonment, which, as discussed above, could place the creditworthiness of their businesses in question. Therefore, the Administrator, in consultation with the Secretary, has determined that this limitation also remains appropriate to ensure that PPP funds are not allocated to an applicant for which a recent felony charge may impair its ongoing business operations and therefore its ability to repay a PPP loan for reasons unrelated to the COVID–19 pandemic.

Finally, under the First Interim Final Rule, as amended, an applicant is ineligible if an owner of 20 percent or more of its equity has been convicted of, pleaded guilty or nolo contendere to, or commenced any form of parole or probation (including probation before judgment) for, a felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance within the last five years or any other felony within the last year. The Administrator, in consultation with the Secretary, has determined that, in order to ensure program integrity and safeguard against misuse of PPP funds, it remains appropriate to require that applicants whose owners previously were convicted of or pleaded guilty or nolo contendere to a felony offense have avoided a further felony charge following conviction or incarceration for a period of at least one year before obtaining a PPP loan. This interval provides a reasonable level of assurance that such applicants do not present unacceptable risks of re-incarceration that could, as discussed above, undermine the ability of their businesses to repay their PPP loans. The Administrator, in consultation with the Secretary, has determined that a longer five-year limitation is appropriate for felonies involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance because such felonies are most relevant to the applicant's business integrity and responsibility, and may indicate a greater risk of potential misuse of PPP loan funds.

Each of the ineligible applicant categories described above has been formulated to reduce the risk of default and fraud in the PPP and to ensure that PPP loan funds are provided for small businesses that will be able to support jobs, consistent with Congressional intent in the CARES Act. These measures are particularly necessary in light of the structure of the PPP, in which lenders are subject to relatively few underwriting obligations before issuing loans that are 100 percent guaranteed by SBA and that may be subject to full forgiveness based on documentation provided by the borrower. While neither lenders nor SBA are conducting typical analysis of the characteristics of PPP applicants, the measures described above are intended to mitigate the risk of default, fraud, or misuse of PPP loan funds intended to benefit small business employees and at the same time balance that need with the need to assist in the rehabilitation of felons, who are working to become responsible and productive members of society.

2. Additional Information

SBA may provide further guidance, if needed, through SBA notices which will be posted on SBA's website at *www.sba.gov.* Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate

the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

This rule is necessary to implement Sections 1102 and 1106 of the CARES Act and the Flexibility Act in order to provide economic relief to small businesses nationwide adversely impacted under the COVID–19 Emergency Declaration. We anticipate that this rule will result in substantial benefits to small businesses, their employees, and the communities they serve. However, we lack data to estimate the effects of this rule.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive effect but does have a limited retroactive effect consistent with section 3(d) of the Flexibility Act.

Executive Order 13132

SBA has determined that 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will require modification to the existing PPP information collection that is approved under OMB Control Number 3245–0407 as an emergency request until October 31, 2020. As discussed above, this rule amends the PPP eligibility requirements regarding certain criminal activity. As a result of these amendments, conforming changes will be made to Questions 5 and 6 of Form 2483, *Borrower Application Form,* and Section H of Form 2484, *Lender Application Form.* SBA will submit the revisions to these forms to the Office of Management and Budget for approval.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are ''small entities.'' Similarly, for purposes of the RFA, individual persons are not small entities.

The requirement to conduct a regulatory impact analysis does not apply if the head of the agency ''certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, ''along with a statement providing the factual basis for such certification.'' If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b).

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. Small Business Administration's Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Act, Ch.1. p.9.* Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Authority: 15 U.S.C. 636(a)(36); Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116–136, Section 1114.

Jovita Carranza,

Administrator.

[FR Doc. 2020–13942 Filed 6–24–20; 4:15 pm]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket No. SBA–2020–0038]

RIN 3245–AH52

DEPARTMENT OF THE TREASURY

RIN 1505–AC70

Business Loan Program Temporary Changes; Paycheck Protection Program—Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules

AGENCY: U.S. Small Business Administration; Department of the Treasury.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted on its website an interim final rule relating to the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act) (published in the **Federal Register** on April 15, 2020). Section 1102 of the Act temporarily adds a new product, titled the ''Paycheck Protection Program,'' to the SBA's 7(a) Loan Program. Subsequently, SBA and Treasury issued additional interim final rules implementing the Paycheck Protection Program. On June 5, 2020, the Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act) was signed into law, amending the CARES Act. This interim final rule revises interim final rules posted on SBA's and the Department of the Treasury's websites on May 22, 2020 (published on June 1, 2020, in the **Federal Register**), by changing key provisions to conform to the Flexibility Act. Several of these amendments are retroactive to the date of enactment of the CARES Act, as required by section 3(d) of the Flexibility Act.

DATES:

Effective Date: This interim final rule is effective March 27, 2020, except for the provision relating to the maturity date of PPP loans, which is effective June 5, 2020, and the provision relating to the cap on the amount of loan forgiveness for owner-employees and self-employed individuals, which is effective on June 24, 2020.

Comment Date: Comments must be received on or before July 27, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0038, through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

In addition, 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 proposed 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).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Sulfur oxides.

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

Dated: May 29, 2020.

Gregory Sopkin,

Regional Administrator, Region 8.

[FR Doc. 2020–12060 Filed 6–4–20; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 9, 15, 19, and 52

[FAR Case 2017–019; Docket No. FAR–2017–0019, Sequence No. 1]

RIN 9000–AN59

Federal Acquisition Regulation: Policy on Joint Ventures

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement statutory and regulatory changes regarding joint ventures made by the Small Business Administration (SBA) in its final rule published in the **Federal Register** on July 25, 2016, and to clarify that 8(a) joint ventures are not certified into the 8(a) program and that 8(a) joint venture agreements need only be approved by the SBA prior to contract award.

DATES: Interested parties should submit written comments at the address shown below on or before August 4, 2020 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2017–019 to *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FAR Case 2017–019.'' Select the link ''Comment Now'' that corresponds with FAR Case 2017–019. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2017–019'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite FAR Case 2017–019, in all correspondence related to this case. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Malissa Jones, Procurement Analyst, at 703–605–2815 or by email at *Malissa.Jones@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAR Case 2017–019.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the FAR to implement statutory and regulatory changes made by the Small Business Administration (SBA) regarding joint ventures. These changes allow a joint venture comprised of a protégé and its mentor to qualify as a small business or under a socioeconomic program (*e.g.,* 8(a)) for which the protégé qualifies. These changes also provide updated requirements for other joint ventures to qualify as a small business or under a socioeconomic program.

Section 1347 of the Small Business Jobs Act of 2010 (Pub. L. 111–240) and section 1641 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112–239; 15 U.S.C. 657r) authorized the SBA Administrator to establish mentor-protégé programs for small business concerns, service-disabled veteran-owned small business (SDVOSB) concerns, women-owned small business concerns in the Women-Owned Small Business (WOSB) Program, and HUBZone small business concerns modeled on the mentor-protégé program under section 8(a) of the Small Business Act (15 U.S.C. 637(a)). On July 25, 2016, SBA issued a final rule (81 FR 48558) that implemented the mentor-protégé programs at 13 CFR 125.9. SBA's final rule allows a joint venture comprised of a protégé and its mentor to seek any type of small business contract, including under a socioeconomic program, for which the protégé qualifies.

SBA's final rule updated requirements for a joint venture to qualify as a small business concern or under a socioeconomic program. A joint venture qualifies as a small business concern when each of the parties to the joint venture qualifies as small for the size standard associated with the North American Industry Classification System (NAICS) code in the solicitation. A joint venture may qualify under a socioeconomic program when at least one party to the joint venture qualifies under a socioeconomic program, and the joint venture meets the applicable joint venture requirements specified in the SBA regulations.

SBA's final rule also revised the joint venture regulations at 13 CFR 124.513 for 8(a) participants, 125.18(b) for SDVOSBs; 126.616 for HUBZone small business concerns; and 127.506 for WOSB and economically disadvantaged WOSB concerns. SBA required agencies to consider past performance of each party to a small business joint venture in addition to any work performed by the joint venture itself.

DoD, GSA, and NASA are proposing to amend the FAR to require contracting officers to consider the past performance of the joint venture, and to consider the past performance of each party to the joint venture if the joint venture does not demonstrate past performance. For consistency and fairness, DoD, GSA, and NASA are proposing to amend the FAR to apply this requirement to joint ventures regardless of size status.

Additionally, DoD, GSA, and NASA are proposing to amend the FAR to clarify that 8(a) joint ventures are not certified into the 8(a) program and that 8(a) joint venture agreements need only be approved by the SBA prior to contract award. This clarification is necessary because Government Accountability Office (GAO) sustained a protest (BGI-Fiore JV, LLC, B–409520, May 29, 2014) in which an agency rejected an 8(a) joint venture's proposal on the basis that the 8(a) joint venture had not been certified by the SBA prior to submission of proposals. Currently, paragraph (a) of the clause at FAR 52.219–18, Notification of Competition

Limited to Eligible 8(a) Concerns, states that, ''Offers are solicited only from small business concerns expressly certified by the Small Business Administration (SBA) for participation in the SBA's 8(a) program and which meet the following criteria at the time of submission of offer . . . .'' This language could be interpreted to mean that 8(a) joint ventures that submit an offer for an 8(a) contract need to be ''certified'' by the SBA and that their joint venture agreement needs to be approved by the SBA by ''the time of submission of offer.'' This rule proposes clarifications to prevent the improper elimination of 8(a) joint venture proposals in the future.

II. Discussion and Analysis

The proposed changes to the FAR are summarized in the following paragraphs.

A. *Definition of ''small business concern.''* The definition of ''small business concern'' is revised in subpart 2.1, as well as in the following provisions and clauses: FAR 52.212–3, Offeror Representations and Certification—Commercial Items; FAR 52.219–1, Small Business Program Representations; FAR 52.219–8, Utilization of Small Business Concerns; and FAR 52.219–28, Post-Award Small Business Program Rerepresentation. This revision removes extraneous material concerning how to determine whether a small business concern is ''not dominant in its field of operation.'' That determination is made by SBA and is addressed in SBA regulations at 13 CFR 121.102(b).

B. *Consideration of past performance of parties to a joint venture.* This rule clarifies that the contracting officer shall consider the past performance of the joint venture. If the joint venture does not demonstrate past performance for award, the contracting officer shall consider the past performance of each party to the joint venture when making a responsibility determination and when past performance is an evaluation factor for source selection. This clarification is made in subpart 9.1, Responsible Prospective Contractors, and in subpart 15.3, Source Selection.

C. *Qualification of joint ventures as small business concerns.* Subpart 19.3, Determination of Small Business Status for Small Business Programs, is amended to address how a joint venture may qualify for an award as a small business concern or under the socioeconomic programs. A joint venture may qualify as a small business concern if each participant in the joint venture qualifies as small under the size standard for the solicitation; or the protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved agreement under a SBA mentor-protégé program. A joint venture may qualify under socioeconomic programs when the joint venture qualifies as a small business joint venture and one of the parties to the joint venture qualifies under one or more of the socioeconomic programs. Similar text is added to subparts 19.13, Historically Underutilized Business Zone (HUBZone) Program; 19.14, Service-Disabled Veteran-Owned Small Business Procurement Program; and 19.15, Women-Owned Small Business Program. Similar text is also added to the following provisions and clauses: FAR 52.212–3, Offeror Representations and Certifications—Commercial Items; FAR 52.219–1, Small Business Program Representations; FAR 52.219–8, Utilization of Small Business Concerns; FAR 52.219–18, Notification of Competition Limited to Eligible 8(a) Participants; FAR 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside; FAR 52.219–29, Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns; and FAR 52.219–30, Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program.

D. *Subpart 19.7, The Small Business Subcontracting Program.* This subpart is amended to remove instructions for contractors that already exist in the clause at FAR 52.219–8, Utilization of Small Business Concerns.

E. *Subpart 19.8, Contracting with the Small Business Administration (the 8(a) Program).* This subpart is amended to add language to FAR sections 19.804–3, SBA acceptance, and 19.805–2, Procedures, to clarify that at least one party to the joint venture must be certified as an 8(a) program participant at the time of proposal submission and that the 8(a) joint venture agreement shall be approved prior to contract award. In addition, pursuant to 13 CFR 124.503 and 13 CFR 124.507, language is added to clarify the general time period within which SBA expects to approve the joint venture agreement prior to award and the procedure to follow if a response is not received within that time period. The rule also proposes to delete text from 19.805–2(b) relating to how SBA determines eligibility because it creates confusion regarding the timing of SBA's determination.

F. *Performance requirement for certain joint ventures.* This rule proposes to amend the following contract clauses to add the requirement that certain small business or socioeconomic parties to a joint venture perform 40 percent of the work performed by the joint venture and that the work performed must be more than administrative functions: FAR 52.219–3, Notice of HUBZone Set-Aside or Sole Source Award; FAR 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns; FAR 52.219–14, Limitations on Subcontracting; FAR 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside; FAR 52.219–29, Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns; and FAR 52.219–30, Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule proposes to amend subparts 2.1, Definitions, 9.1, Responsible Prospective Contractors, and 15.3, Source Selection; multiple subparts of part 19, Small Business Programs; and multiple provisions and clauses related to small business programs. The objective of this rule is to update the FAR to align with SBA regulations regarding joint ventures and to provide clarifications for 8(a) joint ventures.

The Federal Acquisition Regulatory (FAR) Council has made the following preliminary determinations with respect to the proposed rule's application of section 1641 of the NDAA for FY 2013 to contracts at or below the simplified acquisition threshold (SAT) and for the acquisition of commercial items. The Administrator for Federal Procurement Policy has made the following preliminary determination with respect to commercially available off-the-shelf (COTS) items. Discussion of these preliminary determinations is set forth below. The FAR Council will consider public feedback before making a final determination on the scope of the final rule.

A. Applicability to Contracts at or Below the SAT

Pursuant to 41 U.S.C. 1905, a provision of law is not applicable to acquisitions at or below the SAT unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1905 and states that the law

applies to acquisitions at or below the SAT; or (iii) 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. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions at or below the SAT.

The purpose of this rule is to implement section 1641 of the NDAA for FY 2013. Section 1641 authorized the SBA Administrator to establish mentor-protégé programs for small business concerns, SDVOSB concerns, WOSB concerns in the WOSB Program, and HUBZone small business concerns modeled on the mentor-protégé program under section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

These statutory requirements are reflected in SBA's final rule published in the **Federal Register** at 81 FR 48558, on July 25, 2016, which did not exempt acquisitions at or below the SAT.

The law is silent on the applicability of these requirements to acquisitions at or below the SAT and does not independently provide for criminal or civil penalties; nor does it include terms making express reference to 41 U.S.C. 1905 and its application to acquisitions at or below the SAT. Therefore, it does not apply to acquisitions at or below the SAT unless the FAR Council makes a written determination as provided at 41 U.S.C. 1905.

Application of the law to acquisitions at or below the SAT will ensure that the benefits from socioeconomic set-aside and sole source contracts flow to the intended parties. According to the Federal Procurement Data System, an average of 283,374 contracts per year resulted from FAR part 19 set-asides and sole-source awards at or below the simplified acquisition threshold during fiscal years 2016–2018. Not applying section 1641 to the maximum extent possible would exclude a significant number of acquisitions and impede the Administration's objectives to assist small businesses, including SDVOSB, HUBZone small business, and WOSB concerns, to succeed in enhancing their capabilities and improving their ability to successfully compete for both Government and commercial contracts.

The provisions and clauses proposed for revision in this rule currently apply to all solicitations and contracts, as applicable, including those at or below the SAT. The proposed rule continues the existing applicability to solicitations and contracts below the SAT, while revising these clauses to implement the requirements of section 1641 concerning joint ventures. Exclusion of these acquisitions would create confusion among contractors and the Federal contracting workforce. Under the FAR clauses amended by this rule, contractors are already required to comply with small business program set-aside requirements. The effort required for contractors to comply with the new requirements will be relatively small.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of the rule to acquisitions at or below the SAT.

B. Applicability to Contracts for the Acquisition of Commercial Items

Pursuant to 41 U.S.C. 1906, acquisitions of commercial items (other than acquisitions of COTS items, which are addressed in 41 U.S.C. 1907) are exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1906 and states that the law applies to acquisitions of commercial items; or (iii) the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions of commercial items.

The purpose of this rule is to implement section 1641 of the NDAA for FY 2013. Section 1641 allows a joint venture comprised of a protégé and its mentor to qualify as a small business or under a socioeconomic program for which the protégé qualifies and implements SBA regulations establishing mentor-protégé programs for small business concerns, SDVOSB concerns, WOSB concerns in the WOSB Program, and HUBZone small business concerns modeled on the mentor-protégé program under section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

These statutory requirements are reflected in SBA's final rule published in the **Federal Register** at 81 FR 48558, on July 25, 2016, which did not exempt acquisitions of commercial items.

The law is silent on the applicability of these requirements to acquisitions of commercial items and does not independently provide for criminal or civil penalties; nor does it include terms making express reference to 41 U.S.C. 1906 and its application to acquisitions of commercial items. Therefore, it does not apply to acquisitions of commercial items unless the FAR Council makes a written determination as provided at 41 U.S.C. 1906.

The law furthers the Administration's goal of supporting small business. It advances the interests of small business concerns by allowing for more joint ventures that include a small business to qualify as a small business or under a socioeconomic program. Therefore, more small businesses can qualify for set-aside procurements. Exclusion of a large segment of Federal contracting, such as acquisitions for commercial items, will limit the full implementation of these objectives.

The provisions and clauses proposed for revision in this rule currently apply to all solicitations and contracts, as applicable, including those for acquisition of commercial items. The proposed rule continues the existing applicability to the acquisition of commercial items as defined at FAR 2.101. Exclusion of acquisitions for commercial items from these requirements would create confusion among contractors and the Federal contracting workforce. Under the FAR clauses amended by this rule, contractors are already required to comply with small business program set-aside requirements. The effort required for contractors to comply with the new requirements will be relatively small.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of the rule to the acquisition of commercial items.

C. Applicability to Contracts for the Acquisition of COTS Items

Pursuant to 41 U.S.C. 1907, acquisitions of COTS items will be exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1907 and states that the law applies to acquisitions of COTS items; (iii) concerns authorities or responsibilities under the Small Business Act (15 U.S.C. 644) or bid protest procedures developed under the authority of 31 U.S.C. 3551 *et seq.,* 10 U.S.C. 2305(e) and (f), or 41 U.S.C. 3706 and 3707; or (iv) the Administrator for Federal Procurement Policy makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions of COTS items.

The purpose of this rule is to implement section 1641 of the NDAA

for FY 2013. Section 1641 allows a joint venture comprised of a protégé and its mentor to qualify as a small business or under a socioeconomic program for which the protégé qualifies, and implements SBA regulations establishing mentor-protégé programs for small business concerns, SDVOSB concerns, WOSB concerns in the WOSB Program, and HUBZone small business concerns modeled on the mentor-protégé program under section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

These statutory requirements are reflected in SBA's final rule published in the **Federal Register** at 81 FR 48558, on July 25, 2016, which did not exempt acquisitions of COTS items.

The law is silent on the applicability of these requirements to acquisitions of COTS items and does not independently provide for criminal or civil penalties; nor does it include terms making express reference to 41 U.S.C. 1907 and its application to acquisitions of COTS items. Therefore, it does not apply to acquisitions of COTS items unless the Administrator for Federal Procurement Policy makes a written determination as provided at 41 U.S.C. 1907.

Section 1641 furthers the Administration's goal of supporting small business. It advances the interests of small business concerns by allowing for more joint ventures that include a small business to qualify as a small business concern or under a socioeconomic program. Therefore, more small businesses can qualify for set-aside procurements. Exclusion of a large segment of Federal contracting, such as acquisitions for COTS items, will limit the full implementation of these objectives.

The provisions and clauses proposed for revision in this rule currently apply to all solicitations and contracts, as applicable, including those for acquisition of COTS items. The proposed rule continues the existing applicability to the acquisition of COTS items as defined at FAR 2.101. Exclusion of these acquisitions would create confusion among contractors and the Federal contracting workforce. Under the FAR clauses amended by this rule, contractors are already required to comply with small business program set-aside requirements. The effort required for contractors to comply with the new requirements will be relatively small.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of the rule to the acquisition of COTS items.

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. Executive Order 13771

This rule is not expected to be subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

This proposed rule may 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.* The Initial Regulatory Flexibility Analysis (IRFA) is summarized as follows:

DoD, GSA, and NASA are proposing to amend the FAR to update joint venture requirements to align with the changes SBA made in its final rule dated July 25, 2016 (81 FR 48558), and to add clarifications regarding 8(a) joint ventures to address issues identified in a GAO protest decision (B–409520).

Section 1347 of the Small Business Jobs Act of 2010 and section 1641 of the NDAA for FY 2013 authorized SBA to establish mentor-protégé programs for small business concerns, service-disabled veteran-owned small business concerns, women-owned small business concerns in the Women-Owned Small Business (WOSB) Program, and HUBZone small business concerns. SBA issued a final rule (81 FR 48558) that implemented the mentor-protégé programs at 13 CFR 125.9. SBA's final rule allows a joint venture comprised of a protégé and its mentor to qualify as a small business or under a socioeconomic program for which the protégé qualifies. The rule also revised the requirements for joint ventures outside the mentor-protégé programs to qualify as small or for one of the socioeconomic programs. Updates are required in the FAR to reflect these regulatory changes.

On May 29, 2014, the GAO sustained a protest (B–409520, BGI-Fiore JV, LLC) because an 8(a) joint venture proposal was improperly eliminated on the grounds that the joint venture had not been certified for the 8(a) program by the SBA and that the joint venture agreement had not been approved by the SBA by the time of offer submission. The procuring agency had interpreted existing text in the clause at FAR 52.219–18 to require 8(a) joint ventures be certified by SBA and for the joint venture agreement to be approved by SBA at time of offer submission. Clarification for contracting officers is necessary in the FAR to more clearly reflect SBA's regulations at 13 CFR 124.503(a), 124.507(b), and 124.513(e) as well as GAO's bid protest decision.

The proposed rule may 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.* This rule will impact small business joint ventures and small business entities in an SBA mentor-protégé program. Based on joint venture data in the System for Award Management (SAM), the estimated number of small business joint ventures is 3,500. Assuming that each joint venture includes 2 small businesses, the number of small entities impacted is 7,000. According to SBA's final rule, there are an estimated 2,000 pairs of mentors and protégés that may be impacted. Therefore, the estimated number of total small entities to which the rule applies is 9,000.

This proposed rule does not include any recordkeeping or other compliance requirements for small businesses. Joint ventures will be required to represent themselves as small businesses in accordance with the updated representation provisions at FAR 52.212–3 or 52.219–1. Representation is currently required for all small entities doing business with the Government; representation is not a new requirement. The number of options for the entities to select from has increased to include joint venture options; however the number of selections a small entity must make (*i.e.,* check boxes) has not increased. Therefore, the potential impact is minimal.

This rule may have a positive economic impact on small entities. The updated SBA regulations allow for more joint ventures that include a small business to qualify as a small business or under a socioeconomic program; and therefore, more small businesses can qualify for set-aside procurements.

This proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the SBA. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA 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 comments separately and should cite 5 U.S.C. 610

(FAR case 2017–019) in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies as this proposed rule contains information collection requirements. This rule affects the certification and information collection requirements in the provisions at FAR 52.212–3, Offeror Representations and Certifications—Commercial Items, and 52.204–7, System for Award Management, currently approved under OMB Control Numbers 9000–0136 and 9000–0097, respectively. The impact, however, is negligible because the public reporting burden for these collections remains unchanged from the approved burden.

List of Subjects in 48 CFR Parts 2, 9, 15, 19, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 2, 9, 15, 19, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 9, 15, 19, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101, in paragraph (b) by revising the definition of ''Small business concern'' to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

Small business concern means a concern, including its affiliates, that is independently owned and operated, not dominant in its field of operation and qualified as a small business under the criteria and size standards in 13 CFR part 121 (see 19.102).

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

■ 3. Amend section 9.104–3 by redesignating paragraph (c) as paragraph (c)(1) and adding paragraph (c)(2) to read as follows:

9.104–3 Application of standards.

* * * * *

(c)(1) * * *

(2) *Joint ventures.* For a prospective contractor that is a joint venture, the contracting officer shall consider the past performance of the joint venture. If the joint venture does not demonstrate past performance for award, the contracting officer shall consider the past performance of each party to the joint venture.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

■ 4. Amend section 15.305 by adding paragraph (a)(2)(vi) to read as follows:

15.305 Proposal evaluation.

(a) * * *

(2) * * *

(vi) For offerors that are joint ventures, the evaluation shall take into account past performance of the joint venture. If the joint venture does not demonstrate past performance for award, the contracting officer shall consider the past performance of each party to the joint venture.

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

■ 5. Amend section 19.301–1 by revising paragraph (a) to read as follows:

19.301–1 Representation by the offeror.

(a)(1) To be eligible for award as a small business concern identified in 19.000(a)(3), an offeror is required to represent in good faith—

(i)(A) That it meets the small business size standard corresponding to the North American Industry Classification System (NAICS) code identified in the solicitation; or

(B) For a multiple-award contract where there is more than one NAICS code assigned, that it meets the small business size standard for each distinct portion or category (*e.g.,* line item numbers, Special Item Numbers (SINs), sectors, functional areas, or the equivalent) for which it submits an offer. If the small business concern submits an offer for the entire multiple-award contract, it must meet the size standard for each distinct portion or category (*e.g.,* line item number, SIN, sector, functional area, or equivalent); and

(ii) The Small Business Administration (SBA) has not issued a written determination stating otherwise pursuant to 13 CFR 121.1009.

(2)(i) A joint venture may qualify as a small business concern if the joint venture complies with the requirements of 13 CFR 121.103(h) and 13 CFR 125.8(a) and (b) and if—

(A) Each party to the joint venture qualifies as small under the size standard for the solicitation; or

(B) The protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under an SBA mentor-protégé program.

(ii) A joint venture may qualify for an award under the socioeconomic programs as described in subparts 19.8, 19.13, 19.14, and 19.15.

* * * * *

■ 6. Amend section 19.703 by revising paragraph (d) to read as follows:

19.703 Eligibility requirements for participating in the program.

* * * * *

(d) Protests challenging the socioeconomic status of a HUBZone small business concern must be filed in accordance with 13 CFR 126.801.

* * * * *

■ 7. Amend section 19.804–3, in paragraph (c) introductory text, by adding a sentence to the end of the paragraph to read as follows:

19.804–3 SBA acceptance.

* * * * *

(c) * * * For a joint venture, SBA will determine eligibility as part of its acceptance of a sole source requirement and will approve the joint venture agreement prior to award in accordance with 13 CFR 124.513(e).

* * * * *

■ 8. Amend section 19.805–2 by revising paragraph (b) introductory text, and adding paragraphs (d) and (e) to read as follows:

19.805–2 Procedures.

* * * * *

(b) The SBA will determine the eligibility of the apparent successful offeror. Eligibility is based on section 8(a) program criteria. See paragraphs (d) and (e) of this section regarding eligibility of joint ventures.

* * * * *

(d)(1) SBA does not certify joint ventures, as entities, into the 8(a) program.

(2) A contracting officer may consider a joint venture for contract award if the SBA district office servicing the joint venture approves the joint venture agreement and provides a determination of eligibility pursuant to 13 CFR 124.507(b) prior to contract award.

(e) If SBA does not approve the joint venture agreement within 5 working days after receipt of the contracting activity's request for an eligibility determination, the contracting activity may seek SBA's approval through the

SBA Associate Administrator for Business Development.

■ 9. Amend section 19.1303 by revising paragraph (c) to read as follows:

19.1303 Status as a HUBZone small business concern.

* * * * *

(c) A joint venture may be considered a HUBZone small business concern if—

(1) The joint venture qualifies as small under 19.301–1(a)(2)(i);

(2) At least one party to the joint venture is a HUBZone small business concern; and

(3) The joint venture complies with 13 CFR 126.616(a) through (c).

* * * * *

■ 10. Amend section 19.1403 by revising paragraph (c) to read as follows:

19.1403 Status as a service-disabled veteran-owned small business concern.

* * * * *

(c) A joint venture may be considered a service-disabled veteran owned small business concern if—

(1) The joint venture qualifies as small under 19.301–1(a)(2)(i);

(2) At least one party to the joint venture is a service-disabled veteran-owned small business concern, and makes the representations in paragraph (b) of this section; and

(3) The joint venture complies with the requirements of 13 CFR 125.18(b).

* * * * *

■ 11. Amend section 19.1503 by revising paragraph (f) to read as follows:

19.1503 Status.

* * * * *

(f) A joint venture may be considered an EDWOSB concern or WOSB concern eligible under the WOSB Program if—

(1) The joint venture qualifies as small under 19.301–1(a)(2)(i);

(2) At least one party to the joint venture is an EDWOSB or WOSB, and complies with the criteria in paragraph (b) of this section; and

(3) The joint venture complies with the requirements of 13 CFR 127.506(a) through (c).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 12. Amend section 52.212–3 by—

■ a. Revising the date of the provision;

■ b. Removing from the introductory text ''(c) through (v))'' and adding ''(c) through (v)'' in its place;

■ c. In paragraph (a), revising the definition of ''Small business concern'';

■ d. Revising paragraphs (c)(1) and (3);

■ e. Removing from the end of paragraph (c)(6)(i) ''and'' and adding ''or'' in its place;

■ f. Revising paragraph (c)(6)(ii);

■ g. Removing from the end of paragraph (c)(7)(i) ''and'' and adding ''or'' in its place;

■ h. Revising paragraph (c)(7)(ii);

■ i. Removing from the end of paragraph (c)(10)(i) ''13 CFR Part 126; and'' and adding ''13 CFR 126.200; or'' in its place; and

■ j. Revising paragraph (c)(10)(ii).

The revisions read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (DATE)

* * * * *

Small business concern means a concern, including its affiliates, that is independently owned and operated, not dominant in its field of operation and qualified as a small business under the criteria in 13 CFR part 121 and size standards in this solicitation.

* * * * *

(c) * * *

(1) *Small business concern.* The offeror represents as part of its offer that—

(i) It □ is, □ is not a small business concern; or

(ii) It □ is, □ is not a small business joint venture that complies with the requirements of 13 CFR 121.103(h) and 13 CFR 125.8(a) and (b). [*The offeror shall enter the unique entity identifier of each party to the joint venture:* _____.]

* * * * *

(3) *Service-disabled veteran-owned small business concern.* [*Complete only if the offeror represented itself as a veteran-owned small business concern in paragraph (c)(2) of this provision.*] The offeror represents as part of its offer that—

(i) It □ is, □ is not a service-disabled veteran-owned small business concern; or

(ii) It □ is, □ is not a joint venture that complies with the requirements of 13 CFR 125.18(b)(1) and (2). [*The offeror shall enter the unique entity identifier of each party to the joint venture:* _____.] Each service-disabled veteran-owned small business concern participating in the joint venture shall provide representation of its service-disabled veteran-owned small business concern status.

* * * * *

(6) * * *

(ii) It □ is, □ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [*The offeror shall enter the unique entity identifier of each party to the joint venture:* _____.] Each WOSB concern eligible under the WOSB Program participating in the joint venture shall provide representation of its WOSB status.

(7) * * *

(ii) It □ is, □ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [*The offeror shall enter the unique entity identifier of each party to the joint venture:* _____.] Each EDWOSB concern participating in the joint venture shall provide representation of its EDWOSB status.

Note to paragraphs (c)(8) and (9): Complete paragraphs (c)(8) and (9) only if this solicitation is expected to exceed the simplified acquisition threshold.

* * * * *

(10) * * *

(ii) It □ is, □ is not a HUBZone joint venture that complies with the requirements of 13 CFR 126.616(a) through (c). [*The offeror shall enter the unique entity identifier of each party to the joint venture:* _____.] Each HUBZone small business concern participating in the HUBZone joint venture shall provide representation of its HUBZone status.

* * * * *

■ 13. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (b)(11)(i) ''(MAR 2020)'' and adding ''(DATE)'' in its place;

■ c. Removing from paragraph (b)(12)(i) ''(MAR 2020)'' and adding ''(DATE)'' in its place;

■ d. Removing from paragraph (b)(16) ''(OCT 2018)'' and adding ''(DATE)'' in its place;

■ e. Removing from paragraph (b)(17)(i) ''(MAR 2020)'' and adding ''(DATE)'' in its place;

■ f. Removing from paragraph (b)(19) ''(MAR 2020)'' and adding ''(DATE)'' in its place;

■ g. Removing from paragraph (b)(21) ''(MAR 2020)'' and adding ''(DATE)'' in its place;

■ h. Removing from paragraph (b)(22)(i) ''(MAR 2020)'' and adding ''(DATE)'' in its place;

■ i. Removing from paragraph (b)(23) ''(MAR 2020)'' and adding ''(DATE)'' in its place;

■ j. Removing from paragraph (b)(24) ''(MAR 2020)'' and adding ''(DATE)'' in its place;

■ k. Removing from paragraph (e)(1)(v) ''(OCT 2018)'' and adding ''(DATE)'' in its place;

■ l. Revising the date of Alternate II; and

■ m. Removing from paragraph (e)(1)(ii)(E) of Alternate II ''(OCT 2018)'' and adding ''(DATE)'' in its place.

The revisions read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (DATE)

* * * * *

Alternate II (DATE). * * *

* * * * *

■ 14. Amend section 52.213–4 by—

■ a. Revising the date of the clause; and

■ b. Removing from paragraph (a)(2)(viii) ''(AUG 2019)'' and adding ''(DATE)'' in its place.

The revision reads as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (DATE)

* * * * *

■ 15. Amend section 52.219–1 by—

■ a. Revising the date of the provision;

■ b. In paragraph (a), revising the definition of ''Small business concern'';

■ c. Revising paragraph (c)(1);

■ d. Removing from the end of paragraph (c)(4)(i) ''and'' and adding ''or'' in its place, and revising paragraph (c)(4)(ii);

■ e. Removing from the end of paragraph (c)(5)(i) ''and'' and adding ''or'' in its place; and revising paragraph (c)(5)(ii);

■ f. Revising paragraph (c)(7); and

■ g. Removing from the end of paragraph (c)(8)(i) ''13 CFR Part 126; and'' and adding ''13 CFR 126.200; or'' in its place, and revising paragraph (c)(8)(ii);

The revisions read as follows:

52.219–1 Small Business Program Representations.

* * * * *

Small Business Program Representations (DATE)

* * * * *

Small business concern means a concern, including its affiliates, that is independently owned and operated, not dominant in its field of operation and qualified as a small business under the criteria in 13 CFR part 121 and the size standard in paragraph (b) of this provision.

* * * * *

(c) * * * (1) The offeror represents as part of its offer that—

(i) It □ is, □ is not a small business concern; or

(ii) It □ is, □ is not a small business joint venture that complies with the requirements of 13 CFR 121.103(h) and 13 CFR 125.8(a) and (b). [*The offeror shall enter the unique entity identifier of each party to the joint venture:* _____.]

* * * * *

(4) * * *

(ii) It □ is, □ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [*The offeror shall enter the unique entity identifier of each party to the joint venture:* _____.] Each WOSB concern eligible under the WOSB Program participating in the joint venture shall provide representation of its WOSB status.

* * * * *

(5) * * *

(ii) It □ is, □ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [*The offeror shall enter the unique entity identifier of each party to the joint venture:* _____.] Each EDWOSB concern participating in the joint venture shall provide representation of its EDWOSB status.

* * * * *

(7) [*Complete only if the offeror represented itself as a veteran-owned small business concern in paragraph (c)(6) of this provision.*] The offeror represents as part of its offer that—

(i) It □ is, □ is not a service-disabled veteran-owned small business concern; or

(ii) It □ is, □ is not a service-disabled veteran-owned joint venture that complies with the requirements of 13 CFR 125.18(b)(1) and (2). [*The offeror shall enter the unique entity identifier of each party to the joint venture:* _____.] Each service-disabled veteran-owned small business concern participating in the joint venture shall provide representation of its service-disabled veteran-owned small business concern status.

(8) * * *

(ii) It □ is, □ is not a HUBZone joint venture that complies with the requirements of 13 CFR 126.616(a) through (c). [*The offeror shall enter the unique entity identifier of each party to the joint venture:* _____.] Each HUBZone small business concern participating in the HUBZone joint venture shall provide representation of its HUBZone status.

* * * * *

■ 16. Amend section 52.219–3 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (f) and (g) as paragraphs (g) and (h), and adding a new paragraph (f); and

■ c. Revising the newly redesignated paragraph (g).

The revisions read as follows:

52.219–3 Notice of HUBZone Set-Aside or Sole Source Award.

* * * * *

Notice of HUBZone Set-Aside or Sole Source Award (DATE)

* * * * *

(f) *Joint venture.* A joint venture may be considered a HUBZone concern if—

(1) At least one party to the joint venture is a HUBZone small business concern and complies with 13 CFR 126.616(c); and

(2) Each party to the joint venture qualifies as small under the size standard for the solicitation, or the protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under the SBA mentor-protégé program.

(g) A HUBZone joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (d) of this clause shall be performed by the aggregate of the parties to the joint venture. At least 40 percent of the aggregate work performed by the joint venture shall be completed by the HUBZone small business parties to the joint venture. Work performed by the HUBZone small business party or parties to the joint venture must be more than administrative functions.

* * * * *

■ 17. Amend section 52.219–4 by revising the clause title, date, and paragraph (e) to read as follows:

52.219–4 Notice of Price Evaluation Preference for HUBZone Small Business Concerns.

* * * * *

Notice of Price Evaluation Preference for HUBZone Small Business Concerns (DATE)

* * * * *

(e) A HUBZone joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (d) of this clause shall be performed by the aggregate of the parties to the joint venture. At least 40 percent of the aggregate work performed by the joint venture shall be completed by the HUBZone small business parties to the joint venture. Work performed by the HUBZone small business parties to the joint venture must be more than administrative functions.

* * * * *

■ 18. Amend section 52.219–8 by—

■ a. Revising the date of the clause;

■ b. In paragraph (a), revising the definition ''Small business concern'';

■ c. Redesignating paragraphs (c) and (d) as paragraphs (d) and (e), and adding a new paragraph (c); and
■ d. Revising the newly redesignated paragraph (e)(5) introductory text.

The revisions read as follows:

52.219–8 Utilization of Small Business Concerns.

* * * * *

Utilization of Small Business Concerns (DATE)

* * * * *

(a) * * *

Small business concern means a concern, including its affiliates, that is independently owned and operated, not dominant in its field of operation and qualified as a small business under the criteria and size standards in 13 CFR part 121, including the size standard that corresponds to the NAICS code assigned to the contract or subcontract.

* * * * *

(c)(1) A joint venture qualifies as a small business concern if—

(i) Each party to the joint venture qualifies as small under the size standard for the solicitation; or

(ii) The protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under a SBA mentor-protégé program.

(2) A joint venture qualifies as—

(i) A service-disabled veteran-owned small business concern if it complies with the requirements in 13 CFR part 125; or

(ii) A HUBZone small business concern if it complies with the requirements in 13 CFR 126.616(a) through (c).

* * * * *

(e) * * *

(5) The Contractor shall confirm that a subcontractor representing itself as a HUBZone small business concern is certified by SBA as a HUBZone small business concern. If the subcontractor is a joint venture, the Contractor shall confirm that at least one party to the joint venture is certified by SBA as a HUBZone small business concern. The Contractor may confirm the representation by accessing the System for Award Management or contacting SBA. Options for contacting the SBA include—

* * * * *

■ 19. Amend section 52.219–9 by—
■ a. Revising the date of the clause; and
■ b. Removing from paragraph (e)(4) ''52.219–8(d)(2)'' and adding ''52.219–8(e)(2)'' in its place.

The revision reads as follows:

52.219–9 Small Business Subcontracting Plan.

* * * * *

Small Business Subcontracting Plan (DATE)

* * * * *

■ 20. Amend section 52.219–14 by revising the date of the clause and adding paragraph (e) to read as follows:

52.219–14 Limitations on Subcontracting.

* * * * *

Limitations on Subcontracting (DATE)

* * * * *

(e) *Joint ventures.* (1) In a joint venture comprised of a small business protégé and its mentor approved by the Small Business Administration, the small business protégé shall perform at least 40 percent of the work performed by the joint venture. Work performed by the small business protégé in the joint venture must be more than administrative functions.

(2) In an 8(a) joint venture, the 8(a) participant(s) shall perform at least 40 percent of the work performed by the joint venture. Work performed by the 8(a) participants in the joint venture must be more than administrative functions.

* * * * *

■ 21. Amend section 52.219–18 by—
■ a. Revising the date of the clause and paragraph (a);
■ b. Removing from paragraph (b) ''all of the'' and adding ''the applicable'' in its place; and
■ c. Adding paragraph (e);
■ d. Revising Alternate I.

The revisions and addition read as follows:

52.219–18 Notification of Competition Limited to Eligible 8(a) Participants.

* * * * *

Notification of Competition Limited to Eligible 8(a) Participants (DATE)

(a) Offers are solicited only from—

(1) Small business concerns expressly certified by the Small Business Administration (SBA) for participation in the SBA's 8(a) program and which meet the following criteria at the time of submission of offer—

(i) The Offeror is in conformance with the 8(a) support limitation set forth in its approved business plan; and

(ii) The Offeror is in conformance with the Business Activity Targets set forth in its approved business plan or any remedial action directed by the SBA; or

(2) A joint venture, in which at least one of the 8(a) program participants that is a party to the joint venture complies with the criteria set forth in paragraph (a)(1) of this clause, that complies with 13 CFR 124.513(c); or

(3) A joint venture—

(i) That is comprised of a mentor and an 8(a) protégé with an approved mentor-protégé agreement under the 8(a) program;

(ii) In which at least one of the 8(a) program participants that is a party to the joint venture complies with the criteria set forth in paragraph (a)(1) of this clause; and

(iii) That complies with 13 CFR 124.513(c).

* * * * *

(e) *8(a) joint ventures.* The Contracting Officer may consider a joint venture for contract award if SBA approves the joint venture agreement and provides a determination of eligibility pursuant to 13 CFR 124.507(b) prior to contract award.

* * * * *

Alternate I (DATE). If the competition is to be limited to 8(a) participants within one or more specific SBA regions or districts, add the following paragraph (a)(1)(iii) to paragraph (a) of the clause:

(iii) The offeror's approved business plan is on the file and serviced by _____[[*Contracting Officer completes by inserting the appropriate SBA District and/or Regional Office(s) as identified by the SBA*].

■ 22. Amend section 52.219–27 by—
■ a. Revising the date of the clause, and paragraph (f); and
■ b. Adding paragraph (g).

The revisions and addition read as follows:

52.219–27 Notice of Service-Disabled Veteran-Owned Small Business Set-Aside.

* * * * *

Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (DATE)

* * * * *

(f) A joint venture may be considered a service-disabled veteran owned small business concern if—

(1) At least one party to the joint venture complies with the criteria defined in paragraph (a) of this clause and 13 CFR 125.18(b)(2); and

(2) Each party to the joint venture is small under the size standard corresponding to the NAICS code assigned to the procurement, or the protégé is small under the size standard corresponding to the NAICS code assigned to the procurement in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under an SBA mentor-protégé program.

(g) In a joint venture that complies with paragraph (f) of this clause, the service-disabled veteran-owned small business party or parties to the joint venture shall perform at least 40 percent of the work performed by the joint venture. Work performed by the service-disabled veteran-owned small business party or parties to the joint venture must be more than administrative functions.

* * * * *

■ 23. Amend section 52.219–28 by revising the date of the clause, and in paragraph (a) revising the definition of ''Small business concern'' to read as follows:

52.219–28 Post-Award Small Business Program Rerepresentation.

* * * * *

Post-Award Small Business Program Rerepresentation (DATE)

(a) * * *

Small business concern means a concern, including its affiliates, that is independently owned and operated, not dominant in its field of operation and qualified as a small business under the criteria in 13 CFR part 121 and the size standard in paragraph (d) of this clause.

* * * * *

■ 24. Amend section 52.219–29 by—

■ a. Revising the date of the clause;

■ b. In paragraph (a), in the definition ''*Economically disadvantaged women-owned small business (EDWOSB)*'' removing ''It automatically'' and adding ''An EDWOSB concern automatically'' in its place;

■ c. Revising paragraph (f); and

■ d. Adding a new paragraph (g).

The revisions and addition read as follows:

52.219–29 Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns.

* * * * *

Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns (DATE)

* * * * *

(f) *Joint Venture.* A joint venture may be considered an EDWOSB concern if—

(1) At least one party to the joint venture complies with the criteria defined in paragraph (a) and paragraph (c)(3) of this clause, and 13 CFR 127.506(c); and

(2) Each party to the joint venture qualifies as small under the size standard for the solicitation, or the protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under the SBA mentor-protégé program.

(g) In a joint venture that complies with paragraph (f) of this clause, the EDWOSB party or parties to the joint venture shall perform at least 40 percent of the work performed by the joint venture. Work performed by the EDWOSB party or parties to the joint venture must be more than administrative functions.

* * * * *

■ 25. Amend section 52.219–30 by—

■ a. Revising the date of the clause and paragraph (f); and

■ b. Adding paragraph (g).

The revisions and addition read as follows:

52.219–30 Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program.

* * * * *

Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program (DATE)

* * * * *

(f) *Joint Venture.* A joint venture may be considered a WOSB concern eligible under the WOSB Program if—

(1) At least one party to the joint venture complies with the criteria defined in paragraph (a) and (c)(3) of this clause, and 13 CFR 127.506(c); and

(2) Each party to the joint venture qualifies as small under the size standard for the solicitation, or the protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under the SBA mentor-protégé program.

(g) In a joint venture that complies with paragraph (f) of this clause, the WOSB party or parties to the joint venture shall perform at least 40 percent of the work performed by the joint venture. Work performed by the WOSB party or parties to the joint venture must be more than administrative functions.

* * * * *

■ 26. Amend section 52.244–6 by—

■ a. Revising the date of the clause; and

■ b. Removing from paragraph (c)(1)(vii) ''(OCT 2018)'' and adding ''(DATE)'' in its place.

The revision reads as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (DATE)

* * * * *

[FR Doc. 2020–11159 Filed 6–4–20; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 212, and 252

[Docket DARS–2020–0007]

RIN 0750–AK30

Defense Federal Acquisition Regulation Supplement: Data Collection and Inventory for Services Contracts (DFARS Case 2018–D063)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement to implement a section of the United States Code that requires the collection of data on certain DoD service contracts.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before August 4, 2020, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018–D063, using any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Search for ''DFARS Case 2018–D063'' under the heading ''Enter keyword or ID'' and select ''Search.'' Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2018–D063'' on any attached document.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2018–D063 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Carrie Moore, OUSD(A&S)DPC/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).

225.7010–3 Waiver.

The waiver criteria at 225.7008(a) apply to this restriction.

[FR Doc. 2020–11756 Filed 6–4–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 249 and 252

[Docket DARS–2019–0060]

RIN 0750–AK56

Defense Federal Acquisition Regulation Supplement: Modification of DFARS Clause ''Notification of Anticipated Contract Termination or Reduction'' (DFARS Case 2019–D019)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to update legal and DFARS citations in an existing DFARS clause, conform the clause text to the current DFARS convention regarding the use of dollar thresholds in contract clauses; and remove clause text that is no longer needed to implement the underlying statutory language. The rule is pursuant to action taken by the DoD Regulatory Reform Task Force.

DATES: Effective June 5, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 84 FR 58366 on October 31, 2019, to identify the dollar thresholds of the implementing statute (10 U.S.C. 2501 note) for DFARS 249.70 and DFARS clause 252.249–7002, Notification of Anticipated Contract Termination or Reduction, in accordance with current DFARS drafting conventions, and update the clause to reflect the current statute under which employee and training opportunities apply under the clause. No public comments were received in response to the proposed rule. Minor editorial changes are made in the final rule to a cross-reference at DFARS 252.249–7002(c)(2) and the formats of the statutory references.

II. 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 create any new provisions or clauses. The rule simply updates legal and DFARS citations in the clause and removes unnecessary information. This rule does not change the applicability of the affected clause, which does not apply to contracts valued at or below the simplified acquisition threshold, or commercial or commercially available off-the-shelf items.

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. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

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:

The Department of Defense is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to modify the text of DFARS clause 252.249–7002, Notification of Anticipated Contract Termination or Reduction, to: (1) Update legal and DFARS citations in the clause; (2) remove text that is no longer necessary to implement 10 U.S.C. 2501 note; and (3) conform the clause text to the current DFARS convention for referencing dollar thresholds in a clause. The objective of this rule is to provide accurate and up-to-date information to contractors and maintain consistency within the DFARS clause text. The modification of this DFARS text and clause is pursuant to action taken by the Regulatory Reform Task Force under Executive Order 13777, Enforcing the Regulatory Reform Agenda.

No public comments were received in response to the initial regulatory flexibility analysis.

DoD does not collect data on the number of small businesses that have been awarded contracts under a major defense programs and have also received notice of contract termination or a substantial reduction in funding resulting from an Appropriations Act. Senior DoD Program Acquisition officials estimate that such notification of the termination or substantial reduction in a major defense program occurs, on average, no more than once or twice per year. This rule is not expected to have a significant impact on small business entities, as it does not impose any new requirements or change any existing requirements for small business entities.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

DoD did not identify any significant alternatives that would minimize or reduce the significant economic impact, because there is no significant impact on small entities.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however, the changes to DFARS 252.249–7002 do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 0704–0533, titled: DFARS Subpart 249—Termination of Contracts.

List of Subjects in 48 CFR Parts 249 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 249 and 252 are amended as follows:

PART 249—TERMINATION OF CONTRACTS

■ 1. The authority citation for part 249 is revised to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Amend section 249.7003 by—

■ a. In paragraph (a), removing ''Section 824'' and ''Job Training Partnership Act (29 U.S.C. 1661 and 1662)'' and adding ''section 824'' and ''Workforce Innovation and Opportunity Act (29

U.S.C. Chapter 32)'' in their places, respectively;
■ b. In the paragraph (b) introductory text, removing ''to:'' and adding ''to—'' in its place;
■ c. In paragraph (b)(1), removing ''act.'' And adding ''act; and'' in its place;
■ d. Revising paragraph (c).
The revision reads as follows:

249.7003 Notification of anticipated contract terminations or reductions.

* * * * *

(c) When subcontracts have been issued, the prime contractor is responsible for—

(1) Providing notice of the termination or substantial reduction in funding to all first-tier subcontractors with a subcontract valued equal to or greater than $700,000; and

(2) Requiring that each subcontractor—

(i) Provide such notice to each of its subcontractors for subcontracts valued greater than $150,000; and

(ii) Impose a similar notice and flowdown requirement in subcontracts valued greater than $150,000 at all tiers.

■ 3. Add section 249.7004 to read as follows:

249.7004 Contract clause.

Use the clause at 252.249–7002, Notification of Anticipated Contract Termination or Reduction, in all contracts under a major defense program.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. The authority citation for part 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 5. Amend section 252.249–7002 by—
■ a. In the introductory text, removing ''249.7003(c)'' and adding ''249.7004'' in its place;
■ b. Removing the clause date ''(MAY 2019)'' and adding ''(JUN 2020)'' in its place;
■ c. Revising paragraphs (b) and (c);
■ d. In paragraph (d)(1), removing ''225.870–4(c)(2)(i)(A)(*1*)'' and adding ''249.7003(c)(1)'' in its place;
■ e. In paragraphs (d)(2)(i) and (ii), removing ''225.870–4(c)(2)(i)(C)'' and adding ''249.7003(c)(2)(i)'' and ''249.7003(c)(2)(ii)'' in their place, respectively; and
■ f. Removing paragraph (e).
The revisions read as follows:

252.249–7002 Notification of Anticipated Contract Termination or Reduction.

* * * * *

(b) *Scope.* This clause implements section 1372 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103–160) and section 824 of the National Defense Authorization Act for Fiscal Year 1997 (Pub. L. 104–201), which are intended to help establish benefit eligibility under the Workforce Innovation and Opportunity Act (29 U.S.C. chapter 32) for employees of DoD contractors and subcontractors adversely affected by contract terminations or substantial reductions under major defense programs.

(c) *Notice to employees and state and local officials.* (1) Within 2 weeks after the Contracting Officer notifies the Contractor that contract funding will be terminated or substantially reduced, the Contractor shall provide notice of such anticipated termination or reduction to—

(i) Each employee representative of the Contractor's employees whose work is directly related to the defense contract; or

(ii) If there is no such representative, each such employee;

(iii) The State or entity designated by the State to carry out rapid response activities described in the Workforce Innovation and Opportunity Act (29 U.S.C. 3174(a)(2)(A)(i)); and

(iv) The chief elected official of the unit of general local government within which the adverse effect may occur.

(2) The notice provided an employee under paragraph (c)(1) of this clause shall have the same effect as a notice of termination to the employee for the purposes of determining whether such employee is eligible for training, adjustment assistance, and employment services under the Workforce Innovation and Opportunity Act (29 U.S.C. Chapter 32).

* * * * *

[FR Doc. 2020–11747 Filed 6–4–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

[Docket DARS–2020–0001]

Defense Federal Acquisition Regulation Supplement: Technical Amendment; Correction

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Correcting amendment.

SUMMARY: DoD is correcting final regulations that published in the **Federal Register** on April 8, 2020, to reflect that the clause date for the DFARS section on duty-free entry should be ''(APR 2020)''.

DATES: Effective June 5, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer L. Hawes, Defense Acquisition Regulations System, OUSD(A&S)DPC(DARS), Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060. Telephone 571–372–6115; facsimile 571–372–6094.

SUPPLEMENTARY INFORMATION: On April 8, 2020, DoD published in the **Federal Register** at 85 FR 19681 a final rule titled ''Technical Amendments''. The purpose of this correction is to reflect that the clause date for DFARS 252.225–7013, Duty-Free Entry, should be ''(APR 2020)'' and not ''(MAR 2020)'' as published in the technical amendment.

List of Subjects in 48 CFR Part 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is amended as follows:

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 1. The authority citation for 48 CFR part 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

252.225–7013 [Amended]

■ 3. Amend section 252.225–7013 by removing the clause date of ''(MAR 2020)'' and adding ''(APR 2020)'' in its place.

[FR Doc. 2020–11755 Filed 6–4–20; 8:45 am]

BILLING CODE 5001–06–P

(S–71) In accordance with section 823 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92), the head of the procuring activity is the approval authority for a proposed sole-source 8(a) contract exceeding $100 million. This authority may only be delegated to an officer or employee who—

(1) If a member of the armed forces, is serving in a rank above brigadier general or rear admiral (lower half); or

(2) If a civilian, is serving in a position with a grade under the General Schedule (or any other schedule for civilian officers or employees) that is comparable to or higher than the grade of major general or rear admiral.

PART 219—SMALL BUSINESS PROGRAMS

■ 5. Amend section 219.808–1 by adding paragraph (a) to read as follows:

219.808–1 Sole source.

* * * * *

(a) In lieu of the threshold at FAR 19.808–1(a), the SBA may not accept for negotiation a DoD sole-source 8(a) contract exceeding $100 million unless DoD has completed a justification in accordance with FAR 6.303 and 206.303–1(b).

[FR Doc. 2020–11750 Filed 6–4–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 208

[Docket DARS–2020–0001]

Defense Federal Acquisition Regulation Supplement: Technical Amendments

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is making needed technical amendments to update the Defense Federal Acquisition Regulation Supplement (DFARS).

DATES: Effective June 5, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer L. Hawes, Defense Acquisition Regulations System, OUSD(A&S)DPC(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. Section 208.002 heading is corrected to align with the Federal Acquisition Regulation naming convention for this section and to add new paragraphs (a)(1) introductory text and (a)(1)(i) to provide a notice to contracting officers to see DFARS Procedures, Guidance, and Information 208.002(a)(1)(i) to obtain information on available items in DoD's property inventories. In paragraph (a)(1)(v), two references to ''Subpart'' are changed to ''subpart''.

List of Subjects in 48 CFR Part 208

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 208 is amended as follows:

PART 208—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 1. The authority citation for 48 CFR part 208 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Revise section 208.002 to read as follows:

208.002 Priorities for use of mandatory Government sources.

(a)(1) *Supplies.* (i) See the guidance at PGI 208.002(a)(1)(i) to obtain information on available items in DoD's property inventories.

(v) See subpart 208.70, Coordinated Acquisition, and subpart 208.74, Enterprise Software Agreements.

[FR Doc. 2020–11752 Filed 6–4–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 210, 212, 215, and 234

[Docket DARS–2019–0050]

RIN 0750–AK65

Defense Federal Acquisition Regulation Supplement: Market Research and Consideration of Value for the Determination of Price (DFARS Case 2019–D027)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement several sections of the National Defense Authorization Act for Fiscal Year 2017 to address how contracting officers may require the offeror to submit relevant information to support market research for price analysis, and allow an offeror to submit information relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item.

DATES: Effective June 5, 2020.

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 84 FR 50812 on September 26, 2019, to implement sections 871 and 872 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328). Section 871 modifies 10 U.S.C. 2377, Preference for acquisition of commercial items, to state that, to the extent necessary to support market research for determination of the reasonableness of the price of commercial items, the contracting officer shall use the information submitted under 10 U.S.C. 2379(d) in the case of major weapon systems acquired as commercial items; and in the case of other items, the contracting officer may require the offeror to submit relevant information. Section 872 modifies 10 U.S.C. 2379, Requirement for determination by Secretary of Defense and notification to Congress before procurement of major weapon systems as commercial items, to allow an offeror to submit information or analysis relating to the value of a commercial item. One respondent submitted public comments 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 those comments are provided as follows:

A. Summary of Significant Changes

The final rule removes the discussion of value analysis at DFARS 234.7002(d)(5) and the associated definition of ''value analysis'' at DFARS 234.7001 from the proposed rule.

B. Analysis of Public Comments

Comment: The respondent supports the proposed rule, with a few exceptions. The respondent stated that in the proposed definition of ''value analysis'' at DFARS 234.7001, ''cost''

should be replaced with ''price.'' According to the respondent, this is consistent with the Contract Pricing Reference Guide, which states, ''A value analysis estimate results from a specialized analysis of the function of a product and its related price.''

In addition, the respondent recommended that the word ''legitimate'' should be removed from the proposed DFARS 234.7002(d)(5), because ''legitimate'' is a subjective term that cannot be measured. According to the respondent, the policy should leave the determination of value to the discretion of the contracting officer.

Response: The final rule deletes the discussion of the use of value analysis and the associated definition. This discussion and definition are not necessary for implementation of the statute, which provides that an offeror may submit information or analysis relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item and that the contracting officer may consider such information or analysis in addition to other information submitted. The final rule still provides a reference to guidance at DFARS Procedures Guidance and Information 234.7003(d)(5), which in turn references to the Department of Defense Guidebook for Acquiring Commercial Items, Part B, Commercial Item Pricing—the more current guidebook.

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 propose to add or modify any provisions, clauses, or the prescriptions for any provisions or clauses.

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. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this final 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, a final regulatory flexibility analysis has been prepared and is summarized as follows:

This final rule is issued in order to implement sections 871 and 872 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328). The objective of this rule is to address the use of market research and consideration of value to support the determination of price reasonableness when acquiring commercial items. The legal basis of the rule is sections 871 and 872 of the NDAA for FY 2017.

There were no public comments in response to the initial regulatory flexibility analysis.

Based on data from the Federal Procurement Data System, DoD awarded 38,000 new commercial contracts to 16,429 small entities in FY 2018. There are an additional unknown number of small entities that submitted offers and did not receive awards (estimated at several thousand).

This rule does not impose any new reporting, recordkeeping, or other compliance requirements on small entities. DFARS 252.215–7010, Requirements for Certified Cost or Pricing Data, and Data Other Than Certified Cost or Pricing Data, already requires offerors to provide information necessary to determine that the price is fair and reasonable. Offerors are allowed, but not required, to submit information or analysis relating to the value of a commercial item for consideration by the contracting officer in determining price reasonableness.

DoD did not identify any significant alternatives that would minimize or reduce the significant economic impact, because there is no significant impact on small entities.

VII. Paperwork Reduction Act

The rule does not contain any new 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) or impact any existing information collection requirements.

List of Subjects in 48 CFR Parts 210, 212, 215, and 234

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 210, 212, 215, and 234 are amended as follows:

■ 1. The authority citation for 48 CFR parts 210, 212, 215, and 234 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 210—MARKET RESEARCH

■ 2. Amend section 210.001 by—
■ a. In paragraph (a) introductory text removing '', agencies shall'';
■ b. Redesignating paragraphs (a)(i) and (ii) as paragraphs (a)(i)(A) and (B), respectively;
■ c. In the newly redesignated paragraph (a)(i)(A) removing ''Conduct'' and adding ''Agencies shall conduct'' in its place;
■ d. In the newly redesignated paragraph (a)(i)(B) removing the period and adding ''; and'' in its place; and
■ e. Adding a new paragraph (a)(ii).

The addition reads as follows:

210.001 Policy.

* * * * *

(a) * * *

(ii) Contracting officers shall use market research, where appropriate, to inform price reasonableness determinations (see 212.209 and 234.7002).

* * * * *

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 3. Amend section 212.209 by revising paragraph (a) to read as follows:

212.209 Determination of price reasonableness.

(a) In accordance with 10 U.S.C. 2377(d), agencies shall conduct or obtain market research to support the determination of the reasonableness of price for commercial items contained in any bid or offer submitted in response to an agency solicitation. To the extent necessary to support such market research, the contracting officer—

(1) In the case of major weapon systems items acquired as commercial items in accordance with subpart 234.70, shall use information submitted under 234.7002(d); and

(2) In the case of other items, may require the offeror to submit other relevant information.

* * * * *

PART 215—CONTRACTING BY NEGOTIATION

■ 4. Amend section 215.403–3 by adding paragraph (c) to read as follows:

215.403–3 Requiring data other than certified cost or pricing data.

* * * * *

(c) *Commercial items.* For determinations of price reasonableness of major weapon systems acquired as commercial items, see 234.7002(d).

PART 234—MAJOR SYSTEM ACQUISITION

■ 5. Revise section 234.7001 to read as follows:

234.7001 Definition.

As used in this subpart—

Major weapon system means a weapon system acquired pursuant to a major defense acquisition program.

■ 6. Amend section 234.7002 by revising paragraph (d) introductory text and adding paragraph (d)(5) to read as follows:

234.7002 Policy.

* * * * *

(d) * * * See 212.209(a) for requirements of 10 U.S.C. 2377 with regard to market research.

* * * * *

(5) An offeror may submit information or analysis relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item. A contracting officer may consider such information or analysis in addition to the information submitted pursuant to paragraphs (d)(1) and (2) of this section. For additional guidance see PGI 234.7002(d)(5).

[FR Doc. 2020–11748 Filed 6–4–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 215

[Docket DARS–2020–0015]

RIN 0750–AK91

Defense Federal Acquisition Regulation Supplement: Repeal of Annual Reporting Requirements to Congressional Defense Committees (DFARS Case 2020–D004)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2018.

DATES: Effective June 5, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly R. Ziegler, telephone 571–372–6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to implement section 1051 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115–91). Section 1051 repealed numerous DoD reporting requirements to Congress, to include the annual reporting requirements for commercial items and exceptional case exceptions and waivers under section 817 of the NDAA for FY 2003 (Pub. L. 107–314). The section 817 reporting requirements and guidance regarding exceptions and waivers to cost or pricing data requirements were implemented at DFARS 215.403–3(c). Pursuant to section 1051, this rule removes the reporting requirements and guidance.

II. 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 create or revise any solicitation provisions or contract clauses. This rule removes rescinded reporting requirements for exceptions and waivers of cost or pricing data to congressional defense committees.

III. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because the rule merely removes two statutory reporting requirements that have been rescinded.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.) 12866 and E.O. 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. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section III. of this preamble), the analytical requirement of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

VII. 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 Part 215

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 215 is amended as follows:

PART 215—CONTRACTING BY NEGOTIATION

■ 1. The authority for 48 CFR part 215 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Amend section 215.403–1 by—

Year 2020 that removes the qualification requirement for contracting professionals to have completed 24 semester credit hours (or equivalent) of study in specifics areas.

DATES: Effective June 5, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Kerryn Loan, telephone 571–372–6119.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to implement section 861 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 116–92). Section 861 amends section 808 of the NDAA for FY 2000 (Pub. L. 106–398) by removing the requirement for contracting professionals to have completed at least 24 semester credit hours (or equivalent) of study from an accredited institution of higher education in the areas of accounting, business, finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, and organization, and management. The qualification requirement, implemented at Defense Federal Acquisition Regulations Supplement (DFARS) 201.603–2(1)(iii)(B) and 218.201(1), is removed by this final rule in accordance with section 861. The title to DoD Instruction 5000.66 is also updated to read ''Defense Acquisition Workforce Education, Training, Experience, and Career Development Program'' at DFARS 201.603–2(2)(iii).

II. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule only impacts the internal operating procedures of DoD. As such, the rule does not impose any new requirements on contracts at or below the simplified acquisition threshold or for commercial items, including commercially available off-the-shelf items.

III. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it only impacts processes that are internal to DoD.

IV. Executive Orders 12866 and 13563

Executive Order (E.O.) 12866, Regulatory Planning and Review; and E.O. 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). E.O. 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, Office of Information and Regulatory Affairs, has determined that this is not a significant regulatory action as defined under section 3(f) of E.O. 12866 and, therefore, was not subject to review under section 6(b). This rule is not a major rule as defined at 5 U.S.C. 804(2).

V. Executive Order 13771

This rule is not subject to an E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section III. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

VII. 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 201 and 218

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 201 and 218 are amended as follows:

■ 1. The authority citation for 48 CFR parts 201 and 218 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 201—FEDERAL ACQUISITION REGULATION SYSTEM

■ 2. Amend section 201.603–2 by revising paragraphs (1)(iii) and (2)(iii) to read as follows:

201.603–2 Selection.

(1) * * *

(iii) Have received a baccalaureate degree from an accredited educational institution; and

* * * * *

(2) * * *

(iii) Is an individual appointed to a 3-year developmental position. Information on developmental opportunities is contained in DoD Instruction 5000.66, Defense Acquisition Workforce Education, Training, Experience, and Career Development Program.

* * * * *

PART 218—EMERGENCY ACQUISITIONS

218.201 [Amended]

■ 3. Amend section 218.201 in paragraph (1) by removing ''and 24 semester credit hours of business related courses''.

[FR Doc. 2020–11751 Filed 6–4–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 206 and 219

[Docket DARS–2020–0016]

RIN 0750–AK93

Defense Federal Acquisition Regulation Supplement: Justification and Approval Threshold for 8(a) Contracts (DFARS Case 2020–D006)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2020.

DATES: Effective June 5, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly R. Ziegler, telephone 571–372–6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to implement section 823 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116–92). Section 823 increases the threshold for requiring a justification and approval to award a sole source contract to a participant in the 8(a) program to actions exceeding $100 million. The current threshold is $22 million. Section 823 also designates the head of the procuring activity as the approval authority. To implmement section 823, the revised threshold is added in a new DFARS section 206.303–1, Requirements, and the new approval authority is added in DFARS 206.304, Approval of the justification. Corresponding revisions to indicate the new threshold are also included at DFARS 206.303–2, Content, and 219.808–1, Sole source.

II. 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 create or revise any solicitation provisions or contract clauses. This rule amends DFARS 206.303 to increase the threshold for requiring a sole source justification and approval for contracts to 8(a) program participants exceeding $100 million. The rule also designates the appropriate approval authority.

III. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it affects DoD internal operating procedures pertaining to sole source justifications for 8(a) procurements and the designated approval authority. The increased threshold and assignment of approval authority does not have a significant effect beyond the internal operating procedures of the agency issuing the policy. There is no additional cost or administrative impact on contractors or offerors.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.) 12866 and E.O. 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. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section III. of this preamble), the analytical requirement of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

VII. 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 206 and 219

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 206 and 219 are amended as follows:

■ 1. The authority citation for 48 CFR parts 206 and 219 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 206—COMPETITION REQUIREMENTS

■ 2. Add section 206.303–1 to read as follows:

206.303–1 Requirements.

(a) In accordance with section 823 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92), no justification and approval is required for a sole-source contract under the 8(a) authority (15 U.S.C. 637(a)) for an amount not exceeding $100 million.

(b) In lieu of FAR 6.303–1(b), in accordance with section 823 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92), contracting officers shall not award a sole source contract under the 8(a) authority (15 U.S.C. 637(a)) for an amount exceeding $100 million unless—

(1) The contracting officer justifies the use of a sole source contract in writing in accordance with FAR 6.303–2;

(2) The justification is approved in accordance with 206.304(a)(S–71); and

(3) The justification and related information are made public after award in accordance with FAR 6.305.

3. Amend section 206.303–2 by redesignating paragraph (b)(i) as (b)(ii) and adding a new paragraph (b)(i) and paragraph (d) to read as follows:

206.303–2 Content.

(b)(i) In lieu of the threshold at FAR 6.303–2(b), each justification shall include the information at FAR 6.303–2(b), except for sole-source 8(a) contracts over $100 million (see paragraph (d) of this section).

* * * * *

(d) In lieu of the threshold at FAR 6.303–2(d), each justification for a sole-source 8(a) contract over $100 million shall include the information at FAR 6.303–2(d).

■ 4. Amend section 206.304 by adding paragraph (a)(S–71) to read as follows:

206.304 Approval of the justification.

(a) * * *

(S–71) In accordance with section 823 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92), the head of the procuring activity is the approval authority for a proposed sole-source 8(a) contract exceeding $100 million. This authority may only be delegated to an officer or employee who—

(1) If a member of the armed forces, is serving in a rank above brigadier general or rear admiral (lower half); or

(2) If a civilian, is serving in a position with a grade under the General Schedule (or any other schedule for civilian officers or employees) that is comparable to or higher than the grade of major general or rear admiral.

PART 219—SMALL BUSINESS PROGRAMS

■ 5. Amend section 219.808–1 by adding paragraph (a) to read as follows:

219.808–1 Sole source.

* * * * *

(a) In lieu of the threshold at FAR 19.808–1(a), the SBA may not accept for negotiation a DoD sole-source 8(a) contract exceeding $100 million unless DoD has completed a justification in accordance with FAR 6.303 and 206.303–1(b).

[FR Doc. 2020–11750 Filed 6–4–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 208

[Docket DARS–2020–0001]

Defense Federal Acquisition Regulation Supplement: Technical Amendments

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is making needed technical amendments to update the Defense Federal Acquisition Regulation Supplement (DFARS).

DATES: Effective June 5, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer L. Hawes, Defense Acquisition Regulations System, OUSD(A&S)DPC(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. Section 208.002 heading is corrected to align with the Federal Acquisition Regulation naming convention for this section and to add new paragraphs (a)(1) introductory text and (a)(1)(i) to provide a notice to contracting officers to see DFARS Procedures, Guidance, and Information 208.002(a)(1)(i) to obtain information on available items in DoD's property inventories. In paragraph (a)(1)(v), two references to ''Subpart'' are changed to ''subpart''.

List of Subjects in 48 CFR Part 208

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 208 is amended as follows:

PART 208—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 1. The authority citation for 48 CFR part 208 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Revise section 208.002 to read as follows:

208.002 Priorities for use of mandatory Government sources.

(a)(1) *Supplies.* (i) See the guidance at PGI 208.002(a)(1)(i) to obtain information on available items in DoD's property inventories.

(v) See subpart 208.70, Coordinated Acquisition, and subpart 208.74, Enterprise Software Agreements.

[FR Doc. 2020–11752 Filed 6–4–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 210, 212, 215, and 234

[Docket DARS–2019–0050]

RIN 0750–AK65

Defense Federal Acquisition Regulation Supplement: Market Research and Consideration of Value for the Determination of Price (DFARS Case 2019–D027)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement several sections of the National Defense Authorization Act for Fiscal Year 2017 to address how contracting officers may require the offeror to submit relevant information to support market research for price analysis, and allow an offeror to submit information relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item.

DATES: Effective June 5, 2020.

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 84 FR 50812 on September 26, 2019, to implement sections 871 and 872 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328). Section 871 modifies 10 U.S.C. 2377, Preference for acquisition of commercial items, to state that, to the extent necessary to support market research for determination of the reasonableness of the price of commercial items, the contracting officer shall use the information submitted under 10 U.S.C. 2379(d) in the case of major weapon systems acquired as commercial items; and in the case of other items, the contracting officer may require the offeror to submit relevant information. Section 872 modifies 10 U.S.C. 2379, Requirement for determination by Secretary of Defense and notification to Congress before procurement of major weapon systems as commercial items, to allow an offeror to submit information or analysis relating to the value of a commercial item. One respondent submitted public comments 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 those comments are provided as follows:

A. Summary of Significant Changes

The final rule removes the discussion of value analysis at DFARS 234.7002(d)(5) and the associated definition of ''value analysis'' at DFARS 234.7001 from the proposed rule.

B. Analysis of Public Comments

Comment: The respondent supports the proposed rule, with a few exceptions. The respondent stated that in the proposed definition of ''value analysis'' at DFARS 234.7001, ''cost''

Dated at Washington, DC, on February 20, 2020.

Robert E. Feldman,

Executive Secretary.

By the National Credit Union Administration Board.

Gerard Poliquin,

Secretary of the Board.

[FR Doc. 2020–10291 Filed 5–29–20; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P; 7535–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA–2020–0032]

RIN 3245–AH46

DEPARTMENT OF THE TREASURY

RIN 1505–AC69

Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Loan Forgiveness

AGENCY: U.S. Small Business Administration; Department of the Treasury.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule announcing the implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act temporarily adds a new program, titled the ''Paycheck Protection Program,'' to the SBA's 7(a) Loan Program. The CARES Act also provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). SBA posted additional interim final rules on April 3, 2020, April 14, 2020, April 24, 2020, April 28, 2020, April 30, 2020, May 5, 2020, May 8, 2020, May 13, 2020, May 14, 2020, May 18, 2020, and May 20, 2020, and the Department of the Treasury (Treasury) posted an additional interim final rule on April 27, 2020. This interim final rule supplements the previously posted interim final rules in order to help PPP borrowers prepare and submit loan forgiveness applications as provided for in the CARES Act, help PPP lenders who will be making the loan forgiveness decisions, inform borrowers and lenders of SBA's process for reviewing PPP loan applications and loan forgiveness applications, and requests public comment.

DATES: *Effective date:* May 28, 2020.

Applicability date: This interim final rule applies to loan forgiveness applications submitted under the Paycheck Protection Program.

Comment date: Comments must be received on or before July 1, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0032 through the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments. SBA will post all comments on *www.regulations.gov*. If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please send an email to *ppp-ifr@sba.gov*. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at *https://www.sba.gov/tools/local-assistance/districtoffices*.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the CARES Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency. Section 1102 of the CARES Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the ''Paycheck Protection Program.'' Section 1106 of the CARES Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program, and requires SBA to issue guidance and regulations implementing section 1106 within 30 days after the date of enactment of the CARES Act. On April 2, 2020, SBA posted its first PPP interim final rule (85 FR 20811) (the First Interim Final Rule) covering in part loan forgiveness. On April 8, 2020 and April 26, 2020, SBA also posted Frequently Asked Questions relating to loan forgiveness.[1] On April 14, 2020, SBA posted an interim final rule covering in part loan forgiveness for individuals with self-employment income. On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116–139), which provided additional funding and authority for the Paycheck Protection Program.

As described below, this interim final rule provides borrowers and lenders guidance on requirements governing the forgiveness of PPP loans.

Four provisions of this interim final rule are an exercise of rulemaking authority by Treasury either jointly with SBA or by Treasury alone: (1) The *de minimis* exemption provided with respect to certain offers of rehire, (2) the additional reference period option provided for seasonal employers, (3) the *de minimis* exemption from the full-time equivalent employee reduction penalty when an employee is, for example, fired for cause, and (4) the *de minimis* exemption from the full-time equivalent employee reduction penalty when the borrower eliminates reductions by June 30, 2020. Otherwise, all provisions in this rule are an exercise of rulemaking authority by SBA alone.

II. Comments and Immediate Effective Date

The intent of the CARES Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in

[1] *https://www.sba.gov/document/support-faq-lenders-borrowers.*

economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Specifically, it is critical to meet lenders' and borrowers' need for clarity concerning loan forgiveness requirements as rapidly as possible because borrowers can seek loan forgiveness as early as eight-weeks following the date of disbursement of their PPP loans. Because the first PPP loans were disbursed after April 3, providing borrowers with certainty on loan forgiveness requirements and other program requirements will enhance their ability to carry out the purposes of the CARES Act in keeping their workers employed and paid, while at the same time taking necessary steps to maximize eligible loan forgiveness amounts. An immediate effective date also is necessary for PPP lenders who generally will make the loan forgiveness determinations as provided in the CARES Act. Specifically, an immediate effective date is necessary for lenders so that they will have both a degree of certainty and sufficient time to develop their systems and policies and procedures in order to timely review and process loan forgiveness applications, which borrowers are permitted to begin submitting at the end of their covered period.

This interim final rule supplements previous regulations and guidance on the discrete issues related to loan forgiveness. This interim final rule is effective without advance notice and public comment because section 1114 of the CARES Act authorizes SBA to issue regulations to implement Title I of the CARES Act without regard to notice requirements. In addition, SBA has determined that there is good cause for dispensing with advance public notice and comment on the ground that it would be contrary to the public interest. Specifically, SBA has determined that advance notice and public comment would delay the ability of PPP borrowers to understand with certainty which payroll costs and nonpayroll costs that are incurred or paid during the covered period are eligible for forgiveness. By providing a high degree of certainty to PPP borrowers through this interim final rule, PPP borrowers will be able to take immediate steps to maximize their loan forgiveness amounts, for example, by either rehiring employees or not laying off employees during the covered period. This rule is being issued to allow for immediate implementation of the forgiveness component of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of this interim final rule, including section III below. These comments must be submitted on or before July 1, 2020. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program Requirements for Loan Forgiveness

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the Paycheck Protection Program (PPP). Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness. Additional information about the PPP is available in interim final rules published by SBA and Treasury in the **Federal Register** (85 FR 20811, 85 FR 20817, 85 FR 21747, 85 FR 23450, 85 FR 23917, 85 FR 26321, 85 FR 26324, 85 FR 27287, 85 FR 29842, 85 FR 29845, 85 FR 29847, 85 FR 30835) as well as an SBA interim final rule posted on May 20, 2020.

1. General

Section 1106(b) of the CARES Act provides that, subject to several important limitations, borrowers shall be eligible for forgiveness of their PPP loan in an amount equal to the sum of the following costs incurred and payments made during the covered period (as described in section III.3. below):

(1) Payroll costs; [2]

(2) Interest payments on any business mortgage obligation on real or personal property that was incurred before February 15, 2020 (but not any prepayment or payment of principal);

(3) Payments on business rent obligations on real or personal property under a lease agreement in force before February 15, 2020; and

(4) Business utility payments for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020.

This interim final rule uses the term ''nonpayroll costs'' to refer to the payments described in (2), (3), and (4). As set forth in the First Interim Final Rule (85 FR 20811), eligible nonpayroll costs cannot exceed 25 percent of the loan forgiveness amount.

2. Loan Forgiveness Process

What is the general process to obtain loan forgiveness?

To receive loan forgiveness, a borrower must complete and submit the Loan Forgiveness Application (SBA Form 3508 or lender equivalent) to its lender (or the lender servicing its loan). As a general matter, the lender will review the application and make a decision regarding loan forgiveness. The lender has 60 days from receipt of a complete application to issue a decision to SBA. If the lender determines that the borrower is entitled to forgiveness of some or all of the amount applied for under the statute and applicable regulations, the lender must request payment from SBA at the time the lender issues its decision to SBA. SBA will, subject to any SBA review of the loan or loan application, remit the appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment, not later than 90 days after the lender issues its decision to SBA. If applicable, SBA will deduct EIDL Advance Amounts from the forgiveness amount remitted to the Lender as required by section 1110(e)(6) of the CARES Act. If SBA determines in the course of its review that the borrower was ineligible for the PPP loan based on the provisions of the CARES Act, SBA rules or guidance available at the time of the borrower's loan application, or the terms of the borrower's PPP loan application (for example, because the borrower lacked an adequate basis for the certifications that it made in its PPP loan application), the loan will not be eligible for loan forgiveness. The lender is responsible for notifying the borrower of the forgiveness amount. If only a portion of the loan is forgiven, or if the forgiveness request is denied, any remaining balance due on the loan must be repaid by the borrower on or before the two-year maturity of the loan. If the amount remitted by SBA to the lender exceeds the remaining principal balance of the PPP loan (because the borrower made

[2] Payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wages, commissions, income, or net earnings from self-employment, or similar compensation. *See* 15 U.S.C. 636(a)(36)(A)(viii); 85 FR 20811, 20813.

scheduled payments on the loan after the initial deferment period), the lender must remit the excess amount, including accrued interest, to the borrower.

The general loan forgiveness process described above applies only to loan forgiveness applications that are not reviewed by SBA prior to the lender's decision on the forgiveness application. In a separate interim final rule on SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, SBA will describe its procedures for reviewing PPP loan applications and loan forgiveness applications.

3. Payroll Costs Eligible for Loan Forgiveness

a. When must payroll costs be incurred and/or paid to be eligible for forgiveness?

In general, payroll costs paid or incurred during the eight consecutive week (56 days) covered period are eligible for forgiveness. Borrowers may seek forgiveness for payroll costs for the eight weeks beginning on either:

i. The date of disbursement of the borrower's PPP loan proceeds from the Lender (*i.e.,* the start of the covered period); or

ii. the first day of the first payroll cycle in the covered period (the ''alternative payroll covered period'').

Payroll costs are considered paid on the day that paychecks are distributed or the borrower originates an ACH credit transaction. Payroll costs incurred during the borrower's last pay period of the covered period or the alternative payroll covered period are eligible for forgiveness if paid on or before the next regular payroll date; otherwise, payroll costs must be paid during the covered period (or alternative payroll covered period) to be eligible for forgiveness. Payroll costs are generally incurred on the day the employee's pay is earned (*i.e.,* on the day the employee worked). For employees who are not performing work but are still on the borrower's payroll, payroll costs are incurred based on the schedule established by the borrower (typically, each day that the employee would have performed work).

The Administrator of the Small Business Administration (Administrator), in consultation with the Secretary of the Treasury (Secretary), recognizes that the eight-week covered period will not always align with a borrower's payroll cycle. For administrative convenience of the borrower, a borrower with a bi-weekly (or more frequent) payroll cycle may elect to use an alternative payroll covered period that begins on the first day of the first payroll cycle in the covered period and continues for the following eight weeks. If payroll costs are incurred during this eight-week alternative payroll covered period, but paid after the end of the alternative payroll covered period, such payroll costs will be eligible for forgiveness if they are paid no later than the first regular payroll date thereafter.

The Administrator, in consultation with the Secretary, determined that this alternative computational method for payroll costs is justified by considerations of administrative feasibility for borrowers, as it will reduce burdens on borrowers and their payroll agents while achieving the paycheck protection purposes manifest throughout the CARES Act, including section 1102. Because this alternative computational method is limited to payroll cycles that are bi-weekly or more frequent, this computational method will yield a calculation that the Administrator does not expect to materially differ from the actual covered period, while avoiding unnecessary administrative burdens and enhancing auditability.

Example: A borrower has a bi-weekly payroll schedule (every other week). The borrower's eight-week covered period begins on June 1 and ends on July 26. The first day of the borrower's first payroll cycle that starts in the covered period is June 7. The borrower may elect an alternative payroll covered period for payroll cost purposes that starts on June 7 and ends 55 days later (for a total of 56 days) on August 1. Payroll costs paid during this alternative payroll covered period are eligible for forgiveness. In addition, payroll costs incurred during this alternative payroll covered period are eligible for forgiveness as long as they are paid on or before the first regular payroll date occurring after August 1. Payroll costs that were both paid and incurred during the covered period (or alternative payroll covered period) may only be counted once.

b. Are salary, wages, or commission payments to furloughed employees; bonuses; or hazard pay during the covered period eligible for loan forgiveness?

Yes. The CARES Act defines the term ''payroll costs'' broadly to include compensation in the form of salary, wages, commissions, or similar compensation. If a borrower pays furloughed employees their salary, wages, or commissions during the covered period, those payments are eligible for forgiveness as long as they do not exceed an annual salary of $100,000, as prorated for the covered period. The Administrator, in consultation with the Secretary, has determined that this interpretation is consistent with the text of the statute and advances the paycheck protection purposes of the statute by enabling borrowers to continue paying their employees even if those employees are not able to perform their day-to-day duties, whether due to lack of economic demand or public health considerations. This intent is reflected throughout the statute, including in section 1106(d)(4) of the Act, which provides that additional wages paid to tipped employees are eligible for forgiveness. The Administrator, in consultation with the Secretary, has also determined that, if an employee's total compensation does not exceed $100,000 on an annualized basis, the employee's hazard pay and bonuses are eligible for loan forgiveness because they constitute a supplement to salary or wages, and are thus a similar form of compensation.

c. Are there caps on the amount of loan forgiveness available for owner-employees and self-employed individuals' own payroll compensation?

Yes, the amount of loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation can be no more than the lesser of 8/52 of 2019 compensation (*i.e.,* approximately 15.38 percent of 2019 compensation) or $15,385 per individual in total across all businesses. See 85 FR 21747, 21750.

In particular, owner-employees are capped by the amount of their 2019 employee cash compensation and employer retirement and health care contributions made on their behalf. Schedule C filers are capped by the amount of their owner compensation replacement, calculated based on 2019 net profit.[3] General partners are capped by the amount of their 2019 net earnings from self-employment (reduced by claimed section 179 expense deduction, unreimbursed partnership expenses, and depletion from oil and gas properties) multiplied by 0.9235. No additional forgiveness is provided for retirement or health insurance contributions for self-employed individuals, including Schedule C filers and general partners, as such expenses are paid out of their net self-employment income.

[3] *See* 85 CFR 21747, 21749 (April 20, 2020).

4. Nonpayroll Costs Eligible for Loan Forgiveness

a. When must nonpayroll costs be incurred and/or paid to be eligible for forgiveness?

A nonpayroll cost is eligible for forgiveness if it was:

i. Paid during the covered period; or

ii. incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period.

Example: A borrower's covered period begins on June 1 and ends on July 26. The borrower pays its May and June electricity bill during the covered period and pays its July electricity bill on August 10, which is the next regular billing date. The borrower may seek loan forgiveness for its May and June electricity bills, because they were paid during the covered period. In addition, the borrower may seek loan forgiveness for the portion of its July electricity bill through July 26 (the end of the covered period), because it was incurred during the covered period and paid on the next regular billing date.

The Administrator, in consultation with the Secretary, has determined that this interpretation provides an appropriate degree of borrower flexibility while remaining consistent with the text of section 1106(b). The Administrator believes that this simplified approach to calculation of forgivable nonpayroll costs is also supported by considerations of administrative convenience for borrowers, and the Administrator notes that the 25 percent cap on nonpayroll costs will avoid excessive inclusion of nonpayroll costs.

b. Are advance payments of interest on mortgage obligations eligible for loan forgiveness?

No. Advance payments of interest on a covered mortgage obligation are not eligible for loan forgiveness because the CARES Act's loan forgiveness provisions regarding mortgage obligations specifically exclude ''prepayments.'' Principal on mortgage obligations is not eligible for forgiveness under any circumstances.

5. Reductions to Loan Forgiveness Amount

Section 1106 of the CARES Act specifically requires certain reductions in a borrower's loan forgiveness amount based on reductions in full-time equivalent employees or in employee salary and wages during the covered period, subject to an important statutory exemption for borrowers who have rehired employees and restored salary and wage levels by June 30, 2020 (with limitations). In addition, SBA and Treasury are adopting a regulatory exemption to the reduction rules for borrowers who have offered to rehire employees or restore employee hours, even if the employees have not accepted. The instructions to the loan forgiveness application and the guidance below explains how the statutory forgiveness reduction formulas work.

a. Will a borrower's loan forgiveness amount be reduced if the borrower laid-off or reduced the hours of an employee, then offered to rehire the same employee for the same salary and same number of hours, or restore the reduction in hours, but the employee declined the offer?

No. Employees whom the borrower offered to rehire are generally exempt from the CARES Act's loan forgiveness reduction calculation. This exemption is also available if a borrower previously reduced the hours of an employee and offered to restore the employee's hours at the same salary or wages. Specifically, in calculating the loan forgiveness amount, a borrower may exclude any reduction in full-time equivalent employee headcount that is attributable to an individual employee if:

i. The borrower made a good faith, written offer to rehire such employee (or, if applicable, restore the reduced hours of such employee) during the covered period or the alternative payroll covered period;

ii. the offer was for the same salary or wages and same number of hours as earned by such employee in the last pay period prior to the separation or reduction in hours;

iii. the offer was rejected by such employee;

iv. the borrower has maintained records documenting the offer and its rejection; and

v. the borrower informed the applicable state unemployment insurance office of such employee's rejected offer of reemployment within 30 days of the employee's rejection of the offer.[4]

The Administrator and the Secretary determined that this exemption is an appropriate exercise of their joint rulemaking authority to grant *de minimis* exemptions under section 1106(d)(6).[5] Section 1106(d)(2) of the CARES Act reduces the amount of the PPP loan that may be forgiven if the borrower reduces full-time equivalent employees during the covered period as compared to a base period selected by the borrower. Section 1106(d)(5) of the CARES Act waives this reduction in the forgiveness amount if the borrower eliminates the reduction in full-time equivalent employees occurring during a different statutory reference period[6] by not later than June 30, 2020. The Administrator and the Secretary believe that the additional exemption set forth above is consistent with the purposes of the CARES Act and provides borrowers appropriate flexibility in the current economic climate. The Administrator, in consultation with the Secretary, have determined that the exemption is *de minimis* for two reasons. First, it is reasonable to anticipate that most laid-off employees will accept the offer of reemployment in light of current labor market conditions. Second, to the extent this exemption allows employers to cure FTE reductions attributable to terminations that occurred before February 15, 2020 (the start of the statutory FTE reduction safe harbor period), it is reasonable to anticipate those reductions will represent a relatively small portion of aggregate employees given the historically strong labor market conditions before the COVID–19 emergency.

b. What effect does a reduction in a borrower's number of full-time equivalent (FTE) employees have on the loan forgiveness amount?

In general, a reduction in FTE employees during the covered period or the alternative payroll covered period reduces the loan forgiveness amount by the same percentage as the percentage reduction in FTE employees. The borrower must first select a reference period: (i) February 15, 2019 through June 30, 2019; (ii) January 1, 2020 through February 29, 2020; or (iii) in the case of a seasonal employer, either of the two preceding methods or a consecutive 12-week period between May 1, 2019 and September 15, 2019.[7]

[4] Further information regarding how borrowers will report information concerning rejected rehire offers to state unemployment insurance offices will be provided on SBA's website.

[5] Section 1106(d)(6) is the sole joint rulemaking authority exercised in this interim final rule. All other provisions of this interim final rule are an exercise of rulemaking authority by SBA, except as expressly noted otherwise.

[6] Section 1106(d)(5) specifies that this reference period is between February 15, 2020 and 30 days after the date of enactment of the CARES Act or April 26, 2020 (the safe harbor period).

[7] This decision to permit seasonal employers to use, as a reference period, any consecutive 12-week period between May 1, 2019 and September 15, 2019 is an exercise of the Secretary's rulemaking authority under section 1109 of the CARES Act. This reference period is consistent with the interim final rule on seasonal employers issued by Treasury. *See* 85 FR 23917 (April 30, 2020).

If the average number of FTE employees during the covered period or the alternative payroll covered period is less than during the reference period, the total eligible expenses available for forgiveness is reduced proportionally by the percentage reduction in FTE employees. For example, if a borrower had 10.0 FTE employees during the reference period and this declined to 8.0 FTE employees during the covered period, the percentage of FTE employees declined by 20 percent and thus only 80 percent of otherwise eligible expenses are available for forgiveness.

This formula implements section 1106(d)(2) of the CARES Act, which expressly requires that the loan forgiveness amount be reduced by the amount resulting from multiplying the amount that the borrower would otherwise receive by the quotient of the average FTE employees in the covered period divided by the average FTE employees in the relevant reference period.

c. What does ''full-time equivalent employee'' mean?

Full-time equivalent employee means an employee who works 40 hours or more, on average, each week. The hours of employees who work less than 40 hours are calculated as proportions of a single full-time equivalent employee and aggregated, as explained further below in subsection d.

The CARES Act does not define the term ''full-time equivalent employee,'' and the Administrator, in consultation with the Secretary, has determined that full-time equivalent is best understood to mean 40 hours or more of work each week. The Administrator considered using a 30 hour standard, but determined that 40 hours or more of work each week better reflects what constitutes full-time employment for the vast majority of American workers.

d. How should a borrower calculate its number of full-time equivalent (FTE) employees?

Borrowers seeking forgiveness must document their average number of FTE employees during the covered period (or the alternative payroll covered period) and their selected reference period. For purposes of this calculation, borrowers must divide the average number of hours paid for each employee per week by 40, capping this quotient at 1.0. For example, an employee who was paid 48 hours per week during the covered period would be considered to be an FTE employee of 1.0.

For employees who were paid for less than 40 hours per week, borrowers may choose to calculate the full-time equivalency in one of two ways. First, the borrower may calculate the average number of hours a part-time employee was paid per week during the covered period. For example, if an employee was paid for 30 hours per week on average during the covered period, the employee could be considered to be an FTE employee of 0.75. Similarly, if an employee was paid for ten hours per week on average during the covered period, the employee could be considered to be an FTE employee of 0.25. Second, for administrative convenience, borrowers may elect to use a full-time equivalency of 0.5 for each part-time employee. The Administrator recognizes that not all borrowers maintain hours-worked data, and has decided to afford such borrowers this flexibility in calculating the full-time equivalency of their part-time employees.

Borrowers may select only one of these two methods, and must apply that method consistently to all of their part-time employees for the covered period or the alternative payroll covered period and the selected reference period. In either case, the borrower shall provide the aggregate total of FTE employees for both the selected reference period and the covered period or the alternative payroll covered period, by adding together all of the employee-level FTE employee calculations. The borrower must then divide the average FTE employees during the covered period or the alternative payroll covered period by the average FTE employees during the selected reference period, resulting in the reduction quotient.

The Administrator, in consultation with the Secretary, determined that because the Act does not define the term FTE employee, this approach to measurement of FTE is a reasonable and appropriate exercise of the Administrator's rulemaking authority, as it balances the need for a reasonable measurement of FTE employee headcount with the need to limit borrower compliance burdens and ensure administrative feasibility.

e. What effect does a borrower's reduction in employees' salary or wages have on the loan forgiveness amount?

Under section 1106(d)(3) of the CARES Act, a reduction in an employee's salary or wages in excess of 25 percent will generally result in a reduction in the loan forgiveness amount, unless an exception applies. Specifically, for each new employee in 2020 and each existing employee who was not paid more than the annualized equivalent of $100,000 in any pay period in 2019, the borrower must reduce the total forgiveness amount by the total dollar amount of the salary or wage reductions that are in excess of 25 percent of base salary or wages between January 1, 2020 and March 31, 2020 (the reference period), subject to exceptions for borrowers who restore reduced wages or salaries (see g. below). This reduction calculation is performed on a per employee basis, not in the aggregate.

Example: A borrower reduced a full-time employee's weekly salary from $1,000 per week during the reference period to $700 per week during the covered period. The employee continued to work on a full-time basis during the covered period with an FTE of 1.0. In this case, the first $250 (25 percent of $1,000) is exempted from the reduction. Borrowers seeking forgiveness would list $400 as the salary/hourly wage reduction for that employee (the extra $50 weekly reduction multiplied by eight weeks).

The provision implements section 1106(d)(3) of the CARES Act, which provides that ''the amount of loan forgiveness shall be reduced by the amount of any reduction in total salary or wages of any employee [who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount more than $100,000] during the covered period that is in excess of 25 percent of the total salary or wages of the employee during the most recent full quarter during which the employee was employed before the covered period.''

f. How should borrowers seeking loan forgiveness account for the reduction based on a reduction in the number of employees (Section 1106(d)(2)) relative to the reduction relating to salary and wages (Section 1106(d)(3))?

To ensure that borrowers are not doubly penalized, the salary/wage reduction applies only to the portion of the decline in employee salary and wages that is *not* attributable to the FTE reduction.

The Act does not address the intersection between the FTE employee reduction provision in section 1106(d)(2) and the salary/wage reduction provision in section 1106(d)(3). To help ensure uniformity across all borrowers in applying the FTE reduction provision and the salary/wage reduction provision, the Administrator, in consultation with the Secretary, has determined that the salary/wage reduction applies only to the portion of the decline in employee salary and wages that is *not* attributable to the FTE reduction. This approach will help

ensure that borrowers are not doubly penalized for reductions.

Example: An hourly wage employee had been working 40 hours per week during the borrower selected reference period (FTE employee of 1.0) and the borrower reduced the employee's hours to 20 hours per week during the covered period (FTE employee of 0.5). There was no change to the employee's hourly wage during the covered period. Because the hourly wage did not change, the reduction in the employee's total wages is entirely attributable to the FTE employee reduction and the borrower is not required to conduct a salary/wage reduction calculation for that employee.

The Administrator considered applying the salary/wage reduction provision in addition to the FTE reduction in situations similar to the example above because section 1106(d)(3) refers to reductions in ''total salary or wages'' in excess of 25 percent. However, the Administrator determined that, based on the structure of section 1106(d)(2) and section 1106(d)(3), Congress intended to distinguish between an FTE reduction on the one hand and a reduction in hourly wages or salary on the other hand. This interpretation harmonizes the two loan forgiveness reduction provisions in a logical manner consistent with the statute.

g. If a borrower restores reductions made to employee salaries and wages or FTE employees by not later than June 30, 2020, can the borrower avoid a reduction in its loan forgiveness amount?

Yes. Section 1106(d)(5) of the CARES Act provides that if certain employee salaries and wages were reduced between February 15, 2020 and April 26, 2020 (the safe harbor period) but the borrower eliminates those reductions by June 30, 2020 or earlier, the borrower is exempt from any reduction in loan forgiveness amount that would otherwise be required due to reductions in salaries and wages under section 1106(d)(3) of the CARES Act. Similarly, if a borrower eliminates any reductions in FTE employees occurring during the safe harbor period by June 30, 2020 or earlier, the borrower is exempt from any reduction in loan forgiveness amount that would otherwise be required due to reductions in FTE employees.[8]

This provision implements section 1106(d)(5) of the CARES Act, which gives borrowers an opportunity to cure reductions in FTEs, salary/wage reductions in excess of 25 percent, or both, using the applicable methodology set forth in section 1106(d)(5). The Act provides that the reduction in FTEs or the reduction in salary/hourly wages must be eliminated ''not later than June 30, 2020.'' This does not change or affect the requirement that at least 75 percent of the loan forgiveness amount must be attributable to payroll costs.

h. Will a borrower's loan forgiveness amount be reduced if an employee is fired for cause, voluntarily resigns, or voluntarily requests a schedule reduction?

No. When an employee of the borrower is fired for cause, voluntarily resigns, or voluntarily requests a reduced schedule during the covered period or the alternative payroll covered period (FTE reduction event), the borrower may count such employee at the same full-time equivalency level before the FTE reduction event when calculating the section 1106(d)(2) FTE employee reduction penalty. The Administrator and the Secretary have decided to exempt such employees from the calculation of the FTE reduction penalty.

Section 1106 is silent concerning how to account for employees who are fired for cause, voluntarily resign, or voluntarily request a reduced schedule. The Administrator and the Secretary have determined that such an exemption is *de minimis,* because a limited number of borrowers will face an FTE reduction event during the covered period or the alternative payroll covered period. Further, borrowers should not be penalized for changes in employee headcount that are the result of employee actions and requests. Borrowers that avail themselves of this *de minimis* exemption shall maintain records demonstrating that each such employee was fired for cause, voluntarily resigned, or voluntarily requested a schedule reduction. The borrower shall provide such documentation upon request.

6. Documentation Requirements

What must borrowers submit for forgiveness of their PPP loans?

The loan forgiveness application form details the documentation requirements; specifically, documentation each borrower must submit with its Loan Forgiveness Application (SBA Form 3508 or a lender equivalent), documentation each borrower is required to maintain and make available upon request, and documentation each borrower may voluntarily submit with its loan forgiveness application. Section 1106(e) of the Act requires borrowers to submit to their lenders an application, which includes certain documentation, and section 1106(f) provides that the borrower shall not receive forgiveness without submitting the required documentation. For purposes of administrative convenience for both lenders and borrowers, the Administrator, in consultation with the Secretary, has determined that requiring borrowers to submit certain documentation, maintain certain documentation, and choose whether to submit additional documentation will reduce initial reporting burdens on borrowers and reduce initial recordkeeping burdens on lenders.

7. Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA's website at *www.sba.gov*. Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at *https://www.sba.gov/tools/local-assistance/districtoffices*.

Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D), based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

[8] In light of the flexibility the Act provides to borrowers with respect to their selection of the reference time period for any potential reduction in loan forgiveness, and the statutory authority for SBA and the Department of the Treasury to grant *de minimis* exemptions from this requirement, if the borrower meets the requirements for the FTE reduction safe harbor, it will not be subject to any loan forgiveness reduction based on a reduction in FTE employees.

Executive Order 13132

SBA has determined that 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will impose a new reporting requirement on borrowers who request forgiveness of their PPP loan. SBA has developed Form 3508, Paycheck Protection Program—Loan Forgiveness Application, for use in collecting the information required to determine whether a borrower is eligible for loan forgiveness. SBA obtained approval of Form 3508 from the Office of Management and Budget (OMB) as a modification to the existing PPP collection of information (OMB Control Number (3245–0407). This collection of information was approved under emergency procedures to facilitate immediate implementation of the PPP and expires on October 31, 2020.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are ''small entities.'' Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency ''certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, ''along with a statement providing the factual basis for such certification.'' If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b). Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act, Ch.1. p.9. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,

Administrator Small Business Administration.

Michael Faulkender,

Assistant Secretary for Economic Policy, Department of the Treasury.

[FR Doc. 2020–11536 Filed 5–28–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA–2020–0033]

RIN 3245–AH47

Business Loan Program Temporary Changes; Paycheck Protection Program—SBA Loan Review Procedures and Related Borrower and Lender Responsibilities

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule announcing the implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act temporarily adds a new program, titled the ''Paycheck Protection Program,'' to the SBA's 7(a) Loan Program. The CARES Act also provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). SBA posted additional interim final rules on April 3, 2020, April 14, 2020, April 24, 2020, April 28, 2020, April 30, 2020, May 5, 2020, May 8, 2020, May 13, 2020, May 14, 2020, May 18, 2020, and May 20, 2020, and the Department of the Treasury (Treasury) posted an additional interim final rule on April 27, 2020. SBA and Treasury posted an interim final rule on Loan Forgiveness contemporaneously with this interim final rule on May 22, 2020. This interim final rule supplements the previously posted interim final rules in order to inform borrowers and lenders of SBA's process for reviewing PPP loan applications and loan forgiveness applications, and requests public comment.

DATES:

Effective date: This rule is effective May 28, 2020.

Applicability date: This interim final rule applies to loan applications and loan forgiveness applications submitted under the Paycheck Protection Program.

Comment date: Comments must be received on or before July 1, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0033 through the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments. SBA will post all comments on *www.regulations.gov*. If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please send an email to *ppp-ifr@sba.gov*. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at *https://www.sba.gov/tools/local-assistance/districtoffices*.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of

Rules and Regulations

Federal Register
Vol. 85, No. 101
Tuesday, May 26, 2020

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA–2020–0031]

RIN 3245–AH45

Business Loan Program Temporary Changes; Paycheck Protection Program—Second Extension of Limited Safe Harbor With Respect to Certification Concerning Need for PPP Loan and Lender Reporting

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On May 8, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule relating to the extension of a safe harbor with respect to a certification required by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act) in connection with the implementation of a temporary new program, titled the ''Paycheck Protection Program.'' This interim final rule revises the interim final rule posted on May 8, 2020, and published in the **Federal Register** on May 19, 2020, by extending the date by which certain Paycheck Protection Program (PPP) borrowers may repay their loans from May 14, 2020 to May 18, 2020, in order to avail themselves of a safe harbor with respect to the certification required by the Act, and by extending the timeframe for submission of the initial SBA Form 1502 report for PPP loans. This interim final rule supplements SBA's implementation of the Act and requests public comment.

DATES:

Effective date: This rule is effective May 26, 2020.

Comment date: Comments must be received on or before June 25, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0031 through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments. SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please send an email to *ppp-ifr@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency. Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the ''Paycheck Protection Program.'' Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116–139), which provided additional funding and authority for the PPP.

II. Comments and Immediate Effective Date

This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. In addition, SBA has determined that there is good cause for dispensing with advance public notice and comment on the ground that it would be contrary to the public interest. Specifically, SBA, in consultation with the Department of the Treasury, issued additional guidance with regard to the safe harbor posted on SBA's website on May 13, 2020. *See* FAQ 46 (posted May 13, 2020).[1] SBA, in consultation with the Department of the Treasury, determined that extending the safe harbor deadline from May 14, 2020 to May 18, 2020 would afford Paycheck Protection Program borrowers time to review SBA's May 13, 2020 guidance and decide whether to avail themselves of the safe harbor. SBA previously announced this intended extension in nonbinding guidance published on May 13, 2020. *See* FAQ 47 (posted on May 13, 2020).[2] SBA, in consultation with the Department of the Treasury, determined that the immediate effective date of this interim final rule would benefit lenders by allowing them to swiftly close and disburse loans to small businesses and fulfill associated reporting requirements. Advance notice and public comment would defeat the purpose of this interim final rule given the existing May 22, 2020 deadline for lenders to submit the initial SBA Form 1502 report for PPP loans, which this interim final rule extends to the later of (1) May 29, 2020; or (2) 10 calendar days

[1] *https://www.sba.gov/sites/default/files/2020-05/Paycheck-Protection-Program-Frequently-Asked-Questions_05%2013%2020_2.pdf.*

[2] *Id.*

after disbursement or cancellation of a PPP loan. These same reasons provide good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act.

Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before June 25, 2020. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program Requirements for Second Extension of Limited Safe Harbor With Respect to Certification Concerning Need for PPP Loan Request and Lender Reporting

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the Paycheck Protection Program (PPP). Loans under the PPP are 100 percent guaranteed by SBA, and the full principal amount of the loans and any accrued interest may qualify for loan forgiveness. Additional information about the PPP is available in interim final rules published by SBA and the Department of the Treasury in the **Federal Register** (85 FR 20811, 85 FR 20817, 85 FR 21747, 85 FR 23450, 85 FR 23917, 85 FR 26321, 85 FR 26324, 85 FR 27287, 85 FR 29845, 85 FR 29842, 85 FR 29847, and 85 FR 30835) (collectively, the PPP Interim Final Rules).

1. Second Extension of Limited Safe Harbor With Respect to Certification Concerning Need for PPP Loan Request

The Act requires each applicant applying for a PPP loan to certify in good faith ''that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing obligations'' of the applicant. On April 24, 2020, SBA posted on its website an interim final rule (the Fourth PPP Interim Final Rule), which also was published in the **Federal Register** on April 28, 2020 (85 FR 23450), to provide relief to PPP borrowers that applied for and received PPP loans based on a misunderstanding or misapplication of the required good-faith certification standard. The Fourth PPP Interim Final Rule provides that any borrower that applied for a PPP loan and repays the loan in full by May 7, 2020, will be deemed by SBA to have made the required certification in good faith. On May 5, 2020, SBA, in consultation with the Department of the Treasury, issued additional guidance to extend the safe harbor deadline from May 7, 2020 to May 14, 2020. *See* FAQ 43 (posted May 5, 2020) and SBA's interim final rule on Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan Request, posted May 8, 2020, and published in the **Federal Register** on May 19, 2020 (85 FR 29845). SBA, in consultation with the Department of the Treasury, issued additional guidance on May 13, 2020 concerning how SBA will review the required good-faith certification to help PPP borrowers evaluate whether they may have misunderstood or misapplied the statutory certification standard. *See* FAQ 46 (posted May 13, 2020). This guidance included an additional safe harbor providing that any PPP borrower, together with its affiliates, that received PPP loans with an original principal amount of less than $2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith. Based on this guidance, SBA, in consultation with the Department of the Treasury, determined that it is necessary and appropriate to further extend the safe harbor deadline for repaying PPP loans from May 14, 2020 to May 18, 2020. *See* FAQ 47 (posted May 13, 2020).

Second Extension of Limited Safe Harbor with Respect to Good-Faith Certification Concerning Need for PPP Loan Request. Consistent with section 1102 of the CARES Act, the Borrower Application Form requires PPP applicants to certify in good faith that ''[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.'' Any borrower that applied for a PPP loan and repays the loan in full by May 18, 2020 will be deemed by SBA to have made the required certification in good faith. The Administrator, in consultation with the Secretary, determined that this safe harbor is necessary and appropriate to ensure that borrowers promptly repay PPP loan funds that the borrower obtained based on a misunderstanding or misapplication of the statutory certification standard.

2. Lender Reporting

The extension of the safe harbor and administrative convenience necessitate a corresponding date change to the interim final rule that SBA posted on its website on April 28, 2020, which was published in the **Federal Register** on May 4, 2020 (85 FR 26321), regarding PPP loan disbursements (the May 4 Interim Final Rule), as amended by the interim final rule that SBA posted on its website on May 8, 2020 (the May 8 Interim Final Rule). Specifically, Part III.1.b. of the May 4 Interim Final Rule provided that lenders must electronically upload SBA Form 1502 reporting information within 20 calendar days after a PPP loan is approved or, for loans approved before the availability of the updated SBA Form 1502 reporting process, by May 18, 2020. 85 FR 26321, 26323. The May 8 Interim Final Rule extended the deadline for the submission of the initial SBA Form 1502 reporting information from May 18, 2020 to May 22, 2020 because of the extension of the safe harbor deadline to May 14, 2020. Because of the extension of the safe harbor deadline from May 14, 2020 to May 18, 2020 and to promote the administrability of the PPP, SBA is further extending the timelines for reporting Form 1502 information, such that lenders must electronically upload SBA Form 1502 reporting information by the later of: (1) May 29, 2020, or (2) 10 calendar days after disbursement or cancellation of a PPP loan.

As noted in the May 4 Interim Final Rule, lenders must disburse PPP loans within 10 calendar days of loan approval; a loan is considered approved when the loan is assigned a loan number by the SBA. Loans for which funds have not been disbursed because a borrower has not submitted required loan documentation within 20 calendar days of loan approval shall be cancelled by the lender. These two requirements remain unchanged.

The extension of the safe harbor and administrative convenience also require an identical corresponding date change to the interim final rule that SBA posted on May 13, 2020, regarding PPP loan increases. Specifically, that interim final rule states, in Parts III and III.2.b., that SBA Form 1502 reporting information is required to be submitted within 20 calendar days after a PPP loan is approved or, for loans approved before availability of the updated SBA Form 1502 reporting process, by May 22, 2020. As described above, SBA is further extending timelines for reporting Form 1502 information, such that lenders must electronically upload SBA Form 1502 reporting information by the later of: (1) May 29, 2020, or (2) 10 calendar days after disbursement or cancellation of a PPP loan.

The Administrator, in consultation with the Secretary, believes that clarifying timelines for lender reporting will enable lenders to swiftly close and disburse loans and will enhance the

administrability of key program components by enabling lenders and SBA to process data regarding loan disbursements and cancelations in a streamlined manner.

Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA's website at *www.sba.gov.* Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D), and the good cause exemption under 5 U.S.C. 809(2), based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are ''small entities.'' Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency ''certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, ''along with a statement providing the factual basis for such certification.'' If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b). Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act, Ch. 1. p. 9. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,

Administrator.

[FR Doc. 2020–11292 Filed 5–22–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0064; Project Identifier 2019–SW–096–AD; Amendment 39–21132; AD 2020–11–07]

RIN 2120–AA64

Airworthiness Directives; MD Helicopter Inc., Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for MD Helicopters Inc., (MDHI) Model 369D, 369E, 369FF, 369H, 369HE, 369HM, 369HS, 500N, and 600N helicopters. This AD was prompted by a report of non-conforming main rotor (M/R) hub lead-lag bolts (bolts). This AD requires removing certain bolts from service. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 30, 2020.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of June 30, 2020.

ADDRESSES: For service information identified in this final rule, contact MD Helicopters, Inc., Attn: Customer Support Division, 4555 E. McDowell Rd., Mail Stop M615, Mesa, AZ 85215–9734; telephone 1–800–388–3378; fax 480–346–6813; or at *https://www.mdhelicopters.com.* You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0064.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–

restriction on receipt of funds under CFAP but only as to beneficiaries who, as a condition of the waiver, agree to apply the CFAP payments to reduce the amount of the judgment lien.

(g) In addition to any other Federal laws that apply to CFAP, the following laws apply: 15 U.S.C. 714; 18 U.S.C. 286, 287, 371, 1001; and 31 U.S.C. 1001.

(h) This part applies to applications submitted under CFAP through August 28, 2020, or until funds made available for CFAP are exhausted.

§ 9.8 Perjury.

In either applying for or participating in CFAP, or both, the producer is subject to laws against perjury and any penalties and prosecution resulting therefrom, with such laws including but not limited to 18 U.S.C. 1621. If the producer willfully makes and represents as true any verbal or written declaration, certification, statement, or verification that the producer knows or believes not to be true, in the course of either applying for or participating in CFAP, or both, then the producer is guilty of perjury and, except as otherwise provided by law, may be fined, imprisoned for not more than 5 years, or both, regardless of whether the producer makes such verbal or written declaration, certification, statement, or verification within or without the United States.

Stephen L. Censky,

Vice Chairman, Commodity Credit Corporation, and Deputy Secretary, U.S. Department of Agriculture.

[FR Doc. 2020–11025 Filed 5–20–20; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

7 CFR Part 1951

[Docket No. RHS–20–CF–0011]

Notification of Direct Loan Payment Deferrals for the Community Facilities Direct Loan Program

Correction

In rule document 2020–08429 beginning on page 22009 in the issue of Tuesday, April 21, 2020, make the following correction:

On page 22009, in the **DATES** section, ''May 12, 2020'' should read ''April 21, 2020''.

[FR Doc. C1–2020–08429 Filed 5–20–20; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

13 CFR Parts 120 and 121

[Docket Number SBA–2020–0030]

RIN 3245–AH44

Business Loan Program Temporary Changes; Paycheck Protection Program—Treatment of Entities With Foreign Affiliates

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule announcing the implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act temporarily adds a new program, titled the ''Paycheck Protection Program,'' to the SBA's 7(a) Loan Program. The CARES Act also provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). SBA posted additional interim final rules on April 3, 2020, April 14, 2020, April 24, 2020, April 28, 2020, April 30, 2020, May 5, 2020, May 8, 2020, May 13, 2020, and May 14, 2020, and the Department of the Treasury posted an additional interim final rule on April 28, 2020. This interim final rule supplements the previously posted interim final rules by providing guidance on additional eligibility requirements related to entities with foreign affiliates, and requests public comment.

DATES:

Effective date: This rule is effective May 21, 2020.

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment date: Comments must be received on or before June 22, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0030 through the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments. SBA will post all comments on *www.regulations.gov*. If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please send an email to *ppp-ifr@sba.gov*. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at *https://www.sba.gov/tools/local-assistance/districtoffices*.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the CARES Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency. Section 1102 of the CARES Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the ''Paycheck Protection Program.'' Section 1106 of the CARES Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116–139),

which provided additional funding and authority for the PPP.

Under the CARES Act, an entity is eligible for a PPP loan if it is (1) a small business concern, or (2) a business concern, nonprofit organization described in section 501(c)(3) of the Internal Revenue Code, veterans organization described in section 501(c)(19) of the Internal Revenue Code, or Tribal business concern described in section 31(b)(2)(C) of the Small Business Act that employs not more than the greater of 500 employees, or, if applicable, SBA's employee-based size standard for the industry in which the entity operates. Under existing SBA regulations, an entity is generally considered together with its affiliates for purposes of determining the entity's eligibility for SBA loans. *See* 13 CFR 121.301. SBA issued an interim final rule on affiliation (posted April 4, 2020) stating that PPP applicants are subject to the affiliation rules set forth in 13 CFR 121.301. *See* 85 FR 20817 (April 15, 2020). Those rules deem entities to be affiliates based on factors including stock ownership, overlapping management, and identity of interest. Of relevance here, SBA's affiliation rules provide that in determining an entity's number of employees, employees of the entity ''and all of its domestic and foreign affiliates'' are included. As a result, in most cases, a borrower is considered together with its U.S. and foreign affiliates for purposes of determining eligibility for the PPP. Based on that methodology, the borrower application form (SBA Form 2483), which all applicants must complete and submit, includes a certification that the applicant ''employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 CFR 121.201 for the Applicant's industry.'' To provide further clarification of this methodology, SBA issued guidance on May 5, 2020 (FAQ 44) stating that an applicant must count all of its employees and the employees of its U.S. and foreign affiliates, absent a waiver of or an exception to the affiliation rules.

Some market participants have indicated that there may be uncertainty regarding whether PPP applicants must include employees of foreign affiliates in their employee counts, because SBA has previously issued guidance stating that an entity is eligible for a PPP loan if it has 500 or fewer employees whose principal place of residence is in the United States. See 85 FR 20811, 20812 (April 15, 2020). As described above, the generally applicable 500-employee size standard is subject to the application of SBA's affiliation rules, as well as numerous other eligibility requirements. *See, e.g.,* 13 CFR 120.110 (listing 18 types of ineligible businesses); SBA Form 2483 (including mandatory applicant representations regarding defaults on previous government loans or guarantees, Federal suspension or debarment, and criminal backgrounds). The reference in SBA guidance to employees whose principal place of residence is in the United States is relevant to a PPP applicant's calculation of payroll for purposes of determining the PPP loan amount and to the calculation of loan forgiveness. The fact that an applicant might be eligible for a PPP loan if it has 500 or fewer U.S. employees does not mean that the applicant is not also subject to the other requirements applicable to the PPP. Instead, an applicant is eligible for a PPP loan only if it meets all applicable eligibility criteria. If an applicant, together with its domestic and foreign affiliates, does not meet the 500-employee or other applicable PPP size standard, it is not eligible for a PPP loan.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Specifically, it is critical to meet lenders' and borrowers' need for clarity concerning program requirements as rapidly as possible because the last day eligible borrowers can apply for and receive a loan is June 30, 2020.

This interim final rule supplements previous regulations and guidance on an important, discrete issue. The immediate effective date of this interim final rule will benefit lenders so that they can swiftly close and disburse loans to small businesses. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before June 22, 2020. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program Additional Eligibility Criteria

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the PPP. Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans and any accrued interest may qualify for loan forgiveness. Additional information about the PPP is available in interim final rules published by SBA and the Department of the Treasury in the **Federal Register** (85 FR 20811, 85 FR 20817, 85 FR 21747, 85 FR 23450, 85 FR 23917, 85 FR 26321, 85 FR 26324, and 85 FR 27287) and posted on May 8, 2020, May 13, 2020, and May 14, 2020 (85 FR 29845, 85 FR 29842, and 85 FR 29847) (collectively, the PPP Interim Final Rules).

1. Treatment of Foreign Affiliates

Are employees of foreign affiliates included for purposes of determining whether a PPP borrower has more than 500 employees?

Yes. The CARES Act specifies that an entity is eligible for a PPP loan only if it is (1) a small business concern, or (2) a business concern, nonprofit organization described in section 501(c)(3) of the Internal Revenue Code, veterans organization described in section 501(c)(19) of the Internal Revenue Code, or Tribal business concern described in section 31(b)(2)(C) of the Small Business Act that employs not more than the greater of 500 employees, or, if applicable, SBA's employee-based size standard for the industry in which the entity operates. SBA's affiliation regulations provide that to determine a concern's size, employees of the concern ''and all of its domestic and foreign affiliates'' are included. 13 CFR 121.301(f). Therefore, to calculate the number of employees of an entity for purposes of determining eligibility for the PPP, an entity must include all employees of its domestic and foreign affiliates, except in those limited circumstances where the affiliation rules expressly do not apply to the entity.[1] Any entity that, together

[1] Section 7(a)(36)(D)(iv) of the Small Business Act (15 U.S.C. 636(a)(36)(D)(iv), as added by the CARES Act, waives SBA's affiliation rules for (1) any business concern with not more than 500 employees that, as of the date on which the loan

with its domestic and foreign affiliates, does not meet the 500-employee or other applicable PPP size standard is therefore ineligible for a PPP loan.

However, as an exercise of enforcement discretion due to reasonable borrower confusion based on SBA guidance (which was later resolved through a clarifying FAQ on May 5, 2020), SBA will not find any borrower that applied for a PPP loan prior to May 5, 2020 to be ineligible based on the borrower's exclusion of non-U.S employees from the borrower's calculation of its employee headcount if the borrower (together with its affiliates)[2] had no more than 500 employees whose principal place of residence is in the United States. Such borrowers shall not be deemed to have made an inaccurate certification of eligibility solely on that basis. Under no circumstances may PPP funds be used to support non-U.S. workers or operations.

2. Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA's website at *www.sba.gov*. Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at *https://www.sba.gov/tools/local-assistance/districtoffices*.

Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are ''small entities.'' Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency ''certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, ''along with a statement providing the factual basis for such certification.'' If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b). Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy Guide: How to Comply with the Regulatory Flexibility Act, Ch.1. p.9. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,

Administrator.

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is disbursed, is assigned a North American Industry Classification System code beginning with 72; (2) any business concern operating as a franchise that is assigned a franchise identifier code by the Administration; and (3) any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681). SBA also applies affiliation exceptions to certain categories of entities. 13 CFR 121.103(b).

[2] For purposes of this safe harbor, a borrower must include its affiliates to the extent required under the interim final rule on affiliates, 85 FR 20817 (April 15, 2020). SBA's affiliation exceptions in 13 CFR 121.103(b) apply to the PPP.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0204; Project Identifier 2018–CE–042–AD; Amendment 39–21129; AD 2020–11–04]

RIN 2120–AA64

Airworthiness Directives; Learjet Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Learjet Inc. Model 60 airplanes. This AD was prompted by a report of a reverse thrust command accelerating the airplane instead of decelerating the airplane. The acceleration with reverse thrust commanded occurred when the thrust reverser doors were in the stowed position instead of the deployed position. This AD requires installing a thrust reverser (T/R) Voice Command Warning System (VCWS) to alert the crew of a T/R malfunction. The FAA is

SBA's ''alternative size standard.'' [1] The Administrator, in consultation with the Secretary, has determined that this treatment is appropriate to effectuate the purposes of the CARES Act to provide assistance to eligible PPP borrowers, including business concerns, affected by the COVID–19 emergency.

2. Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA's website at *www.sba.gov.* Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are ''small entities.'' Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency ''certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, ''along with a statement providing the factual basis for such certification.'' If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b). Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act, Ch.1. p.9. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,

Administrator.

[FR Doc. 2020–10674 Filed 5–18–20; 8:45 am]

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[1] Under the alternative size standard, a business concern, including an electric cooperative, can qualify for the PPP as a small business concern if, as of March 27, 2020: (1) The maximum tangible net worth of the business was not more than $15 million; and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than $5 million. For an electric cooperative that does not have net income, the cooperative's savings distributed to its owner-members will be considered its net income.

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 730, 732, 736, and 744

[Docket No. 200514–0100]

RIN 0694–AH99

Export Administration Regulations: Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule) and the Entity List

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Interim final rule; request for comments.

SUMMARY: This rule amends General Prohibition Three, also known as the foreign-produced direct product rule, by exercising existing authority under the Export Control Reform Act of 2018 (ECRA), to impose a new control over certain foreign-produced items, when there is knowledge that such items are destined to a designated entity on the Entity List. A foreign-produced item is subject to the new control if the entity for which the item is destined has a footnote 1 designation in the Entity List. This rule also applies this new control to Huawei Technologies Co., Ltd. (Huawei) and its non-U.S. affiliates listed as entities. The Bureau of Industry and Security (BIS) is requesting comments on the impact of this rule.

DATES:

Effective date: This rule is effective May 15, 2020.

Comment date: Submit comments on or before July 14, 2020.

ADDRESSES: You may submit comments, identified by docket number BIS 2020–0011 or RIN 0694–AH99, through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

All filers using the portal should use the name of the person or entity

submitting comments as the name of their files, in accordance with the instructions below. Anyone submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referencing the specific legal authority claimed, and provide a non-confidential version of the submission.

For comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters ''BC.'' Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page. The corresponding non-confidential version of those comments must be clearly marked ''PUBLIC.'' The file name of the non-confidential version should begin with the character ''P.'' The ''BC'' and ''P'' should be followed by the name of the person or entity submitting the comments or rebuttal comments. All filers should name their files using the name of the person or entity submitting the comments. Any submissions with file names that do not begin with a ''BC'' or ''P'' will be assumed to be public and will be made publicly available through *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Sharron Cook, Senior Export Policy Analyst, Regulatory Policy Division, Office of Exporter Services, Bureau of Industry and Security, Department of Commerce, Phone: (949) 660–0144 or (408) 998–8806 or email your inquiry to: *ECDOEXS@bis.doc.gov*.

SUPPLEMENTARY INFORMATION:

Background

''Subject to the EAR'' is a term used in the Export Administration Regulations (15 CFR parts 730 through 774) (EAR) to describe those items and activities over which BIS exercises regulatory jurisdiction under the EAR. All U.S.-origin items, wherever located, may be subject to the EAR. In addition, foreign-produced items are subject to the EAR (1) if they contain a certain percentage of controlled U.S.-origin content (the *de minimis* rules, see § 734.4 of the EAR), or (2) if the foreign-produced item is subject to § 736.2(b)(3) of the EAR (the foreign-produced direct product rule). Section 736.2(b) of the EAR includes ten general prohibitions that describe certain exports, reexports, transfers (in-country), and other conduct, subject to the EAR. General Prohibition Three of § 736.2(b) continues to apply to foreign-produced items controlled for national security reasons, 9x515 items, or ''600 series'' items and has three criteria: The reason for control or classification of the U.S. ''technology'' or ''software''; the foreign-produced item's reason for control or classification; and the destination country of the foreign-produced item, under paragraphs § 736.2(b)(3)(i) through (iv).

Applicability of General Prohibition Three to Huawei and Its Non-U.S. Affiliates on the Entity List

The new rule maintains the scope and criteria of General Prohibition Three and exercises existing authority under ECRA (50 U.S.C. 4801–4852) by imposing a new control through new § 736.2(b)(3)(vi). This new control applies to foreign-produced items based on the following two criteria: (1) The reason for control or classification of the U.S. ''technology'' or ''software''; and (2) when there is knowledge that the foreign-produced item is destined to a designated entity listed on the Entity List under Supplement No. 4 to Part 744. Whether a foreign-produced item is subject to the new control under paragraph (b)(3)(vi) will be set forth in the Entity List of the entity for which the item is destined in Supplement No. 4 to Part 744.

This rule creates a footnote 1 to Supplement No. 4 to Part 744 of the EAR (Entity List) that, when added to an entity on the Entity List, imposes a control on the direct product of ''technology'' or ''software'' subject to the EAR, and specified in Export Control Classification Numbers (ECCN) 3E001, 3E002, 3E003, 4E001, 5E001, 3D001, 4D001, or 5D001; ''technology'' subject to the EAR and specified in ECCN 3E991, 4E992, 4E993, or 5E991; or ''software'' subject to the EAR and specified in ECCN 3D991, 4D993, 4D994, or 5D991 of the Commerce Control List (CCL) in Supplement No. 1 to part 774 of the EAR produced or developed by an entity with a footnote 1 designation on the Entity List. For example, if an entity with a footnote 1 designation on the Entity List produces or develops an integrated circuit design utilizing specified Category 3, 4 or 5 ''technology'' or ''software'' such as Electronic Design Automation software, whether the ''technology'' or ''software'' is U.S.-origin or foreign-produced and made subject to the EAR pursuant to the *de minimis* or foreign-produced direct product rule, that foreign-produced integrated circuit design is subject to the EAR.

Footnote 1 of the Entity List also applies a control to any foreign-produced item (1) that is the direct product of a plant or major component of a plant located outside the United States when the plant or major component of a plant itself is a direct product of U.S.-origin ''technology'' or ''software'' specified in Export Control Classification Number (ECCN) 3E001, 3E002, 3E003, 4E001, 5E001, 3D001, 4D001, or 5D001; U.S.-origin ''technology'' specified in ECCNs 3E991, 4E992, 4E993, or 5E991; or U.S.-origin ''software'' specified in ECCNs 3D991, 4D993, 4D994, or 5D991; and (2) such item is a direct product of ''software'' or ''technology'' produced or developed by an entity with a footnote 1 designation on the Entity List.

For purposes of this control, a note to paragraph (b)(1) of footnote 1 in Supplement No. 4 to Part 744 of the EAR clarifies that a major component of a plant located outside the United States means equipment that is essential to the ''production'' of an item to meet the specifications of any design produced or developed by designated entities, including testing equipment. For example, if a foreign company produces integrated circuits outside the United States in a foundry containing U.S.-origin or foreign-produced equipment (which itself is a direct product of U.S.-origin ''technology'' or ''software'' in specified Category 3, 4, or 5 ECCNs) that is essential to the ''production'' of the integrated circuit to meet the specifications of their design, including testing equipment (*i.e.,* a major component of a plant), and the design for the integrated circuit was produced or developed from ''software'' or ''technology'' by an entity specified in footnote 1 to the Entity List, whether or not such design is subject to the EAR, then that foreign-produced integrated circuit is subject to the EAR.

On May 16, 2019, Huawei and sixty-eight of its non-U.S. affiliates were added to the Entity List, Supplement No. 4 to part 744 of the EAR (84 FR 22961, May 21, 2019). On August 19, 2019, BIS added forty-six additional non-U.S. affiliates of Huawei to the Entity List (84 FR 43493, August 21, 2019). Huawei and its U.S. affiliates were added to the Entity List because they pose a significant risk of involvement in activities contrary to the national security or foreign policy interests of the United States.

This rule amends General Prohibition Three (foreign-produced direct product rule) by adding § 736.2(b)(3)(vi) to address specific national security and foreign policy concerns. The paragraph prohibits the reexport, export from abroad, or transfer (in-country) without a license, of certain foreign-produced items when there is knowledge that the

item is destined to an entity with a footnote 1 designation on the Entity List.

This new rule is warranted to promote the national security and foreign policy interests of the United States, consistent with the mandate of ECRA.

Conforming Change for Huawei and Its Non-U.S. Affiliates Listed on the Entity List

This interim final rule revises ninety-three entries, which list Huawei and its 114 non-U.S. affiliates, on the Entity List. Specifically, BIS is modifying the existing ninety-three entries for Huawei and its 114 non-U.S. affiliates by changing the text in the Licensing Requirement column for these entries from ''For all Items subject to the EAR (See § 744.11 of the EAR).'' to ''For all items subject to the EAR. (See §§ 736.2(b)(3)(vi)[1] and 744.11 of the EAR.)''.

Request for Comments

BIS welcomes comments on the impact of this rule. Instructions for the submission of comments, including comments that contain business confidential information, are found in the **ADDRESSES** section of this final rule.

Savings Clause

Shipments of foreign-produced items identified in paragraph (a) to footnote 1 in Supplement No. 4 of Part 744 of the EAR that are subject to § 736.2(b)(3)(vi) that are now subject to the EAR and require a license that were on dock for loading, on lighter, laden aboard an exporting or transferring carrier, or en route aboard a carrier to a port of export or to the consignee/end-user, on May 15, 2020, pursuant to actual orders for exports, reexports and transfers (in-country) to a foreign destination or to the consignee/end-user, may proceed to that destination under the previous license exception eligibility or without a license.

Shipments of foreign-produced items identified in paragraph (b) to footnote 1 in Supplement No. 4 of Part 744 of the EAR that are subject to § 736.2(b)(3)(vi) and started ''production'' prior to May 15, 2020, are not subject to § 736.2(b)(3)(vi) of the EAR and may proceed as not being subject to the EAR, if applicable, or under the previous license exception eligibility or without a license so long as they have been exported, reexported or transferred (in-country) before September 14, 2020. Any such items not exported from abroad, reexported or transferred (in-country) before midnight on September 14, 2020, will be subject to § 736.2(b)(3)(vi) of the EAR and require a license in accordance with this interim final rule and other provisions of the EAR.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included ECRA. ECRA provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule. As set forth in Section 1768 of ECRA, all delegations, rules, regulations, orders, determinations, licenses, or other forms of administrative action that were made, issued, conducted, or allowed to become effective under the Export Administration Act of 1979 (previously, 50 U.S.C. 4601 *et seq.*) (as in effect prior to August 13, 2018 and as continued in effect pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*)) or the Export Administration Regulations, and were in effect as of August 13, 2018, shall continue in effect according to their terms until modified, superseded, set aside, or revoked under the authority of ECRA.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 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. This final rule has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of Executive Order 12866. Although this rule is a significant regulatory action, it is a regulation where the analysis demonstrates that the primary, direct benefit is national security and is, thus, exempt from the provisions of Executive Order 13771.

2. Notwithstanding any other provision of law, no person is required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This final regulation involves a collection currently approved by OMB under BIS control number 0694–0088, Simplified Network Application Processing System which includes, among other things, license applications, and carries a burden estimate of 42.5 minutes for a manual or electronic submission for a total burden estimate of 31,878 hours. Total burden hours associated with the PRA and OMB control number 0694–0088 are expected to minimally increase and have a limited impact on the existing estimates as a result of this rule.

3. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

4. Pursuant to section 1762 of ECRA, this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements, including prior notice and the opportunity for public comment.

5. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

List of Subjects

15 CFR Part 730

Administrative practice and procedure, Advisory committees, Exports, Reporting and recordkeeping requirements, Strategic and critical materials.

15 CFR Part 732

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

15 CFR Part 736

General Prohibitions.

15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

Accordingly, parts 730, 732, 736, and 744 of the Export Administration Regulations (15 CFR parts 730 through 774) are amended as follows:

PART 730—[AMENDED]

■ 1. The authority citation for part 730 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 8720; 10 U.S.C. 8730(e); 22 U.S.C. 287c; 22 U.S.C. 2151 note; 22 U.S.C. 3201 *et seq.;* 22 U.S.C. 6004; 42 U.S.C. 2139a; 15 U.S.C. 1824; 50 U.S.C. 4305; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 11912, 41 FR 15825, 3 CFR,

1976 Comp., p. 114; E.O. 12002, 42 FR 35623, 3 CFR, 1977 Comp., p. 133; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12214, 45 FR 29783, 3 CFR, 1980 Comp., p. 256; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12854, 58 FR 36587, 3 CFR, 1993 Comp., p. 179; E.O. 12918, 59 FR 28205, 3 CFR, 1994 Comp., p. 899; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 12981, 60 FR 62981, 3 CFR, 1995 Comp., p. 419; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; E.O. 13338, 69 FR 26751, 3 CFR, 2004 Comp., p 168; E.O. 13637, 78 FR 16129, 3 CFR, 2014 Comp., p. 223; Notice of September 19, 2019, 83 FR 47799 (September 20, 2019); Notice of November 12, 2019, 84 FR 61817 (November 13, 2019); Notice of May 8, 2019, 84 FR 20537 (May 10, 2019).

■ 2. Section 730.5 is amended by revising paragraph (b) to read as follows:

§ 730.5 Coverage of more than exports.

* * * * *

(b) *Foreign products.* In some cases, exports from abroad, reexports or transfers (in-country) of items produced outside of the United States are subject to the EAR when they contain more than the *de minimis* amount of controlled U.S.-origin content as specified in § 734.4 of the EAR or when they are the direct product of specified ''technology,'' ''software,'' or a ''plant or major component of a plant'' as specified in § 736.2(b)(3) of the EAR.

* * * * *

PART 732—[AMENDED]

■ 3. The authority citation for part 732 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 4. Section 732.3 is amended by revising paragraph (f) to read as follows:

§ 732.3 Steps regarding the ten general prohibitions.

* * * * *

(f) *Step 11: Foreign-produced direct product rule—General Prohibition Three.* Foreign-produced items located outside the U.S. that are the direct product of ''technology'' or ''software'' subject to the EAR or produced by a plant or major component of a plant located outside the United States that is a direct product of U.S.-origin ''technology'' or ''software'' subject to the EAR, whether made in the U.S. or a foreign country, may be subject to the EAR if they meet the conditions of General Prohibition Three in § 736.2(b)(3). Direct products that are subject to the EAR may require a license to be exported from abroad, transferred (in-country), or reexported to specified countries or end users. If your foreign item meets the conditions of the foreign-produced direct product rule (General Prohibition Three), then your export from abroad, transfer (in-country), or reexport is subject to the EAR. You should next consider the steps regarding all other general prohibitions, license exceptions, and other requirements. If your item does not meet the conditions of General Prohibition Three, then your export from abroad, transfer (in-country), or reexport is not subject to the EAR. You have completed the steps necessary to determine whether your transaction is subject to the EAR, and you may skip the remaining steps.

* * * * *

PART 736—[AMENDED]

■ 5. The authority citation for part 736 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13338, 69 FR 26751, 3 CFR, 2004 Comp., p. 168; Notice of November 12, 2019, 84 FR 61817 (November 13, 2019); Notice of May 8, 2019, 84 FR 20537 (May 10, 2019).

■ 6. Section 736.2 is amended by:
■ a. Revising the paragraph (b)(3) subject heading;
■ b. Redesignating paragraph (b)(3)(vi) as paragraph (b)(3)(vii);
■ c. Adding new paragraph (b)(3)(vi); and
■ d. Revising newly redesignated paragraph (b)(3)(vii).

The revisions and addition read as follows:

§ 736.2 General Prohibitions and Determination of Applicability.

* * * * *

(b) * * *

(3) *General Prohibition Three—Foreign-produced direct product of specified ''technology'' and ''software'' (Foreign-Produced Direct Product Rule).*

* * *

* * * * *

(vi) *Criteria for prohibition relating to parties on Entity List.* You may not reexport, export from abroad, or transfer (in-country) without a license or license exception any foreign-produced item controlled under footnote 1 of Supplement No. 4 to part 744 (''Entity List'') when there is ''knowledge'' that the foreign-produced item is destined to any entity with a footnote 1 designation in the license requirement column of the Entity List.

(vii) *License exceptions.* All license exceptions described in part 740 of the EAR are available for foreign-produced items that are subject to the EAR pursuant to paragraphs (b)(3)(i) through (v) of this section if all terms and conditions of the pertinent license exception terms and conditions are met and the restrictions in § 740.2 do not apply. For foreign-produced items that are subject to the EAR pursuant to paragraph (b)(3)(vi) of this section, license exceptions are available only as set forth in part 740 of the EAR pursuant to § 744.11(a), *i.e.,* the license requirement column for the entity, if all terms and conditions of the pertinent license exception are met and the restrictions in § 740.2 do not apply.

* * * * *

PART 744—[AMENDED]

■ 7. The authority citation for part 744 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13637, 78 FR 16129, 3 CFR, 2014 Comp., p. 223; Notice of November 12, 2019, 84 FR 61817 (November 13, 2019).

■ 8. Supplement No. 4 to part 744 is amended:
■ a. By revising the Argentina entity, ''Huawei Tech Investment Co., Ltd. Argentina''.
■ b. By revising the Australia entity, ''Huawei Technologies (Australia) Pty Ltd.''.
■ c. By revising the Bahrain entity, ''Huawei Technologies Bahrain''.
■ d. By revising the Belarus entity, ''Bel Huawei Technologies LLC''.
■ e. By revising the Belgium entity, ''Huawei Technologies Research & Development Belgium NV''.
■ f. By revising the Bolivia entity, ''Huawei Technologies (Bolivia) S.R.L.''.
■ g. By revising the Brazil entity, ''Huawei do Brasil Telecomunicacoes Ltda''.
■ h. By revising the Burma entity, ''Huawei Technologies (Yangon) Co., Ltd.''.
■ i. By revising the Canada entity, ''Huawei Technologies Canada Co., Ltd''.
■ j. By revising the Chile entity, ''Huawei Chile S.A.''.
■ k. By revising the China entities, ''Beijing Huawei Digital Technologies Co., Ltd.'', ''Chengdu Huawei High-Tech Investment Co., Ltd.'', ''Chengdu

Huawei Technologies Co., Ltd.'', ''Dongguan Huawei Service Co., Ltd.'', ''Dongguan Lvyuan Industry Investment Co., Ltd.'', ''Gui'an New District Huawei Investment Co., Ltd.'', ''Hangzhou Huawei Digital Technology Co., Ltd.'', ''HiSilicon Optoelectronics Co., Ltd.'', ''HiSilicon Technologies Co., Ltd (HiSilicon)'', ''HiSilicon Tech (Suzhou) Co., Ltd.'', ''Huawei Device Co., Ltd.'', ''Huawei Device (Dongguan) Co., Ltd.'', ''Huawei Device (Shenzhen) Co., Ltd.'', ''Huawei Machine Co., Ltd.'', ''Huawei Software Technologies Co., Ltd.'', ''Huawei Technical Service Co., Ltd.'', ''Huawei Technologies Co., Ltd.'', ''Huawei Technologies Service Co., Ltd.'', ''Huawei Training (Dongguan) Co., Ltd.'', ''Huayi Internet Information Service Co., Ltd.'', ''Hui Tong Business Ltd.,'', ''North Huawei Communication Technology Co., Ltd.'', ''Shanghai Haisi Technology Co., Ltd.'', ''Shanghai HiSilicon Technologies Co., Ltd.,'', ''Shanghai Mossel Trade Co., Ltd.'', ''Shenzhen HiSilicon Technologies Co., Electrical Research Center'', ''Shenzhen Huawei Technical Services Co., Ltd.'', ''Shenzhen Huawei Terminal Commercial Co., Ltd.'', ''Shenzhen Huawei Training School Co., Ltd.'', ''Shenzhen Huayi Loan Small Loan Co., Ltd.'', ''Shenzhen Legrit Technology Co., Ltd.'', ''Shenzhen Smartcom Business Co., Ltd.'', ''Suzhou Huawei Investment Co., Ltd.'', ''Wuhan Huawei Investment Co., Ltd.'', ''Xi'an Huawei Technologies Co., Ltd.'', and ''Xi'an Ruixin Investment Co., Ltd.''.

■ l. By revising the Costa Rica entity, ''Huawei Technologies Costa Rica SA''.

■ m. By revising the Cuba entity, ''Huawei Cuba''.

■ n. By revising the Denmark entity, ''Huawei Denmark''.

■ o. By revising the Egypt entity, ''Huawei Technology''.

■ p. By revising the France entity, ''Huawei France''.

■ q. By revising the Germany entity, ''Huawei Technologies Deutschland GmbH''.

■ r. By revising the Hong Kong entities, ''Hua Ying Management Co. Limited'', ''Huawei Device (Hong Kong) Co., Limited'', ''Huawei International Co., Limited'', ''Huawei Tech. Investment Co., Limited'', ''Huawei Technologies Co. Ltd.'', and ''Smartcom (Hong Kong) Co., Limited''.

■ s. By revising the India entity, ''Huawei Technologies India Private Limited''.

■ t. By revising the Indonesia entity, ''Huawei Tech Investment, PT''.

■ u. By revising the Italy entities, ''Huawei Italia'', and ''Huawei Milan Research Institute''.

■ v. By revising the Jamaica entity, ''Huawei Technologies Jamaica Company Limited''.

■ w. By revising the Japan entity, ''Huawei Technologies Japan K.K.''.

■ x. By revising the Jordan entity, ''Huawei Technologies Investment Co. Ltd.''.

■ y. By revising the Kazakhstan entity, ''Huawei Technologies LLC Kazakhstan''.

■ z. By revising the Lebanon entity, ''Huawei Technologies Lebanon''.

■ aa. By revising the Madagascar entity, ''Huawei Technologies Madagascar Sarl''.

■ bb. By revising the Mexico entity, ''Huawei Technologies De Mexico S.A.''.

■ cc. By revising the Netherlands entity, ''Huawei Technologies Coöperatief U.A.''.

■ dd. By revising the New Zealand entity, ''Huawei Technologies (New Zealand) Company Limited''.

■ ee. By revising the Oman entity, ''Huawei Tech Investment Oman LLC''.

■ ff. By revising the Pakistan entity, ''Huawei Technologies Pakistan (Private) Limited''.

■ gg. By revising the Panama entity, ''Huawei Technologies Cr Panama S.A''.

■ hh. By revising the Paraguay entity, ''Huawei Technologies Paraguay S.A.''.

■ ii. By revising the Portugal entity, ''Huawei Technology Portugal''.

■ jj. By revising the Qatar entity, ''Huawei Tech Investment Limited''.

■ kk. By revising the Romania entity, ''Huawei Technologies Romania Co., Ltd.''.

■ ll. By revising the Russia entity, ''Huawei Russia''.

■ mm. By revising the Singapore entity, ''Huawei International Pte. Ltd.''.

■ nn. By revising the South Africa entity, ''Huawei Technologies South Africa Pty Ltd.''.

■ oo. By revising the Sri Lanka entity, ''Huawei Technologies Lanka Company (Private) Limited''.

■ pp. By revising the Sweden entity, ''Huawei Sweden''.

■ qq. By revising the Switzerland entity, ''Huawei Technologies Switzerland AG''.

■ rr. By revising the Taiwan entity, ''Xunwei Technologies Co., Ltd.''

■ ss. By revising the Thailand entity, ''Huawei Technologies (Thailand) Co.''.

■ tt. By revising the United Kingdom entities, ''Centre for Integrated Photonics Ltd.'', ''Huawei Global Finance (UK) Limited'', ''Huawei Technologies (UK) Co., Ltd.'', ''Proven Glory'', and ''Proven Honour''.

■ uu. By revising the Vietnam entities, ''Huawei Technologies (Vietnam) Company Limited'' and ''Huawei Technology Co. Ltd.''.

The revisions read as follows:

Supplement No. 4 to Part 744—Entity List

* * * * *

Country	Entity	License requirement	License review policy	**Federal Register** citation
*	*	*	*	*
ARGENTINA	Huawei Tech Investment Co., Ltd. Argentina, Av. Leandro N. Alem 815, C1054 CABA, Argentina.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
*	*	*	*	*
AUSTRALIA	Huawei Technologies (Australia) Pty Ltd., L6 799 Pacific Hwy., Chatswood, New South Wales, 2067, Australia.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].

Country	Entity	License requirement	License review policy	**Federal Register** citation
*	* *	*	* *	*
BAHRAIN	Huawei Technologies Bahrain, Building 647 2811 Road 2811, Block 428, Muharraq, Bahrain.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	* *	*	* *	*
BELARUS	Bel Huawei Technologies LLC, a.k.a., the following one alias: —BellHuawei Technologies LLC. 5 Dzerzhinsky Ave., Minsk, 220036, Belarus.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	* *	*	* *	*
BELGIUM	Huawei Technologies Research & Development Belgium NV, Technologiepark 19, 9052 Zwijnaarde Belgium.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	* *	*	* *	*
*	* *	*	* *	*
BOLIVIA	Huawei Technologies (Bolivia) S.R.L., La Paz, Bolivia.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
BRAZIL	Huawei do Brasil Telecomunicacões Ltda, Av James Clerk Maxwell, 400 Cond. Techno Park, Campinas 13069380, Brazil.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
*	* *	*	* *	*
BURMA	Huawei Technologies (Yangon) Co., Ltd., Yangon, Burma.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
CANADA	* *	*	* *	*
	Huawei Technologies Canada Co., Ltd., Markham, ON, Canada.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	* *	*	* *	*
CHILE	Huawei Chile S.A., Santiago, Chile.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
CHINA, PEOPLE'S REPUBLIC OF.	* *	*	* *	*
	Beijing Huawei Digital Technologies Co., Ltd., Beijing, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	* *	*	* *	*
	Chengdu Huawei High-Tech Investment Co., Ltd., Chengdu, Sichuan, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Chengdu Huawei Technologies Co., Ltd., Chengdu, Sichuan, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	* *	*	* *	*

Country	Entity	License requirement	License review policy	Federal Register citation
	Dongguan Huawei Service Co., Ltd., Dongguan, Guangdong, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Dongguan Lvyuan Industry Investment Co., Ltd., Dongguan, Guangdong, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	* *	*	* *	*
	Gui'an New District Huawei Investment Co., Ltd., Guiyang, Guizhou, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	* *	*	* *	*
	Hangzhou Huawei Digital Technology Co., Ltd., Hangzhou, Zhejiang, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	* *	*	* *	*
	HiSilicon Optoelectronics Co., Ltd., Wuhan, Hubei, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	HiSilicon Technologies Co., Ltd (HiSilicon), Bantian Longgang District, Shenzhen, 518129, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	HiSilicon Tech (Suzhou) Co., Ltd., Suzhou, Jiangsu, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Huawei Device Co., Ltd., Dongguan, Guangdong, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Huawei Device (Dongguan) Co., Ltd., Dongguan, Guangdong, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Huawei Device (Shenzhen) Co., Ltd., Shenzhen, Guangdong, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Huawei Machine Co., Ltd., Dongguan, Guangdong, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Huawei Software Technologies Co., Ltd., Nanjing, Jiangsu, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Huawei Technical Service Co., Ltd., China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Huawei Technologies Co., Ltd., a.k.a., the following one alias: —Shenzhen Huawei Technologies, and to include the following addresses and the following 22 affiliated entities:	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].

Country	Entity	License requirement	License review policy	**Federal Register** citation
	Addresses for Huawei Technologies Co., Ltd.: Bantian Huawei Base, Longgang District, Shenzhen, 518129, China; *and* No. 1899 Xi Yuan Road, High-Tech West District, Chengdu, 611731; *and* C1, Wuhan Future City, No. 999 Gaoxin Ave., Wuhan, Hebei Province; *and* Banxuegang Industrial Park, Buji Longgang, Shenzhen, Guangdong, 518129, China; *and* R&D Center, No. 2222, Golden Bridge Road, Pu Dong District, Shanghai, China. Affiliated entities: *Beijing Huawei Longshine Information Technology Co., Ltd.,* a.k.a., the following one alias: —Beijing Huawei Longshine, to include the following subordinate. Q80–3–25R, 3rd Floor, No. 3, Shangdi Information Road, Haidian District, Beijing, China. *Hangzhou New Longshine Information Technology Co., Ltd.,* Room 605, No. 21, Xinba, Xiachang District, Hangzhou, China. *Hangzhou Huawei Communication Technology Co., Ltd.,* Building 1, No. 410, Jianghong Road, Changhe Street, Binjiang District, Hangzhou, Zhejiang, China. *Hangzhou Huawei Enterprises,* No. 410 Jianghong Road, Building 1, Hangzhou, China. *Huawei Digital Technologies (Suzhou) Co., Ltd.,* No. 328 XINHU STREET, Building A3, Suzhou (Huawei R&D Center, Building A3, Creative Industrial Park, No. 328, Xinghu Street, Suzhou), Suzhou, Jiangsu, China. *Huawei Marine Networks Co., Ltd.,* a.k.a., the following one alias: —Huawei Marine. Building R4, No. 2 City Avenue, Songshan Lake Science & Tech Industry Park, Dongguan, 523808, *and* No. 62, Second Ave., 5/F–6/F, TEDA, MSD–B2 Area, Tianjin Economic and Technological Development Zone, Tianjin, 300457, China. *Huawei Mobile Technology Ltd.,* Huawei Base, Building 2, District B, Shenzhen, China. *Huawei Tech. Investment Co.,* U1 Building, No. 1899 Xiyuan Avenue, West Gaoxin District, Chengdu City, 611731, China. *Huawei Technology Co., Ltd. Chengdu Research Institute,* No. 1899, Xiyuan Ave., Hi-Tech Western District, Chengdu, Sichuan Province, 610041, China. *Huawei Technology Co., Ltd. Hangzhou Research Institute,* No. 410, Jianghong Rd., Building 4, Changhe St., Binjiang District, Hangzhou, Zhejiang Province, 310007, China.			

Country	Entity	License requirement	License review policy	Federal Register citation
	Huawei Technologies Co., Ltd. Beijing Research Institute, No. 3, Xinxi Rd., Huawei Building, ShangDi Information Industrial Base, Haidian District, Beijing, 100095, China; *and* No. 18, Muhe Rd., Building 1–4, Haidian District, Beijing, China. *Huawei Technologies Co., Ltd. Material Characterization Lab,* Huawei Base, Bantian, Shenzhen 518129, China. *Huawei Technologies Co., Ltd. Xi'an Research Institute,* National Development Bank Building (Zhicheng Building), No. 2, Gaoxin 1st Road, Xi'an High-tech Zone, Xi'an, China. *Huawei Terminal (Shenzhen) Co., Ltd.,* Huawei Base, B1, Shenzhen, China. *Nanchang Huawei Communication Technology,* No. 188 Huoju Street, F10–11, Nanchang, China. *Ningbo Huawei Computer & Net Co., Ltd.,* No. 48 Daliang Street, Ningbo, China. *Shanghai Huawei Technologies Co., Ltd.,* R&D center, No. 2222, Golden Bridge Road, Pu Dong District, Shanghai, 286305 Shanghai, China, China. *Shenzhen Huawei Anjiexin Electricity Co., Ltd.,* a.k.a., the following one alias: —Shenzhen Huawei Agisson Electric Co., Ltd. Building 2, Area B, Putian Huawei Base, Longgang District, Shenzhen, China; *and* Huawei Base, Building 2, District B, Shenzhen, China. *Shenzhen Huawei New Technology Co., Ltd.,* Huawei Production Center, Gangtou Village, Buji Town, Longgang District, Shenzhen, China. *Shenzhen Huawei Technology Service,* Huawei Base, Building 2, District B, Shenzhen, China. *Shenzhen Huawei Technologies Software,* Huawei Base, Building 2, District B, Shenzhen, China. *Zhejiang Huawei Communications Technology Co., Ltd.,* No. 360 Jiangshu Road, Building 5, Hangzhou, Zhejiang, China.			
	Huawei Technologies Service Co., Ltd., Langfang, Hebei, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Huawei Training (Dongguan) Co., Ltd., Dongguan, Guangdong, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Huayi Internet Information Service Co., Ltd., Shenzhen, Guangdong, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Hui Tong Business Ltd., Huawei Base, Electrical Research Center, Shenzhen, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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	North Huawei Communication Technology Co., Ltd., Beijing, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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Country	Entity	License requirement	License review policy	**Federal Register** citation
	Shanghai Haisi Technology Co., Ltd., Shanghai, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Shanghai HiSilicon Technologies Co., Ltd., Room 101, No. 318, Shuixiu Road, Jinze Town (Xiqi), Qingpu District, Shanghai, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Shanghai Mossel Trade Co., Ltd., Shanghai, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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	Shenzhen HiSilicon Technologies Co., Electrical Research Center, Huawei Base, Shenzhen, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Shenzhen Huawei Technical Services Co., Ltd., Shenzhen, Guangdong, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Shenzhen Huawei Terminal Commercial Co., Ltd., Shenzhen, Guangdong, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Shenzhen Huawei Training School Co., Ltd., Shenzhen, Guangdong, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Shenzhen Huayi Loan Small Loan Co., Ltd., Shenzhen, Guangdong, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Shenzhen Legrit Technology Co., Ltd., Shenzhen, Guangdong, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Shenzhen Smartcom Business Co., Ltd., Shenzhen, Guangdong, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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	Suzhou Huawei Investment Co., Ltd., Suzhou, Jiangsu, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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	Wuhan Huawei Investment Co., Ltd., Wuhan, Hubei, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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	Xi'an Huawei Technologies Co., Ltd., Xi'an, Shaanxi, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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	Xi'an Ruixin Investment Co., Ltd., Xi'an, Shaanxi, China.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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COSTA RICA ...	Huawei Technologies Costa Rica SA, a.k.a., the following one alias: —Huawei Technologies Costa Rica Sociedad Anonima. S.J, Sabana Norte, Detras De Burger King, Edif Gru, Po Nueva, San Jose, Costa Rica.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].

Country	Entity	License requirement	License review policy	Federal Register citation
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CUBA	Huawei Cuba, Cuba.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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DENMARK	Huawei Denmark, Vestre Teglgade 9, Kobenhavn Sv, Hovedstaden, 2450, Denmark.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
EGYPT	* *	*	* *	*
	Huawei Technology, Cairo, Egypt.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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FRANCE	* *	*	* *	*
	Huawei France, a.k.a., the following one alias: —Huawei Technologies France SASU. 36–38, quai du Point du Jour, 92659 Boulogne-Billancourt cedex, France.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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GERMANY	* *	*	* *	*
	Huawei Technologies Deutschland GmbH, Germany.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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HONG KONG ...	* *	*	* *	*
	Hua Ying Management Co. Limited, Tsim Sha Tsui, Kowloon, Hong Kong.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Huawei Device (Hong Kong) Co., Limited, Tsim Sha Tsui, Kowloon, Hong Kong.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Huawei International Co., Limited, Hong Kong.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Huawei Tech. Investment Co., Limited, Hong Kong.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Huawei Technologies Co. Ltd., Tsim Sha Tsui, Kowloon, Hong Kong.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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	Smartcom (Hong Kong) Co., Limited, Sheung Wan, Hong Kong.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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Country	Entity	License requirement	License review policy	**Federal Register** citation
INDIA	* *	*	* *	*
	Huawei Technologies India Private Limited, a.k.a., the following one alias: —Huawei Technologies India Pvt., Ltd. Level-3/4, Leela Galleria, The Leela Palace, No. 23, Airport Road, Bengaluru, 560008, India; *and* SYNO 37, 46, 45/3, 45/4 ETC KNO 1540, Kundalahalli Village Bengaluru Bangalore KA 560037 India.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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INDONESIA	Huawei Tech Investment, PT, Bri Ii Building 20th Floor, Suite 2005, Jl. Jend., Sudirman Kav. 44–46, Jakarta, 10210, Indonesia.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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ITALY	Huawei Italia, Via Lorenteggio, 240, Tower A, 20147 Milan, Italy.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Huawei Milan Research Institute, Milan, Italy.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
JAMAICA	Huawei Technologies Jamaica Company Limited, Kingston, Jamaica.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
JAPAN	Huawei Technologies Japan K.K., Japan.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
JORDAN	Huawei Technologies Investment Co. Ltd., Amman, Jordan.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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KAZAKHSTAN	* *	*	* *	*
	Huawei Technologies LLC Kazakhstan, 191 Zheltoksan St., 5th floor, 050013, Bostandyk, District of Almaty, Republic of Kazakhstan.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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LEBANON	* *	*	* *	*
	Huawei Technologies Lebanon, Beirut, Lebanon.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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MADAGASCAR	Huawei Technologies Madagascar Sarl, Antananarivo, Madagascar.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].

Country	Entity	License requirement	License review policy	Federal Register citation
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MEXICO	Huawei Technologies De Mexico S.A., Avenida Santa Fé No. 440, Torre Century Plaza Piso 15, Colonia Santa Fe, Delegación Cuajimalpa de Morelos, C.P. 05348, Distrito Federal, CDMX, Mexico; *and* Laza Carso, Torre Falcón, Lago Zurich No. 245, Piso 18, Colonia Ampliacion Granda, Delegación Miguel Hidalgo, CDMX, Mexico.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
NETHERLANDS	* *	*	* *	*
	Huawei Technologies Coöperatief U.A., Netherlands.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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NEW ZEALAND	Huawei Technologies (New Zealand) Company Limited, 80 Queen Street, Auckland Central, Auckland, 1010, New Zealand.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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OMAN	Huawei Tech Investment Oman LLC, Muscat, Oman.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
PAKISTAN	* *	*	* *	*
	Huawei Technologies Pakistan (Private) Limited, Islamabad, Pakistan.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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PANAMA	Huawei Technologies Cr Panama S.A, Ave. Paseo del Mar, Costa del Este Torre MMG, Piso 17 Ciudad de Panamá, Panama.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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PARAGUAY	Huawei Technologies Paraguay S.A., Asuncion, Paraguay.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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PORTUGAL	Huawei Technology Portugal, Avenida Dom João II, 51B–11°.A 1990–085 Lisboa, Portugal.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
QATAR	Huawei Tech Investment Limited, Doha, Qatar.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
ROMANIA	Huawei Technologies Romania Co., Ltd., Ion Mihalache Blvd, No. 15–17,1st District, 9th Floor of Bucharest Tower center, Bucharest, Romania.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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RUSSIA	* *	*	* *	*

Country	Entity	License requirement	License review policy	**Federal Register** citation
	Huawei Russia, Business-Park "Krylatsky Hills", 17 Bldg. 2, Krylatskaya Str., Moscow 121614, Russia.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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SINGAPORE	* * *	* * *	* * *	* * *
	Huawei International Pte. Ltd., Singapore.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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SOUTH AFRICA	* * *	* * *	* * *	* * *
	Huawei Technologies South Africa Pty Ltd., 128 Peter St Block 7 Grayston Office Park, Sandton, Gauteng, 1682, South Africa.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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SRI LANKA	Huawei Technologies Lanka Company (Private) Limited, Colombo, Sri Lanka.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
SWEDEN	* * *	* * *	* * *	* * *
	Huawei Sweden, Skalholtsgatan 9–11 Kista, 164 40 Stockholm, Sweden.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
SWITZERLAND	* * *	* * *	* * *	* * *
	Huawei Technologies Switzerland AG, Liebefeld, Bern, Switzerland.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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TAIWAN	* * *	* * *	* * *	* * *
	Xunwei Technologies Co., Ltd., Taipei, Taiwan.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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THAILAND	* * *	* * *	* * *	* * *
	Huawei Technologies (Thailand) Co., 87/1 Wireless Road, 19th Floor, Capital Tower, All Seasons Place, Pathumwan, Bangkok, 10330, Thailand.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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UNITED KINGDOM.	* * *	* * *	* * *	* * *
	Centre for Integrated Photonics Ltd., B55 Adastral Park, Pheonix House, Martlesham Heath, Ipswich, IP5 3RE United Kingdom.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
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Country	Entity	License requirement	License review policy	Federal Register citation
	Huawei Global Finance (UK) Limited, Great Britain.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Huawei Technologies (UK) Co., Ltd., a.k.a., the following one alias: —Huawei Software Technologies Co. Ltd., 300 South Oak Way, Green Park, Reading, RG2 6UF; *and* 6 Mitre Passage, SE 10 0ER, United Kingdom.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 43495, 8/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
*	*	*	* *	*
	Proven Glory, British Virgin Islands	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Proven Honour, British Virgin Islands.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
*	*	*	* *	*
VIETNAM	Huawei Technologies (Vietnam) Company Limited, Hanoi, Vietnam.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].
	Huawei Technology Co. Ltd., Hanoi, Vietnam.	For all items subject to the EAR. (See §§ 736.2(b)(3)(vi),[1] and 744.11 of the EAR.)	Presumption of denial	84 FR 22963, 5/21/19. 85 FR [INSERT FR PAGE NUMBER AND 5/19/20].

[1] *Items subject to the EAR that are controlled for NS reasons or specified in certain ECCNs when destined to designated entities.* You may not reexport, export from abroad, or transfer (in-country) without a license or license exception any foreign-produced item specified in paragraph (a) or (b) of this footnote when there is ''knowledge'' that the foreign-produced item is destined to any entity with a footnote 1 designation in the license requirement column of this Supplement.

(a) *Direct product of* ''*technology*'' *or* ''*software*'' *subject to the EAR and specified in certain Category 3, 4 or 5 ECCNs.* The foreign-produced item is produced or developed by any entity with a footnote 1 designation in the license requirement column of this Supplement and is a direct product of ''technology'' or ''software'' subject to the EAR and specified in Export Control Classification Number (ECCN) 3E001, 3E002, 3E003, 4E001, 5E001, 3D001, 4D001, or 5D001; of ''technology'' subject to the EAR and specified in ECCN 3E991, 4E992, 4E993, or 5E991; or of ''software'' subject to the EAR and specified in ECCN 3D991, 4D993, 4D994, or 5D991 of the Commerce Control List in Supplement No. 1 to part 774 of the EAR.

(b) *Direct product of a plant or major component of a plant.* The foreign-produced item is:

(1) Produced by any plant or major component of a plant that is located outside the United States, when the plant or major component of a plant itself is a direct product of U.S.-origin ''technology'' or ''software'' that is specified in Export Control Classification Number (ECCN) 3E001, 3E002, 3E003, 4E001, 5E001, 3D001, 4D001, or 5D001; of U.S.-origin ''technology'' that is specified in ECCN 3E991, 4E992, 4E993, or 5E991; or of U.S.-origin ''software'' that is specified in ECCN 3D991, 4D993, 4D994, or 5D991 of the Commerce Control List in Supplement No. 1 to part 774 of the EAR; and

Note to paragraph (b)(1) of footnote 1: A major component of a plant located outside the United States means equipment that is essential to the ''*production*'' *of an item, including testing equipment, to meet the specifications of a design specified in (b)(2).*

(2) A direct product of ''software'' or ''technology'' produced or developed by an entity with a footnote 1 designation in the license requirement column of the Entity List.

Dated: May 15, 2020.

Wilbur Ross,

Secretary, U.S. Department of Commerce.

[FR Doc. 2020–10856 Filed 5–15–20; 2:15 pm]

BILLING CODE 3510–33–P

COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA

28 CFR Part 813

RIN 3225–AA18

Guidance Development Procedures

AGENCY: Court Services and Offender Supervision Agency.

ACTION: Final rule.

SUMMARY: This final rule responds to an Executive order titled ''Promoting the Rule of Law Through Improved Agency Guidance Documents'' (October 9, 2019). The central principle of the E.O. is that agency guidance documents should clarify existing obligations. Guidance documents are not permitted to impose new, binding requirements on the public. Pursuant to the E.O., Federal agencies are required to finalize regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents. This final rule codifies internal procedural requirements governing the review and clearance of guidance documents for Court Services and Offender Supervision Agency (CSOSA) and Pretrial Services Agency (PSA).

DATES: Effective on May 19, 2020.

FOR FURTHER INFORMATION CONTACT: For CSOSA: Hyun-Ju E. Park, Supervisory Policy Analyst, Court Services and Offender Supervision Agency for the District of Columbia, 633 Indiana Avenue NW, Room 1232B, Washington, DC 20004; Tel: 202–220–5635; Email: *Hyun-Ju.Park@csosa.gov.* For PSA: Victor Davis, Chief of Staff, Pretrial Services Agency for the District of Columbia, 633 Indiana Avenue NW, Washington, DC 20004; Tel: 202–220–5654; Email: *Victor.Davis@psa.gov.*

SUPPLEMENTARY INFORMATION: The Court Services and Offender Supervision Agency (CSOSA) was established within

§ 217.301 [Amended]

■ 4. Amend § 217.301 by:
■ a. In paragraphs (b)(1) and (d) introductory, remove ''U.S. GAAP'' and add in its place ''GAAP''; and
■ b. In paragraph (c)(2) introductory text, add ''or Category III'' after the phrase ''an advanced approaches'' and ''its applicable'' after the words ''its calculation of'';
■ c. In paragraph (d)(2)(i) introductory text, remove the phrase ''in a first'' and add in its place ''in its first''; and
■ d. In paragraph (d)(2)(ii) introductory text, add ''or Category III'' after the phrase ''An advanced approaches'' and ''its applicable'' after the words ''its calculation of''.

Federal Deposit Insurance Corporation

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the joint preamble, chapter III of title 12 of the Code of Federal Regulations is amended as follows:

PART 324—CAPITAL ADEQUACY OF FDIC-SUPERVISED INSTITUTIONS

■ 5. The authority citation for part 324 continues to read as follows:

Authority: 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; 5371; 5412; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note); Pub. L. 102–242, 105 Stat. 2236, 2355, as amended by Pub. L. 103–325, 108 Stat. 2160, 2233 (12 U.S.C. 1828 note); Pub. L. 102–242, 105 Stat. 2236, 2386, as amended by Pub. L. 102–550, 106 Stat. 3672, 4089 (12 U.S.C. 1828 note); Pub. L. 111–203, 124 Stat. 1376, 1887 (15 U.S.C. 78o–7 note); Pub. L. 115–174; Pub. L. 116–136, 134 Stat. 281.

■ 6. Amend § 324.301 as follows:
■ a. Revise paragraph (b)(1);
■ b. In paragraph (b)(2), remove the phrase ''FDIC-supervised's adoption'' and add in its place ''FDIC-supervised institution's adoption'';
■ c. In paragraph (c)(2) introductory text, add ''or Category III'' after the phrase ''an advanced approaches'' and ''its applicable'' after the words ''its calculation of'';
■ d. Revise paragraph (d) introductory text;
■ e. In paragraph (d)(2)(i) introductory text, remove the phrase ''in its a'' and add in its place ''in its first'';
■ f. In paragraph (d)(2)(i)(C), remove the phrase ''fifty percent of its AACL transitional amount'' and add in its place ''fifty percent of its modified AACL transitional amount'' and remove the phrase ''twenty-five percent of its AACL transitional amount'' and add in its place ''twenty-five percent of its modified AACL transitional amount'';
■ g. In paragraph (d)(2)(ii) introductory text, add ''or Category III'' after the phrase ''An advanced approaches'', remove the phrase ''for the fiscal year that begins during the 2020 calendar year'' and add in its place ''during 2020'', and add ''its applicable'' after the words ''its calculation of''; and
■ h. In paragraph (d)(2)(ii)(A), remove the phrase ''fifty percent of its CECL transitional amount'' and add in its place the phrase ''fifty percent of its modified CECL transitional amount'' and remove the phrase ''twenty-five percent of its CECL transitional amount'' and add in its place ''twenty-five percent of its modified CECL transitional amount''.

The revisions read as follows:

§ 324.301 Current expected credit losses (CECL) transition.

* * * * *

(b) * * *

(1) *Transition period* means the three-year period, beginning the first day of the fiscal year in which an FDIC-supervised institution adopts CECL and reflects CECL in its first Call Report filed after that date; or, for the 2020 transition under paragraph (d) of this section, the five-year period beginning on the earlier of the date an FDIC-supervised institution was required to adopt CECL for accounting purposes under GAAP (as in effect on January 1, 2020), or the first day of the quarter in which the FDIC-supervised institution files regulatory reports that include CECL.

* * * * *

(d) *Calculation of the five-year CECL transition provision.* An FDIC-supervised institution that was required to adopt CECL for accounting purposes under GAAP (as in effect January 1, 2020) as of the first day of a fiscal year that begins during the 2020 calendar year, and that makes the election described in paragraph (a)(1) of this section, may use the transitional amounts and modified transitional amounts in paragraph (d)(1) of this section with the 2020 CECL transition calculation in paragraph (d)(2) of this section to adjust its calculation of regulatory capital ratios during each quarter of the transition period in which an FDIC-supervised institution uses CECL for purposes of its Call Report. An FDIC supervised-institution that did not make the election described in paragraph (a)(1) of this section because it did not record a reduction in retained earnings due to the adoption of CECL as of the beginning of the fiscal year in which the FDIC-supervised institution adopted CECL may use the transition provision in this paragraph (d) if it has a positive modified CECL transitional amount during any quarter ending in 2020 and makes the election in the Call Report filed for the same quarter.

* * * * *

Brian Brooks,

First Deputy Comptroller, Comptroller of the Currency.

Board of Governors of the Federal Reserve System.

Ann Misback,

Secretary of the Board.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on April 13, 2020.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2020–08789 Filed 5–18–20; 8:45 am]

BILLING CODE 4810–33–P 6210–01–P; 6714–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA–2020–2028]

RIN 3245–AH42

Business Loan Program Temporary Changes; Paycheck Protection Program—Loan Increases

AGENCY: U. S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule announcing the implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act temporarily adds a new program, titled the ''Paycheck Protection Program,'' to the SBA's 7(a) Loan Program. The CARES Act also provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). SBA posted additional interim final rules on April 3, 2020, April 14, 2020, April 24, 2020, April 28, 2020, April 30, 2020, May 5, 2020, and May 8, 2020, and the Department of the Treasury posted an additional interim final rule on April 28, 2020. This interim final rule supplements the previously posted interim final rules by providing guidance on the ability to increase certain PPP loans, and requests public comment.

DATES:

Effective date: This rule is effective May 19, 2020.

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment date: Comments must be received on or before June 18, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–2028 through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments. SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please send an email to *ppp-ifr@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public limits activity at malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the CARES Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency. Section 1102 of the CARES Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the ''Paycheck Protection Program.'' Section 1106 of the CARES Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116–139), which provided additional funding and authority for the PPP.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Specifically, it is critical to meet lenders' and borrowers' need for clarity concerning program requirements as rapidly as possible because the last day eligible borrowers can apply for and receive a loan is June 30, 2020.

This interim final rule supplements previous regulations and guidance on an important, discrete issue. The immediate effective date of this interim final rule will benefit lenders so that they can swiftly close and disburse loans to small businesses. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. In addition, SBA has determined that there is good cause for dispensing with advance public notice and comment on the ground that it would be contrary to the public interest. Specifically, SBA has determined that advance public notice and comment would delay the ability of certain businesses to obtain increases in their PPP loan amounts in order to ensure they obtain the maximum amount that they are eligible for under current guidance (guidance that was not available at the time their PPP loans were approved). This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before June 18, 2020. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program Requirements for Loan Increases

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the PPP. Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans and any accrued interest may qualify for loan forgiveness. Additional information about the PPP is available in interim final rules published by SBA and the Department of the Treasury in the **Federal Register** (85 FR 20811, 85 FR 20817, 85 FR 21747, 85 FR 23450, 85 FR 23917, 85 FR 26321, 85 FR 26324, 85 FR 27287), and an additional SBA interim final rule entitled ''Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan Request,'' which SBA posted on May 8, 2020, and is published elsewhere in this issue of the **Federal Register** (collectively, the PPP Interim Final Rules).

On April 14, 2020, SBA posted an interim final rule that, among other things, provided guidance for individuals with self-employment income (85 FR 21747). The interim final rule stated, ''if you are a partner in a partnership, you may not submit a separate PPP loan application for yourself as a self-employed individual. Instead, the self-employment income of general active partners may be reported as a payroll cost, up to $100,000 annualized, on a PPP loan application filed by or on behalf of the partnership.'' On April 28, 2020, the Department of the Treasury posted an interim final rule that provided an alternative criterion for calculating the maximum loan amount for PPP loans issued to seasonal employers (85 FR 23917).

Some PPP loans were approved to partnerships or seasonal employers before the additional guidance was

issued and, as a result, those businesses may not have received PPP loans in the maximum amount for which they are eligible. This interim final rule authorizes all PPP lenders to increase existing PPP loans to partnerships or seasonal employers to include appropriate amounts to cover partner compensation in accordance with the interim final rule posted on April 14, 2020, or to permit the seasonal employer to calculate its maximum loan amount using the alternative criterion posted on April 28, 2020.

In addition, although the interim final rule on disbursements posted on April 28, 2020, requires PPP loans to be disbursed in a single disbursement, if a PPP loan that is increased has already been disbursed, this interim final rule authorizes the lender to make an additional disbursement of the increased loan proceeds prior to submission of the initial SBA Form 1502 that includes that loan. SBA Form 1502 is required to be submitted within 20 calendar days after a PPP loan is approved or, for loans approved before availability of the updated SBA Form 1502 reporting process, by May 22, 2020.[1]

1. Loan Increases

a. If a partnership received a PPP loan that did not include any compensation for its partners, can the loan amount be increased to include partner compensation?

Yes. If a partnership received a PPP loan that only included amounts necessary for payroll costs of the partnership's employees and other eligible operating expenses, but did not include any amount for partner compensation,[2] the lender may electronically submit a request through SBA's E-Tran Servicing site to increase the PPP loan amount to include appropriate partner compensation, even if the loan has been fully disbursed, provided that the lender's first SBA Form 1502 report to SBA on the PPP loan has not been submitted. After the initial SBA Form 1502 report on the PPP loan has been submitted to SBA, or after the date the first SBA Form 1502 was required to be submitted to SBA, the loan cannot be increased. In no event can the increased loan amount exceed the maximum loan amount allowed under the PPP Program, which is $10 million for an individual borrower or $20 million for a corporate group. Additionally, the borrower must provide the lender with required documentation to support the calculation of the increase.

The interim final rule posted on April 14, 2020, describes how partnerships, rather than individual partners are eligible for a PPP loan. The interim final rule further explained that the self-employment income of general active partners could be reported as a payroll cost, up to $100,000 annualized, on a PPP loan application filed by or on behalf of the partnership. Guidance describing how to calculate partnership PPP loan amounts and defining the self-employment income of partners was posted on April 24, 2020 (*see* How to Calculate Maximum Loan Amounts, Question 4 at *https://www.sba.gov/sites/default/files/2020-04/How-to-Calculate-Loan-Amounts.pdf*).

b. If a seasonal employer received a PPP loan before the alternative criterion for determining the maximum loan amount for seasonal employers became available, can the loan amount be increased based on a revised calculation using the alternative criterion?

Yes. If a seasonal employer received a PPP loan before the alternative criterion for such employers was posted on April 28, 2020, and would be eligible for a higher maximum loan amount under the alternative criterion, the lender may electronically submit a request through SBA's E-Tran Servicing site to increase the PPP loan amount, even if the loan has been fully disbursed, provided that the lender's first SBA Form 1502 report to SBA on the PPP loan has not been submitted. After the initial SBA Form 1502 report has been submitted to SBA, or after the date the initial SBA Form 1502 report was required to be submitted to SBA, the loan cannot be increased. In no event can the increased loan amount exceed the maximum loan amount allowed under the PPP Program, which is $10 million for an individual borrower or $20 million for a corporate group. Additionally, the borrower must provide the lender with required documentation to support the calculation of the increase.

2. Disbursements and 1502 Reporting on Increased PPP Loans

a. If a borrower's PPP loan has already been fully disbursed, can the lender make an additional disbursement for the increased loan proceeds?

Yes. Notwithstanding the requirement set forth in paragraph 1.a. of the interim final rule on disbursements posted on April 28, 2020, *i.e.,* that lenders make a one-time, full disbursement of the PPP loan within ten calendar days of loan approval, if a PPP loan is increased under paragraphs 1.a. or b. above, the lender may make a single additional disbursement of the increased loan proceeds prior to submission of the initial SBA Form 1502 report for that loan.

b. How do lenders report disbursements on PPP loans that are increased and does the increase in the loan delay the timeframe to report the loan on the SBA Form 1502?

SBA set forth in the interim final rule on disbursements and 1502 reporting posted on April 28, 2020, the process lenders must follow to electronically upload SBA Form 1502 information on PPP loans. The interim final rule provided that lenders must submit the SBA Form 1502 information within 20 calendar days after a PPP loan is approved or, for loans approved before availability of the updated SBA Form 1502 reporting process, by May 18, 2020. In its interim final rule posted on May 8, 2020, SBA revised that date from May 18, 2020 to May 22, 2020. Lenders must comply with the initial 1502 reporting deadline. SBA may review at any time an increase submitted by the lender to confirm that the increase was submitted within the required timeframe; increases submitted outside the required timeframe will not be forgiven and no processing fee will be earned on such amounts. Additionally, lenders are not entitled to processing fees on increases submitted outside of the required timeframe.

3. Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA's website at *www.sba.gov.* Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and

[1] SBA extended the deadline for submission of the initial SBA Form 1502 for such loans from May 18, 2020 to May 22, 2020, in its interim final rule posted on May 8, 2020.

[2] As set forth in the interim final rule posted on April 14, 2020, a partner in a partnership may not submit a separate PPP loan application as a self-employed individual. Instead, the self-employment income of general active partners may be reported as a payroll cost, up to $100,000 annualized, on a PPP loan application filed by or on behalf of the partnership.

13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are ''small entities.'' Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency ''certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, ''along with a statement providing the factual basis for such certification.'' If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b). Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act, Ch.1. p.9. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,

Administrator.

[FR Doc. 2020–10658 Filed 5–18–20; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA–2020–0026]

RIN 3245–AH41

Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Extension of Limited Safe Harbor With Respect to Certification Concerning Need for PPP Loan Request

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On April 24, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule relating to promissory notes, authorizations, affiliation, and eligibility in connection with the implementation of a temporary new program, titled the ''Paycheck Protection Program.'' The Paycheck Protection Program was established under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). This interim final rule revises the interim final rule posted on April 24, 2020, by extending the date by which certain Paycheck Protection Program borrowers may repay their loans from May 7, 2020 to May 14, 2020, in order to avail themselves of a safe harbor with respect to a certification required by the Act, and makes other conforming changes. This interim final rule supplements SBA's implementation of the Act and requests public comment.

DATES:

Effective date: This rule is effective May 19, 2020.

Applicability date: This interim final rule applies to borrowers who applied for loans under the Paycheck Protection Program.

Comment date: Comments must be received on or before June 18, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0026 through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments. SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please send an email to *ppp-ifr@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 124, 125, 126, and 127

RIN 3245–AG75

Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business Certification

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The Small Business Administration (SBA or the Agency) amends its regulations to implement a statutory requirement to certify Women-Owned Small Business Concerns (WOSBs) and Economically Disadvantaged Women-Owned Small Business Concerns (EDWOSBs) participating in the Procurement Program for Women-Owned Small Business Concerns (the Program). The certification requirement applies only to those businesses wishing to compete for set-aside or sole source contracts under the Program, and to those seeking to be awarded multiple award contracts for pools reserved for WOSBs and EDWOSBs. Once this rule is effective, WOSBs and EDWOSBs that are not certified will not be eligible for contracts under the Program. Other women-owned small business concerns that do not participate in the Program may continue to self-certify their status, receive contract awards outside the Program, and count toward an agency's goal for awards to WOSBs. For those purposes, contracting officers would be able to accept self-certifications without requiring them to verify any documentation. In this rule, SBA implements the statutory mandate to provide certification, to accept certification from certain identified government entities, and to allow certification by SBA-approved third-party certifiers. As part of the changes necessary to implement a certification program, this final rule amends SBA's regulations with regard to continuing eligibility and program examinations. This rule also adjusts the economic disadvantage thresholds for determining whether an individual qualifies as economically disadvantaged. The new thresholds will be used for assessing the economic disadvantage of applicants to the 8(a) Business Development (BD) Program, as well as applicants seeking EDWOSB status.

DATES: This rule is effective on July 15, 2020, except for the amendments to §§ 127.300, 127.304, 127.305, the addition of § 127.351, and the amendments to §§ 127.400, 127.401, 127.403, 127.405, 127.504, 127.505, 127.603, and 127.604, which are effective on October 15, 2020. The addition of § 127.355 is delayed indefinitely and we will publish a document in the **Federal Register** announcing the effective date.

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SUPPLEMENTARY INFORMATION: As set forth in section 8(m) of the Small Business Act, 15 U.S.C. 637(m), the Program authorizes Federal contracting officers to restrict competition to eligible WOSBs or EDWOSBs for Federal contracts in certain industries. Section 825 of the National Defense Authorization Act for Fiscal Year 2015, Public Law 113–291, 128 Stat. 3292 (December 19, 2014) (2015 NDAA), amended the Small Business Act to grant contracting officers the authority to award sole source awards to WOSBs and EDWOSBs. In addition, section 825 of the 2015 NDAA amended the Small Business Act to create a requirement that a concern be certified as a WOSB or EDWOSB by a Federal agency, a State government, SBA, or a national certifying entity approved by SBA, in order to be awarded a set aside or sole source contract under the authority of section 8(m) of the Small Business Act. 15 U.S.C. 637(m)(2)(E). SBA believes that certification is also required where an agency establishes a pool of WOSBs or EDWOSBs on a multiple award contract and intends to set-aside or reserve one or more orders for WOSBs or EDWOSBs.

On September 14, 2015, SBA published in the **Federal Register** a final rule to implement the sole source authority for WOSBs and EDWOSBs. 80 FR 55019 (effective October 14, 2015). SBA did not address the certification portion of the 2015 NDAA in that final rule because its implementation could not be accomplished by merely incorporating the statutory language into the regulations and would have delayed the implementation of the sole source authority. SBA notified the public that because it did not want to delay the implementation of the WOSB sole source authority, it would implement the certification requirement through a separate rulemaking.

As part of the process to draft the regulations governing the WOSB/EDWOSB certification program, SBA published an Advance Notice of Proposed Rulemaking in the **Federal Register** on December 18, 2015 (80 FR 78984) and a proposed rule in the **Federal Register** on May 14, 2019 (84 FR 21256). The proposed rule solicited public comments to assist SBA in drafting a final rule to implement a WOSB/EDWOSB certification program. SBA received 898 comments from 307 commenters in response to the proposed rule (Regulations.Gov Docket #SBA–2019–0003). SBA has reviewed all input from interested stakeholders while drafting this rule.

The proposed rule also revised § 124.104(c) to make the economic disadvantage requirements for the 8(a) BD Program consistent with the economic disadvantage requirements for women-owned small businesses seeking EDWOSB status. The proposed change eliminated the distinction in the 8(a) BD Program for initial entry into and continued eligibility for the program.

Economic Disadvantage

Currently, the economic disadvantage criteria for EDWOSBs is $750,000, which is the same as the continuing eligibility threshold for the 8(a) BD program, but higher than the $250,000 initial eligibility threshold for that program. A concern applying for EDWOSB and 8(a) BD status simultaneously could thus be found economically disadvantaged for EDWOSB purposes, but not economically disadvantaged for the 8(a) BD Program. This result would introduce unnecessary confusion and uncertainty into the application and certification processes. To remedy this, this final rule makes economic disadvantage consistent across programs.

SBA commissioned a study to assist the Office of Business Development in defining or establishing criteria for determining what constitutes ''economic disadvantage'' for purposes of firms applying to the 8(a) BD program. The study concluded that the available data support an economic disadvantage threshold between $375,000 and $1.2 million. This range reflects the complexity of establishing a threshold that considers the ability of disadvantaged business owners to compete in the free enterprise system, as well as those individuals' access to credit and capital. That inherent complexity is evident in the varied economic disadvantage thresholds established by other Federal and state programs. For example, the Disadvantaged Business Enterprise Program (DBE), administered by agencies authorized by the U.S. Department of Transportation (DOT), uses a $1.32 million economic disadvantage threshold. States with similar programs for ''minority and

women business enterprises'' have economic disadvantage thresholds up to $1.6 million. The study commissioned by SBA did not come to a definitive conclusion on which threshold the Agency should use. One suggestion was to use a $1.1 million ''unadjusted'' (home and business equity included) personal net worth standard, which would be equal to a $375,000 ''adjusted'' (home and business equity excluded) standard. The study did not, however, consider differences in economic disadvantage between applying to the 8(a) BD program and continuing in the program once admitted, nor did it consider economic disadvantage in the context of EDWOSB eligibility. Because SBA believes that it is important to have the same economic disadvantage criteria for the 8(a) BD program as for the EDWOSB program to avoid confusion and inconsistency between the programs, SBA considered applying a $375,000 net worth standard to both the 8(a) BD and EDWOSB programs. SBA requested comments on whether the $375,000 net worth standard or the $750,000 net worth standard should be used for the EDWOSB and 8(a) BD and Programs.

In response, SBA received 146 comments that supported $750,000 as the appropriate economic disadvantage threshold. Of these, a substantial number explicitly expressed support for changing the regulations to make the economic disadvantage threshold consistent between programs, while the rest expressed support more broadly for maintaining EDWOSB's economic disadvantage threshold of $750,000. SBA did not receive any comments supporting a common $375,000 net worth standard for the EDWOSB and 8(a) BD programs. SBA also received four comments that offered alternative methods to establish an economic threshold. One argued that the standard should be variable and based on inflation, one thought the standard should be locality-based, and two suggested a tiered system. Three additional commenters opposed an economic disadvantage threshold of $750,000. One recommended an economic disadvantage threshold of $1 million, one opposed having an economic disadvantage threshold at all, and the third merely thought that $750,000 was inappropriate. SBA believes that varying the economic disadvantage threshold depending on fluid external factors such as inflation, or applying different thresholds depending on locality, would introduce too much volatility and confusion into the application process and lead to inconsistency between programs. Increasing the economic disadvantage threshold to $1 million or abolishing economic disadvantage thresholds altogether were not contemplated in the proposed rule and are not under consideration now. Based on the study's conclusion that SBA could set an economic disadvantage threshold between $375,000 and $1.2 million, stakeholders' clear affirmation of a $750,000 economic disadvantage threshold, and the preference for uniform standards across programs, SBA is keeping the EDWOSB economic disadvantage threshold and adjusting the 8(a) BD economic disadvantage thresholds accordingly.

SBA also received comments regarding how economic disadvantage would be assessed going forward. Specifically, commenters asked about whether there is any difference between the EDWOSB and the 8(a) BD regulations governing how retirement accounts are calculated when determining an economically disadvantaged individual's net worth, and if the change in the economic disadvantage threshold will affect that calculation. In light of this feedback, SBA has revised § 124.104(c)(2)(ii) and § 127.203(b)(3) in the final rule to note that retirement accounts will now be excluded from calculations of an economically disadvantaged individual's net worth, irrespective of the individual's age. SBA has previously contemplated this change, believing that it accords with the valuable public policy of incentivizing, rather than punishing, saving for retirement. It also expands the pool of potential EDWOSB and 8(a) BD participants because retirement-age small business owners will no longer be ineligible solely due to their retirement savings. Changing the EDWOSB and 8(a) BD net worth provisions now, in conjunction with the changes to the economic disadvantage threshold for both programs, furthers SBA's long-term aim of promoting regulatory consistency and continuity.

Women-Owned Small Business Certification Program

The 2015 NDAA amended the Small Business Act to require that concerns participating in the Program must be certified by SBA, a Federal agency, a state government, or an approved national certifying entity. In response, SBA proposed amending the regulations in part 127 to remove references to self-certification with respect to the award of WOSB/EDWOSB contracts. The certification requirement applies only to participants wishing to compete for set-aside or sole source contracts under the Program. Once this rule is effective, WOSBs and EDWOSBs that are not certified will not be eligible for contracts under the Program. Other women-owned small business concerns that do not participate in the Program may continue to self-certify their status, receive contract awards outside the Program, and count toward an agency's goal for awards to WOSBs. The final rule adds a new § 127.200(c) to make clear that a concern may continue to self-certify as a WOSB for goaling purposes. Revised § 127.300 establishes options for small business concerns seeking certification as WOSBs or EDWOSBs: Applying via SBA's free online application, submitting evidence of certification from another approved Government entity, or submitting evidence of certification from an approved third-party certifier.

SBA received over 400 comments on the proposed revisions to § 127.300(a) and (b), which detail the options for certification. Of these, 170 commenters expressed a general sentiment that there should be ''a fair and unified set of requirements and application processes for all participants'' and ''the process of submitting an application . . . should be fully uniform and completed at *certify.sba.gov*.'' An additional sixteen commenters explicitly supported the proposed processes, and two commenters opposed them.

SBA shares the view that certification requirements must be fair and consistently applied. To ensure this consistency, SBA is the final authority for all of the certification processes. Congress' intent in allowing SBA to delegate certification to other authorized parties was to ensure that the public has access to the broadest range of certification options while at the same time ensuring that consistent Program eligibility requirements are met. There will naturally be differences between each of the processes because they will be administered by different entities, but the foundation for all the processes is SBA's Program eligibility requirements. Each applicant will be providing evidence to SBA that it meets these requirements; the application processes outlined in §§ 127.300–127.305 differ primarily in what kind of documentation demonstrates eligibility.

Based on the comments received, SBA understands that many stakeholders harbor reservations about the fairness and uniformity of the application process. As such, the final rule will clarify in subpart C, ''Certification of WOSB or EDWOSB Status,'' that there is no distinction between ''Certification by SBA'' and ''Certification by Third Party,'' as written in the proposed rule.

Instead, the regulations will refer to all the provisions covering the different application processes in §§ 127.300–127.305 as ''Certification.'' SBA also removed references to SBA in the headings for §§ 127.301–127.305 so that concerns understand that the regulations apply to all applicants, regardless of how they opt to seek certification. The rules for third-party certifiers, covered extensively in new §§ 127.350–127.356, will be labeled as ''Requirements for Third-Party Certifiers.'' SBA believes this will reaffirm that ''Certification'' is a unitary process, that all concerns must meet the same eligibility requirements, and that the only difference is in how they can present evidence that they have met those requirements.

SBA received four comments regarding the proposed change to § 127.300(a)(1), which specifies that concerns can apply for WOSB certification from SBA. Three commenters were supportive. The fourth opposed the provision because it believes that concerns should continue to have the option to self-certify. Because the statutory language mandates the methods for certification, SBA has no authority to retain self-certification as an option for concerns seeking to compete for WOSB and EDWOSB set-aside procurements (as noted above, concerns can still self-certify for non-WOSB and non-EDWOSB set-aside procurements, still self-identify as women-owned small businesses, and awards to firms self-identifying as WOSBs may be counted by a procuring agency towards its WOSB goal). SBA adopts the proposed language as final.

SBA received 12 comments that specifically touched on § 127.300(a)(2), which outlines the options for non-SBA, government-entity certification options. The proposed rule stated that a concern could submit evidence that it was a certified participant of the 8(a) BD Program or the DBE Program, or that it was certified as a Veteran-Owned or Service-Disabled Veteran-Owned Small Business by the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE). The Supplementary Information in the proposed rule also contemplated potentially accepting evidence that a concern participated in SBA's HUBZone Program.

The final rule removes reference to the 8(a) BD Program in § 127.300(a)(2) and instead includes it only in § 127.300(b)(2), which details EDWOSB certification. Every current 8(a) BD participant that is 51% owned and controlled by a woman or women is an EDWOSB because economic disadvantage is a component of 8(a) BD eligibility, and all EDWOSBs are WOSBs. As such, including this information in the EDWOSB certification sub-section covers both EDWOSB and WOSB participation.

The final rule also omits reference to the HUBZone Program in that section. While evidence of HUBZone participation would indicate a concern is small, it would not provide any of the other information to demonstrate WOSB/EDWOSB eligibility. Specifically, a firm need not demonstrate that it is owned and controlled by a specific individual in order to be eligible for the HUBZone program. Thus, such a certification does not include a finding by SBA of any ownership and control. The purpose of § 127.300(a)(2) and (b)(2) is to expand the options for concerns to demonstrate Program eligibility as efficiently as possible. A certification option that necessitates submitting documentation of all but one of the elements of Program eligibility does not meaningfully effectuate this purpose. Similarly, the final rule removes DBE certification from the list of options. After discussions with stakeholders, SBA concluded that evidence of DBE certification would not provide the requisite level of certainty that a concern was eligible for the Program. While the DOT DBE regulations refer back to SBA's size regulations at 13 CFR part 121, concerns would still need to provide documentation to confirm they met SBA's distinct requirements for ownership and control by one or more women, or that they met SBA's economic disadvantage criteria if they were seeking EDWOSB certification. As with HUBZone Program participation, evidence of DBE participation would not help small businesses demonstrate eligibility as efficiently and easily as possible while still ensuring the requirements are met. In contrast, the governing regulations for the CVE program (38 CFR 74.2–74.4) refer to SBA's standards for size, socioeconomic status, ownership, and control. Documentation of CVE certification, along with confirmation that the concern was owned and controlled by one or more women, would demonstrate that a concern had met all the eligibility requirements for the Program. To help concerns better understand how to demonstrate their Program eligibility with their CVE certification, the final rule details the application process in § 127.303.

SBA received 188 comments on § 127.300(a)(3), which provides that a concern may submit evidence that it has been certified as an eligible Program participant by a Third-Party Certifier. Of these, 170 stated generally that SBA should have oversight of third-party certifiers and implement standards for certifiers. SBA agrees with these commenters and §§ 127.350–127.356, discussed below, detail requirements for third-party certifiers. These commenters also requested that SBA update *SAM.gov* to reflect that they are certified, including third-party certified. SBA does not oversee *SAM.gov* but will maintain its own internal records that will reflect up-to-date information and that information will be relayed to the General Services Administration, the agency that maintains *SAM.gov*.

Fifteen commenters opposed proposed § 127.300(a)(3) for a wide variety of reasons. One commenter stated that there should not be ''required'' third-party certification. SBA believes that this commenter misinterpreted the rule. As outlined in the rule, there are several different certification options, and concerns are not required to choose third-party certification. Which way to seek WOSB or EDWOSB certification is a business decision up to discretion of each firm. Three commenters said all certification should be handled by SBA, rather than by third-party certifiers that may have differing standards. In response, SBA notes that Congress specifically enumerated several different certification options in the statutory language, making clear that SBA should not be the sole entity processing certification applications. However, SBA retains responsibility for overseeing the Program eligibility requirements, and these requirements are the standards by which all applicants will be assessed. Certifiers will not be able to impose their own application standards for Program applicants.

Six commenters opposed third-party certification because of the associated fees, which commenters perceived as prohibitively expensive for many small businesses. Both Congress and SBA understand the importance of ensuring certification is available to every eligible concern. As such, Congress authorized several free certification options, and SBA will not distinguish between concerns based on how they were certified. No firm will be required to pay a fee for certification. Again, it is up to each firm seeking WOSB or EDWOSB certification to determine which method of certification makes sense for it. One commenter opposed third-party certification because of the ''frequency of certification'' associated with third-party certifiers. Currently, third-party-

certified concerns are recertified annually. Under the new regulations, all concerns, whether certified directly by SBA or otherwise, will be required to attest to SBA annually that they remain eligible for the Program and undergo a full program examination every three years. As such, third-party-certified concerns will not face a greater administrative burden than concerns certified via other processes. SBA updated subpart D to discuss the requirements for recertification, and these changes are discussed in greater detail below.

SBA received six comments on § 127.300(b), which discusses how SBA will certify concerns as EDWOSBs. One commenter supported having an array of certification options. Two others requested clarification about how SBA will accept certification from other government entities. SBA has provided additional detail about what applicants must submit in order to demonstrate certification via non-SBA government entity certifiers in § 127.303.

SBA received seven comments related to § 127.300(b)(2), which states that a woman- or women-owned business that is a certified 8(a) BD participant qualifies as an EDWOSB. One commenter said that EDWOSB should be a ''sub-set'' of the 8(a) BD Program. Another commenter said that EDWOSB certification should automatically confer 8(a) BD certification. There is significant overlap between the eligibility requirements of the two programs, but they are not identical. The most important difference is that a concern can participate in the WOSB Program for as long as it is eligible, whereas participation in the 8(a) BD Program is limited to nine years. Further, the 8(a) BD Program has unique eligibility requirements that do not apply to the WOSB Program. In particular, the 8(a) BD Program requires the principal of a business to be socially disadvantaged in order to qualify for participation, and women as a group are not presumed to be socially disadvantaged. An individual seeking to qualify as socially disadvantaged based on her status as a woman must demonstrate that she personally has suffered discrimination or bias that has adversely affected her entry into or advancement in the business world. Determining whether an individual woman can demonstrate social disadvantage requires fact-specific analysis and cannot be automatically presumed. Thus, EDWOSB qualification does not automatically confer 8(a) BD qualification, even though the converse is true. In addition, the 8(a) BD certification process requires an applicant to demonstrate that it possesses the necessary ''potential for success,'' as defined in the 8(a) BD regulations, and WOSB certification has no corresponding requirement.

Two commenters said that SBA should adjust goaling requirements so that more 8(a) BD awards are apportioned for WOSBs/EDWOSBs. Goaling thresholds are set by Congress and SBA establishes them in a way that seeks to ensure that the statutory goal is met Government-wide. Although SBA has some discretion in the setting of a particular agency's goals, SBA cannot establish goals that do not meet the overall Government-wide statutory goal. SBA is always seeking to enhance small business participation in Federal contracting and will continue to do so. One commenter suggested that the Program should mirror the outreach and public education efforts of the 8(a) BD Program because the contracting community is not aware of or familiar with WOSB and EDWOSB opportunities. SBA hopes that the increased public outreach during the rulemaking process has helped ameliorate this perceived lack of awareness and that the certification application process will further familiarize concerns with Program benefits and responsibilities. SBA adopts the proposed language as final.

One commenter opposed § 127.300(b)(3), specifically asking why veteran-owned small business that are owned and controlled by women could not be automatically certified as WOSBs, but rather had to submit additional information to SBA to be so designated. CVE eligibility is not based on gender and thus evidence of CVE certification would not automatically communicate that an applicant had necessarily satisfied all Program requirements, including 51% ownership and control by a woman or women. A CVE certification demonstrates that a firm is owned and controlled by one or more veterans or service-disabled veterans, but not necessarily by women veterans or women service-disabled veterans. The process for CVE-certified small businesses will be to demonstrate that the individuals certified to own and control the business concern are women and, if they seek EDWOSB status, that they are economically disadvantaged. CVE certification alone would also not demonstrate an applicant's economic disadvantage, which is a necessary component of EDWOSB participation. SBA adopts the proposed language as final.

SBA did not receive any comments on proposed § 127.301, which provides guidance on when concerns should apply for Program certification. As such, SBA adopts it as final in this rule. SBA did, however, receive comments regarding who will be deemed certified as a WOSB or EDWOSB upon this rule becoming effective and, therefore, be immediately eligible to be awarded set-aside and sole source WOSB and EDWOSB contracts. SBA agrees that this is an important issue that should be clarified.

Pursuant to the underlying statutory authority, a concern must be certified as a WOSB or EDWOSB in order to be awarded a WOSB or EDWOSB set-aside or sole-source contract. The change in the regulations implementing that statutory provision does not affect contracts previously awarded through the Program, so a concern that was previously awarded a WOSB or EDWOSB contract may continue to perform that contract and the procuring agency may continue to count the contract towards its WOSB goal. Once this rule is effective, however, a concern performing on a long-term WOSB or EDWOSB contract (*i.e.,* one in excess of five years) must represent that it is a certified WOSB or EDWOSB in order for the award to continue to count towards an agency's WOSB goal. For new WOSB and EDWOSB set-aside contracts, a concern must be able to demonstrate that it has applied for certification before the date it submitted a bid, and that it has not previously sought and been denied certification. For new WOSB or EDWOSB sole-source contracts, a concern must already be certified at the time it seeks to obtain the sole-source contract. In both situations, the concern must be certified prior to award. Concerns that are owned and controlled by one or more women and certified through the 8(a) BD Program, concerns that are third-party certified, and concerns that were subject to a program examination or status protest and received a concomitant positive decision in the three years prior to the rule's effective date will all be considered certified the day the rule is effective. SBA trusts this information will help concerns plan for when and how to apply for certification so that they are ready to compete for new WOSB and EDWOSB set-aside contracts and able to continue working on existing set-aside contracts without interruption.

SBA received one comment on § 127.302, which provides that concerns will apply for certification on *certify.sba.gov* or any successor system. The commenter opposed having an electronic-only application process. SBA believes that an electronic process is the most efficient and timely way to

process the number of applications SBA is expecting once the rule is effective. In today's business environment, SBA believes that every business concern seeking to contract with the Federal Government must have access to a computer and that this is the easiest and best way to transmit and process applications. SBA adopts the proposed language and will remove ''from SBA'' from the heading in the final rule.

SBA did not receive any comments on § 127.303, which outlines what documentation concerns must submit for certification. Based on questions and feedback received on related sections, SBA has expanded § 127.303 in the final rule. This section now refers to the documentation applicants must submit for each of the certification options detailed in § 127.300(a) and (b). This additional information is intended to help applicants better prepare their applications and will hopefully facilitate a more efficient process.

SBA received two comments on § 127.304, which discusses how SBA will process applications. Both commenters opposed the 90-day timeframe for making determinations after receipt of a completed application. Neither commenter offered an alternative timeframe that would better suit the needs of the small business community. This 90-day processing time aligns with that of the 8(a) BD and HUBZone Programs, and SBA believes that is appropriate for the WOSB Programs as well. As such, SBA adopts the proposed language as final.

SBA received eight comments on §§ 127.305 and 127.306, which dealt with how and when applicants could reapply or seek recertification after being declined or decertified. Five commenters opposed the provisions, two were supportive, and one sought clarification. The commenters in opposition vigorously disagreed with the proposed one-year ''cooling-off'' period, during which time a concern could not reapply for Program certification. One commenter noted that not being able to appeal or rectify a negative certification decision until a year has passed was ''the worst of both worlds.'' In response to the comments, SBA has amended these provisions. The final rule removes proposed § 127.305 (reconsideration) and moves the language in proposed § 127.306 to that section. The final rule also amends the language in proposed § 127.306 (now § 127.305) to align with the HUBZone Program regulations, which do not have a reconsideration or appeal process and instead allow concerns to remedy their eligibility deficits and reapply after 90 days. In addition to responding to industry concerns, mirroring the HUBZone Program regulations has the added benefit of furthering SBA's aim of promoting consistency between its programs.

Requirements for Third-Party Certifiers

SBA proposed to amend subpart C of part 127 to establish procedures for Third-Party Certification in the context of a required certification program. In § 127.350, SBA proposed that all Third-Party Certifiers must be approved by SBA. Under this rule, an approved third-party certifier need not be a non-profit entity. SBA also clarified that a third-party certifier is a non-governmental entity, in contrast to the governmental certifications (8(a) BD and VA CVE) that SBA will accept for WOSB/EDWOSB certification purposes. The proposed rule also stipulated what concerns must do to be certified by a third-party certifier.

SBA received five comments on revised §§ 127.350–127.356. One commenter said that new third-party certifiers must be ''credible.'' SBA does not have concerns about the credibility of third-party certifiers. The statutory language stipulates that only SBA-approved third-party certifiers are authorized to certify concerns. There are currently four SBA-approved third-party certifiers. In advance of effectuating the final rule, SBA has focused on providing clarity and guidance on the certification process as a whole and not on third-party certifiers specifically, but foresees expanding the list of authorized third-party certifiers in the future. All third-party certifiers participating in the Program are required to abide by both the regulations in part 127, and their agreements with SBA. SBA communicates regularly with third-party certifiers, collects monthly data about the WOSBs and EDWOSBs they work with, and periodically reviews their application processes. This is all intended to ensure that SBA's eligibility requirements are consistently applied. As such, SBA feels confident the third-party certifiers are, and will continue to be, credible partners in the certification process.

Three other commenters sought clarification on different provisions in this section. In response to § 127.353(b), one commenter suggested SBA provide language that third-party certifiers can use to advise applicants that SBA offers a free certification option. SBA agrees that providing that language would be helpful, but including it in the regulations would preclude the Agency from refining the language in response to feedback from applicants once the certification process is underway. SBA will plan to communicate with third-party certifiers in the coming months on what the advisory language should look like. Similarly, another commenter requested additional detail about what information SBA will require in reports from third-party certifiers under § 127.355(a). The proposed language was drafted deliberately to allow for SBA to make determinations about what third-party certifiers will have to submit regularly once the certification program is underway and it becomes clear what type of information would be helpful. A third commenter asked for clarification on the timeline for periodic compliance reviews, which SBA believes is adequately spelled out in § 127.355(b)(1).

Finally, several commenters opposed this section on the grounds that SBA should not allow for-profit entities to certify concerns, that there will be too many discrepancies between third-party certification and certification via other entities, and that ''SBA's failure to act appropriately in the budgetary process'' deprived the Program of the funds necessary to manage a certification process. On the first point, the authorizing legislation does not limit third-party certifier participation to entities that are non-profit, so going forward, SBA will not require third-party certifiers to maintain non-profit status. In response to the second concern, SBA reiterates that all certifying entities will assess applicants against the same eligibility requirements. The third point, which expressed concern that the certification program was not appropriately funded, was echoed by many commenters. All of these commenters used identical language to urge SBA to, ''act immediately to move budgetary (taxpayer) funds from programs that have not been sanctioned by Congress towards the full and effective implementation of this nearly twenty-year-old Congressionally-mandated program and advise Congress of the full budget needed so that SBA may receive the necessary funding to assure this program is well run.'' SBA appreciates these commenters' sense of urgency about the implementation of the certification program and understands commenters' frustrations. SBA notes, however, that the requirement that a concern must be certified as a WOSB or EDWOSB in order to be awarded a set-aside or sole source contract under the Program was enacted as part of 2015 NDAA. Further, the Agency's ability to spend funds that ''have not been sanctioned by Congress'' is proscribed by law, and its ability to shift money

between unrelated programs is limited. SBA believes Congress is well-apprised of the scope and breadth of the certification program. The plan continues to be to stand up Program certification by leveraging existing resources.

SBA did not receive specific comments on § 127.354, but in light of the broader concerns expressed about discrepancies between third-party certification and certification by a government entity, the final rule revises the heading of this paragraph to emphasize that SBA will require third-party certifiers to follow detailed, uniform guidance to demonstrate capability to certify concerns.

Proposed § 127.357(a) permitted a concern found to be ineligible by a third-party certifier to request reconsideration and a redetermination. Proposed § 127.357(c) prohibited a declined concern from reapplying for WOSB or EDWOSB certification by SBA or a third-party certifier for a one-year period, and proposed § 127.357(d) prohibited concerns from reapplying through another third-party certifier during that time. In light of the changes to § 127.305, which shortens the reapplication timeframe from one year to 90 days, § 127.357 is omitted in the final rule. As discussed, SBA's aim is to ensure consistency and uniformity between the certification options, both as a policy matter and in response to the 168 commenters who stressed the importance of, ''a fair and unified set of requirements and application processes for all participants.'' Allowing concerns that opt for third-party certification to seek reconsideration if they are declined would privilege them over concerns that apply for certification from SBA or another government entity, because the latter groups will not have a reconsideration option. Removing this proposed section better facilitates alignment between the certification options and is responsive to stakeholders' concerns.

SBA received eight comments on proposed § 127.400, which requires that concerns recertify eligibility every three years. Four commenters supported recertification every three years and four opposed. Of the four commenters opposed, three suggested annual recertification because that is what SBA's other programs require. SBA believes that a helpful comparison is to look at the requirements of the HUBZone Program. Per the HUBZone Program regulations at § 126.500, SBA conducts a program examination and recertification of each HUBZone concern every three years, and concerns are required to represent annually that they continue to meet all program criteria. In contrast, proposed § 127.400 would only have required WOSBs and EDWOSBs to recertify every three years. In an effort to more closely align the WOSB Program regulations with other SBA regulations, and in response to the commenters concerned that recertification every three years is insufficient, the final rule revises § 127.400 to require concerns to annually attest to SBA that they meet the Program requirements, and undergo a full program examination and recertification every three years. SBA added two examples to this section to help illustrate the recertification requirements detailed in the final rule.

Proposed § 127.401 provided that all certified concerns have an affirmative duty to notify SBA of any material changes in writing. SBA did not receive any comments on this section and adopts the proposed language as final.

Proposed § 127.402 addressed the failure of a concern to recertify every three years or to notify SBA of a material change. SBA did not receive any comments on this section. In light of the changes to the rest of this subpart, § 127.402 is omitted in the final rule and the subsequent sections have been renumbered. The information detailed in proposed § 127.402 is included in § 127.405 (formerly § 127.406) in the final rule, which discusses the consequences if SBA is unable to determine a concern's eligibility or determines that a concern is no longer eligible for the Program.

Proposed § 127.403 detailed how SBA would conduct program examinations and specifically how program examinations would change after the certification process is implemented. SBA did not receive any comments on this section. To align with the changes discussed above, SBA has renumbered sections §§ 127.403–127.406. Aside from renumbering, SBA adopts as final the language in proposed § 127.403 (now § 127.402).

Proposed § 127.404 detailed when SBA was authorized to conduct program examinations. SBA did not receive any comments on this section. SBA revised this section in the final rule to reflect that concerns will undergo program examinations every three years in accordance with the recertification process set forth in § 127.400. SBA also renumbered this section to § 127.403 in the final rule. SBA adopts as final the revised and renumbered paragraph.

Proposed § 127.405 authorized SBA to request additional information, in addition to material already submitted, when conducting a program examination. SBA did not receive any comments on this section. SBA renumbered this section to § 127.404 in the final rule. SBA adopts as final the proposed language and renumbered paragraph.

Proposed § 127.406 authorized SBA to decertify concerns that fail to provide or maintain the required certifications or documents. SBA did not receive any comments on this section. This section has been renumbered to § 127.405 in the final rule. SBA also revised this provision in the final rule to more clearly lay out the causes for which SBA can propose decertification, including a failure to follow the recertification processes in § 127.400. Paragraph (a) describes the steps SBA will take to propose decertification and how a concern must respond to a notice of proposed decertification. Paragraph (b) states that SBA's decision on decertification is final and cannot be appealed, and paragraph (c) permits concerns to reapply to the Program after decertification. SBA adopts as final the revised and renumbered paragraph.

The final rule revises § 127.503(h)(2) to confirm that if a concern cannot recertify as a WOSB or EDWOSB by the end of the fifth year of a long-term contract, the procuring agency can no longer count awards made pursuant to that contract as WOSB/EDWOSB awards. SBA's rules have long required recertification of size for contracts with a duration of more than five years. If a concern is unable to recertify its size, the contracting officer could no longer consider awards to that concern towards the procuring agency's small business goals. The Agency's intent in drafting § 127.503(h)(2), and its corresponding paragraphs in §§ 124.1015(f), 125.18(f), and 126.601(i), was to mandate that contracting officers must request that a concern recertify its status on long-term contracts, including Multiple Award Contracts. If a concern were unable to recertify its status as a WOSB, for example, the contracting officer could no longer consider awards to that concern towards the procuring agency's WOSB goals. Procuring agencies understood this was SBA's intent in drafting §§ 124.1015, 125.18(e), 126.601(h), and 127.503(h)(2), and have read them accordingly. The revision to these paragraphs in the final rule confirms that agencies correctly deduced SBA's intent and brings the regulatory text into alignment with already-existing practice, which SBA believes will provide helpful clarity to small businesses and contracting officers.

SBA proposed to remove § 127.505, as the pertinent information in this provision was already detailed in

§ 121.406(b). SBA did not receive any comments on this proposed change and finalizes the deletion in the final rule.

SBA proposed to revise § 127.604(f)(4) to clarify that concerns found to be ineligible would need to reapply, rather than request a reexamination. SBA did not receive any comments on this change and adopts the proposed language as final, except for updating a citation to the appropriate regulation for reapplication procedures (formerly at § 127.306 and now at § 127.305).

Compliance With Executive Orders 12866, 13563, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is a significant regulatory action for the purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act.

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

The U.S. Small Business Administration (SBA) is required by statute to administer the WOSB Federal Contract Program (WOSB Program). The Small Business Act (Act) sets forth the certification criteria for the WOSB Program. Specifically, the Act states that a WOSB or EDWOSB must, ''be certified by a Federal agency, a State government, the Administrator, or a national certifying entity approved by the SBA Administrator, as a small business concern owned and controlled by women.'' 15 U.S.C. 637(m)(2)(E).

The Federal Acquisition Regulation (FAR) and SBA regulations require that in order to be certified as a WOSB or EDWOSB a small business concern must provide documents supporting its WOSB or EDWOSB status to SBA. *See* 13 CFR 127.300 and FAR 19.1503(b)(3). The specific documents concerns are required to provide are outlined in § 127.303. The Act also states that the SBA is authorized to conduct eligibility examinations of any certified WOSB or EDWOSB, and to handle protests and appeals related to such certifications. 15 U.S.C. 637(m)(5)(A) and (5)(B).

Under the current system, WOSBs and EDWOSBs may be certified by third-party certifiers, or they may essentially self-certify and upload the required documents to *sba.certify.gov.* In order to award a WOSB set-aside or sole source contract, the contracting officer must document that the contracting officer reviewed the concern's certifications and documentation. 13 CFR 127.503(g); FAR 19.1503(b)(3). The lack of required certification, coupled with the requirement that the contracting officer must verify that documents have been uploaded, may contribute to reluctance by procuring agencies to use the program, resulting in the failure to meet the statutory goal of 5% of all prime contract dollars being awarded to WOSBs. In FY 2018, the government-wide WOSB goal of 5% was not met with actual performance at 4.75% ($22.9B). The government has only met the goal once (FY 2015). While the amount of dollars awarded to WOSBs under the set aside program is trending up, they still account for less than 0.016% of dollars awarded to WOSBs. A certification could help entice agencies to set aside more contracts for WOSBs, so that the government can meet the statutory 5% goal.

2. What are the potential benefits and costs of this regulatory action?

The benefit of this regulation is a significant improvement in the confidence of contracting officers to make Federal contract awards to eligible concerns. Under the existing system, the burden of eligibility compliance is placed upon the awarding contracting officer. Contracting officers must review the documentation of the apparent successful offeror on a WOSB or EDWOSB contract. Under this rule, the burden is placed upon SBA and/or third-party certifiers. All that a contracting officer needs to do is to verify that the concern is in fact a certified WOSB or EDWOSB in SAM. A contracting officer would not have to look at any documentation provided by a concern or prepare any internal memorandum memorializing any review. This will encourage more contracting officers to set aside opportunities for WOSB Program participants as the validation process will be controlled by SBA in both SAM and DSBS. Increased procurement awards to WOSB concerns can further close a gap of under-representation of women in industries where in the aggregate WOSB represent 12 percent of all sales in contrast with male-owned businesses that represent 79% of all sales (per SBA Office of Advocacy Issue Brief Number 13, dated May 31, 2017 *https://www.sba.gov/sites/default/files/advocacy/Womens-Business-Ownership-in-the-US.pdf*).

Another benefit of this rule is to reduce the cost associated with the time required for completing WOSB certification by replacing the WOSB Program Repository with *Certify.SBA.gov* (''Certify'') in the regulation. It is also anticipated that the WOSB certification methodology and likely increased use of WOSB/EDWOSB set asides will likely increase program participation levels. Under the prior WOSB Program Repository, SBA determined that the average time required to complete the process required by the WOSB Program Repository was two hours, whereas the use of Certify requires only one hour. Across an estimated 12,347 firms, the total cost savings is significant, as discussed below. Another potential benefit is the reduction of time and costs to WOSB firms through the reduction of program participation costs. By successfully leveraging technology, SBA has reduced the total cost of burden hours substantially.

Based on the calculations below, the total estimated number of respondents (WOSBs and EDWOSBs) for this collection of information varies depending upon the types of certification that a business concern is seeking. For initial certification, the total estimated number of respondents is 9,349. The total number was calculated using the two-year average number of business concerns that have provided information through Certify from March 2016 through February 2018. For annual updates and new certifications, the total number is 12,347. For examinations and protests, the total number is 130.

Type of certification	Number of respondents	Source
Initial certification	9,349	Average annual number of respondents to Certify between March 2016 and February 2018.
New certifications each year	500	Program participation is expected to remain constant after initial year of certification, with 500 new certifications annually.
Annual updates to certification	11,847	Program participation is expected to remain constant after initial year of certification, with a reduction of 500 participants annually through attrition.
Total annual responses	12,347	Annual new certifications plus annual updates.

Each respondent submits one response at the time of initial certification and one at the time of annual update. Estimated burden hours vary depending upon the type of certification that a WOSB or EDWOSB pursues. SBA conducted a survey among a sample of entities that assist WOSBs and EDWOSBs to provide information through Certify. The majority of those surveyed stated that for initial certifications the estimated time for completion is one hour per submission. For annual updates, because of the need to submit little if any additional information, the estimated burden is 0.5 hour per submission. For examinations and protests, the estimated burden is 0.25, which is much lower because firms have already provided the documentation referred to in 13 CFR 127.303 through Certify. It is estimated that the initial certification will involve 9,349 existing participants and 2,998 new respondents in the first year. After the first year, initial certifications are expected for 500 new respondents annually with an additional 11,847 annual certifications for existing participants for a total of 12,347 participants in each succeeding year. The participant level is expected to remain stable at 12,347 participants annually with 500 new respondents and 500 attritions from the program annually. Based on the number of protests and appeals received in years past, 130 respondents are expected to participate in protests and appeals. The respondent's cost of burden hours for a five-year period and average is provided in the following table and detailed below.

COST OF BURDEN HOURS—5 YEAR COST ESTIMATE AND AVERAGE

Year	Initial—existing 1 hour at $164.23 per participant	Initial—new participants 1 hour at $164.23 per participant	Annual updates .5 hour at $164.23 per participant	Protests and appeals .25 hour at $164.23 per participant	Annual totals
Number of Program Participants					
1	9,349	2,998		130	12,477
2		500	11,847	130	12,477
3		500	11,847	130	12,477
4		500	11,847	130	12,477
5		500	11,847	130	12,477
Costs					
1	$1,535,386	$492,362		$5,337	$2,033,085
2		82,115	972,816	5,337	1,060,269
3		82,115	972,816	5,337	1,060,269
4		82,115	972,816	5,337	1,060,269
5		82,115	972,816	5,337	1,060,269
5 Year Total					6,274,161
Annual Cost Avg					1,254,832

Initial certification—transition of existing participants (one-time cost):

Estimated officer's salary = $164.23/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area, plus an additional 100% to account for the cost of benefits and overhead, which would be equivalent to a senior manager in an average small business firm).

Total estimated burden: 9,349 × 1 hour × $164.23/hour = $1,535,386.

Initial certification—new participants (first year cost):

Estimated officer's salary = $164.23/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area, plus an additional 100% to account for the costs of benefits and overhead, which would be equivalent to a senior manager in an average small business firm).

Total estimated burden: 2998 × 1 hour × $164.23/hour = $492,362.

Initial certification—new participants (cost for each succeeding year after initial year):

Estimated officer's salary = $164.23/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area, plus an additional 100% to account for the cost of benefits and overhead, which would be equivalent to a senior manager in an average small business firm).

Total estimated burden: 500 × 1 hour × $164.23/hour = $82,115.

Annual update:

Estimated officer's salary = $164.23/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area, plus an additional 100% to account for the cost of benefits and overhead, which would

be equivalent to a senior manager in an average small business firm).

Total estimated burden: 11,847 × .5 hour × $164.23/hour = $72,816.

Examinations and Protests (each year):

Estimated officer's salary = $164.23/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area, plus an additional 100% to account for the cost of benefits and overhead, which would be equivalent to a senior manager in an average small business firm).

Total estimated burden: 130 × .25 hour × $164.23/hour = $5,337.

Previously, the estimated respondents' cost of burden hours was determined to be $4,066,170 for the initial year of certification and $2,120,538 in subsequent years. By successfully leveraging technology, SBA has reduced the cost of burden hours substantially, from $4,066,170 to $2,033,085 in the initial year of certification, and from $2,120,538 to $1,060,269 in subsequent years. This results in annual savings of $2,033,085 initially and $1,060,269 each year thereafter, with a total five-year savings of $6,274,161 for WOSBs to redirect as revenue generating resources to close the noted revenue disparity with male-owned businesses. SBA believes that there are no additional capital or start-up costs or operation and maintenance costs and purchases of services costs to respondents as a result of this rule because there should be no cost in setting up or maintaining systems to collect the required information. As stated previously, the information requested should be collected and retained in the ordinary course of business.

SBA estimates the cost to the government of implementing the certification program to be $3,126,184 in the initial year of certification, and approximately $2,704,140 annually thereafter. SBA is currently working to enhance its existing information technology infrastructure, Certify, to expand its capacity to support SBA's government contracting certification programs. The cost to develop the WOSB and EDWOSB certification processing systems in Certify is $1,654,000. After the initial improvements, Certify should not require a substantial investment of capital. In FY2020, SBA hired a Program Lead, Team Lead, and two Analysts, and brought on via internal transfer a third Analyst and a Marketing and Outreach specialist. The total cost of bringing onboard the new hires and backfilling the positions left vacant by the internal transfers is $1,472,184 (based on General Schedule 13 Step 1 through General Schedule 15 Step 1, Washington-Baltimore-Northern Virginia area plus 100% to account for the cost of benefits and overhead). In the future, the Program hopes to hire an additional six FTEs to further support Program Operations, the cost of which would be $1,231,956 (based on General Schedule 13 Step 1, Washington-Baltimore-Northern Virginia area plus 100% to account for the cost of benefits and overhead).

3. What are the alternatives to this rule?

This rule is required to implement specific statutory provisions which require promulgation of implementing regulations. One alternative considered would be to rely solely on third-party certifiers to certify WOSBs and EDWOSBs. However, there is a cost to small businesses for third-party certifiers. Firms submit the same documentation to third-party certifiers that would submit to SBA, but third-party certifiers charge on average $380 annually. Consequently, the cost of relying completely on third-party certifiers would be $3,552,620 a year (9,349 initial applicants × $380). If third-party certifiers were used for the anticipated increase to 12,477 annual participants, the cost would be $4,741,260. In addition, SBA maintains that certification for Federal procurement purposes is an inherently governmental function. Consequently, even if SBA utilized third-party certifiers for an initial or preliminary review, SBA or a governmental entity would still have to be involved in reviewing those certifications. In addition, there is an intended benefit of certification. The intent is to increase confidence in the eligibility of firms so that contracting officers and activities utilize the sole source authority. Although trending upwards, the government-wide WOSB goal of 5% was not met with actual performance at 4.75%. In addition, WOSB/EDWOSB set-aside and sole-source awards only accounted for 4.1% of total dollars awarded to WOSBs in FY 2018. The Federal Government has met the statutory WOSB goal of 5% of total dollars awarded to WOSBs only once (FY 2015).

Executive Order 13563

A description of the need for this regulatory action and the benefits and costs associated with this action, including possible distributional impacts that relate to Executive Order 13563, are included above in the Regulatory Impact Analysis under Executive Order 12866. As part of its ongoing efforts to engage stakeholders in the development of its regulations, SBA issued an Advance Notice of Proposed Rulemaking (ANPR) on December 18, 2015. 80 FR 78984. The ANPR solicited public comments to assist SBA in drafting a proposed rule to implement a WOSB/EDWOSB certification program. SBA received 122 comments in response to the ANPR. SBA issued a Proposed Rule in the **Federal Register** on May 14, 2019. 84 FR 21256. The Proposed Rule solicited public comments to assist SBA in drafting a final rule to implement a WOSB/EDWOSB certification program. SBA received 898 comments from 307 commenters in response to the Proposed Rule. SBA has reviewed all the comments while drafting this final rule.

Executive Order 12988

For purposes of Executive Order 12988, SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13771

This rule is an Executive Order 13771 regulatory action with annualized net costs of $1,514,179 and a net present value of $21,631,135, both in 2016 dollars. Details on the estimated costs of this rule can be found in the rule's economic analysis. Table 1 summarizes the savings and costs of the first three years of implementation, with the savings and costs in Year 3 expected to continue into perpetuity. Table 2 presents the annualized savings in perpetuity using a 7% discount rate, in 2016 dollars.

TABLE 1—SCHEDULE OF COSTS/(SAVINGS) OVER 3 YEAR HORIZON, CURRENT DOLLARS

	Savings	Costs
Year 1	$(2,033,085)	$3,126,184
Year 2	(1,060,269)	2,704,140
Year 3	(1,060,269)	2,704,140

TABLE 2—ANNUALIZED SAVINGS IN PERPETUITY WITH 7% DISCOUNT RATE, 2016 DOLLARS

	Estimate
Annualized Savings	(1,058,441)
Annualized Costs	2,572,621
Annualized Net Costs	1,514,179

Paperwork Reduction Act, 44 U.S.C. Ch. 35

In carrying out its statutory mandate to provide oversight of certification related to SBA's WOSB Federal Contract Program, SBA is currently approved to collect information from the WOSB applicants or participants through SBA Form 2413, and for EDWOSB applicants or participants, through SBA Form 2414. (OMB Control Number 3245–0374, Certification for the Women-Owned Small Business Federal Contract Program). This collection of information also requires submission or retention of documents that support the applicant's certification. The information collected through Certify includes eligibility documents previously collected in the WOSB Repository, and information collected on SBA Form 2413 (WOSB) and SBA Form 2414 (EDWOSB). SBA revised this information collection in 2018 to establish that the Agency has discontinued these paper forms and will collect the information and supporting documents electronically through Certify, as well as to make minor changes to the requests for information.

As discussed above, this rule will fully implement the statutory requirement for small business concerns to be certified by a Federal agency, a State government, SBA, or a national certifying entity approved by SBA, in order to be awarded a set-aside or sole source contract under the WOSB program. As a result of these changes, the rule eliminates the option to self-certify for WOSB/EDWOSB set-aside and sole source contracts, permits applicants to provide their CVE certification, along with documentation that they meet Program eligibility requirements, as a certification option, and clarifies the third-party certification requirements.

The clarifications for authorized Third-party certifiers impose an additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35. A summary description of the reporting requirement, description of respondents, and estimate of the annual burden is provided below.

Summary Description of Compliance Information: Third-party certifiers will be required to provide SBA with monthly reports that include the number of applications received, number of applications approved and denied, and other information that SBA determines may be helpful for ensuring that third-party certifiers are meeting their obligations or information or data that may be useful for improving the program.

Description of and Estimated Number of Respondents: There are four third-party certifiers authorized by SBA to certify WOSB and EDWOSB applicants. The four third-party certifiers will be required to submit reports to SBA monthly, for a total of 48 reports.

Respondents: 4.

Responses per respondent: 12.

Total annual responses: 48.

Preparation hours per response: 0.5 hour.

Total response burden hours: 24 hours.

Cost per hour: $67.78/hour (based on 2018 Median Pay for accountants and auditors, Bureau of Labor Statistics, plus an additional 100% to account for cost of benefits and overhead).

Total estimated annual cost burden: $1,626.72.

SBA will revise the information collection accordingly and resubmit to OMB for review and approval.

Regulatory Flexibility Act, 5 U.S.C. 601–612

According to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, when an agency issues a rulemaking, it must prepare a regulatory flexibility analysis to address the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines ''small entity'' to include ''small businesses,'' ''small organizations,'' and ''small governmental jurisdictions.'' This rule concerns various aspects of SBA's contracting programs. As such, the rule relates to small business concerns, but would not affect ''small organizations'' or ''small governmental jurisdictions.'' SBA's contracting programs generally apply only to ''business concerns'' as defined by SBA regulations, in other words, to small businesses organized for profit. ''Small organizations'' or ''small governmental jurisdictions'' are non-profits or governmental entities and do not generally qualify as ''business concerns'' within the meaning of SBA's regulations.

As stated in the regulatory impact analysis, this rule will impact approximately 9,000–12,000 women-owned small businesses. These businesses will have to apply to be certified as WOSBs or EDWOSBs to SBA or third-party certifiers in order to be eligible to be awarded any WOSB or EDWOSB set-aside contract. However, SBA has minimized the impact on WOSBs by accepting certifications already conferred by SBA (through the 8(a) BD Program or a positive determination after a status protest or program examination), VA, and third-party certifiers. The costs to WOSBs for certification should be de minimis, because the required documentation (articles of incorporation, bylaws, stock ledgers or certificates, tax records, etc.) already exists. In addition, this information is already required to be provided either to third-party certifiers, governmental certifying entities, or to SBA through Certify. SBA expects WOSBs to see a reduction in burden because under the prior WOSB Program Repository, SBA determined that the average time required to complete the process required by the WOSB Program Repository was two hours, whereas the use of Certify results requires only one hour due to technological improvements. Thus, the Administrator certifies that the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

List of Subjects

13 CFR Part 124

Administrative practice and procedure, Government procurement, Minority businesses, Reporting and recordkeeping requirements, Technical assistance.

13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small business, Technical assistance, Veterans.

13 CFR Part 126

Administrative practice and procedure, Government procurement, Penalties, Reporting and recordkeeping requirements, Small business.

13 CFR Part 127

Government contracts, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble, SBA amends 13 CFR parts 124, 125, 126, and 127 as follows:

PART 124—8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

■ 1. The authority citation for part 124 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), and 644.

■ 2. Amend § 124.104 as follows:
■ a. Remove the first two sentences of paragraph (c)(2) introductory text and add one sentence in their place;
■ b. Revise the first sentence of paragraph (c)(2)(ii);
■ c. Remove the first two sentences of paragraph (c)(3)(i) and add one sentence in their place; and
■ d. Revise the first sentence of paragraph (c)(4).

The additions and revisions read as follows:

§ 124.104 Who is economically disadvantaged?

* * * * *

(c) * * *

(2) * * * The net worth of an individual claiming disadvantage must be less than $750,000. * * *

* * * * *

(ii) Funds invested in an Individual Retirement Account (IRA) or other official retirement account will not be considered in determining an individual's net worth. * * *

* * * * *

(3) * * * (i) SBA will presume that an individual is not economically disadvantaged if his or her adjusted gross income averaged over the three preceding years exceeds $350,000. * * *

* * * * *

(4) * * * An individual will generally not be considered economically disadvantaged if the fair market value of all his or her assets (including his or her primary residence and the value of the applicant/Participant firm) exceeds $6 million. * * *

■ 3. Amend § 124.1015 by adding a sentence at the end of paragraph (f)(2) to read as follows:

§ 124.1015 What are the requirements for representing SDB status, and what are the penalties for misrepresentation?

* * * * *

(f) * * *

(2) * * * If the business is unable to recertify its SDB status, the procuring agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its SDB goals.

* * * * *

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 4. The authority citation for part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657(f), and 657r.

■ 5. Amend § 125.18 by adding a sentence at the end of paragraph (e)(2) to read as follows:

§ 125.18 What requirements must an SDVO SBC meet to submit an offer on a contract?

* * * * *

(e) * * *

(2) * * * If the business is unable to recertify its SDVO status, the procuring agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its SDVO goals.

* * * * *

PART 126—HUBZONE PROGRAM

■ 6. The authority citation for part 126 continues to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a.

■ 7. Amend § 126.619 by adding a sentence at the end of paragraph (b) introductory text to read as follows:

§ 126.619 When must a certified HUBZone small business concern recertify its status for a HUBZone contract?

* * * * *

(b) * * * If the business is unable to recertify its HUBZone status, the procuring agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its HUBZone goals.

* * * * *

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

■ 8. The authority citation for part 127 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), 644 and 657r.

■ 9. Amend § 127.200 by adding paragraphs (c) and (d) to read as follows:

§ 127.200 What are the requirements a concern must meet to qualify as an EDWOSB or WOSB?

* * * * *

(c) *WOSB and EDWOSB certifications.* (1) A concern must be certified as a WOSB or EDWOSB pursuant to § 127.300 in order to be awarded a WOSB or EDWOSB set-aside or sole-source contract.

(2) Other women-owned small business concerns that do not seek WOSB or EDWOSB set-aside or sole-source contracts may continue to self-certify their status, receive contract awards outside the Program, and count toward an agency's goal for awards to WOSBs.

(d) *Suspension and debarment.* In order to be eligible for WOSB and EDWOSB certification and to remain certified, the concern and any of its owners must not have an active exclusion in the System for Award Management at the time of application or recertification.

■ 10. Amend § 127.203 by revising the first sentence of paragraph (b)(3) to read as follows:

§ 127.203 What are the rules governing the requirement that economically disadvantaged women must own EDWOSBs?

* * * * *

(b) * * *

(3) Funds invested in an Individual Retirement Account (IRA) or other official retirement account will not be considered in determining an individual's net worth. * * *

* * * * *

Subpart C—[Amended]

■ 11. Subpart C is amended by adding the undesignated center heading ''Certification'' above § 127.300.

■ 12. Effective October 15, 2020, § 127.300 is revised to read as follows:

§ 127.300 How is a concern certified as an WOSB or EDWOSB?

(a) *WOSB certification.* (1) A concern may apply to SBA for WOSB certification. There is no cost to apply to SBA for certification. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. SBA, in its discretion, may rely solely upon the information submitted to establish eligibility, may request additional information, or may verify the information before making a determination. SBA may draw an adverse inference and deny the certification where the concern fails to cooperate with SBA or submit information requested by SBA.

(2) A concern may submit evidence to SBA that it is a women-owned and controlled small business that is certified by the U.S. Department of Veterans Affairs Center for Verification and Evaluation as a Service-Disabled Veteran Owned Business or Veteran-Owned Business.

(3) A concern may submit evidence that it has been certified as a WOSB by an approved Third-Party Certifier in accordance with this subpart.

(b) *EDWOSB certification.* (1) A concern may apply to SBA for EDWOSB certification. There is no cost to apply to SBA for certification. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. SBA, in its discretion, may rely solely upon the information submitted to establish eligibility, may request additional information, or may verify the information before making a determination. SBA may draw an adverse inference and deny the certification where the concern fails to cooperate with SBA or submit information requested by SBA.

(2) A concern that is a certified participant in the 8(a) BD Program and owned and controlled by one or more women qualifies as an EDWOSB.

(3) A concern may submit evidence to SBA that it is an economically disadvantaged women-owned and controlled small business that is certified by the U.S. Department of Veterans Affairs Center for Verification and Evaluation as a Service-Disabled Veteran Owned Business or Veteran-Owned Business.

(4) A concern may submit evidence that it has been certified as an EDWOSB by a Third-Party Certifier under this subpart.

(c) *SBA notification and designation.* If SBA determines that the concern is a qualified WOSB or EDWOSB, it will issue a letter of certification and designate the concern as a certified WOSB or EDWOSB on the Dynamic Small Business Search (DSBS) system, or successor system.

■ 13. Sections 127.301 through 127.303 are revised to read as follows:

Sec.

* * * * *

127.301 When may a concern apply for certification?

127.302 Where can a concern apply for certification?

127.303 What must a concern submit for certification?

* * * * *

§ 127.301 When may a concern apply for certification?

A concern may apply for WOSB or EDWOSB certification and submit the required information whenever it can represent that it meets the eligibility requirements, subject to the restrictions of § 127.306. All representations and supporting information contained in the application must be complete and accurate as of the date of submission. The application must be signed by an officer of the concern who is authorized to represent the concern.

§ 127.302 Where can a concern apply for certification?

A concern seeking certification as a WOSB or EDWOSB may apply to SBA for certification via *https://certify.sba.gov* or any successor system. Certification pages must be validated electronically or signed by a person authorized to represent the concern.

§ 127.303 What must a concern submit for certification?

(a)(1) *SBA certification.* (i) To be certified by SBA as a WOSB or EDWOSB, a concern must provide documents and information demonstrating that it meets the requirements set forth in part 127, subpart B. SBA maintains a list of the minimum required documents that can be found at *https://certify.sba.gov* or any successor system. A concern may submit additional documents and information to support its eligibility. The required documents must be provided to SBA during the application process electronically. This may include, but is not limited to, corporate records, business and personal financial records, including copies of signed Federal personal and business tax returns, and individual and business bank statements.

(ii) A concern that is certified by the 8(a) BD Program and is owned and controlled by one or more women may use documentation of its most recent annual review, or documentation of its 8(a) acceptance if it has not yet had an annual review, in support of its application for certification.

(iii) A concern that is certified through a program examination or status protest may use the positive determination from SBA as evidence for certification.

(2) *CVE certification.* (i) To be certified as a WOSB, a concern that is certified by the U.S. Department of Veterans Affairs Center for Verification and Evaluation may submit documentation of its most recent certification, along with documentation confirming that it is owned and controlled by one or more women, in support of its application for certification.

(ii) To be certified as an EDWOSB, a concern that is certified by the U.S. Department of Veterans Affairs Center for Verification and Evaluation may submit documentation of its most recent certification, along with documentation confirming that it is owned and controlled by one or more women who are economically disadvantaged in accordance with § 127.203(b)(3), in support of its application for certification.

(3) *Third-Party Certifier certification.* A concern that is certified by a Third-Party Certifier must provide a current, valid certification from an entity designated as an SBA-approved certifier.

(b) In addition to the minimum required documents, SBA may request additional information from applicants in order to verify eligibility.

(c) After submitting the required documentation, an applicant must notify SBA of any changes that could affect its eligibility.

(d) If a concern was decertified or previously denied certification, it must include with its application for certification a full explanation of why it was decertified or denied certification, and what, if any, changes have been made. If SBA is not satisfied with the explanation provided, SBA will decline to certify the concern.

(e) If the concern was decertified for failure to notify SBA of a material change affecting its eligibility pursuant to § 127.401, it must include with its application for certification a full explanation of why it failed to notify SBA of the material change. If SBA is not satisfied with the explanation provided, SBA will decline to certify the concern.

■ 14. Effective October 15, 2020, §§ 127.304 and 127.305 are revised to read as follows:

§ 127.304 How is an application for certification processed?

(a) The SBA's Director of Government Contracting (D/GC) or designee is authorized to approve or decline applications for certification. SBA must receive all required information and supporting documents before it will begin processing a concern's application. SBA will not process incomplete applications. SBA will advise each applicant within 15 calendar days after the receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or clarification is required to complete the application. SBA will make its determination within ninety (90) calendar days after receipt of a complete package, whenever practicable.

(b) SBA may request additional information or clarification of information contained in an application or document submission at any time.

(c) The burden of proof to demonstrate eligibility is on the applicant concern. If a concern does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may presume that disclosure of the

missing information would adversely affect the business concern's eligibility or demonstrate a lack of eligibility in the area or areas to which the information relates.

(d) The applicant must be eligible as of the date it submitted its application and up until the time the D/GC issues a decision. The decision will be based on the facts contained in the application, any information received in response to SBA's request for clarification, and any changed circumstances since the date of application.

(e) Any changed circumstances occurring after an applicant has submitted an application will be considered and may constitute grounds for decline. After submitting the application and signed representation, an applicant must notify SBA of any changes that could affect its eligibility. The D/GC may propose decertification for any EDWOSB or WOSB that fails to inform SBA of any changed circumstances that affected its eligibility for the program during the processing of the application.

(f) If SBA approves the application, SBA will send a written notice to the concern and update *https://certify.sba.gov* or any successor system, and update DSBS and the System for Award Management (or any successor systems) to indicate the concern has been certified by SBA as a WOSB and/or EDWOSB.

(g) A decision to deny eligibility must be in writing and state the specific reasons for denial.

(h) SBA will send a copy of the decision letter to the electronic mail address provided with the application. SBA will consider any decision sent to this electronic mail address provided to have been received by the applicant concern.

(i) The decision of the D/GC to decline certification is the final agency decision. The concern can reapply for certification after ninety (90) days, as set forth in § 127.305.

§ 127.305 May declined or decertified concerns seek recertification at a later date?

(a) A concern that SBA or a third-party certifier has declined or that SBA has decertified may seek certification after ninety (90) days from the date of decline or decertification if it believes that it has overcome all of the reasons for decline or decertification and is currently eligible. A concern that has been declined may seek certification by any of the certification options listed in § 127.300.

(b) A concern found to be ineligible during a WOSB/EDWOSB status protest or program examination is precluded from applying for certification for ninety (90) days from the date of the final agency decision (the D/GC's decision if no appeal is filed or the decision of SBA's Office of Hearings and Appeals (OHA) where an appeal is filed pursuant to § 127.605).

■ 15. An undesignated center heading and § 127.350 are added to subpart C to read as follows:

Requirements for Third-Party Certifiers

§ 127. 350 What is a third-party certifier?

A third-party certifier is a non-governmental entity that SBA has authorized to certify that an applicant concern is eligible for the WOSB or EDWOSB contracting program. A third-party certifier may be a for-profit or non-profit entity. The list of SBA-approved third-party certifiers may be found on SBA's website at *sba.gov*.

■ 16. Effective October 15, 2020, § 127.351 is added to subpart C to read as follows:

§ 127.351 What third-party certifications may a concern use as evidence of its status as a qualified EDWOSB or WOSB?

In order for SBA to accept a third-party certification that a concern qualifies as a WOSB or EDWOSB, the concern must have a current, valid certification from an entity designated as an SBA-approved certifier. The third-party certification must be submitted to SBA through *https://certify.sba.gov* or a successor system.

■ 17. Sections 127.352 through 127.356 are added to subpart C to read as follows:

Subpart C—Certification of EDWOSB or WOSB Status

* * * * *

Sec.

§ 127.352 What is the process for becoming a third-party certifier?

SBA will periodically hold open solicitations. All entities that believe they meet the criteria to act as a third-party certifier will be free to respond to the solicitation.

§ 127.353 May third-party certifiers charge a fee?

(a) Third-party certifiers may charge a reasonable fee, but must notify applicants first, in writing, that SBA offers certification for free.

(b) The method of notification and the language that will be used for this notification must be approved by SBA. The third-party certifier may not change its method or the language without SBA approval.

§ 127.354 What requirements must a third-party certifier follow to demonstrate capability to certify concerns?

(a) All third-party certifiers must enter into written agreements with SBA. This agreement will detail the requirements that the third-party certifier must meet. SBA may terminate the agreement if SBA subsequently determines that the entity's certification process does not comply with SBA-approved certification standards or is not based on the same program eligibility requirements as set forth in subpart B of this part or if, upon review, SBA determines that the third-party certifier has demonstrated a pattern of certifying concerns that SBA later determines to be ineligible for certification.

(b) Third-party certifiers' certification process must comply with SBA-approved certification standards and track the WOSB or EDWOSB eligibility requirements set forth in subpart B of this part.

(c) In order for SBA to enter into an agreement with a third-party certifier, the entity must establish the following:

(1) It will render fair and impartial WOSB/EDWOSB Federal Contract Program eligibility determinations;

(2) It will provide the approved applicant a valid certificate for entering into the SBA electronic platform, and will retain documents used to determine eligibility for a period of six (6) years to support SBA's responsibility to conduct a status protest, eligibility examination, agency investigation, or audit of the third party determinations;

(3) Its certification process will require applicant concerns to register in SAM (or any successor system) and submit sufficient information as determined by SBA to enable it to determine whether the concern qualifies as a WOSB. This information must include documentation demonstrating whether the concern is:

(i) A small business concern under the SBA size standard corresponding to the concern's primary industry, as defined in § 121.107 of this part;

(ii) At least 51 percent owned and controlled by one or more women who are United States citizens; and

(4) It will not decline to accept a concern's application for WOSB/EDWOSB certification on the basis of race, color, national origin, religion, age, disability, sexual orientation, marital or family status, or political affiliation.

§ 127.355 How will SBA ensure that approved third-party certifiers are meeting the requirements?

(a) SBA will require third-party certifiers to submit monthly reports to SBA. These reports will contain information including the number of applications received, number of applications approved and denied, and other information that SBA determines may be helpful for ensuring that third-party certifiers are meeting their obligations or information or data that may be useful for improving the program.

(b) SBA will conduct periodic compliance reviews of third-party certifiers and their underlying certification determinations to ensure that they are properly applying SBA's WOSB/EDWOSB requirements and certifying concerns in accordance with those requirements.

(1) SBA will conduct a full compliance review on every third-party certifier at least once every three years.

(2) At the conclusion of each compliance review, SBA will provide the third-party certifier with a written report detailing SBA's findings with regard to the third-party certifier's compliance with SBA's requirements. The report will include recommendations for possible improvements, and detailed explanations for any deficiencies identified by SBA.

(c) If SBA determines that a third-party certifier is not properly applying SBA's eligibility requirements, SBA may revoke the approval of that third-party certifier.

§ 127.356 How does a concern obtain certification from an approved certifier?

(a) A concern that seeks WOSB or EDWOSB certification from an SBA-approved third-party certifier must submit its application directly to the approved certifier in accordance with the specific application procedures of the particular certifier.

(b) The concern must register in the System for Award Management (SAM), or any successor system.

(c) The approved certifier must ensure that all documents used to determine that a concern is approved for certification are uploaded in *https://certify.sba.gov* or any successor system.

■ 18. Effective October 15, 2020, §§ 127.400 and 127.401 are revised to read as follows:

§ 127.400 How does a concern maintain its WOSB or EDWOSB certification?

(a) Any concern seeking to remain a certified WOSB or EDWOSB must annually represent to SBA that it continues to meet all WOSB/EDWOSB eligibility criteria.

(1) Except as provided in paragraph (b) of this section, unless SBA has reason to question the concern's representation of its continued eligibility, SBA will accept the representation without requiring the certified WOSB or EDWOSB to submit any supporting information or documentation.

(2) The concern's recertification must be submitted within 30 days of the anniversary date of its original certification. The date of certification is the date specified in the concern's certification letter. If the concern fails to recertify, SBA may propose the concern for decertification pursuant to § 127.405.

(b) Any concern seeking to remain a certified WOSB or EDWOSB must undergo a program examination and recertify its continued eligibility to SBA every three years.

(1) SBA or a third-party certifier will conduct a program examination three years after the concern's initial WOSB or EDWOSB certification (whether by SBA or a third-party certifier) or three years after the date of the concern's last program examination, whichever date is later.

(i) *Example 1.* Concern A is certified by SBA to be eligible for the WOSB program on July 20, 2021. Concern A must recertify its eligibility to SBA between June 20, 2022 and July 19, 2022. Concern A will continue to be a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through July 19, 2023. Concern A must recertify its eligibility to SBA between June 20, 2023 and July 19, 2023. Concern A will continue to be a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through July 19, 2024. Concern A must recertify its eligibility to SBA between June 20, 2024 and July 19, 2024. Because three years have elapsed since its application and original certification, SBA will conduct a program examination of Concern A at that time. In addition to its representation that it continues to be an eligible WOSB, Concern A must provide additional information as requested by SBA to demonstrate that it continues to meet all the eligibility requirements of the WOSB Program.

(ii) *Example 2.* Concern B is certified by a third-party certifier to be eligible for the WOSB program on September 27, 2021. Concern B must recertify its eligibility to SBA between August 28, 2022 and September 26, 2022. Concern B will continue to be a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through September 26, 2023. On March 31, 2023, Concern B is awarded a WOSB set-aside contract. Subsequently, Concern B's status as an eligible WOSB is protested. On June 28, 2023, Concern B receives a positive determination from SBA confirming that it is an eligible WOSB. Concern B's new certification date is June 28, 2023. Concern B must recertify its eligibility to SBA between May 29, 2024 and June 27, 2024. Concern B will continue to be a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through June 27, 2025. Concern B must recertify its eligibility to SBA between May 29, 2025 and June 27, 2025. Concern B will continue to be a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) until June 27, 2026. Concern B must recertify its eligibility to SBA between May 29, 2026 and June 27, 2025. Because three years have elapsed since its certification date of June 28, 2022, Concern B must seek a program examination, by SBA or a third-party certifier, between May 29, 2025 and June 27, 2026. In addition to its representation that it continues to be an eligible WOSB, Concern B must provide additional information as requested by SBA or a third-party certifier to demonstrate that it continues to meet all the eligibility requirements of the WOSB Program.

(2) The concern must either request a program examination from SBA or notify SBA that it has requested a program examination by a third-party certifier no later than 30 days prior to its certification anniversary. Failure to do so will result in the concern being decertified.

§ 127.401 What are a WOSB's and EDWOSB's ongoing obligations to SBA?

Once certified, a WOSB or EDWOSB must notify SBA of any material changes that could affect its eligibility within 30 calendar days of any such change. Material change includes, but is not limited to, a change in the ownership, business structure, or

management. The notification must be in writing and must be uploaded into the concern's profile with SBA. The method for notifying SBA can be found on *https://certify.sba.gov.* A concern's failure to notify SBA of such a material change may result in decertification and removal from SAM and DSBS (or any successor system) as a designated certified WOSB/EDWOSB concern. In addition, SBA may seek the imposition of penalties under § 127.700.

■ 19. Section 127.402 is revised to read as follows:

§ 127.402 What is a program examination, who will conduct it, and what will SBA examine?

(a) A program examination is an investigation by SBA officials or authorized third-party certifier that verifies the accuracy of any certification of a concern issued in connection with the concern's WOSB or EDWOSB status. Thus, examiners may verify that the concern currently meets the program's eligibility requirements, and that it met such requirements at the time of its application for certification, its most recent recertification, or its certification in connection with a WOSB or EDWOSB contract.

(b) Examiners may review any information related to the concern's eligibility requirements. SBA may also conduct site visits.

(c) It is the responsibility of program participants to ensure the information provided to SBA is kept up to date and is accurate. SBA considers all required information and documents material to a concern's eligibility and assumes that all information and documentation submitted are up to date and accurate unless SBA has information that indicates otherwise.

■ 20. Effective October 15, 2020, § 127.403 is revised to read as follows:

§ 127.403 When will SBA conduct program examinations?

(a) SBA may conduct a program examination at any time after the concern submits its application, during the processing of the application, and at any time while the concern is a certified WOSB or EDWOSB.

(b) SBA will conduct program examinations periodically as part of the recertification process set forth in § 127.400.

■ 21. Section 127.404 is revised to read as follows:

§ 127.404 May SBA require additional information from a WOSB or EDWOSB during a program examination?

At the discretion of the D/GC, SBA has the right to require that a WOSB or EDWOSB submit additional information at any time during the program examination. SBA may draw an adverse inference from the failure of a concern to cooperate with a program examination or provide requested information.

■ 22. Effective October 15, 2020, § 127.405 is revised to read as follows:

§ 127.405 What happens if SBA determines that the concern is no longer eligible for the program?

If SBA believes that a concern does not meet the program eligibility requirements, the concern fails to recertify in accordance with the requirements in § 127.400, or the concern has failed to notify SBA of a material change, SBA will propose the concern for decertification from the program.

(a) *Proposed decertification.* The D/GC or designee will notify the concern in writing that it has been proposed for decertification. This notice will state the reasons why SBA has proposed decertification, and that the WOSB or EDWOSB must respond to each of the reasons set forth.

(1) The WOSB or EDWOSB must respond in writing to a proposed decertification within 20 calendar days from the date of the proposed decertification.

(2) If the initial certification was done by a third-party certifier, SBA will also notify the third-party certifier of the proposed decertification in writing.

(b) *Decertification.* The D/GC or designee will consider the reasons for proposed decertification and the concern's response before making a written decision whether to decertify. The D/GC may draw an adverse inference where a concern fails to cooperate with SBA or provide the information requested. The D/GC's decision is the final agency decision.

(c) *Reapplication.* A concern decertified pursuant to this section may reapply to the program pursuant to § 127.305.

■ 23. Amend § 127.503 by adding a sentence at the end of paragraph (h)(2) to read as follows:

§ 127.503 When is a contracting officer authorized to restrict competition or award a sole source contract or order under this part?

* * * * *

(h) * * *

(2) * * * If the business is unable to recertify its WOSB/EDWOSB status, the procuring agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

* * * * *

■ 24. Effective October 15, 2020, amend § 127.504 by revising paragraph (a), redesignating paragraphs (b) and (c) as paragraphs (c) and (d) respectively, and adding a new paragraph (b).

The revision and addition read as follows:

§ 127.504 What additional requirements must a concern satisfy to submit an offer on an EDWOSB or WOSB requirement?

(a) In order for a concern to submit an offer on a specific EDWOSB or WOSB set-aside requirement, the concern must qualify as a small business concern under the size standard corresponding to the NAICS code assigned to the contract, and either be a certified EDWOSB or WOSB pursuant to § 127.300, or represent that it has submitted a complete application for WOSB or EDWOSB certification to SBA or a third-party certifier and has not received a negative determination regarding that application from SBA or the third party certifier.

(1) If a concern becomes the apparent successful offeror while its application for WOSB or EDWOSB certification is pending, either at SBA or a third-party certifier, the contracting officer for the particular contract must immediately inform SBA's D/GC. SBA will then prioritize the concern's WOSB or EDWOSB application and make a determination regarding the firm's status as a WOSB or EDWOSB within 15 calendar days from the date that SBA received the contracting officer's notification. Where the application is pending with a third-party certifier, SBA will immediately contact the third-party certifier to require the third-party certifier to complete its determination within 15 calendar days.

(2) If the contracting officer does not receive an SBA or third-party certifier determination within 15 calendar days after the SBA's receipt of the notification, the contracting officer may presume that the apparently successful offeror is not an eligible WOSB or EDWOSB and may make award accordingly, unless the contracting officer grants an extension to the 15-day response period.

(b) In order for a concern to seek a specific sole source EDWOSB or WOSB requirement, the concern must be a certified EDWOSB or WOSB pursuant to § 127.300 and qualify as small under the size standard corresponding to the requirement being sought.

* * * * *

§ 127.505 [Removed and Reserved]

■ 25. Effective October 15, 2020, remove and reserve § 127.505.

§ 127.603 [Amended]

■ 26. Effective October 15, 2020, amend § 127.603 by removing the next to last sentence in paragraph (d).

■ 27. Effective October 15, 2020, amend § 127.604 by revising paragraph (f)(4) to read as follows:

§ 127.604 How will SBA process an EDWOSB or WOSB status protest?

* * * * *

(f) * * *

(4) A concern that has been found to be ineligible will be decertified from the program and may not submit an offer as a WOSB or EDWOSB on another procurement until it is recertified. A concern may be recertified by reapplying to the program pursuant to § 127.305.

Jovita Carranza,

Administrator.

[FR Doc. 2020–09022 Filed 5–8–20; 8:45 am]

BILLING CODE 8026–03–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0827; Product Identifier 2019–SW–014–AD; Amendment 39–21120; AD 2020–10–02]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters (Type Certificate Previously Held by Eurocopter France) Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2011–12–07 for Eurocopter France (now Airbus Helicopters) Model SA–365C, SA–365C1, SA–365C2, SA–365N, SA–365N1, AS–365N2, AS 365 N3, and SA–366G1 helicopters. AD 2011–12–07 required repetitively inspecting the adhesive bead between the bushings and the Starflex star (Starflex) arms and the Starflex arm ends. This new AD retains the requirements of AD 2011–12–07 while omitting helicopters with an improved Starflex installed from the applicability. This AD was prompted by the development of the improved Starflex by Airbus Helicopters. The actions of this AD are intended to address an unsafe condition on these products.

DATES: This AD is effective June 15, 2020.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of June 15, 2020.

ADDRESSES: For service information identified in this final rule, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.* You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0827.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* in Docket No. FAA–2019–0827; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the European Aviation Safety Agency (now European Union Aviation Safety Agency) (EASA) AD, any service information that is incorporated by reference, any comments received, and other information. The street address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Matt Fuller, Senior Aviation Safety Engineer, Safety Management Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *matthew.fuller@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to remove AD 2011–12–07, Amendment 39–16714 (76 FR 35346, June 17, 2011) (''AD 2011–12–07'') and add a new AD. AD 2011–12–07 applied to Eurocopter France (now Airbus Helicopters) Model SA–365C, SA–365C1, SA–365C2, SA–365N, SA–365N1, AS–365N2, AS 365 N3, and SA–366G1 helicopters and required a repetitive inspection of the adhesive bead between the bushing and the Starflex arm for a crack, a gap, or loss of the adhesive bead and the Starflex arm ends for delamination. AD 2011–12–07 was prompted by three cases of deterioration of a Starflex arm end. In two of these cases, the deterioration caused high amplitude vibrations in flight, compelling the pilot to make a precautionary landing.

The NPRM published in the **Federal Register** on November 1, 2019 (84 FR 58638). The NPRM proposed to retain the requirements of AD 2011–12–07 but omit helicopters with an improved Starflex installed from the applicability.

The NPRM was prompted by EASA AD No. 2008–0165R1, dated June 30, 2017 (EASA AD 2008–0165R1), issued by EASA, which is the Technical Agent for the Member States of the European Union, to correct an unsafe condition for Airbus Helicopters Model SA 365 N, SA 365 N1, AS 365 N2, AS 365 N3, SA 365 C, SA 365 C1, SA 365 C2, SA 365 C3 and SA 366 G1 helicopters, except helicopters with MOD 0762C37 installed in production. EASA advises that the Airbus Helicopters Starflex manufactured with improved materials make the 10-hour repetitive inspections specified in the original issue of its AD, EASA AD No. 2008–0165, dated August 28, 2008 (EASA AD 2008–0165), unnecessary. EASA AD 2008–0165R1 retains the repetitive inspections from EASA AD 2008–0165 but does not apply to helicopters with the new Starflex installed.

Comments

The FAA gave the public the opportunity to participate in developing this AD, but did not receive any comments on the NPRM.

FAA's Determination

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA of the unsafe condition described in its AD. The FAA is issuing this AD after evaluating all information provided by EASA and determining the unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs and that air safety and the public interest require adopting the AD requirements as proposed.

Differences Between This AD and the EASA AD

The EASA AD uses the word ''check,'' whereas this AD uses the word ''inspect'' instead. In some ADs, the FAA uses the word ''check'' to designate specific actions that may be performed by the owner/operator (pilot). An

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Federal Register

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Friday, May 8, 2020

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 113 and 120

[Docket Number SBA–2020–0024]

RIN 3245–AH40

Business Loan Program Temporary Changes; Paycheck Protection Program—Nondiscrimination and Additional Eligibility Criteria

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule announcing the implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act temporarily adds a new program, titled the ''Paycheck Protection Program,'' to the SBA's 7(a) Loan Program. The CARES Act also provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). SBA posted additional interim final rules on April 3, 2020, April 14, 2020, April 24, 2020, April 28, 2020, and April 30, 2020 and the Department of the Treasury posted an additional interim final rule on April 28, 2020. This interim final rule supplements the previously posted interim final rules by providing guidance on nondiscrimination obligations and additional eligibility requirements, and requests public comment.

DATES:

Effective date: This rule is effective May 8, 2020.

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment date: Comments must be received on or before June 8, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0024 through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments. SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please send an email to *ppp-ifr@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the CARES Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency. Section 1102 of the CARES Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the ''Paycheck Protection Program.'' Section 1106 of the CARES Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116–139), which provided additional funding and authority for the PPP.

Prior to the CARES Act, nonprofit organizations were not eligible to participate in SBA's 7(a) Loan Program (15 U.S.C. 636(a)). Section 1102 of the CARES Act expanded eligibility, limited to PPP, to include certain nonprofit organizations, among other organizations.

SBA regulations at 13 CFR part 113 impose regulatory requirements ''to reflect to the fullest extent possible the nondiscrimination policies of the Federal Government as expressed in the several statutes, Executive Orders, and messages of the President dealing with civil rights and equality of opportunity.'' 13 CFR 113.1(a). But because SBA's loan programs previously served business entities, these regulations did not restate certain limitations and exemptions under federal law primarily pertinent to certain faith-based or nonprofit organizations. In particular, Title IX of the Education Amendments of 1972 permits single-sex admissions practices by preschools, non-vocational elementary or secondary schools, and private undergraduate higher education institutions. *See* 20 U.S.C. 1681(a)(1). Additionally, the Fair Housing Act of 1968 allows religious organizations to reserve housing for coreligionists, *see* 42 U.S.C. 3607, and allows for single-sex emergency shelters that provide refuge to abused women (or abused men), *see* 24 CFR 5.106; *see also Johnson* v. *Dixon,* 786 F. Supp. 1, 4 (D.D.C. 1991) (''It is . . . doubtful [that] 'emergency

overnight shelter,' . . . can be characterized as a 'dwelling' within the meaning of the [Fair Housing] Act.''). Finally, the Indian Child Welfare Act of 1978 requires certain placement preferences in the foster care and adoptions of Indian children. *See* 25 U.S.C. 1915. The broadly worded SBA regulations do not articulate these limitations on the application of the relevant nondiscrimination provisions.

In addition, there is a technical discrepancy between SBA's religious employer exemption at 13 CFR 113.3–1(h) and Title VII of the Civil Rights Act, which allows religious employers to make hiring decisions according to their religious beliefs with respect to all ''activities,'' not just ''religious activities.'' *See* An Act to further promote equal employment opportunities for American workers, Public Law 92–261, 86 Stat. 103, 104 (1972), *codified at* 42 U.S.C. 2000e–1(a).

Given these various discrepancies, organizations have accordingly faced uncertainty about whether their participation in the PPP program would require them to substantially change their operations for a short period of months. These types of changes are impossible for some organizations, and impractical for many. This uncertainty risks frustrating the purpose of the CARES Act, which was to afford swift stopgap relief to Americans who might otherwise lose their jobs or businesses because of the economic hardships wrought by the response to the COVID–19 public health emergency. To provide certainty to applicants and recipients of loans and loan forgiveness under the PPP, and to address the large-scale burdens that SBA regulations may impose on recipients participating only on a short-term basis, this interim final rule provides guidance that for purposes of the PPP, nonprofits must meet their nondiscrimination obligations under existing Federal laws and Executive Orders. This interim final rule also provides guidance with respect to the religious employer exemption to ensure harmony with Section 702 of Title VII.

In addition, as described below, to enable certain eligible small educational institutions to participate in PPP, this interim final rule provides that institutions of higher education shall exclude work study students when determining the number of employees for purposes of PPP loan eligibility.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Specifically, it is critical to meet lenders' and borrowers' need for clarity concerning program requirements as rapidly as possible because the last day eligible borrowers can apply for and receive a loan is June 30, 2020.

This interim final rule supplements previous regulations and guidance on certain important, discrete issues. The immediate effective date of this interim final rule will benefit lenders so that they can swiftly close and disburse loans to small businesses. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. In addition, SBA has determined that there is good cause for dispensing with advance public notice and comment on the ground that it would be contrary to the public interest. Specifically, SBA has determined that advance public notice and comment would delay the ability of certain organizations to implement their nondiscrimination obligations in a manner consistent with the limitations contained in existing Federal laws, and potentially force such organizations to change their operations until SBA adopted a final or interim final rule. Rather than change their operations, the affected organizations could elect not to apply for PPP loans and lay off employees, which would defeat the paycheck protection purposes of the PPP. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before June 8, 2020. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program Nondiscrimination and Additional Eligibility Criteria

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the PPP. Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans and any accrued interest may qualify for loan forgiveness. Additional information about the PPP is available in interim final rules published by SBA and the Department of the Treasury in the **Federal Register** (85 FR 20811, 85 FR 20817, 85 FR 21747, 85 FR 23450, 85 FR 23917, 85 FR 26321 and 85 FR 26324) (collectively, the PPP Interim Final Rules).

1. Non-Discrimination

Are recipients of PPP loans entitled to exemptions on the grounds provided in Federal nondiscrimination laws for sex-specific admissions practices, sex-specific domestic violence shelters, coreligionist housing, or Indian tribal preferences in connection with adoption or foster care practices?

Yes. With respect to any loan or loan forgiveness under the PPP, the nondiscrimination provisions in the applicable SBA regulations incorporate the limitations and exemptions provided in corresponding Federal statutory or regulatory nondiscrimination provisions for sex-specific admissions practices at preschools, non-vocational elementary or secondary schools, and private undergraduate higher education institutions under Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), for sex-specific emergency shelters and coreligionist housing under the Fair Housing Act of 1968 (42 U.S.C. 3601 *et seq.*), and for adoption or foster care practices giving child placement preferences to Indian tribes under the Indian Child Welfare Act of 1978 (25 U.S.C. 1901 *et seq.*).

In addition, for purposes of the PPP, SBA regulations do not bar a religious nonprofit entity from making decisions with respect to the membership or the employment of individuals of a particular religion to perform work connected with the carrying on by such nonprofit of its activities.

2. Student Workers and PPP Loan Eligibility

Do student workers count when determining the number of employees for PPP loan eligibility?

Yes, student workers generally count as employees, unless (a) the applicant is an institution of higher education, as defined in the Department of Education's Federal Work-Study regulations, 34 675.2, and (b) the student worker's services are performed as part of a Federal Work-Study Program (as defined in those regulations [1]) or a

[1] The Department of Education's Federal Work-Study Programs described at 34 CFR part 675 are

substantially similar program of a State or political subdivision thereof. Institutions of higher education must exclude work study students when determining the number of employees for PPP loan eligibility, and must also exclude payroll costs for work study students from the calculation of payroll costs used to determine their PPP loan amount.

The Administrator, in consultation with the Secretary, has determined that this is a reasonable interpretation of section 1102(a) of the CARES Act's reference to ''individuals employed on a full-time, part-time, or other basis.'' Such programs generally provide part-time jobs for students with financial need, and their services are incident to and for the purpose of pursuing a course of study. Work study students are excluded from the definition of employees in other areas of federal law. For example, in the regulations implementing the Affordable Care Act, Treasury defined an employee's ''hours of service'' to exclude work study hours.[2] Explaining this exclusion, the regulation's preamble states that ''[t]he federal work study program, as a federally subsidized financial aid program, is distinct from traditional employment in that its primary purpose is to advance education.'' [3] Similarly, student work is generally exempt from Federal Insurance Contribution Act (FICA) and Federal Unemployment taxes.[4]

For similar reasons, the Administrator, in consultation with the Secretary of the Treasury, has determined that a limited exception for work study is appropriate here. In particular, the Administrator recognizes that requiring institutions of higher education to count work study students towards employee headcount would result in an anomalous outcome in two respects. First, it would prevent some small educational institutions from receiving PPP loans due solely to their provision of financial aid to students in the form of work study. Second, it would result in the exclusion of small educational institutions whose part-time work study headcount dwarfs their full-time faculty and staff headcounts. Educational institutions that filed loan applications prior to the issuance of the regulation are not bound by this interpretation but may rely on it. Lenders may continue to rely on borrower certifications as part of their good faith review process.

3. Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA's website at *www.sba.gov.* Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612).

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are ''small entities.'' Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency ''certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, ''along with a statement providing the factual basis for such certification.'' If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b). Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary

(1) the Federal Work-Study Program, (2) the Job Location and Development Program, and (3) Work Colleges Program.

[2] 26 CFR 54.4980H–1(a)(24) (''Hour of service . . . (ii) Excluded hours . . . (B) Work-study program. The term hour of service does not include any hour for services to the extent those services are performed as part of a Federal Work-Study Program as defined under 34 CFR 675 or a substantially similar program of a State or political subdivision thereof.'').

[3] 79 FR 8544, 8550 (Feb. 12, 2014).

[4] Internal Revenue Code Section 3121(b)(10) excepts from FICA tax ''service performed in the employ of—(A) a school, college, university . . . if such service is performed by a student who is enrolled and regularly attending classes at such school, college, university.'' Student workers, who are not full time, are excepted where the services are ''incident to and for the purposes of pursuing a course of study.'' 26 CFR 31.3121(b)(10)–2(d)(3)(i).

to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act, Ch.1. p.9. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,

Administrator.

[FR Doc. 2020–09963 Filed 5–7–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 124

RIN 3245–AH13

Regulatory Reform Initiative: Small Disadvantaged Businesses

AGENCY: U.S. Small Business Administration.

ACTION: Direct final rule.

SUMMARY: The U.S. Small Business Administration (SBA) is removing from the Code of Federal Regulations (CFR) 16 regulations that are no longer necessary because they are either redundant or obsolete. This action will assist the public by simplifying SBA's regulations.

DATES: This rule is effective on August 6, 2020 without further action, unless significant adverse comment is received by July 7, 2020. If significant adverse comment is received, SBA will publish a timely withdrawal of the rule in the **Federal Register**.

ADDRESSES: You may submit comments, identified by RIN 3245–AH13 by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail or Hand Delivery/Courier:* Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416.

SBA will post all comments on *http://www.regulations.gov.* If you wish to submit confidential business information (CBI), as defined in the User Notice at *http://www.regulations.gov,* please submit the information to Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416, or send an email to *brenda.fernandez@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, Washington, DC 20416; (202) 205–7337; *brenda.fernandez@sba.gov.*

SUPPLEMENTARY INFORMATION:

Small Disadvantaged Business Program

The government promotes contracting and subcontracting with small disadvantaged businesses (SDBs) by setting government-wide and agency-specific goals for the percentage of Federal contract and subcontract dollars awarded to SDBs each fiscal year. The government-wide goal is that not less than 5 percent of the total value of all prime contract and subcontract awards be made to SDBs. At one time, SDBs had to be certified by the SBA, or by a private certifying entity acting in compliance with SBA regulations, to qualify for certain Federal programs as prime contractors. However, all Federal programs for SDB prime contractors have been discontinued, with only the government-wide and agency-specific goals for the percentage of Federal contract and/or subcontract dollars awarded to SDBs each year remaining. Pursuant to the SDB subcontracting program, Federal agencies must negotiate subcontracting plans with the apparent successful bidder or offeror on qualifying prime contracts prior to awarding the contract. Subcontracting plans set goals for the percentage of subcontract dollars to be awarded to SDBs, among others, and describe efforts that will be made to ensure that SDBs have an equitable opportunity to compete for subcontracts. Federal agencies may also consider the extent of subcontracting with SDBs in determining to whom to award a contract or whether to give contractors monetary incentives to subcontract with SDBs.

Firms do not need to be certified SDBs to qualify for Federal programs for subcontractors. Rather, a firm may represent that it qualifies as an SDB for any Federal subcontracting program if it believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals. In addition, 8(a) Participants are deemed to be SBDs for Federal contracting purposes. As of August 8, 2019, the SBA's Dynamic Small Business Search database included 125,616 self-certified SDBs.

Background Information

On February 24, 2017, President Trump issued Executive Order 13777, Enforcing the Regulatory Reform Agenda, which further emphasized the goal of the Administration to alleviate the regulatory burdens placed on the public. Under Executive Order 13777, agencies must evaluate their existing regulations to determine which ones should be repealed, replaced, or modified. In doing so, agencies should focus on identifying regulations that, among other things: Eliminate jobs or inhibit job creation; are outdated, unnecessary or ineffective; impose costs that exceed benefits; create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; or are associated with Executive Orders or other Presidential directives that have been rescinded or substantially modified.

In response to the President's directive, SBA initiated a review of its regulations to determine which might be revised or eliminated. Based on this analysis, SBA has identified unnecessary provisions that can be removed from the CFR. First, this rule removes 13 CFR 124.516—which states that the procuring activity decides all contract disputes arising between an 8(a) Participant and a procuring activity contracting officer after the award of an 8(a) contract—because this provision is redundant. 13 CFR 124.512 already delegates 8(a) contract administration functions to procuring agencies and contract dispute resolution is an element of contract administration.

Second, this rule removes 13 CFR 124.1002 through 124.1016. As discussed below, these provisions pertain to the Small Disadvantaged Business Program, which is no longer a viable program. Section 1207 of the 1987 Defense Authorization Act (Pub. L. 99–661, codified in 10 U.S.C. 2323) established a statutory 5 percent goal for all Department of Defense (DOD) contracts to be awarded to small disadvantaged businesses (SDBs). To this end, the statute authorized the award of contracts to SDBs using less than full and open competitive procedures. Specifically, DOD implemented regulations requiring a contracting officer to set-aside a procurement for exclusive competition among SDBs whenever market research identified two or more SDBs that could perform the contract at a fair and reasonable price. In addition, SDBs would receive a 10 percent price evaluation adjustment for offers submitted in an unrestricted or full and open competition. DOD's SDB program was initially a self-certification program. SBA established eligibility criteria, but firms self-certified their SDB status for particular procurements. However, SBA was responsible for processing SDB

to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act, Ch.1. p.9. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,

Administrator.

[FR Doc. 2020–09963 Filed 5–7–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 124

RIN 3245–AH13

Regulatory Reform Initiative: Small Disadvantaged Businesses

AGENCY: U.S. Small Business Administration.

ACTION: Direct final rule.

SUMMARY: The U.S. Small Business Administration (SBA) is removing from the Code of Federal Regulations (CFR) 16 regulations that are no longer necessary because they are either redundant or obsolete. This action will assist the public by simplifying SBA's regulations.

DATES: This rule is effective on August 6, 2020 without further action, unless significant adverse comment is received by July 7, 2020. If significant adverse comment is received, SBA will publish a timely withdrawal of the rule in the **Federal Register**.

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Firms do not need to be certified SDBs to qualify for Federal programs for subcontractors. Rather, a firm may represent that it qualifies as an SDB for any Federal subcontracting program if it believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals. In addition, 8(a) Participants are deemed to be SBDs for Federal contracting purposes. As of August 8, 2019, the SBA's Dynamic Small Business Search database included 125,616 self-certified SDBs.

Background Information

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In response to the President's directive, SBA initiated a review of its regulations to determine which might be revised or eliminated. Based on this analysis, SBA has identified unnecessary provisions that can be removed from the CFR. First, this rule removes 13 CFR 124.516—which states that the procuring activity decides all contract disputes arising between an 8(a) Participant and a procuring activity contracting officer after the award of an 8(a) contract—because this provision is redundant. 13 CFR 124.512 already delegates 8(a) contract administration functions to procuring agencies and contract dispute resolution is an element of contract administration.

Second, this rule removes 13 CFR 124.1002 through 124.1016. As discussed below, these provisions pertain to the Small Disadvantaged Business Program, which is no longer a viable program. Section 1207 of the 1987 Defense Authorization Act (Pub. L. 99–661, codified in 10 U.S.C. 2323) established a statutory 5 percent goal for all Department of Defense (DOD) contracts to be awarded to small disadvantaged businesses (SDBs). To this end, the statute authorized the award of contracts to SDBs using less than full and open competitive procedures. Specifically, DOD implemented regulations requiring a contracting officer to set-aside a procurement for exclusive competition among SDBs whenever market research identified two or more SDBs that could perform the contract at a fair and reasonable price. In addition, SDBs would receive a 10 percent price evaluation adjustment for offers submitted in an unrestricted or full and open competition. DOD's SDB program was initially a self-certification program. SBA established eligibility criteria, but firms self-certified their SDB status for particular procurements. However, SBA was responsible for processing SDB

status protests and appeals filed in connection with individual contracts.

In 1994, Congress extended the authority granted to DOD to all Federal agencies through enactment of the Federal Acquisition Streamlining Act (FASA) (Pub. L. 103–355). However, as a result of the U.S. Supreme Court's decision in *Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200 (1995), President Clinton directed the Department of Justice (DOJ) to work with Federal agencies to conduct a review of all race and gender conscious Federal contracting programs and implement necessary regulatory reforms to comply with the Court's ruling. Regulations to implement FASA were delayed until completion of this review.

On May 23, 1996, DOJ proposed reforms to these Federal preferential contracting programs (61 FR 26042–63). Among other things, DOJ placed the SDB set-aside authority in abeyance pending further review, which left the price evaluation adjustment for SBDs on full and open competitions as the primary benefit for SDBs. DOJ further proposed governmental SDB certification for all firms seeking to submit offers as SDBs for Federal prime contracts and subcontracts. Agencies were given the option to implement a certification program or enter into an agreement with SBA under which SBA would make all determinations of SDB eligibility. However, agencies were strongly encouraged to defer to SBA's experience on matters related to SDB eligibility. SBA published regulations governing its SDB certification process in August 1997 and June 1998.

SBA terminated its SDB certification program on October 3, 2008 (73 FR 57490) after determining that it was no longer efficient or effective to certify SDBs government-wide. At that time, statutory authority for the SDB price evaluation adjustment had expired for all but three agencies: DOD, the National Aeronautics and Space Administration, and the U.S. Coast Guard. Subsequently, on November 3, 2008, the U.S. Court of Appeals for the Federal Circuit struck down DOD's SDB program in *Rothe Development Corporation* v. *Department of Defense,* 545 F.3d 1023 (Fed. Cir. 2008), holding that Section 1207 of the 1987 Defense Authorization Act was facially unconstitutional because Congress did not have sufficient evidence to conclude that there was racial discrimination in defense contracting when it reauthorized the program in 2006. Congress declined to reauthorize the government's remaining SDB programs in 2009, and the SDB price evaluation adjustment was removed from the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement in 2014 and 2015, respectively (79 FR 61746 and 80 FR 15912). Currently, there is no SDB set-aside program; there is no statutory authority for the SDB price evaluation adjustment; and SBA does not administer an SDB certification program. As such, the provisions set forth in 13 CFR 124.1002 through 124.1016 are obsolete and SBA is removing them from the CFR. However, SBA is retaining and re-designating the SDB definition currently set forth in 13 CFR 124.1002. Because a firm may self-certify that it qualifies as an SDB for any Federal subcontracting program, SBA believes this provision should remain in the CFR in order to provide guidance to firms seeking to participate in the Federal subcontracting program.

Executive Order 13771

On January 30, 2017, President Trump signed Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, which, among other objectives, is intended to ensure that an agency's regulatory costs are prudently managed and controlled so as to minimize the compliance burden imposed on the public. For every new regulation an agency proposes to implement, unless prohibited by law, this Executive Order requires the agency to (i) identify at least two existing regulations that the agency can cancel; and (ii) use the cost savings from the cancelled regulations to offset the cost of the new regulation.

Executive Order 13777

On February 24, 2017, the President issued Executive Order 13777, Enforcing the Regulatory Reform Agenda, which further emphasized the goal of the Administration to alleviate the regulatory burdens placed on the public. Under Executive Order 13777, agencies must evaluate their existing regulations to determine which ones should be repealed, replaced, or modified. In doing so, agencies should focus on identifying regulations that, among other things: Eliminate jobs or inhibit job creation; are outdated, unnecessary or ineffective; impose costs that exceed benefits; create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; or are associated with Executive Orders or other Presidential directives that have been rescinded or substantially modified. SBA has engaged in this process and has identified the regulations in this rulemaking as appropriate for removal in accordance with Executive Order 13777.

Section by Section Analysis

Section 124.516

The rule removes § 124.516, which provides that a contract dispute arising between an 8(a) contractor and the procuring activity contracting officer will be decided by the procuring activity, and that appeals may be taken by the 8(a) contractor without SBA involvement. As previously noted, § 124.512 already delegates 8(a) contract administration functions, including contract dispute resolution responsibilities, to procuring agencies. As such, § 124.516 is redundant and is no longer needed.

Section 124.1001

The rule amends § 124.1001 to eliminate references to SBA's SDB protest and appeal procedures as well as the SDB certification program, as these provisions are now obsolete. SBA is also amending this section to incorporate the substantive provisions of the SDB definition currently set forth in § 124.1002. As noted above, SDB status remains relevant for Federal subcontracting programs.

Sections 124.1002 Through 124.1016

The rule removes §§ 124.1002 through 124.1016, which set forth SBA's SDB certification program, as well as SBA's SDB protest and appeal procedures. These provisions are unnecessary because SBA no longer administers an SDB certification program, nor does it process SDB protests or appeals.

To provide more information to the public, the titles of these rules to be removed are as follows: (1) § 124.1002 What is a Small Disadvantaged Business (SDB)?; (2) § 124.1003 How does a firm become certified as an SDB?; (3) § 124.1004 What is a misrepresentation of SDB status?; (4) § 124.1005 How long does an SDB certification last?; (5) § 124.1006 Can SBA initiate a review of the SDB status of a firm claiming to be an SDB?; (6) § 124.1007 Who may protest the disadvantaged status of a concern?; (7) § 124.1008 When will SBA not decide an SDB protest?; (8) § 124.1009 Who decides disadvantaged status protests?; (9) § 124.1010 What procedures apply to disadvantaged status protests?; (10) § 124.1011 What format, degree of specificity, and basis does SBA require to consider an SDB protest?; (11) § 124.1012 What will SBA do when it receives an SDB protest?; (12) § 124.1013 How does SBA make disadvantaged status determinations in considering an SDB protest?; (13) § 124.1014 Appeals of disadvantaged status determinations.; (14) § 124.1015 What are the requirements for

representing SDB status, and what are the penalties for misrepresentation?; and (15) § 124.1016 What must a concern do in order to be identified as an SDB in any Federal procurement database?.

Administrative Procedure Act—Direct Final Rule

SBA is publishing this rule as a direct final rule because SBA views this action as an administrative action that relates solely to expired SBA programs and is non-controversial. This rule will be effective on the date shown in the **DATES** section unless SBA receives any significant adverse comments on or before the deadline for comments set forth in the **DATES** section. Significant adverse comments are comments that provide strong justifications for why the rule should not be adopted or for changing the rule. If SBA receives any significant adverse comments, SBA will publish a notice in the **Federal Register** withdrawing this rule before the effective date.

Compliance With Executive Orders 12866, 13771, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C., Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule does not constitute a significant regulatory action for purposes of Executive Order 12866 and is not a major rule under the Congressional Review Act, 5 U.S.C. 801, *et seq.*

Executive Order 13771

This direct final rule is an Executive Order 13771 deregulatory action with an annualized net savings of $74,606 and a net present value of $1,065,795, both in 2016 dollars.

This rule removes redundant and obsolete regulations, which will save SDBs time reading irrelevant information. These calculations assume 2 percent of the 125,616 self-certified SDBs read these regulations per year (or approximately 2,500 SDBs) and that they would save 30 minutes each from not reading them. This time is valued at $75.57 per hour—the wage of an attorney according to 2018 Bureau of Labor Statistics data adding 30 percent more for benefits. This produces savings to the SBA community of $94,928 per year.

The cost savings also includes a savings to the government workforce assuming that 2 percent of the 38,000 Federal contracting officers per year (or about 760) will save 30 minutes from not reading this removed information. This time is valued at a rate of $54.21 per hour—assuming the average Federal contracting officer is a GS–12 step 1 (DC locality) adding 30 percent more benefits, for savings of $20,600. This produces total savings per year of $115,528 in current dollars.

In the first year, it is assumed that 5 percent of SDBs (about 6,280) and 5 percent of Federal contracting officers (1,900) would read this Direct Final Rule, which is estimated to take 1 hour per SDB at $75.57 per hour and $54.21 per Federal contracting officer, producing cost in the first year of $577,639 ($474,640 for SDBs and $102,999 for the Federal government). This cost is not expected to continue in subsequent years.

Table 1 lays out the costs and savings of this rule over the first 2 years after publication, with the savings and costs in the second year expected to continue into perpetuity. Table 2 presents the annualized net savings in 2016 dollars.

TABLE 1—SCHEDULE OF COSTS/(SAVINGS) OVER 2 YEAR HORIZON, CURRENT DOLLARS

	Savings	Costs
Year 1	1,636 hours ($115,528)	8,181 hours. $577,639.
Year 2	1,636 hours ($115,528)	0 hours. $0.

TABLE 2—ANNUALIZED SAVINGS IN PERPETUITY WITH 7% DISCOUNT RATE, 2016 DOLLARS

	Estimate
Annualized Savings	$110,872
Annualized Costs	($36,267)
Annualized Net Savings	$74,606

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

This rule does not have federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Executive Order. As such it does not warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act (44 U.S.C., Ch. 35)

The SBA has determined that this final rule does not affect any existing collection of information.

Regulatory Flexibility Act, 5 U.S.C. 601–612

When an agency issues a rule, the Regulatory Flexibility Act (RFA) requires the agency to prepare a final regulatory flexibility analysis (FRFA), which describes whether the rule will have a significant economic impact on a substantial number of small entities. However, Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing a FRFA, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

There are approximately 125,000 self-certified SDBs in SBA's Dynamic Small Business Search and all can be affected by this rule. However, this rule removes regulations that are no longer necessary because they are either redundant or obsolete. The annualized net savings to SDBs is $63,877 in current dollars or less than a dollar per SDB, as detailed in the Executive Order13771 discussion above.

Accordingly, the Administrator of the SBA hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 13 CFR Part 124

Administrative practice and procedure, Government procurement, Government property, Small businesses.

Accordingly, for the reasons stated in the preamble, SBA amends 13 CFR part 124 as follows:

PART 124—8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

■ 1. The authority citation for part 124 is continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644 and Pub. L. 99–661, Pub. L. 100–656, sec. 1207, Pub. L. 101–37, Pub. L. 101–574, section 8021, Pub. L. 108–87, and 42 U.S.C. 9815.

§ 124.516 [Removed and Reserved]

■ 2. Remove and reserve § 124.516.

■ 3. Revise § 124.1001 to read as follows:

§ 124.1001 What is a Small Disadvantaged Business?

(a) *General.* A Small Disadvantaged Business (SDB) for purposes of any Federal subcontracting program is a concern that qualifies as small under part 121 of this title for the size standard corresponding to the six-digit North American Industry Classification System (NAICS) code that is assigned by the contracting officer to the procurement at issue, and that is owned and controlled by one or more socially and economically disadvantaged individuals. Unless specifically stated otherwise, the phrase ''socially and economically disadvantaged individuals'' includes Indian tribes, ANCs, CDCs, and NHOs. A firm may represent that it qualifies as an SDB for any Federal subcontracting program if it believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals.

(b) *Reliance on 8(a) criteria.* In determining whether a firm qualifies as an SDB, the criteria of social and economic disadvantage and other eligibility requirements established in subpart A of this part apply, including the requirements of ownership and control and disadvantaged status, unless otherwise provided in this subpart. All current Participants in the 8(a) BD program qualify as SDBs.

§§ 124.1002 through 124.1016 [Removed]

■ 4. Remove §§ 124.1002 through 124.1016.

Jovita Carranza,

Administrator.

[FR Doc. 2020–08619 Filed 5–7–20; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2019–1040; Airspace Docket No. 19–ASW–18]

RIN 2120–AA66

Amendment of Class E Airspace; Ada, OK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace extending upward from 700 feet above the surface at Ada Regional Airport, Ada, OK. This action is the result of an airspace review caused by the decommissioning of the Ada VHF omnidirectional range (VOR) navigation aid, which provided navigation information for the instrument procedures at this airport. The name of the airport is also being updated to coincide with the FAA's aeronautical database. Airspace redesign is necessary for the safety and management of instrument flight rules (IFR) operations at this airport.

DATES: Effective 0901 UTC, July 16, 2020. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11D, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11D at NARA, email *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends the Class E airspace extending upward from 700 feet above the surface at Ada Regional Airport, Ada, OK, to support IFR operations at this airport.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (85 FR 5352; January 30, 2020) for Docket No. FAA–2019–1040 to amend the Class E airspace extending upward from 700 feet above the surface at Ada Regional Airport, Ada, OK. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.11D, dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019. FAA Order 7400.11D is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11D lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 amends the Class E airspace area extending upward from 700 feet above the surface to within a 6.6-mile radius (increased from a 6.5-mile radius) at Ada Regional Airport, Ada, OK; updates the name of the airport (previously Ada Municipal Airport) to coincide with the FAA's aeronautical database; extends the extension to the north of the airport to 10.4 miles north of the airport (increased from 10.3 miles); and removes the Ada VOR and associated extension from the airspace legal description.

This action is the result of an airspace review caused by the decommissioning of the Ada VOR, which provided navigation information for the instrument procedures at this airport.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 2, 22, and 52

[FAC 2020–06; FAR Case 2020–001; Item I; Docket No. FAR–2020–0001; Sequence No. 1]

RIN 9000–AO03

Federal Acquisition Regulation: Revocation of Executive Order on Nondisplacement of Qualified Workers

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to remove the FAR subpart on nondisplacement of qualified workers. This final rule implements an Executive order which revoked the previous Executive order on this topic.

DATES: *Effective:* June 5, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 or *zenaida.delgado@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2020–06, FAR Case 2020–001.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are issuing a final rule amending the FAR to implement Executive Order (E.O.) 13897 of October 31, 2019, Improving Federal Contractor Operations by Revoking Executive Order 13495 (published in the **Federal Register** on November 5, 2019, at 84 FR 59709). E.O. 13897 revokes E.O. 13495 of January 30, 2009, Nondisplacement of Qualified Workers Under Service Contracts.

E.O. 13495 required service contractors and their subcontractors to offer employees of the predecessor contractor and its subcontractors a right of first refusal of employment for positions for which they are qualified.

This final rule amends the FAR to delete FAR subpart 22.12 in its entirety as well as the corresponding clause at FAR 52.222–17, Nondisplacement of Qualified Workers. FAR 1.106, 2.101, and clause 52.212–5 are also amended to delete references to the revoked E.O. 13495, FAR subpart 22.12, and FAR 52.222–17. Contracting officers should not take any action on any complaints filed under former FAR subpart 22.12.

The Department of Labor (DOL) rescinded its implementing regulations on January 31, 2020 (85 FR 5567).

II. 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 solicitation provisions or clauses. The FAR rule removes a requirement for service contractors and their subcontractors to offer employees of the predecessor contractor and its subcontractors a right of first refusal of employment for positions for which they are qualified.

III. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the FAR is the Office of Federal Procurement Policy statute (codified at Title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it is simply removing a requirement that has become obsolete as a result of an executive action that compelled the Federal Acquisition Regulatory Council to rescind the requirement. See section 2 of E.O. 13897.

IV. Executive Orders 12866 and 13563

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 rule is not a significant regulatory action, and therefore, this rule was not subject to the review of the Office of Information and Regulatory Affairs under section 6(b) of E.O. 12866. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section III. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies. The FAR rule information collection requirements were collected under the approval authority granted to the DOL Wage and Hour Division currently cleared by the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.,* under OMB control number 1235–0025, Nondisplacement of Qualified Workers Under Service Contracts, Executive Order 13495. The Wage and Hour Division has requested a discontinuation of this collection as a result of E.O. 13897.

List of Subjects in 48 CFR Parts 1, 2, 22, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 2, 22, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 2, 22, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106 by removing from the table the entries ''22.12'' and ''52.222–17''.

PART 2—DEFINITIONS OF WORDS AND TERMS

2.101 [Amended]

■ 3. Amend section 2.101(b) in the definition ''United States'' by removing paragraph (4) and redesignating paragraphs (5) through (12) as paragraphs (4) through (11).

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 22.12 [Removed and Reserved]

■ 4. Remove and reserve subpart 22.12.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Removing paragraph (c)(1) and redesignating paragraphs (c)(2) through (10) as paragraphs (c)(1) through (9); and

■ c. Removing paragraph (e)(1)(vi) and redesignating paragraphs (e)(1)(vii) through (xxiii) as paragraphs (e)(1)(vi) through (xxii).

The revision reads as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (JUN 2020)

* * * * *

52.222–17 [Removed and Reserved]

■ 6. Remove and reserve section 52.222–17.

[FR Doc. 2020–07108 Filed 5–5–20; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 5, 8, 9, 12, 13, 15, 19, 22, 25, 30, 50, and 52

[FAC 2020–06; FAR Case 2018–007; Item II; Docket No. FAR–2018–0007; Sequence No. 1]

RIN 9000–AN67

Federal Acquisition Regulation: Applicability of Inflation Adjustments of Acquisition-Related Thresholds

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 to make inflation adjustments of statutory acquisition-related thresholds applicable to existing contracts and subcontracts in effect on the date of the adjustment that contain the revised clauses in this rulemaking.

DATES: *Effective:* June 5, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 or *zenaida.delgado@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2020–06, FAR Case 2018–007.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** on June 24, 2019, at 84 FR 29482, to make inflation adjustments of statutory acquisition-related thresholds under 41 U.S.C. 1908 applicable to existing contracts and subcontracts in effect on the date of the adjustment. This FAR change implements section 821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115–91).

Title 41 U.S.C. 1908, Inflation adjustment of acquisition-related dollar thresholds, requires an adjustment every five years of acquisition-related thresholds for inflation using the Consumer Price Index for all urban consumers, except for the Construction Wage Rate Requirements statute (Davis-Bacon Act), Service Contract Labor Standards statute, and trade agreements thresholds. See FAR 1.109. The last FAR case that raised the thresholds for inflation was 2014–022, a final rule published on July 2, 2015, effective October 1, 2015. The next inflation adjustment under 41 U.S.C. 1908 will be implemented through FAR Case 2019–013 and planned to be effective October 1, 2020. One respondent submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments is provided as follows:

A. Summary of Changes

There are no changes as a result of comments on the proposed rule.

B. Analysis of Public Comments

Comment: One respondent supported the proposed rule and suggested to include a list, preferably in table form, of the actual calendar dates of threshold effectiveness.

Response: The Councils agree a table might be a helpful reference tool and will add one at *Acquisition.gov* under *https://www.acquisition.gov/tableofeffectivedatesforMPTandSAT.* The table will only illustrate changes to the micro-purchase and simplified acquisition thresholds, after they are implemented through the rulemaking process.

C. Other Changes

Editorial changes are made to three clauses to change the paragraph heading of ''Flowdown'' to ''Subcontracts'' in order to conform to FAR drafting conventions. See FAR clauses 52.203–16, paragraph (d); 52.215–23, paragraph (f); and 52.226–6, paragraph (e).

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 solicitation provisions or clauses, or impact any existing provisions or clauses, except for the added references to acquisition-related thresholds in the FAR text.

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

with their mortgage transaction and disclose them on the Loan Estimate.[13] For purposes of determining good faith under the TRID Rule, creditors may use revised estimates of such costs in a limited number of situations pursuant to Regulation Z, § 1026.19(e)(3)(iv).[14] One such situation is if there are ''changed circumstances'' that affect the settlement charges consumers would incur.[15] The TRID Rule specifies that changed circumstances includes ''an extraordinary event beyond the control of any interested party,'' with the commentary to the TRID Rule clarifying that a ''war or natural disaster'' is an example of such an extraordinary event.[16]

Economic disruptions and shortages during the COVID–19 pandemic may affect the ability of stakeholders to provide accurate estimates of some settlement charges. Stakeholders have sought guidance from the Bureau as to whether the COVID–19 pandemic is an extraordinary event that permits creditors to provide consumers with revised estimates reflecting changes in settlement charges. For example, a stakeholder asked to clarify whether, for purposes of establishing good faith, a creditor could provide a revised estimate of the appraisal fee based on changed circumstances where (1) the amount disclosed on the Loan Estimate was based on a reasonable market price at the time of the estimate and (2) the actual appraisal fee was higher because of a shortage of available appraisers due to the effects of the COVID–19 pandemic. Upon consideration of the interpretive issues, the Bureau concludes that, as with wars or natural disasters, the COVID–19 pandemic is an example of an extraordinary event beyond the control of any interested party, and thus is a changed circumstance. Accordingly, for purposes of determining good faith, creditors may use revised estimates of settlement charges that consumers would incur in connection with the mortgage transaction if the COVID–19 pandemic has affected the estimate of such settlement charges.[17]

3. Legal Authority and TILA Safe Harbor Provisions

The Bureau is issuing this interpretive rule based on its authority to interpret TILA and Regulation Z, including under section 1022(b)(1) of the Dodd-Frank Act, which authorizes guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws.[18]

By operation of TILA section 130(f), no provision of TILA sections 108(b), 108(c), 108(e), 112, or 130 imposing any liability applies to any act done or omitted in good faith in conformity with this interpretive rule, notwithstanding that after such act or omission has occurred, this interpretive rule is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[19]

II. Effective Date

Because this rule is solely interpretive, it is not subject to the 30-day delayed effective date for substantive rules under section 553(d) of the Administrative Procedure Act.[20] Therefore, this rule is effective on May 4, 2020, the same date that it is published in the **Federal Register**.

III. Regulatory Requirements

This rule articulates the Bureau's interpretation of Regulation Z and TILA. As an interpretive rule, it is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[21] Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[22]

The Bureau has determined that this interpretive rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act.[23]

IV. Congressional Review Act

Pursuant to the Congressional Review Act,[24] the Bureau will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

V. Signing Authority

The Director of the Bureau, having reviewed and approved this document, is delegating the authority to electronically sign this document to Laura Galban, a Bureau Federal Register Liaison, for purposes of publication in the **Federal Register**.

Dated: April 29, 2020.

Laura Galban,

Federal Register Liaison, Bureau of Consumer Financial Protection.

[FR Doc. 2020–09515 Filed 5–1–20; 8:45 am]

BILLING CODE 4810–AM–P

[13] 12 CFR 1026.19(e)(3). As a general rule, an estimated closing cost disclosed on the Loan Estimate pursuant to § 1026.19(e)(1)(i) is in good faith if the charge paid by or imposed on the consumer does not exceed the amount originally disclosed. 12 CFR 1026.19(e)(3)(i). For certain categories of settlement charges, good faith is determined with reference to whether: (1) The aggregate amount of certain charges paid by or imposed on the consumer does not exceed the aggregate amount of those charges disclosed pursuant to § 1026.19(e)(1)(i) by more than 10 percent (*see* 12 CFR 1026.19(e)(3)(ii)(A)); or (2) the charge was estimated consistent with the best information reasonably available at the time it was disclosed, regardless of whether the final amount exceeds the estimated amount (*see* 12 CFR 1026.19(e)(3)(iii)).

[14] 12 CFR 1026.19(e)(3)(iv); 12 CFR 1026.19(e)(4)(i). Under § 1026.19(e)(4)(i), the revised estimates must be reflected on a revised version of the Loan Estimate, on the Closing Disclosure, or on a corrected Closing Disclosure.

[15] 12 CFR 1026.19(e)(3)(iv)(A).

[16] 12 CFR 1026.19(e)(3)(iv)(A)(*1*); comment 19(e)(3)(iv)(A)–2.

[17] *See id.;* 12 CFR 1026.19(e)(4)(i). As noted above, the revised estimates must be reflected on a revised version of the Loan Estimate, on the Closing Disclosure, or on a corrected Closing Disclosure. 12 CFR 1026.19(e)(4)(i). *See also* 12 CFR 1024.2(b) (definition of ''Changed circumstances'' in Regulation X, which predates the TRID Rule changed circumstance definition, includes ''Acts of God, war, disaster, or other emergency'').

[18] 12 U.S.C. 5512(b)(1). The relevant provisions of TILA and Regulation Z form part of Federal consumer financial law. *See* 12 U.S.C. 5481(12)(O), (14).

[19] 15 U.S.C. 1640(f).

[20] 5 U.S.C. 553(d).

[21] 5 U.S.C. 553(b).

[22] 5 U.S.C. 603(a), 604(a).

[23] 44 U.S.C. 3501 *et seq.*

[24] 5 U.S.C. 801 *et seq.*

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA–2020–0022]

RIN 3245–AH38

Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Disbursements

AGENCY: U. S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule (the First PPP Interim Final Rule) announcing the implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). The Act

temporarily adds a new program, titled the ''Paycheck Protection Program,'' to the SBA's 7(a) Loan Program. The Act also provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). SBA posted additional interim final rules on April 3, 2020, April 14, 2020, and April 24, 2020. This interim final rule supplements the previously posted interim final rules with additional guidance. This interim final rule supplements SBA's implementation of the Act and requests public comment.

DATES:

Effective date: This rule is effective May 4, 2020.

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment date: Comments must be received on or before June 3, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0022, through the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments. SBA will post all comments on *www.regulations.gov*. If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please send an email to *ppp-ifr@sba.gov*. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at *https://www.sba.gov/tools/local-assistance/districtoffices*.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency. Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the ''Paycheck Protection Program.'' Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116–139), which provided additional funding and authority for the Paycheck Protection Program.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Specifically, it is critical to meet lenders' and borrowers' need for clarity concerning program requirements as rapidly as possible because the last day eligible borrowers can apply for and receive a loan is June 30, 2020.

This interim final rule supplements previous regulations and guidance on several important, discrete issues. The immediate effective date of this interim final rule will benefit lenders so that they can swiftly close and disburse loans to small businesses. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before June 3, 2020. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program Requirements for Disbursements

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the Paycheck Protection Program (PPP). Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans and any accrued interest may qualify for loan forgiveness. Additional information about the PPP is available in the First PPP Interim Final Rule (85 FR 20811), a second interim final rule (85 FR 20817) (the Second PPP Interim Final Rule), a third interim final rule (85 FR 21747) (the Third PPP Interim Final Rule), a fourth interim final rule (85 FR 23450) (the Fourth PPP Interim Final Rule), and in an interim final rule issued by the Department of the Treasury, which was posted for public inspection at the **Federal Register** on April 28, 2020 (FR Doc. 2020–09239) (collectively, the PPP Interim Final Rules).

1. Disbursements

a. Can a borrower take multiple draws from a PPP loan and thereby delay the start of the eight-week covered period?

No. The lender must make a one-time, full disbursement of the PPP loan within ten calendar days of loan approval; for the purposes of this rule, a loan is considered approved when the loan is assigned a loan number by SBA.[1] For loans that received an SBA loan number prior to the posting of this interim final rule but have not yet been fully disbursed, the following transition rules apply:

[1] If the tenth calendar day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next business day.

• The ten calendar-day period described above begins on April 28, 2020.

• The eight-week covered period began on the date of first disbursement.

Notwithstanding this limitation, lenders are not responsible for delays in disbursement attributable to a borrower's failure to timely provide required loan documentation, including a signed promissory note. Loans for which funds have not been disbursed because a borrower has not submitted required loan documentation within 20 calendar days of loan approval shall be cancelled by the lender, subject to the transition rules above. When disbursing loans, lenders must send any amount of loan proceeds designated for the refinance of an EIDL loan directly to SBA and not to the borrower.

The Administrator, in consultation with the Secretary, determined that requiring a single loan disbursement will best serve the interests of both borrowers and lenders and promote the purposes of the CARES Act. A single loan disbursement will eliminate the risk of delays in processing loan disbursement installments, advance the goal of payroll continuity for employees, and provide borrowers with faster access to the full loan amount so that they can immediately cover payroll costs.

b. By when must a lender electronically submit an SBA Form 1502 indicating that PPP loan funds have been disbursed?

SBA will make available a specific SBA Form 1502 reporting process through which PPP lenders will report on PPP loans and collect the processing fee on fully disbursed loans to which they are entitled. Lenders must electronically upload SBA Form 1502 information within 20 calendar days after a PPP loan is approved or, for loans approved before availability of the updated SBA Form 1502 reporting process, by May 18, 2020. The lender must report on SBA Form 1502 whether it has fully disbursed PPP loan proceeds. A lender will not receive a processing fee: (1) Prior to full disbursement of the PPP loan; (2) if the PPP loan is cancelled before disbursement; or (3) if the PPP loan is cancelled or voluntarily terminated and repaid after disbursement (including if a borrower repays the PPP loan proceeds to conform to the borrower's certification regarding the necessity of the PPP loan request). In addition to providing ACH credit information to direct payment of the requested processing fee, lenders will be required to confirm that all PPP loans for which the lender is requesting a processing fee have been fully disbursed on the disbursement dates and in the loan amounts reported. A lender must report through either Etran Servicing or the SBA Form 1502 report any PPP loans that have been cancelled before disbursement or that have been cancelled or voluntarily terminated and repaid after disbursement.

The Administrator, in consultation with the Secretary, determined that requiring lenders to report on disbursement within 20 calendar days of loan approval ensures that disbursement of funds to eligible borrowers will occur more rapidly. This requirement also will enhance SBA's ability to track program data.

2. Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA's website at *www.sba.gov*. Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at *https://www.sba.gov/tools/local-assistance/districtoffices*.

Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are ''small entities.'' Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency ''certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, ''along with a statement providing the factual basis for such certification.'' If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b).

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a

regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act, Ch.1. p.9. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,

Administrator.

[FR Doc. 2020–09398 Filed 5–1–20; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA–2020–0023]

RIN 3245–AH39

Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Corporate Groups and Non-Bank and Non-Insured Depository Institution Lenders

AGENCY: U. S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule announcing the implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act temporarily adds a new program, titled the ''Paycheck Protection Program,'' to the SBA's 7(a) Loan Program. The CARES Act also provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). SBA posted additional interim final rules on April 3, 2020, April 14, 2020, April 24, 2020, and April 28, 2020, and the Department of the Treasury posted an additional interim final rule on April 28, 2020. This interim final rule supplements the previously posted interim final rules by limiting the amount of PPP loans that any single corporate group may receive and provides additional guidance on the criteria for non-bank lender participation in the PPP, and requests public comment.

DATES:

Effective date: This rule is effective May 4, 2020.

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment date: Comments must be received on or before June 3, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0023 through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments. SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please send an email to *ppp-ifr@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the CARES Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency. Section 1102 of the CARES Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the ''Paycheck Protection Program.'' Section 1106 of the CARES Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116–139), which provided additional funding and authority for the Paycheck Protection Program.

As described below, to preserve the limited resources available to the PPP program, this interim final rule limits the aggregate amount of PPP loans that any single corporate group may receive. This interim final rule also provides additional guidance regarding lenders eligible to make PPP loans.

II. Comments and Immediate Effective Date

The intent of the CARES Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Specifically, it is critical to meet lenders' and borrowers' need for clarity concerning program requirements as rapidly as possible because the last day eligible borrowers can apply for and receive a loan is June 30, 2020.

This interim final rule supplements previous regulations and guidance on certain important, discrete issues. The immediate effective date of this interim final rule will benefit lenders so that they can swiftly close and disburse loans to small businesses. This interim final rule is effective without advance notice and public comment because section 1114 of the CARES Act authorizes SBA to issue regulations to implement Title I of the CARES Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of this interim final rule, including section III below. These comments must be submitted on or before June 3, 2020. SBA will consider these comments and the need for making any revisions as a result of these comments.

SMALL BUSINESS ADMINISTRATION

[Docket Number SBA–2020–0021]

13 CFR Parts 120 and 121

RIN 3245–AH37

Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule (the First PPP Interim Final Rule) announcing the implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). The Act temporarily adds a new program, titled the ''Paycheck Protection Program,'' to the SBA's 7(a) Loan Program. The Act also provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). SBA posted additional interim final rules on April 3, 2020, and April 14, 2020. This interim final rule supplements the previously posted interim final rules with additional guidance. SBA requests public comment on this additional guidance.

DATES: *Effective date:* This rule is effective April 28, 2020.

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment date: Comments must be received on or before May 28, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0021 through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments. SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please send an email to *ppp-ifr@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency. Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the ''Paycheck Protection Program.'' Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Specifically, it is critical to meet lenders' and borrowers' need for clarity concerning program requirements as rapidly as possible because the last day eligible borrowers can apply for and receive a loan is June 30, 2020.

This interim final rule supplements previous regulations and guidance on several important, discrete issues. The immediate effective date of this interim final rule will benefit lenders so that they can swiftly close and disburse loans to small businesses. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before May 28, 2020. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the Paycheck Protection Program (PPP). Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans and any accrued interest may qualify for loan forgiveness. Additional information about the PPP is available in the First PPP Interim Final Rule (85 FR 20811), a second interim final rule (85 FR 20817) (the Second PPP Interim Final Rule), and a third interim final rule (the Third PPP Interim Final Rule) (85 FR 21747) (collectively, the PPP Interim Final Rules).

1. Requirements for Promissory Notes and Authorizations

This guidance is substantively identical to previously posted FAQ guidance.

a. Are lenders required to use a promissory note provided by SBA or may they use their own?

Lenders may use their own promissory note or an SBA form of promissory note. *See* FAQ 19 (posted April 8, 2020).

b. Are lenders required to use a separate SBA Authorization document to issue PPP loans?

No. A lender does not need a separate SBA Authorization for SBA to guarantee a PPP loan. However, lenders must have executed SBA Form 2484 (the Lender Application Form—Paycheck Protection Program Loan Guaranty) [1] to issue PPP loans and receive a loan number for each originated PPP loan. Lenders may include in their promissory notes for PPP loans any terms and conditions, including relating to amortization and disclosure, that are not inconsistent with Sections 1102 and 1106 of the CARES Act, the PPP Interim Final Rules and guidance, and SBA Form 2484. *See* FAQ 21 (posted April 13, 2020). The decision not to require a separate SBA Authorization in order to ensure that critical PPP loans are disbursed as efficiently as practicable.

2. Clarification Regarding Eligible Businesses

a. Is a hedge fund or private equity firm eligible for a PPP loan?

No. Hedge funds and private equity firms are primarily engaged in investment or speculation, and such businesses are therefore ineligible to receive a PPP loan. The Administrator, in consultation with the Secretary, does not believe that Congress intended for these types of businesses, which are generally ineligible for section 7(a) loans under existing SBA regulations, to obtain PPP financing.

b. Do the SBA affiliation rules prohibit a portfolio company of a private equity fund from being eligible for a PPP loan?

Borrowers must apply the affiliation rules that appear in 13 CFR 121.301(f), as set forth in the Second PPP Interim Final Rule (85 FR 20817). The affiliation rules apply to private equity-owned businesses in the same manner as any other business subject to outside ownership or control.[2] However, in addition to applying any applicable affiliation rules, all borrowers should carefully review the required certification on the Paycheck Protection Program Borrower Application Form (SBA Form 2483) stating that ''[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.''

c. *Is a hospital owned by governmental entities eligible for a PPP loan?*

A hospital that is otherwise eligible to receive a PPP loan as a business concern or nonprofit organization (described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code) shall not be rendered ineligible for a PPP loan due to ownership by a state or local government if the hospital receives less than 50% of its funding from state or local government sources, exclusive of Medicaid.

The Administrator, in consultation with the Secretary, determined that this exception to the general ineligibility of government-owned entities, 13 CFR 120.110(j), is appropriate to effectuate the purposes of the CARES Act.

d. Part III.2.b. of the Third PPP Interim Final Rule (85 FR 21747, 21751) is revised to read as follows:

Are businesses that receive revenue from legal gaming eligible for a PPP Loan?

A business that is otherwise eligible for a PPP Loan is not rendered ineligible due to its receipt of legal gaming revenues, and 13 CFR 120.110(g) is inapplicable to PPP loans. Businesses that received illegal gaming revenue remain categorically ineligible. On further consideration, the Administrator, in consultation with the Secretary, believes this approach is more consistent with the policy aim of making PPP loans available to a broad segment of U.S. businesses.

3. Business Participation in Employee Stock Ownership Plans

Does participation in an employee stock ownership plan (ESOP) trigger application of the affiliation rules?

No. For purposes of the PPP, a business's participation in an ESOP (as defined in 15 U.S.C. 632(q)(6)) does not result in an affiliation between the business and the ESOP. The Administrator, in consultation with the Secretary, determined that this is appropriate given the nature of such plans. Under an ESOP, a business concern contributes its stock (or money to buy its stock or to pay off a loan that was used to buy stock) to the plan for the benefit of the company's employees. The plan maintains an account for each employee participating in the plan. Shares of stock vest over time before an employee is entitled to them. However, with an ESOP, an employee generally does not buy or hold the stock directly while still employed with the company. Instead, the employee generally receives the shares in his or her personal account only upon the cessation of employment with the company, including retirement, disability, death, or termination.

4. Eligibility of Businesses Presently Involved in Bankruptcy Proceedings

Will I be approved for a PPP loan if my business is in bankruptcy?

No. If the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan. If the applicant or the owner of the applicant becomes the debtor in a bankruptcy proceeding after submitting a PPP application but before the loan is disbursed, it is the applicant's obligation to notify the lender and request cancellation of the application. Failure by the applicant to do so will be regarded as a use of PPP funds for unauthorized purposes.

The Administrator, in consultation with the Secretary, determined that providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans. In addition, the Bankruptcy Code does not require any person to make a loan or a financial accommodation to a debtor in bankruptcy. The Borrower Application Form for PPP loans (SBA Form 2483), which reflects this restriction in the form of a borrower certification, is a loan program requirement. Lenders may rely on an applicant's representation concerning the applicant's or an owner of the applicant's involvement in a bankruptcy proceeding.

5. Limited Safe Harbor With Respect to Certification Concerning Need for PPP Loan Request

Consistent with section 1102 of the CARES Act, the Borrower Application Form requires PPP applicants to certify that ''[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.''

Any borrower that applied for a PPP loan prior to the issuance of this regulation and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

The Administrator, in consultation with the Secretary, determined that this safe harbor is necessary and appropriate

[1] This requirement is satisfied by a lender when the lender completes the process of submitting a loan through the E-Tran system; no transmission or retention of a physical copy of Form 2484 is required.

[2] However, the Act waives the affiliation rules if the borrower receives financial assistance from an SBA-licensed Small Business Investment Company (SBIC) in any amount. This includes any type of financing listed in 13 CFR 107.50, such as loans, debt with equity features, equity, and guarantees. Affiliation is waived even if the borrower has investment from other non-SBIC investors.

to ensure that borrowers promptly repay PPP loan funds that the borrower obtained based on a misunderstanding or misapplication of the required certification standard.

6. Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA's website at *www.sba.gov.* Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are ''small entities.'' Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency ''certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, ''along with a statement providing the factual basis for such certification.'' If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b). Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act, Ch.1. p.9. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,

Administrator.

[FR Doc. 2020–09098 Filed 4–27–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0095; Product Identifier 2019–NM–192–AD; Amendment 39–19904; AD 2020–08–12]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain The Boeing Company Model 747–8 and 747–8F series airplanes. This AD was prompted by an evaluation by the design approval holder (DAH) indicating that the skin lap joints at certain stringers are subject to widespread fatigue damage (WFD). This AD requires modifying the left and right side lap joints of the fuselage skin, repetitive post-modification inspections for cracking, and applicable on-condition actions. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 2, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 2, 2020.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0095.

Examining the AD Docket

You may examine the AD docket on the internet at *https://*

Presidential Documents

Executive Order 13903 of January 31, 2020

Combating Human Trafficking and Online Child Exploitation in the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Trafficking Victims Protection Act, 22 U.S.C. 7101 *et seq.*, it is hereby ordered as follows:

Section 1. *Policy*. Human trafficking is a form of modern slavery. Throughout the United States and around the world, human trafficking tears apart communities, fuels criminal activity, and threatens the national security of the United States. It is estimated that millions of individuals are trafficked around the world each year—including into and within the United States. As the United States continues to lead the global fight against human trafficking, we must remain relentless in resolving to eradicate it in our cities, suburbs, rural communities, tribal lands, and on our transportation networks. Human trafficking in the United States takes many forms and can involve exploitation of both adults and children for labor and sex.

Twenty-first century technology and the proliferation of the internet and mobile devices have helped facilitate the crime of child sex trafficking and other forms of child exploitation. Consequently, the number of reports to the National Center for Missing and Exploited Children of online photos and videos of children being sexually abused is at record levels.

The Federal Government is committed to preventing human trafficking and the online sexual exploitation of children. Effectively combating these crimes requires a comprehensive and coordinated response to prosecute human traffickers and individuals who sexually exploit children online, to protect and support victims of human trafficking and child exploitation, and to provide prevention education to raise awareness and help lower the incidence of human trafficking and child exploitation into, from, and within the United States.

To this end, it shall be the policy of the executive branch to prioritize its resources to vigorously prosecute offenders, to assist victims, and to provide prevention education to combat human trafficking and online sexual exploitation of children.

Sec. 2. *Strengthening Federal Responsiveness to Human Trafficking*. (a) The Domestic Policy Council shall commit one employee position to work on issues related to combating human trafficking occurring into, from, and within the United States and to coordinate with personnel in other components of the Executive Office of the President, including the Office of Economic Initiatives and the National Security Council, on such efforts. This position shall be filled by an employee of the executive branch detailed from the Department of Justice, the Department of Labor, the Department of Health and Human Services, the Department of Transportation, or the Department of Homeland Security.

(b) The Secretary of State, on behalf of the President's Interagency Task Force to Monitor and Combat Trafficking in Persons, shall make available, online, a list of the Federal Government's resources to combat human trafficking, including resources to identify and report instances of human trafficking, to protect and support the victims of trafficking, and to provide public outreach and training.

(c) The Secretary of State, the Attorney General, the Secretary of Labor, the Secretary of Health and Human Services, and the Secretary of Homeland Security shall, in coordination and consistent with applicable law:

(i) improve methodologies of estimating the prevalence of human trafficking, including in specific sectors or regions, and monitoring the impact of anti-trafficking efforts and publish such methodologies as appropriate; and

(ii) establish estimates of the prevalence of human trafficking in the United States.

Sec. 3. *Prosecuting Human Traffickers and Individuals Who Exploit Children Online*. (a) The Attorney General, through the Federal Enforcement Working Group, in collaboration with the Secretary of Labor and the Secretary of Homeland Security, shall:

(i) improve interagency coordination with respect to targeting traffickers, determining threat assessments, and sharing law enforcement intelligence to build on the Administration's commitment to the continued success of ongoing anti-trafficking enforcement initiatives, such as the Anti-Trafficking Coordination Team and the U.S.-Mexico Bilateral Human Trafficking Enforcement Initiatives; and

(ii) coordinate activities, as appropriate, with the Task Force on Missing and Murdered American Indians and Alaska Natives as established by Executive Order 13898 of November 26, 2019 (Establishing the Task Force on Missing and Murdered American Indians and Alaska Natives).

(b) The Attorney General and the Secretary of Homeland Security, and other heads of executive departments and agencies as appropriate, shall, within 180 days of the date of this order, propose to the President, through the Director of the Domestic Policy Council, legislative and executive actions that would overcome information-sharing challenges and improve law enforcement's capabilities to detect in real-time the sharing of child sexual abuse material on the internet, including material referred to in Federal law as ''child pornography.'' Overcoming these challenges would allow law enforcement officials to more efficiently identify, protect, and rescue victims of online child sexual exploitation; investigate and prosecute alleged offenders; and eliminate the child sexual abuse material online.

Sec. 4. *Protecting Victims of Human Trafficking and Child Exploitation*. (a) The Attorney General, the Secretary of Health and Human Services, and the Secretary of Homeland Security, and other heads of executive departments and agencies as appropriate, shall work together to enhance capabilities to locate children who are missing, including those who have run away from foster care and those previously in Federal custody, and are vulnerable to human trafficking and child exploitation. In doing so, such heads of executive departments and agencies, shall, as appropriate, engage social media companies; the technology industry; State, local, tribal and territorial child welfare agencies; the National Center for Missing and Exploited Children; and law enforcement at all levels.

(b) The Secretary of Health and Human Services, in consultation with the Secretary of Housing and Urban Development, shall establish an internal working group to develop and incorporate practical strategies for State, local, and tribal governments, child welfare agencies, and faith-based and other community organizations to expand housing options for victims of human trafficking.

Sec. 5. *Preventing Human Trafficking and Child Exploitation Through Education Partnerships*. The Attorney General and the Secretary of Homeland Security, in coordination with the Secretary of Education, shall partner with State, local, and tribal law enforcement entities to fund human traf- ficking and child exploitation prevention programs for our Nation's youth in schools, consistent with applicable law and available appropriations.

Sec. 6. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

THE WHITE HOUSE,
January 31, 2020.

[FR Doc. 2020–02438
Filed 2–4–20; 11:15 am]
Billing code 3295–F0–P

Federal Register
Vol. 85, No. 56
Monday, March 23, 2020

Presidential Documents

Title 3—

The President

Executive Order 13909 of March 18, 2020

Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID–19

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (50 U.S.C. 4501 *et seq.*) (the ''Act''), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Policy and Findings*. On March 13, 2020, I declared a national emergency recognizing the threat that the novel (new) coronavirus known as SARS–CoV–2 poses to our national security. In recognizing the public health risk, I noted that on March 11, 2020, the World Health Organization announced that the outbreak of COVID–19 (the disease caused by SARS–CoV–2) can be characterized as a pandemic. I also noted that while the Federal Government, along with State and local governments, have taken preventive and proactive measures to slow the spread of the virus and to treat those affected, the spread of COVID–19 within our Nation's communities threatens to strain our Nation's healthcare system. To ensure that our healthcare system is able to surge capacity and capability to respond to the spread of COVID–19, it is critical that all health and medical resources needed to respond to the spread of COVID–19 are properly distributed to the Nation's healthcare system and others that need them most at this time.

Accordingly, I find that health and medical resources needed to respond to the spread of COVID–19, including personal protective equipment and ventilators, meet the criteria specified in section 101(b) of the Act (50 U.S.C. 4511(b)). Under the delegation of authority provided in this order, the Secretary of Health and Human Services may identify additional specific health and medical resources that meet the criteria of section 101(b).

Sec. 2. *Priorities and Allocation of Medical Resources.*

(a) Notwithstanding Executive Order 13603 of March 16, 2012 (National Defense Resource Preparedness), the authority of the President conferred by section 101 of the Act to require performance of contracts or orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense, and to implement the Act in subchapter III of chapter 55 of title 50, United States Code, is delegated to the Secretary of Health and Human Services with respect to all health and medical resources needed to respond to the spread of COVID–19 within the United States.

(b) The Secretary of Health and Human Services may use the authority under section 101 of the Act to determine, in consultation with the Secretary of Commerce and the heads of other executive departments and agencies as appropriate, the proper nationwide priorities and allocation of all health and medical resources, including controlling the distribution of such materials (including applicable services) in the civilian market, for responding to the spread of COVID–19 within the United States.

(c) The Secretary of Health and Human Services shall issue such orders and adopt and revise appropriate rules and regulations as may be necessary to implement this order.

Sec. 3. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

THE WHITE HOUSE,
March 18, 2020.

[FR Doc. 2020–06161
Filed 3–20–20; 8:45 am]
Billing code 3295–F0–P

Federal Register
Vol. 85, No. 63
Wednesday, April 1, 2020

Presidential Documents

Title 3—

The President

Executive Order 13911 of March 27, 2020

Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources To Respond to the Spread of COVID–19

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (50 U.S.C. 4501 *et seq.*) (the ''Act''), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Policy*. In Proclamation 9994 of March 13, 2020 (Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak), I declared a national emergency recognizing the threat that the novel (new) coronavirus known as SARS–CoV–2 poses to our Nation's healthcare systems. In recognizing the public health risk, I noted that on March 11, 2020, the World Health Organization announced that the outbreak of COVID–19 (the disease caused by SARS–CoV–2) can be characterized as a pandemic. I also noted that while the Federal Government, along with State and local governments, have taken preventive and proactive measures to slow the spread of the virus and to treat those affected, the spread of COVID–19 within our Nation's communities threatens to strain our Nation's healthcare systems.

To deal with this threat, on March 18, 2020, I issued Executive Order 13909 (Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID–19), in which I delegated to the Secretary of Health and Human Services the prioritization and allocation authority under section 101 of the Act with respect to health and medical resources needed to respond to the spread of COVID–19. And on March 23, 2020, I issued Executive Order 13910 (Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID–19), in which I delegated to the Secretary of Health and Human Services the authority under section 102 of the Act to combat hoarding and price gouging with respect to such resources.

To ensure that our healthcare systems are able to surge capacity and capability to respond to the spread of COVID–19, it is the policy of the United States to expand domestic production of health and medical resources needed to respond to the spread of COVID–19, including personal protective equipment and ventilators. Accordingly, I am delegating authority under title III of the Act to guarantee loans by private institutions, make loans, make provision for purchases and commitments to purchase, and take additional actions to create, maintain, protect, expand, and restore domestic industrial base capabilities to produce such resources. To enable greater cooperation among private businesses in expanding production of and distributing such resources, I am also delegating my authority under section 708(c) and (d) of the Act (50 U.S.C. 4558(c), (d)) to provide for the making of voluntary agreements and plans of action by the private sector.

Sec. 2. *Delegation of Authority Under Title III of the Act*. (a) Notwithstanding Executive Order 13603 of March 16, 2012 (National Defense Resources Preparedness), the Secretary of Health and Human Services and the Secretary of Homeland Security are each delegated, with respect to responding to the spread of COVID–19 within the United States, the authority of the President conferred by sections 301, 302, and 303 of the Act (50 U.S.C. 4531, 4532, and 4533), and the authority to implement the Act in subchapter

III of chapter 55 of title 50, United States Code (50 U.S.C. 4554, 4555, 4556, and 4560).

(b) The Secretary of Health and Human Services and the Secretary of Homeland Security may each use the authority under sections 301, 302, and 303 of the Act, in consultation with the Secretary of Defense and the heads of other executive departments and agencies as he deems appropriate, to respond to the spread of COVID–19.

(c) To provide additional authority to respond to the national emergency I declared in Proclamation 9994, the requirements of section 301(a)(2), section 301(d)(1)(A), and section 303(a)(1) through (a)(6) of the Act are waived during the period of that national emergency.

(d) To provide additional authority to respond to the national emergency I declared in Proclamation 9994, the Secretary of Health and Human Services and the Secretary of Homeland Security are each authorized to submit for my approval under section 302(d)(2)(B) of the Act a proposed determination that any specific loan is necessary to avert an industrial resource or critical technology shortfall that would severely impair national defense capability.

(e) Before exercising the authority delegated under this section with respect to health or medical resources, the Secretary of Homeland Security shall consult with the Secretary of Health and Human Services.

Sec. 3. *Delegation of Authority Under Title VII of the Act.* (a) Notwithstanding Executive Order 13603, the Secretary of Health and Human Services and the Secretary of Homeland Security are each delegated, with respect to responding to the spread of COVID–19 within the United States, the authority of the President conferred by section 708(c)(1) and (d) of the Act. The Secretary of Health and Human Services shall provide to the Secretary of Homeland Security notice of any use of such delegated authority.

(b) The delegation made in this section is made upon the condition that the Secretary of Health and Human Services or the Secretary of Homeland Security consult with the Attorney General and with the Federal Trade Commission, and obtain the prior approval of the Attorney General, after consultation by the Attorney General with the Federal Trade Commission, as required by section 708(c)(2) of the Act, except when such consultation is waived under subsection (c) of section 3 of this order and section 708(c)(3) of the Act.

(c) The Secretary of Health and Human Services and the Secretary of Homeland Security are each authorized to submit for my approval under section 708(c)(3) of the Act any proposed determination that any specific voluntary agreement or plan of action is necessary to meet national defense requirements resulting from an event that degrades or destroys critical infrastructure.

(d) Before exercising the authority delegated under this section with respect to health or medical resources, the Secretary of Homeland Security shall consult with the Secretary of Health and Human Services.

Sec. 4. *Additional Delegations.* (a) Notwithstanding Executive Order 13603, the Secretary of Health and Human Services and the Secretary of Homeland Security are each delegated, with respect to responding to the spread of COVID–19 within the United States, the authority of the President conferred by section 107 of the Act (50 U.S.C. 4517).

(b) In addition to the delegations of authority in Executive Order 13909 and Executive Order 13910, the authority of the President conferred by sections 101 and 102 of the Act (50 U.S.C. 4511, 4512) is delegated to the Secretary of Homeland Security with respect to health and medical resources needed to respond to the spread of COVID–19 within the United States.

(c) The Secretary of Homeland Security may use the authority under section 101 of the Act to determine, in consultation with the heads of

other executive departments and agencies as appropriate, the proper nationwide priorities and allocation of health and medical resources, including by controlling the distribution of such materials (including applicable services) in the civilian market, for responding to the spread of COVID–19 within the United States.

(d) Before exercising the authority under section 102 of the Act, the Secretary of Homeland Security shall consult with the Secretary of Health and Human Services.

(e) The Secretary of Homeland Security shall periodically consider whether the designations made by him under section 102 of the Act pursuant to section 4(b) of this order remain necessary. Upon finding that such designation of material is no longer necessary, the Secretary of Homeland Security shall promptly publish a notice of withdrawal of the designation in the *Federal Register*, and in such other manner as he deems appropriate.

Sec. 5. *Implementing Rules and Regulations.* The Secretary of Health and Human Services and the Secretary of Homeland Security shall each adopt and revise appropriate rules and regulations as may be necessary to implement this order.

Sec. 6. *Policy Coordination.* The Assistant to the President for Trade and Manufacturing Policy shall serve as National Defense Production Act Policy Coordinator.

Sec. 7. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

THE WHITE HOUSE,
March 27, 2020.

[FR Doc. 2020–06969
Filed 3–31–20; 11:15 am]
Billing code 3295–F0–P

Federal Register
Vol. 85, No. 85
Friday, May 1, 2020

Presidential Documents

Title 3—

The President

Executive Order 13917 of April 28, 2020

Delegating Authority Under the Defense Production Act With Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID–19

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (50 U.S.C. 4501 *et seq*.) (the ''Act''), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Policy*. The 2019 novel (new) coronavirus known as SARS–CoV–2, the virus causing outbreaks of the disease COVID–19, has significantly disrupted the lives of Americans. In Proclamation 9994 of March 13, 2020 (Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak), I declared that the COVID–19 outbreak in the United States constituted a national emergency, beginning March 1, 2020. Since then, the American people have united behind a policy of mitigation strategies, including social distancing, to flatten the curve of infections and reduce the spread of COVID–19. The COVID–19 outbreak and these necessary mitigation measures have taken a dramatic toll on the United States economy and critical infrastructure.

It is important that processors of beef, pork, and poultry (''meat and poultry'') in the food supply chain continue operating and fulfilling orders to ensure a continued supply of protein for Americans. However, outbreaks of COVID–19 among workers at some processing facilities have led to the reduction in some of those facilities' production capacity. In addition, recent actions in some States have led to the complete closure of some large processing facilities. Such actions may differ from or be inconsistent with interim guidance recently issued by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services and the Occupational Safety and Health Administration (OSHA) of the Department of Labor entitled ''Meat and Poultry Processing Workers and Employers'' providing for the safe operation of such facilities.

Such closures threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the national emergency. Given the high volume of meat and poultry processed by many facilities, any unnecessary closures can quickly have a large effect on the food supply chain. For example, closure of a single large beef processing facility can result in the loss of over 10 million individual servings of beef in a single day. Similarly, under established supply chains, closure of a single meat or poultry processing facility can severely disrupt the supply of protein to an entire grocery store chain.

Accordingly, I find that meat and poultry in the food supply chain meet the criteria specified in section 101(b) of the Act (50 U.S.C. 4511(b)). Under the delegation of authority provided in this order, the Secretary of Agriculture shall take all appropriate action under that section to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA. Under the delega- tion of authority provided in this order, the Secretary of Agriculture may identify additional specific food supply chain resources that meet the criteria of section 101(b).

Sec. 2. *Ensuring the Continued Supply of Meat and Poultry*. (a) Notwithstanding Executive Order 13603 of March 16, 2012 (National Defense Resources Preparedness), the authority of the President to require performance of contracts or orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense, and to implement the Act in subchapter III of chapter 55 of title 50, United States Code (50 U.S.C. 4554, 4555, 4556, 4559, 4560), is delegated to the Secretary of Agriculture with respect to food supply chain resources, including meat and poultry, during the national emergency caused by the outbreak of COVID–19 within the United States.

(b) The Secretary of Agriculture shall use the authority under section 101 of the Act, in consultation with the heads of such other executive departments and agencies as he deems appropriate, to determine the proper nationwide priorities and allocation of all the materials, services, and facilities necessary to ensure the continued supply of meat and poultry, consistent with the guidance for the operations of meat and poultry processing facilities jointly issued by the CDC and OSHA.

(c) The Secretary of Agriculture shall issue such orders and adopt and revise appropriate rules and regulations as may be necessary to implement this order.

Sec. 3. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

THE WHITE HOUSE,
April 28, 2020.

[FR Doc. 2020–09536
Filed 4–30–20; 11:15 am]
Billing code 3295–F0–P

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Tuesday, May 19, 2020

Presidential Documents

Title 3—

The President

Executive Order 13922 of May 14, 2020

Delegating Authority Under the Defense Production Act to the Chief Executive Officer of the United States International Development Finance Corporation To Respond to the COVID–19 Outbreak

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (50 U.S.C. 4501 *et seq.*) (the ''Act''), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Policy*. In Proclamation 9994 of March 13, 2020 (Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak), I declared a national emergency recognizing the threat that the novel (new) coronavirus known as SARS–CoV–2 poses to our Nation's healthcare systems. In recognizing the public health risk, I noted that on March 11, 2020, the World Health Organization announced that the outbreak of COVID–19 (the disease caused by SARS–CoV–2) can be characterized as a pandemic.

To ensure that our country has the capacity, capability, and strong and resilient domestic industrial base necessary to respond to the COVID–19 outbreak, it is the policy of the United States to further expand domestic production of strategic resources needed to respond to the COVID–19 outbreak, including strengthening relevant supply chains within the United States and its territories. It is important to use all resources available to the United States, including executive departments and agencies (agencies) with expertise in loan support for private institutions. Accordingly, I am delegating authority under title III of the Act to make loans, make provision for purchases and commitments to purchase, and take additional actions to create, maintain, protect, expand, and restore the domestic industrial base capabilities, including supply chains within the United States and its territories (''domestic supply chains''), needed to respond to the COVID–19 outbreak.

Sec. 2. *Delegation of Authority Under Title III of the Act*. (a) Notwithstanding Executive Order 13603 of March 16, 2012 (National Defense Resources Preparedness), and in addition to the delegation of authority in Executive Order 13911 of March 27, 2020 (Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources to Respond to the Spread of COVID–19), the Chief Executive Officer of the United States International Development Finance Corporation (DFC) is delegated the authority of the President conferred by sections 302 and 303 of the Act (50 U.S.C. 4532 and 4533), and the authority to implement the Act in subchapter III of chapter 55 of title 50, United States Code (50 U.S.C. 4554, 4555, 4556, and 4560).

(b) The Chief Executive Officer of the DFC may use the authority under sections 302 and 303 of the Act, in consultation with the Secretary of Defense, the Secretary of Health and Human Services, the Secretary of Homeland Security, and the heads of other agencies as he deems appropriate, for the domestic production of strategic resources needed to respond to the COVID–19 outbreak, or to strengthen any relevant domestic supply chains.

(c) The loan authority delegated by this order is limited to loans that create, maintain, protect, expand, or restore domestic industrial base capabilities supporting:

(i) the national response and recovery to the COVID–19 outbreak; or

(ii) the resiliency of any relevant domestic supply chains.

(d) Loans extended using the authority delegated by this order shall be made in accordance with the principles and guidelines outlined in OMB Circular A–11, OMB Circular A–129, and the Federal Credit Reform Act of 1990, as amended (2 U.S.C. 661 *etseq.*).

(e) The Chief Executive Officer of the DFC shall adopt appropriate rules and regulations as may be necessary to implement this order.

Sec. 3. *Termination.* The delegation of authority in this order shall expire upon termination of the 2-year period during which the requirements described in section 302(c)(1) of the Act (50 U.S.C. 4532(c)(1)) are waived pursuant to title III of division B of the Coronavirus Aid, Relief, and Economic Security Act (Public Law 116–136).

Sec. 4. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

THE WHITE HOUSE,
May 14, 2020.

[FR Doc. 2020–10953
Filed 5–18–20; 11:15 am]
Billing code 3295–F0–P

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Thursday, August 6, 2020

Presidential Documents

Title 3—

The President

Executive Order 13940 of August 3, 2020

Aligning Federal Contracting and Hiring Practices With the Interests of American Workers

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy*. It is the policy of the executive branch to create opportunities for United States workers to compete for jobs, including jobs created through Federal contracts. These opportunities, particularly in regions where the Federal Government remains the largest employer, are especially critical during the economic dislocation caused by the 2019 novel coronavirus (COVID–19) pandemic. When employers trade American jobs for temporary foreign labor, for example, it reduces opportunities for United States workers in a manner inconsistent with the role guest-worker programs are meant to play in the Nation's economy.

Sec. 2. *Review of Contracting and Hiring Practices*. (a) The head of each executive department and agency (agency) that enters into contracts shall review, to the extent practicable, performance of contracts (including subcontracts) awarded by the agency in fiscal years 2018 and 2019 to assess:

(i) whether contractors (including subcontractors) used temporary foreign labor for contracts performed in the United States, and, if so, the nature of the work performed by temporary foreign labor on such contracts; whether opportunities for United States workers were affected by such hiring; and any potential effects on the national security caused by such hiring; and

(ii) whether contractors (including subcontractors) performed in foreign countries services previously performed in the United States, and, if so, whether opportunities for United States workers were affected by such offshoring; whether affected United States workers were eligible for assistance under the Trade Adjustment Assistance program authorized by the Trade Act of 1974; and any potential effects on the national security caused by such offshoring.

(b) The head of each agency that enters into contracts shall assess any negative impact of contractors' and subcontractors' temporary foreign labor hiring practices or offshoring practices on the economy and efficiency of Federal procurement and on the national security, and propose action, if necessary and as appropriate and consistent with applicable law, to improve the economy and efficiency of Federal procurement and protect the national security.

(c) The head of each agency shall, in coordination with the Director of the Office of Personnel Management, review the employment policies of the agency to assess the agency's compliance with Executive Order 11935 of September 2, 1976 (Citizenship Requirements for Federal Employment), and section 704 of the Consolidated Appropriations Act, 2020, Public Law 116–93.

(d) Within 120 days of the date of this order, the head of each agency shall submit a report to the Director of the Office of Management and Budget summarizing the results of the reviews required by subsections (a) through (c) of this section; recommending, if necessary, corrective actions that may be taken by the agency and timeframes to implement such actions; and proposing any Presidential actions that may be appropriate.

Sec. 3. *Measures to Prevent Adverse Effects on United States Workers.* Within 45 days of the date of this order, the Secretaries of Labor and Homeland Security shall take action, as appropriate and consistent with applicable law, to protect United States workers from any adverse effects on wages and working conditions caused by the employment of H–1B visa holders at job sites (including third-party job sites), including measures to ensure that all employers of H–1B visa holders, including secondary employers, adhere to the requirements of section 212(n)(1) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)).

Sec. 4. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

THE WHITE HOUSE,
August 3, 2020.

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Presidential Documents

Title 3—

The President

Executive Order 13944 of August 6, 2020

Combating Public Health Emergencies and Strengthening National Security by Ensuring Essential Medicines, Medical Countermeasures, and Critical Inputs Are Made in the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy*. The United States must protect our citizens, critical infrastructure, military forces, and economy against outbreaks of emerging infectious diseases and chemical, biological, radiological, and nuclear (CBRN) threats. To achieve this, the United States must have a strong Public Health Industrial Base with resilient domestic supply chains for Essential Medicines, Medical Countermeasures, and Critical Inputs deemed necessary for the United States. These domestic supply chains must be capable of meeting national security requirements for responding to threats arising from CBRN threats and public health emergencies, including emerging infectious diseases such as COVID–19. It is critical that we reduce our dependence on foreign manufacturers for Essential Medicines, Medical Countermeasures, and Critical Inputs to ensure sufficient and reliable long-term domestic production of these products, to minimize potential shortages, and to mobilize our Nation's Public Health Industrial Base to respond to these threats. It is therefore the policy of the United States to:

(a) accelerate the development of cost-effective and efficient domestic production of Essential Medicines and Medical Countermeasures and have adequate redundancy built into the domestic supply chain for Essential Medicines, Medical Countermeasures, and Critical Inputs;

(b) ensure long-term demand for Essential Medicines, Medical Countermeasures, and Critical Inputs that are produced in the United States;

(c) create, maintain, and maximize domestic production capabilities for Critical Inputs, Finished Drug Products, and Finished Devices that are essential to protect public safety and human health and to provide for the national defense; and

(d) combat the trafficking of counterfeit Essential Medicines, Medical Countermeasures, and Critical Inputs over e-commerce platforms and from third-party online sellers involved in the government procurement process.

I am therefore directing each executive department and agency involved in the procurement of Essential Medicines, Medical Countermeasures, and Critical Inputs (agency) to consider a variety of actions to increase their domestic procurement of Essential Medicines, Medical Countermeasures, and Critical Inputs, and to identify vulnerabilities in our Nation's supply chains for these products. Under this order, agencies will have the necessary flexibility to increase their domestic procurement in appropriate and responsible ways, while protecting our Nation's service members, veterans, and their families from increases in drug prices and without interfering with our Nation's ability to respond to the spread of COVID–19.

Sec. 2. *Maximizing Domestic Production in Procurement.* (a) Agencies shall, as appropriate, to the maximum extent permitted by applicable law, and in consultation with the Commissioner of Food and Drugs (FDA Commissioner) with respect to Critical Inputs, use their respective authorities under section 2304(c) of title 10, United States Code; section 3304(a) of title 41,

United States Code; and subpart 6.3 of the Federal Acquisition Regulation, title 48, Code of Federal Regulations, to conduct the procurement of Essential Medicines, Medical Countermeasures, and Critical Inputs by:

(i) using procedures to limit competition to only those Essential Medicines, Medical Countermeasures, and Critical Inputs that are produced in the United States; and

(ii) dividing procurement requirements among two or more manufacturers located in the United States, as appropriate.

(b) Within 90 days of the date of this order, the Director of the Office of Management and Budget (OMB), in consultation with appropriate agency heads, shall:

(i) review the authority of each agency to limit the online procurement of Essential Medicines and Medical Countermeasures to e-commerce platforms that have:

(A) adopted, and certified their compliance with, the applicable best practices published by the Department of Homeland Security in its Report to the President on ''Combating Trafficking in Counterfeit and Pirated Goods,'' dated January 24, 2020; and

(B) agreed to permit the Department of Homeland Security's National Intellectual Property Rights Coordination Center to evaluate and confirm their compliance with such best practices; and

(ii) report its findings to the President.

(c) Within 90 days of the date of this order, the head of each agency shall, in consultation with the FDA Commissioner, develop and implement procurement strategies, including long-term contracts, consistent with law, to strengthen and mobilize the Public Health Industrial Base in order to increase the manufacture of Essential Medicines, Medical Countermeasures, and Critical Inputs in the United States.

(d) No later than 30 days after the FDA Commissioner has identified, pursuant to section 3(c) of this order, the initial list of Essential Medicines, Medical Countermeasures, and Critical Inputs, the United States Trade Representative shall, to the extent permitted by law, take all appropriate action to modify United States Federal procurement product coverage under all relevant Free Trade Agreements and the World Trade Organization Agreement on Government Procurement to exclude coverage of Essential Medicines, Medical Countermeasures, and Critical Inputs. The United States Trade Representative shall further modify United States Federal procurement product coverage, as appropriate, to reflect updates by the FDA Commissioner. After the modifications to United States Federal procurement coverage take effect, the United States Trade Representative shall make any necessary, corresponding modifications of existing waivers under section 301 of the Trade Agreements Act of 1979. The United States Trade Representative shall notify the President, through the Director of OMB, once it has taken the actions described in this subsection.

(e) No later than 60 days after the FDA Commissioner has identified, pursuant to section 3(c) of this order, the initial list of Essential Medicines, Medical Countermeasures, and Critical Inputs, and notwithstanding the public interest exception in subsection (f)(i)(1) of this section, the Secretary of Defense shall, to the maximum extent permitted by applicable law, use his authority under section 225.872–1(c) of the Defense Federal Acquisition Regulation Supplement to restrict the procurement of Essential Medicines, Medical Countermeasures, and Critical Inputs to domestic sources and to reject otherwise acceptable offers of such products from sources in Qualifying Countries in instances where considered necessary for national defense reasons.

(f) Subsections (a), (d), and (e) of this section shall not apply:

(i) where the head of the agency determines in writing, with respect to a specific contract or order, that (1) their application would be inconsistent with the public interest; (2) the relevant Essential Medicines, Medical Countermeasures, and Critical Inputs are not produced in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality; or (3) their application would cause the cost of the procurement to increase by more than 25 percent, unless applicable law requires a higher percentage, in which case such higher percentage shall apply;

(ii) with respect to the procurement of items that are necessary to respond to any public health emergency declared under section 319 of the Public Health Service Act (42 U.S.C. 247d), any major disaster or emergency declared under the Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*), or any national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*).

(g) To the maximum extent permitted by law, any public interest determination made pursuant to section 2(f)(i)(1) of this order shall be construed to maximize the procurement and use of Essential Medicines and Medical Countermeasures produced in the United States.

(h) The head of an agency who makes any determination pursuant to section 2(f)(i) of this order shall submit an annual report to the President, through the Director of OMB and the Assistant to the President for Trade and Manufacturing Policy, describing the justification for each such determination.

Sec. 3. *Identifying Vulnerabilities in Supply Chains*. (a) Within 180 days of the date of this order, the Secretary of Health and Human Services, through the FDA Commissioner and in consultation with the Director of OMB, shall take all necessary and appropriate action, consistent with law, to identify vulnerabilities in the supply chain for Essential Medicines, Medical Countermeasures, and Critical Inputs and to mitigate those vulnerabilities, including by:

(i) considering proposing regulations or revising guidance on the collection of the following information from manufacturers of Essential Medicines and Medical Countermeasures as part of the application and regulatory approval process:

(A) the sources of Finished Drug Products, Finished Devices, and Critical Inputs;

(B) the use of any scarce Critical Inputs; and

(C) the date of the last FDA inspection of the manufacturer's regulated facilities and the results of such inspection;

(ii) entering into written agreements, pursuant to section 20.85 of title 21, Code of Federal Regulations, with the National Security Council, Department of State, Department of Defense, Department of Veterans Affairs, and other interested agencies, as appropriate, to disclose records regarding the security and vulnerabilities of the supply chains for Essential Medicines, Medical Countermeasures, and Critical Inputs;

(iii) recommending to the President any changes in applicable law that may be necessary to accomplish the objectives of this subsection; and

(iv) reviewing FDA regulations to determine whether any of those regulations may be a barrier to domestic production of Essential Medicines, Medical Countermeasures, and Critical Inputs, and by advising the President whether such regulations should be repealed or amended.

(b) The Secretary of Health and Human Services, through the FDA Commissioner, shall take all appropriate action, consistent with applicable law, to:

(i) accelerate FDA approval or clearance, as appropriate, for domestic producers of Essential Medicines, Medical Countermeasures, and Critical

Inputs, including those needed for infectious disease and CBRN threat preparedness and response;

(ii) issue guidance with recommendations regarding the development of Advanced Manufacturing techniques;

(iii) negotiate with countries to increase site inspections and increase the number of unannounced inspections of regulated facilities manufacturing Essential Medicines, Medical Countermeasures, and Critical Inputs; and

(iv) refuse admission, as appropriate, to imports of Essential Medicines, Medical Countermeasures, and Critical Inputs if the facilities in which they are produced refuse or unreasonably delay an inspection.

(c) Within 90 days of the date of this order, and periodically updated as appropriate, the FDA Commissioner, in consultation with the Director of OMB, the Assistant Secretary for Preparedness and Response in the Department of Health and Human Services, the Assistant to the President for Economic Policy, and the Director of the Office of Trade and Manufacturing Policy, shall identify the list of Essential Medicines, Medical Countermeasures, and their Critical Inputs that are medically necessary to have available at all times in an amount adequate to serve patient needs and in the appropriate dosage forms.

(d) Within 180 days of the date of this order, the Secretary of Defense, in consultation with the Director of OMB, shall take all necessary and appropriate action, consistent with law, to identify vulnerabilities in the supply chain for Essential Medicines, Medical Countermeasures, and Critical Inputs necessary to meet the unique needs of the United States Armed Forces and to mitigate the vulnerabilities identified in subsection (a) of this section. The Secretary of Defense shall provide to the Secretary of Health and Human Services, the FDA Commissioner, the Director of OMB, and the Director of the Office of Trade and Manufacturing Policy a list of defense-specific Essential Medicines, Medical Countermeasures, and Critical Inputs that are medically necessary to have available for defense use in adequate amounts and in appropriate dosage forms. The Secretary of Defense shall, as appropriate, periodically update this list.

Sec. 4. *Streamlining Regulatory Requirements.* Consistent with law, the Administrator of the Environmental Protection Agency shall take all appropriate action to identify relevant requirements and guidance documents that can be streamlined to provide for the development of Advanced Manufacturing facilities and the expeditious domestic production of Critical Inputs, including by accelerating siting and permitting approvals.

Sec. 5. *Priorities and Allocation of Essential Medicines, Medical Countermeasures, and Critical Inputs*. The Secretary of Health and Human Services shall, as appropriate and in accordance with the delegation of authority under Executive Order 13603 of March 16, 2012 (National Defense Resources Preparedness), use the authority under section 101 of the Defense Production Act of 1950, as amended (50 U.S.C. 4511), to prioritize the performance of Federal Government contracts or orders for Essential Medicines, Medical Countermeasures, or Critical Inputs over performance of any other contracts or orders, and to allocate such materials, services, and facilities as the Secretary deems necessary or appropriate to promote the national defense.

Sec. 6. *Reporting.* (a) No later than December 15, 2021, and annually thereafter, the head of each agency shall submit a report to the President, through the Director of OMB and the Assistant to the President for Trade and Manufacturing Policy, detailing, for the preceding three fiscal years:

(i) the Essential Medicines, Medical Countermeasures, and Critical Inputs procured by the agency;

(ii) the agency's annual itemized and aggregated expenditures for all Essential Medicines, Medical Countermeasures, and Critical Inputs;

(iii) the sources of these products and inputs; and

(iv) the agency's plan to support domestic production of such products and inputs in the next fiscal year.

(b) Within 180 days of the date of this order, the Secretary of Commerce shall submit a report to the Director of OMB, the Assistant to the President for National Security Affairs, the Director of the National Economic Council, and the Director of the Office of Trade and Manufacturing Policy, describing any change in the status of the Public Health Industrial Base and recommending initiatives to strengthen the Public Health Industrial Base.

(c) To the maximum extent permitted by law, and with the redaction of any information protected by law from disclosure, each agency's report shall be published in the *Federal Register* and on each agency's official website.

Sec. 7. *Definitions.* As used in this order:

(a) ''Active Pharmaceutical Ingredient'' has the meaning set forth in section 207.1 of title 21, Code of Federal Regulations.

(b) ''Advanced Manufacturing'' means any new medical product manufacturing technology that can improve drug quality, address shortages of medicines, and speed time to market, including continuous manufacturing and 3D printing.

(c) ''API Starting Material'' means a raw or intermediate material that is used in the manufacturing of an API, that is incorporated as a significant structural fragment into the structure of the API, and that is determined by the FDA Commissioner to be relevant in assessing the safety and effectiveness of Essential Medicines and Medical Countermeasures.

(d) ''Critical Inputs'' means API, API Starting Material, and other ingredients of drugs and components of medical devices that the FDA Commissioner determines to be critical in assessing the safety and effectiveness of Essential Medicines and Medical Countermeasures.

(e) ''Essential Medicines'' are those Essential Medicines deemed necessary for the United States pursuant to section 3(c) of this order.

(f) ''Finished Device'' has the meaning set forth in section 820.3(l) of title 21, Code of Federal Regulations.

(g) ''Finished Drug Product'' has the meaning set forth in section 207.1 of title 21, Code of Federal Regulations.

(h) ''Healthcare and Public Health Sector'' means the critical infrastructure sector identified in Presidential Policy Directive 21 of February 12, 2013 (Critical Infrastructure Security and Resilience), and the National Infrastructure Protection Plan of 2013.

(i) An Essential Medicine or Medical Countermeasure is ''produced in the United States'' if the Critical Inputs used to produce the Essential Medicine or Medical Countermeasures are produced in the United States and if the Finished Drug Product or Finished Device, are manufactured, prepared, propagated, compounded, or processed, as those terms are defined in section 360(a)(1) of title 21, United States Code, in the United States.

(j) ''Medical Countermeasures'' means items that meet the definition of ''qualified countermeasure'' in section 247d–6a(a)(2)(A) of title 42, United States Code; ''qualified pandemic or epidemic product'' in section 247d–6d(i)(7) of title 42, United States Code; ''security countermeasure'' in section 247d–6b(c)(1)(B) of title 42, United States Code; or personal protective equipment described in part 1910 of title 29, Code of Federal Regulations.

(k) ''Public Health Industrial Base'' means the facilities and associated workforces within the United States, including research and development facilities, that help produce Essential Medicines, Medical Countermeasures, and Critical Inputs for the Healthcare and Public Health Sector.

(l) ''Qualifying Countries'' has the meaning set forth in section 225.003, Defense Federal Acquisition Regulation Supplement.

Sec. 8. *Rule of Construction*. Nothing in this order shall be construed to impair or otherwise affect:

(a) the ability of State, local, tribal, or territorial governments to timely procure necessary resources to respond to any public health emergency declared under section 319 of the Public Health Service Act (42 U.S.C. 247d), any major disaster or emergency declared under the Stafford Act (42 U.S.C. 5121 *et seq.*), or any national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*);

(b) the ability or authority of any agency to respond to the spread of COVID–19; or

(c) the authority of the Secretary of Veterans Affairs to take all necessary steps, including those necessary to implement the policy set forth in section 1 of this order, to ensure that service members, veterans, and their families continue to have full access to Essential Medicines at reasonable and affordable prices.

Sec. 9. *Severability*. If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of any of its other provisions to any other persons or circumstances shall not be affected thereby.

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

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

(ii) the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

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

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

THE WHITE HOUSE,
August 6, 2020.

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Filed 8–13–20; 11:15 am]
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Monday, September 28, 2020

Presidential Documents

Title 3—

The President

Executive Order 13950 of September 22, 2020

Combating Race and Sex Stereotyping

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to promote economy and efficiency in Federal contracting, to promote unity in the Federal workforce, and to combat offensive and anti-American race and sex stereotyping and scapegoating, it is hereby ordered as follows:

Section 1. *Purpose*. From the battlefield of Gettysburg to the bus boycott in Montgomery and the Selma-to-Montgomery marches, heroic Americans have valiantly risked their lives to ensure that their children would grow up in a Nation living out its creed, expressed in the Declaration of Independence: ''We hold these truths to be self-evident, that all men are created equal.'' It was this belief in the inherent equality of every individual that inspired the Founding generation to risk their lives, their fortunes, and their sacred honor to establish a new Nation, unique among the countries of the world. President Abraham Lincoln understood that this belief is ''the electric cord'' that ''links the hearts of patriotic and liberty-loving'' people, no matter their race or country of origin. It is the belief that inspired the heroic black soldiers of the 54th Massachusetts Infantry Regiment to defend that same Union at great cost in the Civil War. And it is what inspired Dr. Martin Luther King, Jr., to dream that his children would one day ''not be judged by the color of their skin but by the content of their character.''

Thanks to the courage and sacrifice of our forebears, America has made significant progress toward realization of our national creed, particularly in the 57 years since Dr. King shared his dream with the country.

Today, however, many people are pushing a different vision of America that is grounded in hierarchies based on collective social and political identities rather than in the inherent and equal dignity of every person as an individual. This ideology is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans.

This destructive ideology is grounded in misrepresentations of our country's history and its role in the world. Although presented as new and revolutionary, they resurrect the discredited notions of the nineteenth century's apologists for slavery who, like President Lincoln's rival Stephen A. Douglas, maintained that our government ''was made on the white basis'' ''by white men, for the benefit of white men.'' Our Founding documents rejected these racialized views of America, which were soundly defeated on the blood-stained battlefields of the Civil War. Yet they are now being repackaged and sold as cutting-edge insights. They are designed to divide us and to prevent us from uniting as one people in pursuit of one common destiny for our great country.

Unfortunately, this malign ideology is now migrating from the fringes of American society and threatens to infect core institutions of our country. Instructors and materials teaching that men and members of certain races, as well as our most venerable institutions, are inherently sexist and racist are appearing in workplace diversity trainings across the country, even in

components of the Federal Government and among Federal contractors. For example, the Department of the Treasury recently held a seminar that promoted arguments that ''virtually all White people, regardless of how 'woke' they are, contribute to racism,'' and that instructed small group leaders to encourage employees to avoid ''narratives'' that Americans should ''be more color-blind'' or ''let people's skills and personalities be what differentiates them.''

Training materials from Argonne National Laboratories, a Federal entity, stated that racism ''is interwoven into every fabric of America'' and described statements like ''color blindness'' and the ''meritocracy'' as ''actions of bias.''

Materials from Sandia National Laboratories, also a Federal entity, for non-minority males stated that an emphasis on ''rationality over emotionality'' was a characteristic of ''white male[s],'' and asked those present to ''acknowledge'' their ''privilege'' to each other.

A Smithsonian Institution museum graphic recently claimed that concepts like ''[o]bjective, rational linear thinking,'' ''[h]ard work'' being ''the key to success,'' the ''nuclear family,'' and belief in a single god are not values that unite Americans of all races but are instead ''aspects and assumptions of whiteness.'' The museum also stated that ''[f]acing your whiteness is hard and can result in feelings of guilt, sadness, confusion, defensiveness, or fear.''

All of this is contrary to the fundamental premises underpinning our Republic: that all individuals are created equal and should be allowed an equal opportunity under the law to pursue happiness and prosper based on individual merit.

Executive departments and agencies (agencies), our Uniformed Services, Federal contractors, and Federal grant recipients should, of course, continue to foster environments devoid of hostility grounded in race, sex, and other federally protected characteristics. Training employees to create an inclusive workplace is appropriate and beneficial. The Federal Government is, and must always be, committed to the fair and equal treatment of all individuals before the law.

But training like that discussed above perpetuates racial stereotypes and division and can use subtle coercive pressure to ensure conformity of viewpoint. Such ideas may be fashionable in the academy, but they have no place in programs and activities supported by Federal taxpayer dollars. Research also suggests that blame-focused diversity training reinforces biases and decreases opportunities for minorities.

Our Federal civil service system is based on merit principles. These principles, codified at 5 U.S.C. 2301, call for all employees to ''receive fair and equitable treatment in all aspects of personnel management without regard to'' race or sex ''and with proper regard for their . . . constitutional rights.'' Instructing Federal employees that treating individuals on the basis of individual merit is racist or sexist directly undermines our Merit System Principles and impairs the efficiency of the Federal service. Similarly, our Uniformed Services should not teach our heroic men and women in uniform the lie that the country for which they are willing to die is fundamentally racist. Such teachings could directly threaten the cohesion and effectiveness of our Uniformed Services.

Such activities also promote division and inefficiency when carried out by Federal contractors. The Federal Government has long prohibited Federal contractors from engaging in race or sex discrimination and required contractors to take affirmative action to ensure that such discrimination does not occur. The participation of contractors' employees in training that promotes race or sex stereotyping or scapegoating similarly undermines efficiency in Federal contracting. Such requirements promote divisiveness in the workplace and distract from the pursuit of excellence and collaborative achievements in public administration.

Therefore, it shall be the policy of the United States not to promote race or sex stereotyping or scapegoating in the Federal workforce or in the Uniformed Services, and not to allow grant funds to be used for these purposes. In addition, Federal contractors will not be permitted to inculcate such views in their employees.

Sec. 2. *Definitions*. For the purposes of this order, the phrase:

(a) ''Divisive concepts'' means the concepts that (1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term ''divisive concepts'' also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.

(b) ''Race or sex stereotyping'' means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.

(c) ''Race or sex scapegoating'' means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.

(d) ''Senior political appointee'' means an individual appointed by the President, or a non-career member of the Senior Executive Service (or agency-equivalent system).

Sec. 3. *Requirements for the United States Uniformed Services*. The United States Uniformed Services, including the United States Armed Forces, shall not teach, instruct, or train any member of the United States Uniformed Services, whether serving on active duty, serving on reserve duty, attending a military service academy, or attending courses conducted by a military department pursuant to a Reserve Officer Corps Training program, to believe any of the divisive concepts set forth in section 2(a) of this order. No member of the United States Uniformed Services shall face any penalty or discrimination on account of his or her refusal to support, believe, endorse, embrace, confess, act upon, or otherwise assent to these concepts.

Sec. 4. *Requirements for Government Contractors*. (a) Except in contracts exempted in the manner provided by section 204 of Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity), as amended, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

''During the performance of this contract, the contractor agrees as follows:

1. The contractor shall not use any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating, including the concepts that (a) one race or sex is inherently superior to another race or sex; (b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (c) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (d) members of one race or sex cannot and should not attempt

to treat others without respect to race or sex; (e) an individual's moral character is necessarily determined by his or her race or sex; (f) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (h) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term ''race or sex stereotyping'' means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex, and the term ''race or sex scapegoating'' means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex.

2. The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under the Executive Order of September 22, 2020, entitled Combating Race and Sex Stereotyping, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

3. In the event of the contractor's noncompliance with the requirements of paragraphs (1), (2), and (4), or with any rules, regulations, or orders that may be promulgated in accordance with the Executive Order of September 22, 2020, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246, and such other sanctions may be imposed and remedies invoked as provided by any rules, regulations, or orders the Secretary of Labor has issued or adopted pursuant to Executive Order 11246, including subpart D of that order.

4. The contractor will include the provisions of paragraphs (1) through (4) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.''

(b) The Department of Labor is directed, through the Office of Federal Contract Compliance Programs (OFCCP), to establish a hotline and investigate complaints received under both this order as well as Executive Order 11246 alleging that a Federal contractor is utilizing such training programs in violation of the contractor's obligations under those orders. The Department shall take appropriate enforcement action and provide remedial relief, as appropriate.

(c) Within 30 days of the date of this order, the Director of OFCCP shall publish in the *Federal Register* a request for information seeking information from Federal contractors, Federal subcontractors, and employees of Federal contractors and subcontractors regarding the training, workshops, or similar programming provided to employees. The request for information should request copies of any training, workshop, or similar programing having to do with diversity and inclusion as well as information about the duration, frequency, and expense of such activities.

Sec. 5. *Requirements for Federal Grants*. The heads of all agencies shall review their respective grant programs and identify programs for which the agency may, as a condition of receiving such a grant, require the recipient to certify that it will not use Federal funds to promote the concepts that

(a) one race or sex is inherently superior to another race or sex; (b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (c) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (d) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (e) an individual's moral character is necessarily determined by his or her race or sex; (f) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (h) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. Within 60 days of the date of this order, the heads of agencies shall each submit a report to the Director of the Office of Management and Budget (OMB) that lists all grant programs so identified.

Sec. 6. *Requirements for Agencies*. (a) The fair and equal treatment of individuals is an inviolable principle that must be maintained in the Federal workplace. Agencies should continue all training that will foster a workplace that is respectful of all employees. Accordingly:

(i) The head of each agency shall use his or her authority under 5 U.S.C. 301, 302, and 4103 to ensure that the agency, agency employees while on duty status, and any contractors hired by the agency to provide training, workshops, forums, or similar programming (for purposes of this section, ''training'') to agency employees do not teach, advocate, act upon, or promote in any training to agency employees any of the divisive concepts listed in section 2(a) of this order. Agencies may consult with the Office of Personnel Management (OPM), pursuant to 5 U.S.C. 4116, in carrying out this provision; and

(ii) Agency diversity and inclusion efforts shall, first and foremost, encourage agency employees not to judge each other by their color, race, ethnicity, sex, or any other characteristic protected by Federal law.

(b) The Director of OPM shall propose regulations providing that agency officials with supervisory authority over a supervisor or an employee with responsibility for promoting diversity and inclusion, if such supervisor or employee either authorizes or approves training that promotes the divisive concepts set forth in section 2(a) of this order, shall take appropriate steps to pursue a performance-based adverse action proceeding against such supervisor or employee under chapter 43 or 75 of title 5, United States Code.

(c) Each agency head shall:

(i) issue an order incorporating the requirements of this order into agency operations, including by making compliance with this order a provision in all agency contracts for diversity training;

(ii) request that the agency inspector general thoroughly review and assess by the end of the calendar year, and not less than annually thereafter, agency compliance with the requirements of this order in the form of a report submitted to OMB; and

(iii) assign at least one senior political appointee responsibility for ensuring compliance with the requirements of this order.

Sec. 7. *OMB and OPM Review of Agency Training*. (a) Consistent with OPM's authority under 5 U.S.C. 4115–4118, all training programs for agency employees relating to diversity or inclusion shall, before being used, be reviewed by OPM for compliance with the requirements of section 6 of this order.

(b) If a contractor provides a training for agency employees relating to diversity or inclusion that teaches, advocates, or promotes the divisive concepts set forth in section 2(a) of this order, and such action is in violation of the applicable contract, the agency that contracted for such training shall evaluate whether to pursue debarment of that contractor, consistent with

applicable law and regulations, and in consultation with the Interagency Suspension and Debarment Committee.

(c) Within 90 days of the date of this order, each agency shall report to OMB all spending in Fiscal Year 2020 on Federal employee training programs relating to diversity or inclusion, whether conducted internally or by contractors. Such report shall, in addition to providing aggregate totals, delineate awards to each individual contractor.

(d) The Directors of OMB and OPM may jointly issue guidance and directives pertaining to agency obligations under, and ensuring compliance with, this order.

Sec. 8. *Title VII Guidance*. The Attorney General should continue to assess the extent to which workplace training that teaches the divisive concepts set forth in section 2(a) of this order may contribute to a hostile work environment and give rise to potential liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. If appropriate, the Attorney General and the Equal Employment Opportunity Commission shall issue publicly available guidance to assist employers in better promoting diversity and inclusive workplaces consistent with Title VII.

Sec. 9. *Effective Date*. This order is effective immediately, except that the requirements of section 4 of this order shall apply to contracts entered into 60 days after the date of this order.

Sec. 10. *General Provisions*. (a) This order does not prevent agencies, the United States Uniformed Services, or contractors from promoting racial, cultural, or ethnic diversity or inclusiveness, provided such efforts are consistent with the requirements of this order.

(b) Nothing in this order shall be construed to prohibit discussing, as part of a larger course of academic instruction, the divisive concepts listed in section 2(a) of this order in an objective manner and without endorsement.

(c) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its provisions to any other persons or circumstances shall not be affected thereby.

(d) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

THE WHITE HOUSE,
September 22, 2020.

[FR Doc. 2020–21534
Filed 9–25–20; 8:45 am]
Billing code 3295–F0–P

OFFICE OF MANAGEMENT AND BUDGET

2 CFR Parts 25, 170, 183, and 200

Guidance for Grants and Agreements

ACTION: Final guidance.

SUMMARY: The Office of Management and Budget (OMB) is revising sections of OMB Guidance for Grants and Agreements. This revision reflects the foundational shift outlined in the President's Management Agenda (PMA) to set the stage for enhanced result-oriented accountability for grants. This guidance is reflects the Administration's focus on improved stewardship and ensuring that the American people are receiving value for funds spent on grant programs. The revisions are limited in scope to support implementation of the President's Management Agenda, Results-Oriented Accountability for Grants Cross-Agency Priority Goal (Grants CAP Goal) and other Administration priorities; implementation of statutory requirements and alignment of these sections with other authoritative source requirements; and clarifications of existing requirements in particular areas within these sections.

DATES: These revisions to the guidance are effective November 12, 2020, except for the amendments to §§ 200.216 and 200.340, which are effective on August 13, 2020.

FOR FURTHER INFORMATION CONTACT: Nicole Waldeck or Gil Tran at the OMB Office of Federal Financial Management at *GrantsTeam@omb.eop.gov* or 202–395–3993.

SUPPLEMENTARY INFORMATION:

Background and Objectives

In 2013, OMB partnered with the Council on Financial Assistance Reform (COFAR) to revise and streamline guidance to develop the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance) located in title 2 of the Code of Federal Regulations (2 CFR part 200) (79 FR 78589; December 26, 2013). The intent of this effort was to simultaneously reduce administrative burden and the risk of waste, fraud, and abuse while delivering better performance on behalf of the American people. Implementation of the Uniform Guidance became effective on December 26, 2014 (79 FR 75867, December 19, 2014) and must be reviewed every five years in accordance with 2 CFR 200.109.

Based on feedback and ongoing engagement with the grants management community, the Administration established the Results-Oriented Accountability for Grants Cross Agency Priority Goal (Grants CAP Goal) in the President's Management Agenda on March 20, 2018 (available at: *https://www.performance.gov/CAP/grants/*). The Grants CAP Goal recognizes that grants managers report spending a disproportionate amount of time using antiquated processes to monitor compliance. Efficiencies could be gained from modernization and grants managers could instead shift their time to analyze data to improve results. To address this challenge, the Grants CAP Goal Executive Steering Committee (ESC), which reports to the Chief Financial Officer's Council (CFOC), has identified four strategies to work toward maximizing the value of grant funding by developing a risk-based, data-driven framework that balances compliance requirements with demonstrating successful results for the American taxpayer.

1. Strategy 1: Operationalize the Grants Management Standards
2. Strategy 2: Establish a Robust Marketplace of Modern Solutions
3. Strategy 3: Manage Risk
4. Strategy 4: Achieve Program Goals and Objectives

The revisions to 2 CFR support these four strategies. In support of Strategies 1 and 2, OMB is implementing changes throughout 2 CFR to modernize reporting by recipients of Federal grants by requiring Federal agencies to adopt standard data elements for the information recipients are required to report (available at: *https://ussm.gsa.gov/fibf/*). This adoption will enable technology solutions to better manage the data the recipients report to the Federal government. These changes also support implementation of the Grants Reporting Efficiency and Agreements Transparency Act of 2019 (GREAT Act). OMB is also implementing revisions to strengthen the governmentwide approach to performance and risk, to support efforts under Strategies 3 and 4 by encouraging agencies to measure the recipient's performance in a way that will help Federal awarding agencies and non-Federal entities to improve program goals and objectives, share lessons learned, and spread the adoption of promising performance practices.

OMB is also revising 2 CFR to implement relevant statutory requirements. These revisions include requirements from several National Defense Authorization Acts (NDAAs) and the Federal Funding Accountability and Transparency Act (FFATA), as amended by the Digital Accountability and Transparency Act (DATA Act).

Finally, OMB is implementing revisions to 2 CFR to clarify areas of misinterpretation. The revisions are intended to reduce recipient burden by improving consistent interpretation. OMB consulted and collaborated with agency representatives identified by the Grants CAP Goal ESC to support the implementation of these revisions. OMB also solicited feedback from the broader Federal financial assistance community by publishing the proposed changes to 2 CFR in the **Federal Register** for a sixty (60) day public comment period (*https://www.federalregister.gov/d/2019-28524*). OMB received 215 submissions with over 1,200 comments from the public, around 1,200 comments from Federal agencies, and around 100 comments from the Council of the Inspectors General on Integrity and Efficiency (CIGIE) Grant Reform Workgroup for a total of over 2,500 comments. OMB reconvened agency representatives to review the comments and make changes to the proposed revisions as appropriate.

In summary and as discussed further in the sections below, OMB is revising 2 CFR parts 25, 170, and 200. Additionally, OMB is adding part 183 to 2 CFR to implement Never Contract with the Enemy. The sections are revised within the following scope. Comments received that were out of scope for the revision were not accepted by OMB.

I. To support implementation of the President's Management Agenda Results-Oriented Accountability for Grants CAP Goal and other Administration priorities;

II. To meet statutory requirements and to align with other authoritative source requirements; and

III. To clarify existing requirements.

I. Support Implementation of the President's Management Agenda and Other Administration Priorities

A. Emphasizing Stewardship and Results-Oriented Accountability for Grant Program Results

The President's Management Agenda, Results-Oriented Accountability for Grants CAP goal is working toward shifting the balance between compliance and performance while reducing burden. Agencies are encouraged to promote promising performance practices that support the achievement of program goals and objectives. Many Federal agencies are working together to innovate and develop a risk-based approach that incorporates performance to achieve

results-oriented grants (where applicable). By shifting the focus to the balance between performance and compliance, agencies may have the opportunity to streamline burdensome compliance requirements for programs that demonstrate results. To support this goal, OMB is publishing revisions in multiple sections of the guidance that together emphasize the importance of focusing on performance to achieve program results throughout the Federal award lifecycle.

The provisions that were revised to improve the governmentwide approach to performance and risk emphasize stewardship and results-oriented grant making. Revisions to 2 CFR 200.102 *Exceptions* encourages Federal awarding agencies to apply a risk-based, data-driven framework to alleviate select compliance requirements for programs that demonstrate results. 2 CFR 200.202 *Program planning and design* highlights the importance of developing a strong plan and design to set the stage for demonstrating program results. 2 CFR 200.205 *Federal awarding agency review of merit proposals* strengthens the merit review process which is linked to 2 CFR 200.301 *Performance measurement* requiring Federal awarding agencies to measure recipient performance, which is derived from program planning and design (§ 200.202). Performance information focused on results must be made available to recipients in the solicitation and in the award, which is reflected in 2 CFR 200.211 *Information contained in a Federal award.* Award recipients must also be aware of termination provisions in 2 CFR 200.340 *Termination* and reinforced in 2 CFR 200.211 *Information contained in a Federal award,* which are linked to performance goals of the program (§ 200.301). Revisions to 2 CFR 200.413 *Direct costs* were also made to include evaluation costs as an example of a direct cost, which demonstrates program results.

Revisions to 2 CFR 200.202 *Program planning and design* develops a new provision. This section formalizes a requirement that are already expected of Federal awarding agencies to develop a strong program design by establishing program goals, objectives, and indicators, to the extent permitted by law, before the applications are solicited. The development of 2 CFR 200.202 emphasizes the importance of sound program design as an essential component of performance management and program administration. Ideally, program design takes place before an agency drafts related projects. This enables Federal agency leadership and employees to codify program goals, objectives, and intended results before specifying the goals and objectives of in a solicitation. A well-designed program has clear goals and objectives that facilitate the delivery of meaningful results, whether a new scientific discovery, positive impact on citizen's daily life, or improvement of the Nation's infrastructure. Well-designed programs also represent a critical component of an agency's implementation strategies and efforts that contribute to and support the longer-term outcomes of an agency's strategic plan. OMB encourages Federal awarding agencies to reference the ''Managing for Results: The Performance Management Playbook for Federal Awarding Agencies'' for promising performance practices throughout the Federal award lifecycle, including steps to develop a strong program plan and design (*www.performance.gov/CAP/grants/*).

Program design elements may include a problem or needs statement, goals and objectives; a logic model depicting the program's structure; program activities; a theory or theories of change and the evidence supporting them; performance and other indicators to measure program accomplishments and find ways to improve, set priorities, and identify targets of opportunity. In addition, it may include use or intended use of independently available sources of data, development and support of learning communities which may benefit from a shared understanding of promising practices and collaboration on common challenges and opportunities, and a system to periodically review award selection criteria.

OMB is revising to 2 CFR 200.205 *Federal awarding agency review of merit proposals,* 2 CFR 200.203 *Requirement to provide public notice of Federal financial assistance programs* and § 200.204 *Notices of funding opportunities* to strengthen merit review, public notice of Federal financial assistance programs, and the notices of funding opportunities to further the goals of results-oriented grantmaking. These changes require Federal awarding agencies to extend their merit review process to discretionary Federal awards, unless prohibited by Federal statute, the Federal awarding agency must design and execute a merit review process for applications.

Additional language was included to articulate an explanation of the merit review process that Federal awarding agencies are expected to follow. Further, Federal awarding agencies are required to periodically review their Federal award merit review process. These changes support the Administration's priority to ensure a fair and transparent process for the selection of award recipients and supports efforts under the President's Management Agenda to ensure that Federal awards are designed to achieve program goals and objectives.

Changes to 2 CFR 200.206 *Federal awarding agency review of risk posed by applicants* allow Federal awarding agencies to adjust requirements when a risk-evaluation indicates that it may be merited. Changes are included in 2 CFR 200.211 *Information contained in a Federal award* and 2 CFR 200.301 *Performance measurement* further emphasize existing requirements for requiring Federal awarding agencies to provide recipients with clear performance goals, indicators, targets, and baseline data. OMB is adding language to § 200.102 *Exceptions* to emphasize that Federal awarding agencies are encouraged to request exceptions to certain provisions of 2 CFR part 200 in support of innovative program designs that apply a risk-based, data-driven framework to alleviate select compliance requirements and hold recipients accountable for good performance. OMB recognizes that Federal financial assistance program goals and their intended results will differ by type of Federal program. For example, criminal justice grant programs may focus on specific goals such as reducing crime, basic scientific research grant programs may focus on expanding knowledge, and infrastructure projects may fund building or infrastructure projects.

Related to the above changes that aim to strengthen program planning and Federal award terms and conditions, OMB is revising §§ 200.211 *Information contained in a Federal award* and 200.340 *Termination* to strengthen the ability of the Federal awarding agency to terminate Federal awards, to the greatest extent authorized by law, when the Federal award no longer effectuates the program goals or Federal awarding agency priorities. Federal awarding agencies must clearly and unambiguously articulate the conditions under which a Federal award may be terminated in their applicable regulations and in the terms and conditions of Federal awards. The intent of this change is to ensure that Federal awarding agencies prioritize ongoing support to Federal awards that meet program goals. For instance, following the issuance of a Federal award, if additional evidence reveals that a specific award objective is ineffective at achieving program goals, it may be in the government's interest to terminate the Federal award. Further, additional

evidence may cause the Federal awarding agency to significantly question the feasibility of the intended objective of the award, such that it may be in the interest of the government to terminate the Federal award. OMB is also eliminating the termination for cause provision because this term is not substantially different than the provision allowing Federal awarding agencies to terminate Federal awards when the recipient fails to comply with the terms and conditions.

In addition, OMB is expanding the definition of fixed amount awards in § 200.1 to allow Federal awarding agencies to apply the provision to both grant agreements and cooperative agreements.

The revisions in 2 CFR 200.301 emphasize that agencies are encouraged to measure recipient performance to improve program goals and objectives, share lessons learned, and spread the adoption of promising practices. While understanding that grant program goals and their intended results will differ by type of program, the Grants CAP Goal is working to shift the culture of Federal grant making from a heavy focus on compliance to a balanced approach that includes a focus on the degree to which grant programs achieve their goals and intended results. To provide clarity and consistency among Federal awarding agencies, a revision to include program evaluation costs as an example of a direct cost under a Federal award has been included in 2 CFR 200.413 *Direct costs.* Please refer to OMB Circular A–11 for a definition on program evaluation. Evaluation costs are allowed as a direct cost in existing guidance. This language is intended to strengthen this intent and ensure that agencies are applying this consistently.

Agencies are reminded that evaluation costs are allowable costs (either as direct or indirect), unless prohibited by statute or regulation. The work under the Grants CAP goal performance work group emphasizes evaluation as an important practice to understand the results achieved with Federal funding.

200.102 Exceptions

OMB received several comments on this section asking for clarification on the proposed revisions. Some commenters also noted that the addition of the ''or less restrictive requirements'' in 2 CFR 200.102(c) and 200.208 is confusing, redundant and not needed because Federal awarding agencies already have the discretion to impose conditions on the recipient. OMB deliberated upon these comments and ultimately agreed to replace the language ''or less restrictive requirements'' with ''adjust requirements'' within the final guidance. OMB strongly encourages Federal awarding agencies to add or remove requirements by applying a risk-based, data-driven framework to alleviate select compliance requirements and hold recipients accountable for good performance. One commenter felt that the inclusion of the requirement for agencies to ''apply more restrictive terms and conditions when merited as indicated by a risk evaluation'' did not warrant an exception from OMB and thus did not belong in the exceptions section. OMB concurred with the commenter and moved this language to 2 CFR 200.206 *Federal awarding agency review of risk posed by applicants.*

200.202 Program Planning and Design

Many commenters were supportive of this new section and the other revisions related to results-based grant making. Some commenters also thought the proposal could go further to better utilize federal grantees' activities to build and disseminate evidence of what works. One commenter expressed concern that revisions to the performance sections would lead to the unintended consequence of making research look like a contract agreement. OMB provided explicit language to state that performance measures for each program will be different. One commenter expressed concern that this new requirement would add burden. OMB respectfully disagrees, as this requirement is not new and does not add burden. This section reflects activities that were previously implied within 2 CFR and not explicitly included in its own section.

OMB appreciates the commenters who challenged OMB to go even further with the proposal with regards to evidence-building. OMB looks forward to furthering this discussion with stakeholder sessions in fall 2020 and will also consider these proposals in future revisions of 2 CFR. This provision is designed to operate in tandem with evidence-related statutes (*e.g.,* The Foundations for Evidence-Based Policymaking Act of 2018, which emphasizes collaboration and coordination to advance data and evidence-building functions in the Federal government) and related OMB implementation guidance (*e.g.,* OMB Memorandum M–19–23: Phase 1 implementation of the Foundations for Evidence-Based Policymaking Act of 2018. Learning Agendas, Personnel, and Planning Guidance).

200.203 Requirement To Provide Public Notice of Federal Financial Assistance Programs

There were several comments provided in response to the changes made to 2 CFR 200.203. One comment inquired as to why no similar requirements exist within the Uniform Guidance and is applicable to pass-through entities within 2 CFR 200.332. OMB notes that the Federal awarding agency does not have a direct relationship with the subaward recipient; that is the role of the pass-through entity. Mandating application of this requirement would require additional public comment as it would add burden to the process. Further, comments asked for OMB to develop guidance to help ensure that Federal awarding agencies have the appropriate controls in place with respect to their processes for making awarding decisions. OMB rejects this change for this iteration of 2 CFR as it would be a significant change that would require an opportunity for public comment based on the language and requirements imposed. Additionally, some commenters requested for language to be added regarding how often updates are expected. OMB rejects these suggestions as the language references guidance provided by General Services Administration (GSA) in consultation with OMB. That is where the requirement to update each Assistance Listing on an annual basis is specified, and it is not necessary to include this level of detail in 2 CFR 200.203.

200.204 Notice of Funding Opportunities

Commenters observed that the change in terminology from ''competitive'' to ''discretionary'' appears to broaden the requirement of these notices to not just competitive announcements, but also sole source discretionary announcements. Some commenters suggested for the language to be changed back to ''competitive'' and questioned the value of this revision. One commenter requested clarification as to whether or not this new requirement is intended to apply when the discretionary award is non-competitive. Another commenter suggested that it would be burdensome and inefficient to require agencies to have notices of funding opportunities for noncompetitive awards. OMB deliberated these comments and subsequently decided to change this language to reflect discretionary awards that are competed.

200.205 Federal Awarding Agency Review of Merit Proposals

Some of the comments received were from Federal agencies who wanted to know the purpose and the benefits behind the proposed revisions to justify the added burden. There were also concerns about the efficiency of the awarding process if these changes are made. Some commenters asked for clarity on what a systematic review meant and what would classify as ''effective.'' OMB considered all comments and made further revisions to specify that the merit review process should be periodically reviewed as a point of clarity on the process review.

OMB disagrees with the commenters that expressed these revisions will add burden. The purpose of these revisions is to add clarity to the merit review process which should already be occurring and is not a new requirement.

200.206 Federal Awarding Agency Review of Risk Posed by Applicants

As stated in the above section describing the comments received for § 200.102, one commenter felt that the inclusion of the requirement for agencies to ''apply more restrictive terms and conditions when merited as indicated by a risk evaluation'' did not warrant an exception from OMB and thus did not belong in the exceptions section. OMB concurred with the commenter, moved this language to 2 CFR 200.206 *Federal awarding agency review of risk posed by applicants*, and provided revisions to the language to read ''. . . adjust requirements when a risk-evaluation indicates that it may be merited either pre-award or post-award.'' One commenter requested pass-through entities to have access to enter information into the FAPIIS system and require a pass-through entity review as part of the risk assessment process. OMB deliberated this comment and while it is an important topic for discussion, OMB feels the scope of this revision would be too substantial for finalization without receiving additional comments from the public. Thus, OMB respectfully declines this comment. Some commenters requested for OMB to include the requirement for Federal awarding agencies to leverage commercially available data management tools. OMB declines this comment and does not specify tools required for use.

200.208 Specific Conditions

As stated above in 2 CFR 200.102, some commenters were not supportive of the requirement of the language ''or less restrictive requirements'' in 2 CFR 200.102(c) and 200.208. Some commenters described this new language as confusing, redundant and not needed because Federal awarding agencies already have the discretion to impose conditions on the recipient. One commenter applauded OMB's decision to further emphasize the flexibilities afforded to Federal awarding agencies revise or remove certain requirements based on a risk analysis. After deliberation, OMB replaced this language with ''the Federal awarding agency may adjust requirements to a class of Federal awards or non-Federal entities when approved by OMB .....''

200.211 Information Contained in a Federal Award

Some comments asked for clarity on the revisions that were proposed. One clarifying question was the difference between the data point for the ''Total Approved Cost Sharing or Matching, where applicable'' and ''Total Amount of the Federal Award including approved Cost Sharing or Matching.'' These are two completely separate data points which call for the approved cost sharing or matching to be identified, and then the total amount of the Federal award that is approved cost sharing or matching. OMB did not recommend that these were removed. Further, in response to various comments, the language in (a) was streamlined and users are referred to the relevant performance sections for additional information. The data points previously proposed in paragraph (b) related to performance were already captured in paragraph (a), and thus removed from (b). The proposed language for (e) was revised and moved to § 200.105(b) within the guidance. Many comments received suggested revisions that would make the language more prescriptive. Title 2 CFR was written as guidance for a large array of users. If the language is too prescriptive, it doesn't provide sufficient flexibility for use by the large array of users. Additional technical corrections were made for clarity throughout this provision. Revisions were made to § 200.211(c)(1)(iv) to clarify that if the underlying legal authority for a program changes, that may be a reason why there would be no future budget periods under an award.

200.301 Performance Measurement

Some commenters were in support of the revisions to this section. Many commenters provided suggestions for further revisions to the guidance. Several commenters provided suggestions with regards to the use of ''should'' and ''must'' throughout this section. Some commenters wanted the language to be written strongly and use the word ''must'' throughout, others preferred ''should'' and many suggested the use of these words should be consistent throughout this section. Some commenters also expressed the need for OMB to include data quality within this section. OMB concurs with the comments that consistent use of ''must'' and ''may'' should be used in this section. Some commenters also pointed out discrepancies between various performance sections and a few commenters pointed out that there are discrepancies between what is required in 2 CFR 200.211 and 200.301. In response to commenters, OMB re-wrote this section for clarity and consistency.

200.340 Termination

There were several comments received in response to the revisions proposed to this section. The comments can be group into the following discreet categories:

- Concern over arbitrary Federal award termination;
- Adding or editing language for clarity;
- Concern over how Federal awarding agencies will evaluate awards with long-term outcomes;
- Request further OMB guidance; and
- Not relevant.

The largest number of commenters expressed a concern that the proposed language will provide Federal agencies too much leverage to arbitrarily terminate awards without sufficient cause. Several commenters requested OMB reinstate the language, *for cause,* to address this issue. Some commenters requested additional clarity and examples. OMB deliberated upon these requests and decided as written agencies are not able to terminate grants arbitrarily and that it was not appropriate to include examples in 2 CFR for this section. OMB made a technical correction to provide additional clarity. Some commenters expressed concerns over how Federal awarding agencies will evaluate awards with long-term outcomes. One example from the commenter was an environmental program where the performance will require years to measure. The example from the commenter should be determined in coordination with the Federal awarding agency. OMB respectfully declines this comment. Title 2 CFR is intended to be written and used by a large array of stakeholders and thus the language is not intended to be prescriptive, as the commenter has requested. Some commenters requested further OMB guidance on this provision. OMB appreciates the request for additional

guidance and notes that guidance beyond what has been provided in the proposed rule is out of scope for this revision effort. Other comments provided were not relevant to the revisions proposed and thus OMB has rejected these comments.

200.413 Direct Costs

Most comments received for this 2 CFR 200.413 were in agreement of the revisions. The remaining comments were out of scope. Therefore, OMB did not make changes to the revised language. Some commenters requested OMB include additional examples for clarity that the activities are direct costs such as planning and program coordination, data technology, analytics, staff training, data collection, storage, communication of evaluation and analytics, and more. OMB appreciates the request to clarify additional examples as direct costs and would like to expand on this further in future revisions of 2 CFR. OMB does not think it is appropriate to include specific examples within the guidance because it could be unintentionally interpreted to be limited to only that list of items. However, as we think of ways to encourage promising performance practices, OMB would like to discuss this further during stakeholder sessions in the fall 2020.

200.328 Financial Reporting

There were some comments received in response to the revisions made to this provision. One commenter requested that the collection of information be no more frequently than semiannually to reduce burden. OMB declines this comment and notes that it was out of scope because there were no proposed changes to the frequency of financial reporting. One commenter requested that OMB add language to discourage pass-through entities from the practice of requiring more frequent and more detailed financial reporting. After discussion, OMB declines this comment as it is out of scope for this revision but will consider the comment for a future revision of 2 CFR. Several commenters sought clarification on the use of the term ''OMB-designated standards lead.'' Pursuant to the Grant Reporting Efficiency and Agreements Transparency Act of 2019 (GREAT Act), the OMB Director is required to designate a standard-setting agency (*i.e.*, the Executive department that administers the greatest number of programs under which Federal awards are issued in a calendar year). The Executive department designated by OMB as the standard-setting agency assists OMB with execution of the requirements of the GREAT Act.

In response to commenters' requests for clarity on the performance sections of the guidance, OMB moved the financial reporting requirement noted currently in 2 CFR 200.301 *Performance measurement* to 2 CFR 200.328 *Financial reporting.*

200.329 Monitoring and Reporting Program Performance

Several commenters requested clarity regarding the ''OMB-designated standards lead'' and notes that this terminology has been used throughout the guidance. As mentioned above, one commenter also suggested a technical correction to reference the Grant Reporting Efficiency and Agreements Transparency (GREAT) Act for clarity on this designation. One commenter suggested that this provision should be tied together with the closeout provision with regards to the timeframe to submission of reports. OMB concurred with this commenter and made revisions accordingly. One commenter noted concern and confusion regarding the requirement that ''costs must be charged to the approved budget period in which they were incurred.'' The commenter also suggested edits to clarify this requirement. OMB concurred with the commenter and accepted the edits for incorporation into the package.

Appendix I to Part 200—Full Text of the Notice of Funding Opportunity

A number of commenters suggested edits to this section. One commenter suggested including the term ''outcome'' to indicate the end result and also include terms for tracking and determining if that end result is being or has been achieved. OMB agreed with this commenter and made the revisions accordingly. Another commenter suggested that OMB include the requirement for Federal awarding agencies to ensure SAM registration is current before making any advanced payments and/or issuing any reimbursements. OMB disagrees with this recommendation, as this requirements is already stated in 2 CFR 25.205.

B. Expanded Use of the De Minimis Rate

The revision to 2 CFR 200.414(f) expands use of the de minimis rate of 10 percent of modified total direct costs (MTDC) to all non-Federal entities (except for those described in Appendix VII to Part 200—State and Local Government and Indian Tribe Indirect Cost Proposals, paragraph D.1.b). Currently, the de minimis rate can only be used for non-Federal entities that have never received a negotiated indirect cost rate. The use of the de minimis rate has reduced burden for both the non-Federal entities and the Federal agencies for preparing, reviewing, and negotiating indirect cost rates. Since the publication of 2 CFR in 2013, both Federal agencies and non-Federal entities have advocated expansion of the de minimis rate for non-Federal entities that have negotiated an indirect cost rate previously, but for some circumstances, the negotiated rates have expired. The expiration may be due to breaks in Federal relationships and grant funding, or lack of resources for preparing an indirect cost proposal. This change will further reduce the administrative burden for non-Federal entities and Federal agencies and shift more resources toward accomplishing the program mission.

Another revision adds language to 2 CFR 200.414(f) to clarify that when a non-Federal entity is using the de minimis rate for its Federal grants, it is not required to provide proof of costs that are covered under that rate. The 10 percent de minimis rate was designed to reduce burden for small non-Federal entities and the requirement to document the actual indirect costs would eliminate the benefits of using the de minimis rate. Lastly, for transparency purposes, another revision adds a new paragraph (h) to § 200.414 to require that negotiated agreements for indirect cost rates are collected and displayed on a public website.

200.414 Indirect (F&A) Costs

200.414(f)

OMB received several comments that were concerned with awarding a de minimis rate that is higher than a Negotiated Indirect Cost Rate Agreement (NICRA). OMB concurs with the concerns regarding applying a higher de minimis rate in cases where a NICRA rate is lower than 10 percent. However, the regulation states in paragraph (c)(1) that Federal agencies must honor negotiated rates. Additionally, some commenters expressed concern that guidance will be misinterpreted to allow provisional rates to be considered as expired. OMB intends to include provisional rates and added clarifying language to the section in response to these comments. Further, commenters were concerned with a lack of required documentation. OMB concurs with concerns that the language implies source documents rather than the indirect cost rate agreement and altered the language accordingly. There were

several comments that suggested that the Modified Total Direct Cost (MTDC) be used as the base. However, this suggestion is out of the scope of this revision. Additionally, OMB would like to note that Federal agencies must accept the negotiated rate even if it is lower than the de minimis rate.

200.414(h)

OMB appreciated the many comments that supported the proposed requirement to post NICRAs to a public website. There were several comments that cited concerns over the sharing of proprietary information through the posting of NICRA information on a public website. To address these concerns, OMB clarified that the requirement is not for the entire rate agreement and added language to specify the exact information that is requested be provided for a non-Federal entity; the indirect negotiated rate; distribution base; and the rate type. In addition, the Indian tribes or tribal organizations, as defined in the Indian Self Determination, Education and Assistance Act, 25 U.S.C. 450b(1)) are excluded. Further, there were several comments that inquired about the applicability of this section. Lastly, there were comments that inquired about who is responsible for making sure this information is publically posted. OMB recognizes this concern and notes that the responsibility of the Federal government will be communicated appropriately.

C. Eliminate References to Non-Authoritative Guidance

To support implementation of E.O. 13892 of October 9, 2019 (Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication) and to prohibit Federal awarding agencies from including references to non-authoritative guidance in the terms and conditions of Federal awards, OMB proposed changes to § 200.105 *Effect on other issuances*. The proposed change was intended to reduce recipient burden and prevent Federal awarding agencies from imposing non-binding guidance as award requirements for recipients that has not gone through appropriate public notice and comment. The proposed revisions related to eliminating references to non-authoritative guidance were included in 2 CFR 200.211(e) *Information contained in a Federal award.* Some commenters suggested for this requirement to be moved within the guidance to 2 CFR 200.105(b) *Effect on other issuances* for clarity of the policy intent. OMB concurred with the commenter's suggestion and moved the requirement accordingly.

200.105 Effect on Other Issuances

There were several commenters in strong support of this new provision while other commenters expressed concerns regarding the implementation. One commenter mentioned that finalizing this proposal would cause significant difficulties in effective implementation and effectively overseeing programs. OMB appreciates the comments received. To address concerns, the language was re-written to better align with E.O. 13892 and provide clarity.

D. Promoting Free Speech

Several provisions within 2 CFR are revised to align with E.O. 13798 ''Promoting Free Speech and Religious Liberty'' and E.O. 13864 ''Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities.'' These sections include 2 CFR 200.300 *Statutory and national policy requirements,* 200.303 *Internal controls,* 200.339 *Remedies for noncompliance,* and 200.341 *Notification of termination requirement.* These E.O.s advise Federal awarding agencies on the requirements of religious liberty laws, including those laws that apply to grants and provide a policy for free inquiry at institutions receiving Federal grants. The revision to 2 CFR underscores the importance of compliance with the First Amendment.

200.209 Certifications and Representations, 200.300 Statutory and National Policy Requirements, 200.303 Internal Controls, 200.339 Remedies for Noncompliance, 200.341 Notification of Termination Requirement

OMB received several comments in response to this policy proposal. Some commenters supported compliance with the Constitution while other commenters questioned the need to include a reference to the Constitution. OMB appreciates all comments received and after consideration has decided to retain the proposed language within these sections. One comment suggested the removal of the word ''statutory.'' OMB concurred with this recommendation and made the change.

E. Standardization of Terminology and Implementation of Standard Data Elements

OMB is standardizing terms across 2 CFR part 200 to support efforts under the Grants CAP Goal to standardize the grants management business process and data. OMB is replacing the term ''obligation'' to either ''financial obligation'' or ''responsibility'' within the guidance as appropriate, to ensure alignment with DATA Act definitions. OMB is adding changes across the entirety of 2 CFR to ensure consistent use of terms across parts 25, 170, 183, and 200 where possible, relying on 2 CFR part 200 as the primary source. As reflected in the changes, there are instances where the terms within 2 CFR cannot be made consistent. For example, the term ''non-Federal entity'' cannot be consistently defined across 2 CFR: Parts 25 and 170 apply to Federal awards to foreign organizations, foreign public entities, and for-profit organizations, while part 200 only applies to these type of non-Federal entities when a Federal awarding agency elects for part 200 to apply. For definitions that are consistent across 2 CFR parts 25, 170, and 200, revisions have been made to parts 25 and 170 to refer definitions to part 200 as the authoritative source.

The definitions ''Catalog for Federal Domestic Assistance (CFDA) number'' and ''CFDA program title'' have been replaced with the terms ''Assistance Listings number'' and ''Assistance Listings program title'' to reflect the change in terminology.

OMB is also revising several definitions for clarity. For example, the term management decision is revised to emphasize that it is a written determination provided by a Federal awarding agency or pass-through entity.

To promote uniform application of standard data elements in future information collection requests, OMB is also revising 2 CFR 200.207 and 200.328 to reflect that information collection requests must adhere to the standards available from the OMB-designated standards lead. This change further supports OMB Memorandum M–19–16 Centralized Mission Support Capabilities for the Federal Government, which requires that future shared service solutions must adhere to the Federal Integrated Business Framework standards (available at: *https://ussm.gsa.gov/fibf/*).

Further, OMB is revising 2 CFR part 200 to replace the term ''standard form'' with ''common form.'' Some commenters submitted feedback with concerns that the change in terminology would allow agencies to create unique forms with a lack of standardization. OMB did not make any changes to the final language based on these comments. Existing forms widely adopted by Federal awarding agencies that are regularly referred to as standard forms are in fact common forms. For instance, the SF–424 series, SF–425,

and research performance progress report are all common forms/formats. OMB acknowledges that this is a significant change in how the community refers to these forms and will ensure that any future guidance on the adoption of standard data elements clarifies the use of common forms. More information regarding common forms and flexibility under the Paperwork Reduction Act is available at: *https://www.whitehouse.gov/omb/information-regulatory-affairs/federal-collection-information/.* Finally, OMB is reformatting the definitions section of 2 CFR part 200, subpart A—Acronyms and Definitions, by removing the section numbers to facilitate future additions to this section.

Subpart A—Acronyms and Definitions

New Defined Terms

Several commenters sought to clarify existing parts within 2 CFR and grant processes and procedures through the addition of several defined terms under 200.1 *Definitions.* Examples of recommended terms to include were formula grant, program beneficiary/recipient, procurement, administrative costs, for-profit organization, conflict of interest, covered technology, architectural/engineering professional services, Federally-owned property, and demonstration.

In certain cases OMB agrees that additional terms may provide greater clarification to the regulation and the management of Federal financial assistance. OMB may consider the recommended definitions for the suggested terms in future updates to 2 CFR. In other cases, the terms are either not used in 2 CFR or are only applicable to a small number of Federal awarding agencies. OMB declined these recommendation either due to scope, or because they do not align with the intent of this regulation.

Inserting Programmatic Instruction in Definitions

Several commenters recommended inserting programmatic instruction for specific terms, which would provide more guidance for Federal agencies, non-Federal entities, auditors, or others.

OMB considered these comments, but determined that it was inappropriate to include programmatic guidance in the definition of terms for the regulation. The purpose of 2 CFR 200.1 *Definitions* is to provide meaning for specified terms within the regulation; guidance and instruction is more appropriate other parts of 2 CFR.

Modification to Existing Definitions

Several commenters sought to clarify existing definitions by providing technical corrections or clarification statements.

In several cases, OMB agrees that technical corrections are necessary. The updates to these definitions are minor and did not affect the intent of the term. In other cases, the recommendations were either too substantive or did not align with the intent of this update to the regulation. OMB may consider these recommendations in future updates to 2 CFR.

Formatting

Several commenters disagreed with the removal of the numbering of the definitions. The commenters were concerned about the overall changes to the numbering of 2 CFR part 200, which would add burden to updating the non-Federal entities' policies and procedures.

OMB appreciates these concerns, but does not believe that the removal of the definition numbering will generate any significant additional burden on non-Federal entities, because these groups already should regularly review and update their policies and procedures to ensure compliance with Federal, state, and local laws and regulations. This revision is expected to limit future burden for non-Federal entities in the event of new terms are added to this section of part 200, which would change the section's numeration.

Subpart A—Specific Definitions

Compliance Supplement

A number of commenters recommended clarifying the definition of compliance supplement and offered revised wording for the definition. OMB concurred and adapted the definition in consultation with members of the interagency working group. One commenter recommended revising the definition to frame the compliance supplement as the sole source of information for auditors. OMB did not include this recommendation because the compliance supplement is one of the authoritative sources that auditors can use when auditing Federal programs. Other sources include Federal awarding agency and program specific documents.

Contract

One commenter noted that the definition of contract was confusing, while another recommended cross-referencing the Subrecipient and Contractor Determinations subsection (§ 200.331). OMB agreed with this assessment and updated the definition to make it easier to read, understand, and use. Another commenter recommended the addition of mutual aid or intergovernmental agreements to the definition of contract. This change was not considered because it would substantively alter the definition without providing the public the opportunity to comment on the revision.

Cooperative Agreement, Grant Agreement

One commenter recommended specifically explaining ''transfer anything of value'' in the definitions of cooperative agreement and grant agreement. OMB opted to keep the existing language because both definitions cite 31 U.S.C. 6101(3), which provides the scope of the ''transfer of anything of value.'' A commenter recommended further describing substantial involvement in the definition of cooperative agreement. This change was not considered because the Federal awarding agency and the recipient are given the discretion to negotiate this relationship. Another commenter stated that there was a conflict §§ 25.306 and 200.1 associated with the transfer of land or property. OMB disagrees as the two definitions align and are also in alignment with the associated legislation. Through the review of the definitions of cooperative agreement and grant agreement, OMB and members of the working group clarified that the relationship was between the Federal awarding agency and a recipient or a pass-through entity and a subrecipient.

Discretionary, Non-Discretionary Award

Technical edits were made to the definitions of discretionary award and non-discretionary award to provide clarity to the intended definitions.

Federal Interest

Two commenters recommended correcting the formula for determining *Federal interest,* noting that reliance on the Federal share of the total project costs does not appropriately account for the Federal interest in real property, equipment, or supplies. OMB agreed with this recommendation and amended the definition to appropriately rely on the percentage of Federal participation in the total cost of the real property, equipment, or supplies as part of the formula.

Recipient

One commenter recommended amending recipient be inclusive of entities that are not necessarily non-Federal entities such as for-profit and

foreign entities as well as Federal agencies. OMB agreed with this assessment and updated the definition appropriately.

Subsidiary

One commenter recommended replacing non-Federal entity with entity, while another recommended adding ''or controlled'' after owned to be more inclusive of a diversity of organizations that may have subsidiaries. Several other commenters were confused by the reference to the FAR or found it to be redundant, recommending that it be removed from the definition. OMB agreed with these recommended changes to the definition and incorporated them, as appropriate.

Period of Performance, Budget Period, and Renewal

OMB also revised the proposed definitions of period of performance, budget period, and renewal in 2 CFR part 200, as there were a significant number of comments from varying stakeholders indicating that the proposed revised definitions of period of performance, budget period, and renewal created more confusion than clarity. In response, the final rule revises the definitions for these terms to clarify how period of performance, budget period, and renewal operationally relate. Additionally, the final rule revises 2 CFR 200.309 to better describe how the period of performance is modified if there is an extension or termination of a current award. Some commenters expressed concern about the removal of pass-through entities' authority to allow pre-award costs to subrecipients. It was not OMB's intention to remove the pass-through entities' authority to allow pre-award costs to subrecipients. OMB recognizes these concerns and added language to 2 CFR 200.458 for clarification in response to commenters. Further, there were many comments that expressed concern about removing 2 CFR 200.309 from the guidance due to burden with other entities that reference 2 CFR within their own rules and regulations. Including 2 CFR 200.309 in the final publication will eliminate that concern from commenters.

The definition of period of performance and renewal was revised to help clarify that the term period of performance reflects the total estimated time interval between the start of an initial Federal award and the planned end date, and that the period of performance may include one or more budget periods, but the identification of the period of performance does not commit funding beyond the currently approved budget period. The definition of budget period was edited to clarify that recipients are authorized to expend the current funds awarded, including any funds carried forward or other revisions pursuant to 2 CFR 200.308. Further, recipients may only incur costs during the first year budget period until subsequent budget periods are funded based on the availability of appropriations, satisfactory performance, and compliance with the terms and conditions of the award. The definition of renewal was edited to help clarify that a renewal award begins a distinct period of performance that starts contiguous with, or closely following, the end of the expiring award. This change also ensures consistent use of the term for purposes of transparency reporting as required by FFATA.

200.403 Factors Affecting Allowability of Costs

To maintain consistency within the guidance regarding the definition of *Budget Period,* 2 CFR 200.403(h) has been added to clarify that costs must be incurred during the approved budget period and the Federal awarding agency may waive prior written approval to carry forward unobligated balances to subsequent budget periods.

Improper Payment, Questioned Costs

Based on some confusion expressed in comments, the definition of improper payment was revised to accurately reflect how questioned costs, including costs questioned costs identified in audits, are not improper payments until reviewed and confirmed as such.

Internal Controls

Based on some confusion expressed in comments, minor modifications to the definition of internal controls were made to provide greater clarity on the internal controls requirements for non-Federal entities and Federal agencies.

Oversight Agency for Audit

Several commenters expressed confusion with the revision to this definition. Some commenters provided suggested edits for clarity. After deliberation and in response to the commenters, OMB made further edits to this definition for clarity.

Simplified Acquisition Threshold, Micro-Purchase

Multiple commenters were confused by the second paragraph proposed to be added to the definition for *simplified acquisition threshold.* Revisions were made to this paragraph to alleviate confusion and accurately reflect how the simplified acquisition may be determined. Minor technical edits were made to the definition for *micro-purchase,* based on comments, to clarify that the cognizant agency for indirect costs may approve a higher micro-purchase threshold if requested by the non-Federal entity.

F. Support for Domestic Preferences for Procurement

As expressed in Executive Order (E.O) 13788 of April 18, 2017 (Buy American and Hire American) and E.O. 13858 of January 21, 2019 (Executive Order on Strengthening Buy-American Preferences for Infrastructure Projects), it is the policy of this Administration to maximize, consistent with law, the use of goods, products, and materials produced in the United States, in Federal procurements and through the terms and conditions of Federal financial assistance awards. In support of this policy, OMB is adding a new section 2 CFR 200.322 *Domestic preferences for procurement,* encouraging Federal award recipients, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States when procuring goods and services under Federal awards. This Part will apply to procurements under a grant or cooperative agreement.

200.322 Domestic Preferences for Procurement

OMB appreciates the many comments were very supportive of this section. Several comments suggested including language in Appendix II because the proposed new 2 CFR 200.322 includes the requirement that such term be flowed down to all contracts and purchase orders. OMB accepts this change and has made the appropriate edits to the final language. Several comments asked for clarification regarding how preference is given. OMB rejects this change as the language gives Federal awarding agencies the flexibility to adjust their guidance accordingly. Further, another comment suggested to exempt purchases below the micro-purchase threshold from requirements in this section to reduce the burden on non-Federal entities. OMB rejects this suggestion as OMB does not agree with the assessment that an additional burden is being placed. The language did not set a dollar threshold and instead states that domestic preference should be used as appropriate and to ''to the maximum extent practicable.'' One commenter suggested a reference to this section should also be included in *Appendix II to Part 200—Contract Provisions for Non-Federal Entity*

Contracts Under Federal Awards. OMB concurred with this commenter and made the revision accordingly.

G. Changes to the Procurement Standards to Better Target Areas of Greater Risk and Conform to Statutory Requirements

To better target 2 CFR requirements on areas of greater risk consistent with the intent of the Grants CAP Goal, and to align with legislation related to procurement standards, OMB is revising the guidance to increase the micro-purchase threshold from $3,500 to $10,000, raising the simplified acquisition threshold from $100,000 to $250,000, and allowing non-Federal entities to request a micro-purchase threshold higher than $10,000 based on certain conditions. The NDAA 2017 increased the micro-purchase threshold from $3,500 to $10,000 for institutions of higher education, or related or affiliated nonprofit entities, nonprofit research organizations or independent research institutes (41 U.S.C. 1908).

The NDAA 2017 also established an interim uniform process by which these recipients can request, and Federal awarding agencies can approve requests to apply, a higher micro-purchase threshold. Specifically, the NDAA 2017 allowed a threshold above $10,000, if approved by the head of the relevant executive agency and consistent with clean audit findings under chapter 75 of title 31, internal institutional risk assessment, or State law. The NDAA for FY 2018 (NDAA 2018) increased the micro-purchase threshold to $10,000 for all recipients and also increased the simplified acquisition threshold from $100,000 to $250,000 for all recipients. The revisions to § 200.320 outline a permanent process by which non-Federal entities may establish a micro-purchase level above the $10,000 threshold.

A proposal to increase the micro-purchase and simplified acquisition thresholds in the Federal Acquisition Regulation (FAR) was published in the **Federal Register** on October 2, 2019 (84 FR 52420), FAR Case 2018–004. The FAR Rules at 48 CFR part 2, subpart 2.1, were finalized on July 2, 2020 (85 FR 40060, 85 FR 40064) with the effective date of August 31, 2020. In addition, the American Innovation and Competitiveness Act of 2017 (AICA), section 207(b) required that 2 CFR part 200 be revised to conform to the requirements concerning the micro-purchase threshold.

In response to these statutory changes, OMB issued OMB Memorandum M–18–18, Implementing Statutory Changes to the Micro-Purchase and the Simplified Acquisition Thresholds for Financial Assistance (June 20, 2018) which is now incorporated in 200.320. With the final procurement guidance now implemented, OMB Memorandum M–18–18 is rescinded.

200.320 Methods of Procurement To Be Followed

There were nearly 100 comments received relating to this section. Many expressed confusion with the proposed revisions and provided recommendations for clarity. In response, the section was rewritten to incorporate many of the suggestions from commenters.

The following revisions were made to 2 CFR 200.320:

- The procurement types were grouped into three categories: (1) Informal (micro-purchase, small purchase); (2) formal (sealed bids, proposals) and (3) Non-Competitive (sole source)
- The micro-purchase threshold was raised from $3,500 to $10,000
- All non-Federal entities are now authorized to request a micro-purchase threshold higher than $10,000 based on certain conditions that include a requirement to maintain records for threshold up to $50,000 and a formal approval process by the Federal government for threshold above $50,000; and
- The simplified acquisition threshold was raised from $150,000 to $250,000

200.321 Contracting With Small and Minority Businesses, Women's Business Enterprises, and Labor Surplus Area Firms

Several comments were made regarding this section that were out of scope for the current set of revisions. As such, no changes to the proposed language will be made at this time.

200.317 Procurements by States

One commenter suggested that 2 CFR 200.317 should reference the procurement requirements in 2 CFR 200.322 Domestic preference for procurements, as it is applicable to all non-Federal entities. OMB concurred with the commenter and made revisions accordingly.

200.318 General Procurement Standards

One commenter expressed strong support for the revisions proposed for this provision. Most commenters provided suggested edits for clarity. One commenter provided suggested edits to clarify that the ''. . . non-Federal entity must use its own documented procurement procedures which must conform to applicable State, local, and tribal laws and regulations; and Federal law. In addition, procurements for goods and services that are directly charged to a Federal award must conform to the standards identified in this part.'' OMB agreed with this clarifying revision and incorporated it within 2 CFR 200.318.

200.319 Competition

One commenter expressed support for the revisions to 2 CFR 200.319. Other commenters provided suggested edits for clarity. One commenter asked for clarity of the meaning ''section'' and expressed the entire subpart D should be referenced. OMB declines this comment and notes that the term ''section'' should not be interpreted to mean the entire subpart D and the proposed revisions to 2 CFR 200.319 only adds a new reference to 2 CFR 200.320. This new language in no way infers that the other procurement provisions do not apply. One commenter expressed that it is unclear what ''required'' under an award means. OMB notes that this language is used throughout the document as no such change was made.

H. Emphasis on Machine-Readable Information Format

OMB aims to clarify the methods for collection, transmission, and storage of data in 2 CFR 200.336 to further explain and promote the collection of data in machine-readable formats. A machine-readable format is a format that can be easily processed by a computer without human intervention while ensuring no semantic meaning is lost (44 U.S.C. 3502(18)). The clarification reinforces the machine-readable requirements in *the Foundations of Evidence-Based Policymaking Act of 2018* (Pub. L. 115–435) and accompanying OMB guidance. This requirement also reflects the need to continually evaluate which formats (and structures) maximize accessibility and usability for all stakeholders. Machine-readable formats will also help support the Leveraging Data as a Strategic Asset Cross-Agency Priority Goal (CAP Goal #2) and efforts under the Grants CAP Goal to Build Shared IT Infrastructure.

200.336 Methods for Collection, Transmission, and Storage of Information

OMB received some comments on 2 CFR 200.336 requesting the inclusion of PDFs in the language. OMB declined this suggestion since prescribing a specific format in official guidance was deemed inappropriate.

I. Changes to Closeout Provisions To Reduce Recipient Burden and Support GONE Act Implementation

Based on lessons learned from the implementation of 2 CFR part 200 and the Grants Oversight and New Efficiency Act (GONE Act), OMB is revising 2 CFR 200.344 *Closeout* to support timely closeout of awards, improve the accuracy of final closeout reporting, and reduce recipient burden.

The final language will increase the number of days for recipients to submit closeout reports and liquidate all financial obligations from 90 days to 120 days. This change takes into consideration the challenges faced by pass-through entities with respect to awards that contain a large number of subawards. These recipients must reconcile subawards and submit final reports to Federal awarding agencies within the same 90 day period. Recognizing the need for pass-through entities to receive timely reports from subrecipients to report back to Federal awarding agencies, OMB will continue to require subrecipients to submit their reports to the pass-through entity within 90 days. The intent of this change is to support financial reconciliation, help ease the burden associated with submitting reports for closeout, and promote improved accuracy. However, OMB recognizes that providing additional time may increase the likelihood that non-Federal entities will not submit their final closeout reports. To mitigate this risk, OMB is requiring Federal awarding agencies to report when a non-Federal entity does not submit final closeout reports as a failure to comply with the terms and conditions of the award to the OMB-designated integrity and performance system. Finally, OMB is publishing the requirement of Federal awarding agencies to make every effort to close out Federal awards within one year after the end of the period of performance unless otherwise directed by authorizing statute. The language is intended to promote timely closeout of awards, assist with reconciling closeout activities, and hold recipients accountable for submitting required closeout reports.

200.344 Closeout

Many of the comments in response to revisions to 2 CFR 200.344 were in support of the proposed revisions. The two sections listed below received the highest volume of comments.

200.344(a)

OMB is appreciative of the many commenters who supported the proposed extension of deadlines for the submission of reports. Due to the significant amount of support for the changes, OMB is keeping the language published in the proposed version. OMB also received comments to permit pass-through entities to establish earlier dates, in accordance with existing practice. OMB accepts this recommendation. OMB also received comments relating to final indirect cost rates after the end of the period of performance. OMB rejects these suggestions, as a revised final Federal financial report can be submitted after closeout. Therefore, lengthening the deadline would not have an impact. OMB is making several small changes based on received comments, such as changing ''non-Federal entity'' to ''recipient'' and adding ''or an earlier date as agreed upon by the pass-through entity and subrecipient.''

200.344(i)

OMB received several comments that recommended making the Federal Awardee Performance and Integrity Information System (FAPIIS) entries optional. The intent of the added regulation was to hold recipients accountable and share performance across Federal agencies, which promotes results-oriented grantmaking. Therefore, OMB is finalizing the language that makes entry into FAPIIS mandatory. Further, it should be noted that entry into FAPIIS does not constitute a termination, which OMB has clarified in the final language.

200.345 Post-Closeout Adjustments and Continuing Responsibilities

Some commenters expressed concerns that the language proposed for this provision was too open-ended and the period could extend beyond record retention. OMB concurred with the commenters and made revisions to address these concerns.

J. Changes to Performing the Governmentwide Audit Quality Project

Revisions to 2 CFR 200.513 include a change in the date for the requirement for a governmentwide audit data quality project that must be performed once every 6 years beginning with audits submitted in 2018. This date has been changed to 2021, given the significant changes to the 2019 Compliance Supplement in support of the Grants CAP Goal.

200.513 Responsibilities

Comments in response to the change regarding the assignment of the cognizant agency for audit responsibilities based on the direct funding and total funding were positive and thus OMB did not make changes to the language for the final publication. We clarified that the determination for funding is based the federal award expenditures as reported in the recipient's Schedule of expenditures of Federal Awards (see § 200.510(b)). Commenters in response on the governmentwide project to determine the quality of single audits suggested a delay on such project by a few years due the changes in the 2019 Compliance Supplement regarding the maximum of review for compliance areas. Commenters also suggested the use of current and on-going quality review performed by agencies on single audits to substitute or complement the governmentwide project. We agreed on the suggested timing of the project and have removed the specific date listed in the proposal. OMB will work with the agencies and the single audit stakeholders to determine a future date for the project that is more optimal. OMB added language to address that current quality control review work performed by the agencies can be leveraged for the governmentwide project.

II. Meeting Statutory Requirements and Aligning 2 CFR With Other Authoritative Source Requirements

A. Prohibition on Certain Telecommunication and Video Surveillance Services or Equipment

OMB revised 2 CFR to align with section 889 of the NDAA for FY 2019 (NDAA 2019). The NDAA 2019 prohibits the head of an executive agency from obligating or expending loan or grant funds to procure or obtain, extend or renew a contract to procure or obtain, or enter into a contract (or extend or renew a contract) to procure or obtain the equipment, services, or systems prohibited systems as identified in NDAA 2019. To implement this requirement, OMB is adding a new section, 2 CFR 200.216 *Prohibition on certain telecommunication and video surveillance services or equipment,* which prohibit Federal award recipients from using government funds to enter into contracts (or extend or renew contracts) with entities that use covered telecommunications equipment or services. This prohibition applies even if the contract is not intended to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services. As described in section 889 of the NDAA 2019, covered telecommunications equipment or services includes:

D Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).

D For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).

D Telecommunications or video surveillance services provided by such entities or using such equipment.

D Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

200.216 Prohibition on Certain Telecommunication and Video Surveillance Services or Equipment

Commenters expressed widespread concerns on the impact and implementation of the statutory requirement. OMB sought to address commenter concerns by re-writing this section to align closely with the law, add a new definition for telecommunications and video surveillance costs, and add a new section 2 CFR 200.471. The final language provides guidance describing the meaning of covered telecommunications as explained in the statute. The language also aligns with the requirements in the statute affecting the financial assistance community to include the prohibition of non-Federal entities from obligating or expending loan or grant funds to (1) procure or obtain, (2) extend or renew a contract to procure or obtain, or (3) enter into a contract (or extend or renew a contract) to procure or obtain, equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system.

Federal awarding agencies are also required by the law to work with OMB to prioritize available funding and technical support to assist affected businesses, institutions and organizations. In addition, the funds must be prioritized as reasonably necessary for affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained. Further, OMB added a new 2 CFR 200.471 *Telecommunication and video surveillance costs* to provide clarity that the telecommunications and video surveillance costs associated with 2 CFR 200.216 are unallowable. A new definition for *telecommunication and video surveillance costs,* which is described in 2 CFR 200.471, has also been added to 2 CFR for clarity.

B. Never Contract With the Enemy

To meet statutory requirements, OMB is adding part 183 to 2 CFR to implement Never Contract with the Enemy, consistent with the fact that the law applies to only a small number of grants and cooperative agreements. Never Contract with the Enemy applies only to grants and cooperative agreements that exceed $50,000, are performed outside the United States, including U.S. territories, to a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

To implement Never Contract with the Enemy and to reflect current practice, OMB requires Federal awarding agencies to utilize the System for Award Management (SAM) Exclusions and the FAPIIS to ensure compliance before awarding a grant or cooperative agreement. Federal awarding agencies are prohibited from making awards to persons or entities listed in SAM Exclusions (NDAA 2017) pursuant to Never Contract with the Enemy and are required to list in FAPIIS any grant or cooperative agreement terminated due to Never Contract with the Enemy as a Termination for Material Failure to Comply. The revisions also require agencies to insert terms and conditions in grants and cooperative agreements regarding non-Federal entities' responsibilities to ensure no Federal award funds are provided directly or indirectly to the enemy, to terminate subawards in violation of Never Contract with the Enemy, and to allow the Federal Government access to records to ensure that no Federal award funds are provided to the enemy.

The law allows Federal awarding agencies to terminate, in whole or in part any grant, cooperative agreement, or contract that provides funds to the enemy, as defined in the NDAA for FY 2015 (NDAA 2015). This statute applies to procurement as well as to grants and cooperative agreements. OMB coordinated with the procurement community as appropriate before issuing this final guidance, including the roles and responsibilities of the covered combatant command and Federal awarding agencies.

Part 183 Never Contract With the Enemy

Many of the comments focused on aligning the regulation with the authorizing legislation and streamlining and using consistent terms in the regulatory language. OMB concurred with these comments and made the necessary changes to the language. OMB also agreed with several comments suggested the use of ''recipient'' rather than ''non-Federal entity.'' In addition, OMB revised part 183 to include a reference to void covered grants or cooperative agreements, and updated specific parts of the legislative authority that were set to expire by aligning with recently passed legislation for the extension of dates.

A couple commenters noted the potential burden associated with checking *SAM.gov* on a monthly basis. OMB concurred with these comments and revised the language accordingly.

C. Requirement for the FAPIIS To Include Information on a Non-Federal Entity's Parent, Subsidiary, or Successor Entities

To meet statutory requirements, OMB revised 2 CFR parts 25 and 200 to implement Sec. 852 of the NDAA for FY 2013 (NDAA 2013), which requires that the FAPIIS include information on a non-Federal entity's parent, subsidiary, or successor entities. OMB requires financial assistance applicants to provide information in SAM on their immediate owner and highest-level owner and subsidiaries, as well as on all predecessors that have been awarded a Federal contract, grant, or cooperative agreement within the last three years. In addition, OMB requires that prior to making a grant or cooperative agreement, agencies must consider all of the information in FAPIIS with regard to an applicant's immediate owner or highest-level owner and predecessor, or subsidiary, if applicable. These revisions are consistent with the Federal Acquisition Regulation (FAR) final rule regarding this law published at 81 FR 11988 on March 7, 2016.

Part 25 Universal Identifier and System for Award Management

OMB received a significant number of comments concerning subrecipient requirements and registration with the

SAM database. These commenters expressed concern with requiring subrecipients to fully register with the SAM database. The commenters thought this requirement would be overly burdensome and was unnecessary.

It was not OMB's intention to require subrecipients to fully register with the SAM database. To address this concern, OMB added a new ''Subpart C-Recipient requirements of subrecipients'' and a note to the terms in appendix A to clearly state that subrecipients do not need to fully register with the SAM database.

Further, several commenters thought the addition of the requirement for subrecipients to register with the SAM database, Federal agencies applying for or receiving Federal awards register in the SAM database made sections of part 25 confusing. The commenters thought that using the term ''Federal agency'' could be misunderstood. Some commenters thought this was particularly true with regard to section 100.

OMB agreed that the addition of the term ''Federal agency'' in part 25 made the requirements in part 25 less clear. OMB and the interagency work group also thought that there was a need for additional clarity on who the requirements actually apply to and in what situation. As a result, OMB added definitions for ''applicant'' and ''recipient'' in part 25 and removed ''non-Federal entity'' and ''Federal agency'' where appropriate throughout part 25.

25.200 Requirements for Notice of Funding Opportunities, Regulations, and Application Instructions

Several commenters stated that their organizations do not have a higher level owner or subsidiaries and they may not have predecessors. OMB recognizes that not all entities will have the same organizational structure. The purpose of providing this information is for greater transparency in the awarding of Federal financial assistance. The regulatory language requires that applicants and recipients must provide the information ''if applicable.'' If the requested information is not applicable, an applicant or recipient would not be required to report it.

D. Increase Transparency Through FFATA, as Amended by the DATA Act

OMB made several revisions to increase transparency regarding Federal spending as required by FFATA, as amended by the DATA Act, which mandates Federal agencies to report Federal appropriations received or expended by Federal agencies and non-Federal entities. OMB has revised the reporting thresholds to further align financial assistance requirements with those of the Federal acquisition community.

To increase transparency, OMB extended the applicability of Federal financial assistance in 2 CFR part 25 and 2 CFR part 170 beyond grants and cooperative agreements so that it includes other types of financial assistance that Federal agencies receive or administer such as loans, insurance, contributions, and direct appropriations.

OMB also made changes throughout 2 CFR to make it clear that Federal agencies may receive Federal financial assistance awards. This will increase transparency for Federal awards received by Federal agencies.

To further align implementation of FFATA, as amended by DATA Act, between the Federal financial assistance and acquisition communities, OMB revises the Federal awarding agency and pass-through entity reporting thresholds. For Federal awarding agencies, OMB revises 2 CFR part 170 to require agencies to report Federal awards that equal or exceed the micro-purchase threshold as set by the FAR at 48 CFR part 2, subpart 2.1. Consistent with the FAR threshold for subcontract reporting, OMB will raise the reporting threshold for subawards that equal or exceed $30,000.

OMB proposed to revise 2 CFR part 25 to allow agencies the flexibility to exempt a foreign entity applying for or receiving an award for a project or program performed outside the United States valued at less than $100,000. Currently, Federal awarding agencies have the flexibility to exempt this requirement for awards valued at less than $25,000. The exemption applies to cases where the Federal agency has conducted a risk-based analysis and deems it impractical for the entity to comply with the requirements(s). OMB proposed to make this revision after receiving feedback from the international community that requiring certain foreign entities to register in SAM introduces substantial burden with no significant value for the Federal awarding agency. Federal awarding agencies will continue to remain responsible for reporting these awards for transparency purposes.

Finally, OMB will require Federal awarding agencies to associate Federal Assistance Listings with the authorizing statute to make listings more consistent. This supports implementation of the DATA Act which requires agencies to report award level Federal Assistance Listings information for display on *www.usaspending.gov*.

Part 25 Universal Identifier and System for Award Management

Some commenters expressed concern regarding the proposal to expand SAM registration requirements to all type of Federal financial assistance as required by FFATA. Specifically, commenters requested clarity on who is considered the applicant or recipient in cases when the intended recipient does not have a direct relationship with the Federal awarding agency. For instance, for certain loan and loan guarantee programs, a third-party administers the program on behalf of the Federal awarding agency. One organization specifically expressed concern that these third-party administers may not participate in loan guarantee programs, if they are required to register in SAM. OMB disagrees that it is overly burdensome for third-party administrators to register in SAM, however, OMB agreed that it would be inappropriate to have the intended recipient who does not have a direct relationship with the Federal awarding agency to register in these instances. In response to these comments, OMB revised the definitions of applicant and recipient to clarify that SAM registration requirements apply to those entities that receive Federal awards directly from a Federal awarding agency and that applicants and recipients also include those entities that administer Federal awards on behalf of Federal awarding agencies.

25.110 Exceptions to This Part

Some commenters supported raising the threshold for foreign organizations or foreign public entities to $100,000 in 2 CFR 25.110. Other commenters expressed concerns that a thorough pre-award Federal review would not be conducted for foreign entity recipients under this higher threshold and it would be a disservice to the American taxpayer to raise the threshold. OMB also received comments that requiring Federal awarding agencies to only grant exemptions to foreign organizations or foreign public entities on a case-by-case basis to be overly burdensome.

OMB does not think that requiring Federal awarding agencies to determine whether to grant exemptions to foreign organizations or foreign public entities on a case-by-case basis is overly burdensome. Considering the comments received, OMB decided to retain the current threshold of $25,000.

Based on feedback provided by agencies and in light of the COVID–19 emergency and past emergency

situations where this requirement has been waived, OMB added an exception in § 25.110 allowing agencies to waive the requirement to register in SAM when there are exigent circumstances that would prevent an applicant from registering prior to the submission of an application. Federal awarding agencies are responsible for the determination on whether there are exigent circumstances that prevent an applicant from registering in SAM and are no longer required to request a waiver from OMB in these instances.

Part 170 Reporting Subaward and Executive Compensation Information

170 Definitions

Several commenters mentioned the difference between the term non-Federal entity in part 170 and part 200 and requested that part 170 reference part 200 for this definition. Related comments also were provided to the definitions of foreign organizations and foreign public entity. The definition of non-Federal entity in part 170 intentionally includes foreign organizations, foreign public entities, and for-profit organizations, which is not included in the definition of non-Federal entity in part 200. Part 200 only applies to these organization types when a Federal awarding agency chooses to apply the requirements in their adoption of part 200. Part 170 applies to foreign and for-profit organizations because of the Federal Funding Accountability and Transparency Act (Pub. L. 109–282, hereafter cited as ''Transparency Act'') requirements. Thus, the definition for non-Federal entity in part 200 and part 170 will remain different.

170.110 Types of Entities to Which This Part Applies

Several commenters requested clarification on the language surrounding ''non-Federal'' and ''Federal agencies.'' OMB concurred with these comments and made the corresponding changes to ensure clarity. Further, OMB also agreed with comments that suggested clarification to § 170.110(b) in relation to Title IV funds and made the subsequent edits in the final language.

170.115 Deviations

OMB concurred with comments asking to define ''deviation'' to differentiate between exceptions by removing ''deviation'' and adding paragraph (c) to ''Types of Exemptions.''

170.200 Federal Awarding Agency Reporting

OMB received several comments suggesting that a reference to the definition for micro-purchase in § 200.1 be added to the end of the section. OMB concurred and made this change in the final language. Further, OMB received comments relating to the grammatical structuring of this section. After further review, OMB retained the existing language.

170.210 Requirements for Notices of Funding Opportunities, Regulations, and Application Instructions

OMB concurred with a comment that suggested including the information on the requirements for Notice of Funding Opportunity found in 2 CFR 200.204 and appendix I to part 200. OMB made the suggested changes to appendix I to include these references. Further, comments inquired if OMB has considered collecting the assurance from applicants when they register and renew in *beta.SAM.gov*. OMB would like to note that this is already part of the requirements for award terms and conditions, and the needed assurance should go into the Compliance Supplement for auditors to check that the assurance is received from the recipient. Therefore, no changes related to obtaining assurances were made to the language in this section.

170.220 Award Term

Several commenters referenced the thresholds discussed in part 25. OMB would like to point out that the thresholds in part 25 are unrelated to the threshold in § 170.220. Additionally, several comments suggested changes that were outside of the scope of this revision. OMB concurred with a suggestion to remove a reference to the Recovery Act in appendix A. Further, a comment suggested the deletion of the insertion of ''and Federal agency'' in paragraph (a) of this section. OMB notes that some agencies can make awards to other agencies, dependent on the authority. Therefore, it is necessary to keep the language that was used in the proposed version. One commenter noted that raising the subaward reporting threshold from $25,000 to $30,000 is unlikely to result in greater efficiencies or ease administrative requirements and recommended for the threshold to be increased to at least $75,000 or $100,000. OMB disagrees with this commenter's recommendation, as the purpose of this change was to further align implementation of FFATA, as amended by DATA Act, between the Federal financial assistance and acquisition communities.

170.305 Federal Award

Commenters had questions relating to how this definition differs from part 200. OMB would like to note that the definition differs because this section is discussing Federal awards in the context of ''direct'' federal awards. Federal award in part 200 includes is more expansive to include caveats depending on which section it is applied to, so the definition cannot be the same. As such, the proposed language remains.

170.315 Executive

One comment suggested clarifying this definition as many recipients of Federal awards are state and local governments with elected officials. OMB rejected this change as this is already covered within the ''Exceptions'' to this section. Further, one comment requested that this definition be included in part 200. OMB aims to eliminate duplicative definitions and thus respectfully declines this comment to also include the definition in part 200.

170.320 Federal Financial Assistance Subject to the Transparency Act

A commenter noted that the term Federal financial assistance subject to the Transparency Act is not defined in part 200. OMB concurred with this comment and made edits to the definition in § 170.320 to clarify that the term includes Federal financial assistance as defined in part 200, with some limited exceptions.

170.325 Subaward

Commenters recommended deleting the definition for ''Subaward'' and including a reference to the definition used in part 200 to reduce duplication. OMB concurred with this recommendation and made the subsequent change.

E. Aligning 2 CFR With Authoritative Sources

OMB revises 2 CFR 200.431 to allow states to conform with Generally Accepted Accounting Principles (GAAP), specifically Governmental Accounting Standards Board (GASB) Statement 68, and to continue to claim pension costs that are both actual and funded. OMB has made this revision because GASB issued Statement 68, *Accounting and Financial Reporting for Pensions* which amends GASB Statement 27 and allows non-Federal entities (NFE) to claim only estimated pension costs in their financial

statements. OMB's revision will allow non-Federal entities to continue to claim pension costs that are both actual and funded.

200.431 Compensation

OMB appreciated the comments in support of the proposed changes. In response to several comments that asked for clarification, OMB is revising the final language to require state and local governments to be compliant with GASB #68 for pension costs. OMB would like to note that the cost associated with each fiscal year should be determined in accordance with GAAP.

The definition for ''Improper Payment'' has been revised to refer to the authoritative source for clarity, OMB Circular A–123—Management's Responsibility for Internal Control in Federal Agencies, Appendix C—Requirements for Payment Integrity Improvement. See above Section I for additional information on the changes to ''Improper Payment.''

Some commenters expressed that the reference to OMB Circular A–123 for the definition of ''Improper Payment'' added confusion and suggested retaining the original language. OMB considered this request and respectfully declined the comment in keeping with the practice to align the guidance with source documents, if possible.

III. Clarifying Requirements Regarding Areas of Misinterpretation

Following the publication of 2 CFR part 200, OMB received a substantial amount of questions from stakeholders requesting clarifications about key aspects of the guidance. In other instances, it has come to OMB's attention that the interpretation of certain provisions was not consistent with the intent of 2 CFR part 200. In response, OMB is publishing clarifications that are aimed at reducing recipient administration burden and ensuring consistent interpretation of guidance.

A. Responsibilities of the Pass-Through Entity To Address Only a Subrecipient's Audit Findings Related to Their Subaward

To clarify requirements regarding responsibility for audit findings, OMB revises 2 CFR 200.332 *Requirements for pass-through entities* to clarify that pass-through entities (PTE) are responsible for addressing only a subrecipient's audit findings that are specifically related to their subaward. For example, a PTE is not required to address all of the subrecipient's audit findings. In addition, the PTE may rely on the subrecipient's auditors and cognizant agency's oversight for routine audit follow-up and management decisions. These changes reduce the burden for PTEs by allowing a PTE to rely on the cognizant agency to address a subrecipient's entity-wide issues.

200.332 Requirements for Pass-Through Entities

OMB received substantial feedback relating to the changes made in this section. The two main changes for this section are related to the clarification of the pass-through entities responsibilities toward the establishment of the subrecipient indirect cost rates and the pass-through entities responsibilities for resolving the sub recipient's audit findings (§ 200.332(d)).

Although most commenters approved of the proposed changes regarding the pass-through entities responsibilities for the subrecipient indirect cost rates, some requested clarification on specific situations:

- Where the subrecipient has a federally approved indirect cost rate
- where the subrecipient receives funds from multiple pass-through entities from which it may be already established an indirect cost rate with one of the pass-through entity; or
- where the subrecipient decides to use the direct allocation method instead of the use of indirect cost rate for cost reimbursement.

OMB provides clarifications in the final language for all of the three situations above.

Most commenters supported the proposed changes to clarify the pass-through entities responsibility in the resolution of audit findings reported by the subrecipients and the required management decision letters to address the audit findings. Some commenters questioned the use of the term ''systemic findings'' to describe the findings that impact the whole organization. This section has been revised to streamline and clarify the original intent of the revision which limits the pass-through entity to review and resolve the audit findings that are specifically related to the subaward. OMB replaced the term ''systemic findings'' with ''cross-cutting findings.'' OMB also added that written confirmation by the subrecipients for corrective actions on audit findings can be used as a means for follow-up and monitoring of the subrecipient's performance.

B. Reducing Burden on Universities by Clarifying Timing of the Disclosure Statement

OMB is adding language to the timing of submission of the disclosure statement (DS–2), which is only required for institutions of higher education that meet certain thresholds as defined in 48 CFR 9903.202–1(f). This revision reduces burden while maintaining the requirement for institutions of higher education to implement policies that are in compliance with 2 CFR.

200.419 Cost Accounting Standards and Disclosure Statement

OMB received several comments in response to 2 CFR 200.419 that focused on concerns with the legal instruments that were subject to this part. In response to these concerns, the language was revised to provide clarification.

C. Response to Frequently Asked Questions Related to the Prior Release of 2 CFR

In July 2017, OMB developed and posted Frequently Asked Questions (FAQs) on the Chief Financial Officers Council website in response to stakeholder requests for clarification on the first publication of 2 CFR *(https://cfo.gov//wp-content/uploads/2017/08/July2017-UniformGuidanceFrequentlyAskedQuestions.pdf)*. Due to the volume of questions related to these topics, OMB is including revisions to clarify the following: The meaning of the words ''must'' and ''may'' as they pertain to requirements; applicability and documentation requirements when a non-Federal entity elects to charge the de minimis indirect cost rate of MTDC; PTE responsibilities related to indirect cost rates and audits; and applicability of 2 CFR to FAR based contracts. These proposed revisions are intended to improve clarity and reduce recipient burden by providing guidance on implementing 2 CFR.

The Words ''must'' and ''may'' as They Pertain to Requirements

All commenters that provided feedback on this section were in favor of incorporating the meaning of ''must'' and ''may'' within the guidance. One commenter suggested that the location for this change within the guidance could be within its own section. After consideration, OMB disagrees with the commenter and has determined that this change should remain in the applicability section of the guidance under the stated sub title.

De Minimis Indirect Cost Rate of MTDC Applicability and Documentation

See Section I (K) for additional information on the comments received.

PTE Responsibilities Related to Indirect Cost Rates and Audits

See Section III or additional information on the comments received.

Applicability of 2 CFR to FAR Based Contracts

Many commenters expressed confusion regarding the changes to this section. The intent of the changes to this section are to make clear that the FAR applies to Federal contracts awarded to non-Federal entities, and that these requirements supersede the requirements of 2 CFR part 200 in a Federal contract. Clarification was requested from a commenter to confirm if an audit conducted for a Cost Accounting Standards (CAS) applicable contract will take the place of a Single Audit and how an entity with multiple grants and only one CAS-contract would meet the requirements of the Single Audit Act.

The language clarified in § 200.101(c) to state that for CAS covered contracts, the CAS requirements regarding audit would supersede the audit requirements in subpart F. In addition, in the case where an entity receives many grants and one CAS covered contracts, the entity must comply to both the Single Audits for its grants and the CAS audit requirements for the CAS covered contract.

D. Applicability of Guidance to Federal Agencies

OMB is making changes to 2 CFR 200.101 *Applicability* to clarify that Federal awarding agencies may apply the requirements of 2 CFR part 200 to other Federal agencies, to the extent permitted by law. This change recognizes that there are instances when Federal awarding agencies or pass-through entities have the authority to issue Federal awards to Federal agencies and in these instances, the provisions of 2 CFR part 200 may be applied, as appropriate. This change is consistent with how for-profit entities, foreign public entities, or foreign organizations are treated in the Uniform Guidance.

200.101 Applicability

Several comments expressed concerns as to whether or not it is appropriate to include awards to Federal agencies in the scope of 2 CFR. It was determined that it was appropriate to include Federal agencies in the scope of 2 CFR as some Federal agencies are authorized to receive grants or cooperative agreements as direct recipients or subrecipients. This addition clarifies that subparts A through E of 2 CFR part 200 is applicable when determined by the Federal awarding agency. There will be no change from the proposed version.

E. Other Clarifications

Parts 25 and 170

Many commenters expressed concerns that parts 25 and 170 were confusing, inconsistent and needed to be edited for clarity. In response to these comments, parts 25 and 170 have been revised throughout with many technical corrections to add clarity and consistency.

200.110 Effective/Applicability Date

A number of comments, particularly from Federal agencies, expressed concern about the effective date for negotiated indirect cost rate agreements (NICRAs) in paragraph (b). The intent of this section is to retain the existing NICRAs until they are renegotiated and incorporate the requirements from the revision to 2 CFR upon renegotiation. Non-Federal entities with a NIRCA are expected to work with their cognizant agency for indirect costs as appropriate. OMB clarified the intent for 2 CFR 200.110(b). One Federal agency commenter stated that OMB should specify if the applicability date is for the entire guidance or for the revisions. OMB accepted this comment and made revisions accordingly.

200.200 Purpose

All commenters provided recommendations to revise this section to better align the terms ''competitive'' and ''non-competitive'' with the new terms ''discretionary'' and ''non-discretionary.'' OMB concurs with the recommendation to revise this section to align with other changes within the guidance. In response to commenters, OMB has removed 2 CFR 200.200(b) and made other technical corrections accordingly.

200.207 Standard Application Requirements

OMB received one comment on this section that was out of scope for the current set of revisions, and therefore the proposed language remains the same.

Out of Scope Comments

Many commenters submitted comments that were either not part of the scope of the effort, were not relevant to the revisions proposed, pertained to sections of the guidance that were not proposed to be revised, or would be a change too drastic that would warrant a need for the public to have an opportunity to provide input before finalizing. All comments within these categories were not accepted by OMB.

Changes From the Proposed Revisions Not Recommended

Comments received for several provisions within 2 CFR were reviewed, deliberated, and determined that no changes were needed from the proposed revisions. Some of these provisions within 2 CFR include the following:

- 200.201 Use of grant agreements (including fixed amount awards), cooperative agreements, and contracts
- 200.207 Standard application requirements
- 200.311 Real property
- 200.312 Federally-owned and exempt property
- 200.313 Equipment
- 200.314 Supplies
- 200.331 Subrecipient and contractor determinations
- 200.430 Compensation—personal services
- 400.458 Pre-award costs

200.402 Composition of Costs

Some commenters requested clarity and noted that the use of ''approved budget period'' is specific to Federal financial assistance when 2 CFR 200.402 would apply to both contracts and Federal financial assistance awarded to non-Federal entities. Another commenter suggested that further clarification is needed for what ''cost principle'' and ''budget period'' mean. Based on the vast array of comments received and the revised definitions for finalization, OMB decided to remove the language proposed for 2 CFR 200.402.

200.449 Interest

One comment was received for this provision. The commenter suggested that OMB provide a different example within 2 CFR 200.449 because lease contracts that transfer ownership are essentially debt financing. The commenter explains that the example is comparing debt financing to debt financing, which doesn't work for the intent. The commenter provided a suggested edit that would enable the example to remain and retain the original intent. OMB concurred with the commenter and made the suggested edit accordingly.

200.461 Publication and Printing Costs

All commenters requested clarity and suggested revisions to this provision. One commenter objected to specifying that costs must be charged to the last budget period, citing that printing costs

are historically charged at various stages of the award. One commenter noted that these costs have historically been allowable up until the closeout of the award. Edits were suggest to provide additional clarity in § 200.461(b)(3) to specify that The non-Federal entity may charge the Federal award during closeout. OMB concurs with this suggested revision and made the change accordingly.

200.507 Program-Specific Audits

One comment was received for 2 CFR 200.507. The commenter requested a clarification on the first phase to indicate ''in some cases'' rather than ''in many cases'' because Appendix VI of the 2019 Compliance Supplement only shows two current program specific audit guides. OMB concurred with the commenter and made the revision accordingly. The commenter provided a second recommendation to remove the 2014 beginning date and instead include the current reference to the Compliance Supplement appendix. OMB also concurs with this suggestion from the commenter and made the revisions.

200.515 Audit Reporting

The comments submitted for 2 CFR 200.515 provided suggestions for clarity. One commenter suggested reviewing this subsection against what the Federal Audit Clearinghouse is collecting in Part III: Information from the Schedule of Findings and Questioned Costs, Item 2. Financial Statements, to ensure an appropriate alignment between the regulation and the Form. Another commenter inquired about the intent of the revisions to this provision. OMB considered and discussed all the comments for clarity and made revisions accordingly.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The revision of 2 CFR is not a significant regulatory action under Executive Order 12866.

Regulatory Flexibilities Act

The Regulatory Flexibility Act 5 U.S.C. 601, *et seq.*, requires a regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities. OMB expects this guidance to have a significant economic impact on a substantial number of such entities. There are some proposed revisions that may impose burden, however, there are more proposed revisions that reduce burden to small entities. When reviewing all the revisions, the burden that will be reduced for recipients is much greater than the burden imposed.

The revisions to 2 CFR are not applicable to Federal financial assistance awards issued prior to the effective dates provided in the **DATES** section of this Notice of Final Guidance, including financial assistance awards issued prior to those dates under the Coronavirus Aid, Relief, and Economic Support (CARES) Act of 2020 (Pub. L. 116–136). OMB plans to consult with applicable agencies to provide regulatory flexibility analyses in future revisions to 2 CFR and its subcomponents.

The applicability of Federal financial assistance in 2 CFR part 25 will be expanded beyond grants and cooperative agreements to include other types of financial assistance such as loans and insurance. This revision ensures compliance with FFATA, as amended by the DATA Act, and will impact small entities that voluntarily seek financial assistance. It will not have a significant impact on a substantial number of U.S. small entities as approximately 69,185 small entities who received awards for other types of financial assistance did not have a unique entity identifier in FY 2019, while the Small Business Administration's Office of Advocacy reported 30.7 million U.S. small businesses in that same calendar year. Currently, 2 CFR part 25 requires all non-Federal entities that apply for grants and cooperative agreements to register in the SAM. In alignment with FFATA, the guidance provides that all entities that apply directly to a Federal program for financial assistance such as loans and insurance must register in SAM, which requires the establishment of a unique entity identifier. Individuals who receive Federal financial assistance as a natural person remain exempt from this requirement. In practice, some Federal awarding agencies already require SAM registration for all types of Federal financial assistance and the change would make this practice consistent among agencies. OMB recognizes that this new requirement may be burdensome to small entities and there may be instances where it is appropriate for Federal awarding agencies to request an exception or delay implementation of this requirement for their programs. In response, Federal awarding agencies may exercise the flexibility provided in 2 CFR 25.110 to either exempt an applicant or recipient from this requirement or request an exception from OMB on a case-by-case for a class applicants or recipients, particularly in situations of national emergency such as natural disasters and pandemics.

As noted in the Paperwork Reduction Act section, as of July 1, 2020, there were 159,477 unique Federal financial assistance registrants in the SAM. According to data accessed from *USASpending.gov,* in FY 2018, approximately 2,952 small entities who received awards for other types of financial assistance did not have a unique entity identifier. Assuming that non-Federal entities with a unique entity identifier reported to *USASpending.gov* are already registered in SAM, this change will impact approximately 2,952 small entities annually. SAM registration is estimated to take 2.5 hours per response, which results in 7,380 burden hours annually.

The guidance also provides consistency among definitions and terms and proposes several provisions to increase transparency regarding Federal spending. These revisions are intended to reduce recipient burden and will not have a significant economic impact on a substantial number of small entities because they will affect Federal awarding agencies; they do not include any new requirements for non-Federal entities.

The guidance introduces a new provision to align with section 889 of the NDAA 2019, prohibition on certain telecommunication and video surveillance services or equipment. This statutory requirement will introduce burden to small entities that are prohibited from obligating or expending grant or loan funds to procure or obtain, extend or renew a contract to procure or obtain, or enter in a contract with, as identified in the NDAA 2019. Since this is a new legal requirement, the burden estimate is difficult to calculate. It will impact all unique entities awarded Federal financial assistance, of which 69,185 are small entities.

The guidance implements a new statute that requires applicants of Federal assistance to provide information on their owner, predecessor and subsidiary, including the Commercial and Government Entity (CAGE) Code and name of all predecessors, if applicable. This will not have a significant economic impact on a substantial number of small entities because small entities typically do not have a complex corporate structure requiring them to report information on their owner, predecessor, and

subsidiary. Further, the burden is minimal for a non-Federal entity to provide the name of its immediate owner and highest-level owner.

The NDAA for FY2018 increased the micro-purchase threshold from $3,500 to $10,000 and increased the simplified acquisition threshold from $100,000 to $250,000 for all recipients. OMB's revisions reduces burden and will not have a significant economic impact on a substantial number of small entities because it is likely to reduce burden for all non-Federal entities.

Paperwork Reduction Act

Consistent with the Regulatory Flexibility Act analysis discussion, the Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The guidance contains information collection requirements and will impact the current Information Collection Requests approved under OMB control number 3090–0290 managed by GSA. Accordingly, GSA will submit a request for approval to amend the existing Information Collection Requests for SAM registration requirements for Federal financial assistance recipients.

Annual Reporting Burden

The estimated annual reporting burden includes all possible entities for Federal financial assistance that may be required to register in SAM. The estimated annual reporting burden also includes entities that receive Federal financial assistance reported in *USASpending.gov* and either may or may not be required to register in SAM.

Previously, SAM only requires that applicants and recipients of Federal financial assistance in the form of grants register in the system. However, applicants and recipients are required to maintain accurate SAM registration at all times during which they have an active Federal award, an application, or a plan under consideration by a Federal awarding agency.

The burden estimates are approximations based on the best available data.

As of July 7, 2019, there were 159,477 unique Federal financial assistance registrants in SAM. However, not all registrants ultimately apply for, or receive, Federal financial assistance. OMB aggregated SAM data with Federal financial assistance recipient data from *USASpending.gov,* excluding grants, to determine the anticipated number of additional Federal financial assistance in SAM. OMB ran reports in *USASpending.gov* to identify the number of unique recipients of Federal financial assistance other than grants to isolate the total number of potential registrants in SAM as a result of the updates to the proposed guidance.

OMB removed duplicate recipients based on recipient Data Universal Numbering System Number (DUNS) numbers, from Dun & Bradstreet (D&B). At this time all Federal financial assistance recipients are required to register for DUNS numbers.

In FY 2019 there were 1,751 loan and 8,915 other Federal financial assistance recipients with unique DUNS numbers reported in *USASpending.gov.* Therefore, based on the number of entities with unique DUNS numbers that are registered in SAM (159,477), plus entities that receive loans (122) or other Federal financial assistance (8,915) reported in *USASpending.gov* that may not be reflected in SAM, the total number of entities that may be impacted by the proposed guidance associated Information Collection Requests under OMB control number 3090–0290 could be 172,084 registrants.

Public reporting burden for Information Collection Requests under OMB control number 3090–0290 is managed by the GSA and estimated to average 2.5 hours per response, including the 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:

Respondents: 172,084.
Responses per Respondent: 1.
Total annual responses: 172,084.
Hours per Response: 2.5.
Total response Burden Hours: 430,210.

The guidance also requires that registrants for Federal financial assistance provide information on their owner, predecessor, and subsidiary, including the CAGE code and name of all predecessors, if applicable. This information is required to implement Sec. 852 of the NDAA of FY 2013, which requires that the FAPIIS include information on a non-Federal entity's parent, subsidiary, or successor entities. Non-Federal entities are already required to obtain a CAGE code for purposes of SAM registration. It is anticipated that including this information as part of SAM registration or for a renewal should not result in significant additional time. Public reporting burden for this collection of information is estimated to average 0.1 hours per response. Based on the burden estimates for the total number of SAM registrants indicated in the previous section, the annual reporting burden for this proposal is estimated as follows:

Respondents: 172,084.
Responses per respondent: 1.
Total annual responses: 172,084.
Preparation hours per response: 0.1.
Total response Burden Hours: 17,208.

List of Subjects

2 CFR Part 25

Administrative practice and procedure, Grant programs, Grants administration, Loan programs.

2 CFR Part 170

Colleges and universities, Grant programs, Hospitals, International organizations, Loan programs, Reporting and recordkeeping requirements.

2 CFR Part 183

Foreign aid, Grant programs, Grants administration, International organizations, Reporting and recordkeeping requirements.

2 CFR Part 200

Accounting, Colleges and universities, Grant programs, Grants administration, Hospitals, Indians, Nonprofit organizations, Reporting and recordkeeping requirements, State and local governments.

Timothy F. Soltis,

Deputy Controller.

For the reasons stated in the preamble, the Office of Management and Budget amends 2 CFR chapters I and II as set forth below:

PART 25—UNIVERSAL IDENTIFIER AND SYSTEM FOR AWARD MANAGEMENT

■ 1. The authority citation for part 25 continues to read as follows:

Authority: Pub. L. 109–282; 31 U.S.C. 6102.

■ 2. Amend § 25.100 by revising the introductory text and paragraph (a) to read as follows:

§ 25.100 Purposes of this part.

This part provides guidance to Federal awarding agencies to establish:

(a) The unique entity identifier as a universal identifier for Federal financial assistance applicants, as well as recipients and their direct subrecipients, and;

* * * * *

■ 3. Revise § 25.105 to read as follows:

§ 25.105 Types of awards to which this part applies.

This part applies to a Federal awarding agency's grants, cooperative agreements, loans, and other types of Federal financial assistance as defined in § 25.406.

- 4. Revise § 25.110 to read as follows:

§ 25.110 Exceptions to this part.

(a) *General.* Through a Federal awarding agency's implementation of the guidance in this part, this part applies to all applicants and recipients of Federal awards, other than those exempted by statute or exempted in paragraphs (b) and (c) of this section that apply for or receive agency awards.

(b) *Exceptions for individuals.* None of the requirements in this part apply to an individual who applies for or receives Federal financial assistance as a natural person (*i.e.*, unrelated to any business or nonprofit organization he or she may own or operate in his or her name).

(c) *Other exceptions.* (1) Under a condition identified in paragraph (c)(2) of this section, a Federal awarding agency may exempt an applicant or recipient from an applicable requirement to obtain a unique entity identifier and register in the SAM, or both.

(i) In that case, the Federal awarding agency must use a generic unique entity identifier in data it reports to *USAspending.gov* if reporting for a prime award to the recipient is required by the Federal Funding Accountability and Transparency Act (Pub. L. 109–282, hereafter cited as ''Transparency Act'').

(ii) Federal awarding agency use of a generic unique entity identifier should be used rarely for prime award reporting because it prevents prime awardees from being able to fulfill the subaward or executive compensation reporting required by the Transparency Act.

(2) The conditions under which a Federal awarding agency may exempt an applicant or recipient are—

(i) For any applicant or recipient, if the Federal awarding agency determines that it must protect information about the entity from disclosure if it is in the national security or foreign policy interests of the United States, or to avoid jeopardizing the personal safety of the applicant or recipient's staff or clients.

(ii) For a foreign organization or foreign public entity applying for or receiving a Federal award or subaward for a project or program performed outside the United States valued at less than $25,000, if the Federal awarding agency deems it to be impractical for the entity to comply with the requirement(s). This exemption must be determined by the Federal awarding agency on a case-by-case basis while utilizing a risk-based approach and does not apply if subawards are anticipated.

(iii) For an applicant, if the Federal awarding agency makes a determination that there are exigent circumstances that prohibit the applicant from receiving a unique entity identifier and completing SAM registration prior to receiving a Federal award. In these instances, Federal awarding agencies must require the recipient to obtain a unique entity identifier and complete SAM registration within 30 days of the Federal award date.

(3) Federal awarding agencies' use of generic unique entity identifier, as described in paragraphs (c)(1) and (2) of this section, should be rare. Having a generic unique entity identifier limits a recipient's ability to use Governmentwide systems that are needed to comply with some reporting requirements.

(d) *Class exceptions.* OMB may allow exceptions for classes of Federal awards, applicants, and recipients subject to the requirements of this part when exceptions are not prohibited by statute.

§ 25.115 [Removed]

- 5. Remove § 25.115.
- 6. Revise § 25.200 to read as follows:

§ 25.200 Requirements for notice of funding opportunities, regulations, and application instructions.

(a) Each Federal awarding agency that awards the types of Federal financial assistance defined in § 25.406 must include the requirements described in paragraph (b) of this section in each notice of funding opportunity, regulation, or other issuance containing instructions for applicants that is issued on or after August 13, 2020.

(b) The notice of funding opportunity, regulation, or other issuance must require each applicant that applies and does not have an exemption under § 25.110 to:

(1) Be registered in the SAM prior to submitting an application or plan;

(2) Maintain an active SAM registration with current information, including information on a recipient's immediate and highest level owner and subsidiaries, as well as on all predecessors that have been awarded a Federal contract or grant within the last three years, if applicable, at all times during which it has an active Federal award or an application or plan under consideration by a Federal awarding agency; and

(3) Provide its unique entity identifier in each application or plan it submits to the Federal awarding agency.

(c) For purposes of this policy:

(1) The applicant meets the Federal awarding agency's eligibility criteria and has the legal authority to apply and to receive the Federal award. For example, if a consortium applies for a Federal award to be made to the consortium as the recipient, the consortium must have a unique entity identifier. If a consortium is eligible to receive funding under a Federal awarding agency program but the agency's policy is to make the Federal award to a lead entity for the consortium, the unique entity identifier of the lead applicant will be used.

(2) A notice of funding opportunity is any paper or electronic issuance that an agency uses to announce a funding opportunity, whether it is called a ''program announcement,'' ''notice of funding availability,'' ''broad agency announcement,'' ''research announcement,'' ''solicitation,'' or some other term.

(3) To remain registered in the SAM database after the initial registration, the applicant is required to review and update its information in the SAM database on an annual basis from the date of initial registration or subsequent updates to ensure it is current, accurate and complete.

- 7. Revise § 25.205 to read as follows:

§ 25.205 Effect of noncompliance with a requirement to obtain a unique entity identifier or register in the SAM.

(a) A Federal awarding agency may not make a Federal award or financial modification to an existing Federal award to an applicant or recipient until the entity has complied with the requirements described in § 25.200 to provide a valid unique entity identifier and maintain an active SAM registration with current information (other than any requirement that is not applicable because the entity is exempted under § 25.110).

(b) At the time a Federal awarding agency is ready to make a Federal award, if the intended recipient has not complied with an applicable requirement to provide a unique entity identifier or maintain an active SAM registration with current information, the Federal awarding agency:

(1) May determine that the applicant is not qualified to receive a Federal award; and

(2) May use that determination as a basis for making a Federal award to another applicant.

- 8. Revise § 25.210 to read as follows:

§ 25.210 Authority to modify agency application forms or formats.

To implement the policies in §§ 25.200 and 25.205, a Federal awarding agency may add a unique entity identifier field to information collections previously approved by OMB, without having to obtain further approval to add the field.

▪ 9. Revise § 25.215 to read as follows:

§ 25.215 Requirements for agency information systems.

Each Federal awarding agency that awards Federal financial assistance (as defined in § 25.406) must ensure that systems processing information related to the Federal awards, and other systems as appropriate, are able to accept and use the unique entity identifier as the universal identifier for Federal financial assistance applicants and recipients.

▪ 10. Revise § 25.220 to read as follows:

§ 25.220 Use of award term.

(a) To accomplish the purposes described in § 25.100, a Federal awarding agency must include in each Federal award (as defined in § 25.405) the award term in appendix A to this part.

(b) A Federal awarding agency may use different letters and numbers than those in appendix A to this part to designate the paragraphs of the Federal award term, if necessary, to conform the system of paragraph designations with the one used in other terms and conditions in the Federal awarding agency's Federal awards.

▪ 11. Revise subpart C to read as follows:

Subpart C—Recipient Requirements of Subrecipients

§ 25.300 Requirement for recipients to ensure subrecipients have a unique entity identifier.

(a) A recipient may not make a subaward to a subrecipient unless that subrecipient has obtained and provided to the recipient a unique entity identifier. Subrecipients are not required to complete full SAM registration to obtain a unique entity identifier.

(b) A recipient must notify any potential subrecipients that the recipient cannot make a subaward unless the subrecipient has obtained a unique entity identifier as described in paragraph (a) of this section.

▪ 12. Add subpart D to read as follows:

Subpart D—Definitions

Sec

Subpart D—Definitions

§ 25.400 Applicant.

Applicant, for the purposes of this part, means a non-Federal entity or Federal agency that applies for Federal awards.

§ 25.401 Federal Awarding Agency.

Federal Awarding Agency has the meaning given in 2 CFR 200.1.

§ 25.405 Federal Award.

Federal Award, for the purposes of this part, means an award of Federal financial assistance that a non-Federal entity or Federal agency received from a Federal awarding agency.

§ 25.406 Federal financial assistance.

(a) *Federal financial assistance,* for the purposes of this part, means assistance that entities received or administer in the form of:

(1) Grant;

(2) Cooperative agreements (which does not include a cooperative research and development agreement pursuant to the Federal Technology Transfer Act of 1986, as amended (15 U.S.C. 3710a));

(3) Loans;

(4) Loan guarantees;

(5) Subsidies;

(6) Insurance;

(7) Food commodities;

(8) Direct appropriations;

(9) Assessed or voluntary contributions; or

(10) Any other financial assistance transaction that authorizes the non-Federal entity's expenditure of Federal funds.

(b) *Federal financial assistance,* for the purposes of this part, does not include:

(1) Technical assistance, which provides services in lieu of money; and

(2) A transfer of title to federally owned property provided in lieu of money, even if the award is called a grant.

§ 25.407 Recipient.

Recipient, for the purposes of this part, means a non-Federal entity or Federal agency that received a Federal award. This term also includes a non-Federal entity who administers Federal financial assistance awards on behalf of a Federal agency.

§ 25.410 System for Award Management (SAM).

System for Award Management (SAM) has the meaning given in paragraph C.1 of the award term in appendix A to this part.

§ 25.415 Unique entity identifier.

Unique entity identifier has the meaning given in paragraph C.2 of the award term in appendix A to this part.

§ 25.425 For-profit organization.

For-profit organization means a non-Federal entity organized for profit. It includes, but is not limited to:

(a) An ''S corporation'' incorporated under Subchapter S of the Internal Revenue Code;

(b) A corporation incorporated under another authority;

(c) A partnership;

(d) A limited liability corporation or partnership; and

(e) A sole proprietorship.

§ 25.430 Foreign organization.

Foreign organization has the meaning given in 2 CFR 200.1.

§ 25.431 Foreign public entity.

Foreign public entity has the meaning given in 2 CFR 200.1.

§ 25.432 Highest level owner.

Highest level owner has the meaning given in 2 CFR 200.1.

§ 25.433 Indian Tribe (or "federally recognized Indian Tribe").

Indian Tribe (or ''federally recognized Indian Tribe'') has the meaning given in 2 CFR 200.1.

§ 25.440 Local government.

Local government has the meaning given in 2 CFR 200.1.

§ 25.443 Non-Federal entity.

Non-Federal entity, as it is used in this part, has the meaning given in paragraph C.3 of the award term in appendix A to this part.

§ 25.445 Nonprofit organization.

Non-Federal organization, has the meaning given in 2 CFR 200.1.

§ 25.447 Predecessor.

Predecessor means a non-Federal entity that is replaced by a successor and includes any predecessors of the predecessor.

§ 25.450 State.

State has the meaning given in 2 CFR 200.1.

§ 25.455 Subaward.

Subaward has the meaning given in 2 CFR 200.1.

§ 25.460 Subrecipient.

Subrecipient has the meaning given in 2 CR 200.1.

§ 25.462 Subsidiary.

Subsidiary has the meaning given in 2 CFR 200.1.

§ 25.465 Successor.

Successor means a non-Federal entity that has replaced a predecessor by acquiring the assets and carrying out the affairs of the predecessor under a new name (often through acquisition or merger). The term ''successor'' does not include new offices or divisions of the same company or a company that only changes its name.

▪ 13. Revise appendix A to part 25 to read as follows:

Appendix A to Part 25—Award Term

I. System for Award Management and Universal Identifier Requirements

A. Requirement for System for Award Management

Unless you are exempted from this requirement under 2 CFR 25.110, you as the recipient must maintain current information in the SAM. This includes information on your immediate and highest level owner and subsidiaries, as well as on all of your predecessors that have been awarded a Federal contract or Federal financial assistance within the last three years, if applicable, until you submit the final financial report required under this Federal award or receive the final payment, whichever is later. This requires that you review and update the information at least annually after the initial registration, and more frequently if required by changes in your information or another Federal award term.

B. Requirement for Unique Entity Identifier

If you are authorized to make subawards under this Federal award, you:

1. Must notify potential subrecipients that no entity (*see* definition in paragraph C of this award term) may receive a subaward from you until the entity has provided its Unique Entity Identifier to you.

2. May not make a subaward to an entity unless the entity has provided its Unique Entity Identifier to you. Subrecipients are not required to obtain an active SAM registration, but must obtain a Unique Entity Identifier.

C. Definitions

For purposes of this term:

1. *System for Award Management (SAM)* means the Federal repository into which a recipient must provide information required for the conduct of business as a recipient. Additional information about registration procedures may be found at the SAM internet site (currently at *https://www.sam.gov*).

2. *Unique Entity Identifier* means the identifier assigned by SAM to uniquely identify business entities.

3. *Entity* includes non-Federal entities as defined at 2 CFR 200.1 and also includes all of the following, for purposes of this part:

a. A foreign organization;

b. A foreign public entity;

c. A domestic for-profit organization; and

d. A domestic or foreign for-profit organization; and

d. A Federal agency.

4. *Subaward* has the meaning given in 2 CFR 200.1.

5. *Subrecipient* has the meaning given in 2 CFR 200.1.

PART 170—REPORTING SUBAWARD AND EXECUTIVE COMPENSATION INFORMATION

▪ 14. The authority citation for part 170 continues to read as follows:

Authority: Pub. L. 109–282; 31 U.S.C. 6102.

▪ 15. Revise § 170.100 read as follows:

§ 170.100 Purposes of this part.

This part provides guidance to Federal awarding agencies on reporting Federal awards to establish requirements for recipients' reporting of information on subawards and executive total compensation, as required by the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282), as amended by section 6202 of Public Law 110–252, hereafter referred to as ''the Transparency Act''.

▪ 16. Revise § 170.105 to read as follows:

§ 170.105 Types of awards to which this part applies.

This part applies to Federal awarding agency's grants, cooperative agreements, loans, and other forms of Federal financial assistance subject to the Transparency Act, as defined in § 170.320.

▪ 17. Revise § 170.110 to read as follows:

§ 170.110 Exceptions to which this part applies.

(a) *General.* Through a Federal awarding agency's implementation of the guidance in this part, this part applies to recipients, other than those exempted by law or excepted in accordance with paragraphs (b) and (c) of this section, that—

(1) Apply for or receive Federal awards; or

(2) Receive subawards under Federal awards.

(b) *Exceptions.* (1) None of the requirements in this part apply to an individual who applies for or receives a Federal award as a natural person (*i.e.*, unrelated to any business or nonprofit organization he or she may own or operate in his or her name).

(2) None of the requirements regarding reporting names and total compensation of a non-Federal entity's five most highly compensated executives apply unless in the non-Federal entity's preceding fiscal year, it received—

(i) 80 percent or more of its annual gross revenue in Federal procurement contracts (and subcontracts) and Federal financial assistance awards subject to the Transparency Act, as defined at § 170.320 (and subawards); and

(ii) $25,000,000 or more in annual gross revenue from Federal procurement contracts (and subcontracts) and Federal financial assistance awards subject to the Transparency Act, as defined at § 170.320; and

(3) The public does not have access to information about the compensation of senior executives, unless otherwise publicly available, through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

(c) Exceptions for classes of Federal awards or recipients. OMB may allow exceptions for classes of Federal awards or recipients subject to the requirements of this part when exceptions are not prohibited by statute.

§ 170.115 [Removed]

▪ 18. Remove § 170.115.

▪ 19. Revise § 170.200 to read as follows:

§ 170.200 Federal awarding agency reporting requirements.

(a) Federal awarding agencies are required to publicly report Federal awards that equal or exceed the micro-purchase threshold and publish the required information on a public-facing, OMB-designated, governmentwide website and follow OMB guidance to support Transparency Act implementation.

(b) Federal awarding agencies that obtain post-award data on subaward obligations outside of this policy should take the necessary steps to ensure that

their recipients are not required, due to the combination of agency-specific and Transparency Act reporting requirements, to submit the same or similar data multiple times during a given reporting period.

▪ 20. Add § 170.210 to read as follows:

§ 170.210 Requirements for notices of funding opportunities, regulations, and application instructions.

(a) Each Federal awarding agency that makes awards of Federal financial assistance subject to the Transparency Act must include the requirements described in paragraph (b) of this section in each notice of funding opportunity, regulation, or other issuance containing instructions for applicants under which Federal awards may be made that are subject to Transparency Act reporting requirements, and is issued on or after the effective date of this part.

(b) The notice of funding opportunity, regulation, or other issuance must require each non-Federal entity that applies for Federal financial assistance and that does not have an exception under § 170.110(b) to have the necessary processes and systems in place to comply with the reporting requirements should they receive Federal funding.

▪ 21. Revise § 170.220 to read as follows:

§ 170.220 Award term.

(a) To accomplish the purposes described in § 170.100, a Federal awarding agency must include the award term in appendix A to this part in each Federal award to a recipient under which the total funding is anticipated to equal or exceed $30,000 in Federal funding.

(b) A Federal awarding agency, consistent with paragraph (a) of this section, is not required to include the award term in appendix A to this part if it determines that there is no possibility that the total amount of Federal funding under the Federal award will equal or exceed $30,000. However, the Federal awarding agency must subsequently modify the award to add the award term if changes in circumstances increase the total Federal funding under the award is anticipated to equal or exceed $30,000 during the period of performance.

▪ 22. Revise § 170.300 to read as follows:

§ 170.300 Federal agency.

Federal agency means a Federal agency as defined at 5 U.S.C. 551(1) and further clarified by 5 U.S.C. 552(f).

▪ 23. Add § 170.301 to read as follows:

§ 170.301 Federal awarding agency.

Federal awarding agency has the meaning given in 2 CFR 200.1.

▪ 24. Revise § 170.305 to read as follows:

§ 170.305 Federal award.

Federal award, for the purposes of this part, means an award of Federal financial assistance that a recipient receives directly from a Federal awarding agency.

▪ 25. Add § 170.307 to read as follows:

§ 170.307 Foreign organization.

Foreign organization has the meaning given in 2 CFR 200.1.

▪ 26. Add § 170.308 to read as follows:

§ 170.308 Foreign public entity.

Foreign public entity has the meaning given in 2 CFR 200.1.

▪ 27. Revise § 170.310 to read as follows:

§ 170.310 Non-Federal entity.

Non-Federal entity has the meaning given in 2 CFR 200.1 and also includes all of the following, for the purposes of this part:

(a) A foreign organization;

(b) A foreign public entity; and

(c) A domestic or foreign for-profit organization.

▪ 28. Amend § 170.320 by correctly designating the paragraph (b) that follows paragraph (j) as paragraph (k) and by revising paragraphs (k) introductory text and (k)(2) to read as follows:

§ 170.320 Federal financial assistance subject to the Transparency Act.

* * * * *

(k) Federal financial assistance subject to the Transparency Act, does not include—

* * * * *

(2) A transfer of title to federally-owned property provided in lieu of money, even if the award is called a grant;

* * * * *

▪ 29. Add § 170.322 to read as follows:

§ 170.322 Recipient.

Recipient, for the purposes of this part, means a non-Federal entity or Federal agency that received a Federal award.

▪ 30. Revise § 170.325 to read as follows:

§ 170.325 Subaward.

Subaward has the meaning given in 2 CFR 200.1.

▪ 31. Revise appendix A to part 170 to read as follows:

Appendix A to Part 170—Award Term

I. Reporting Subawards and Executive Compensation

a. Reporting of first-tier subawards.

Applicability. Unless you are exempt as provided in paragraph d. of this award term, you must report each action that equals or exceeds $30,000 in Federal funds for a subaward to a non-Federal entity or Federal agency (see definitions in paragraph e. of this award term).

2. Where and when to report.

i. The non-Federal entity or Federal agency must report each obligating action described in paragraph a.1. of this award term to *http://www.fsrs.gov.*

ii. For subaward information, report no later than the end of the month following the month in which the obligation was made. (For example, if the obligation was made on November 7, 2010, the obligation must be reported by no later than December 31, 2010.)

3. *What to report.* You must report the information about each obligating action that the submission instructions posted at *http://www.fsrs.gov specify.*

b. Reporting total compensation of recipient executives for non-Federal entities.

1. Applicability and what to report. You must report total compensation for each of your five most highly compensated executives for the preceding completed fiscal year, if—

i. The total Federal funding authorized to date under this Federal award equals or exceeds $30,000 as defined in 2 CFR 170.320;

ii. in the preceding fiscal year, you received—

(A) 80 percent or more of your annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards), and

(B) $25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards); and,

iii. The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at *http://www.sec.gov/answers/execomp.htm.*)

2. *Where and when to report.* You must report executive total compensation described in paragraph b.1. of this award term:

i. As part of your registration profile at *https://www.sam.gov.*

ii. By the end of the month following the month in which this award is made, and annually thereafter.

c. Reporting of Total Compensation of Subrecipient Executives.

1. *Applicability and what to report.* Unless you are exempt as provided in paragraph d. of this award term, for each first-tier non-Federal entity subrecipient under this award, you shall report the names and total compensation of each of the subrecipient's five most highly compensated executives for the subrecipient's preceding completed fiscal year, if—

i. in the subrecipient's preceding fiscal year, the subrecipient received—

(A) 80 percent or more of its annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards) and,

(B) $25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts), and Federal financial assistance subject to the Transparency Act (and subawards); and

ii. The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at *http://www.sec.gov/answers/execomp.htm.*)

2. *Where and when to report.* You must report subrecipient executive total compensation described in paragraph c.1. of this award term:

i. To the recipient.

ii. By the end of the month following the month during which you make the subaward. For example, if a subaward is obligated on any date during the month of October of a given year (*i.e.*, between October 1 and 31), you must report any required compensation information of the subrecipient by November 30 of that year.

d. Exemptions.

If, in the previous tax year, you had gross income, from all sources, under $300,000, you are exempt from the requirements to report:

i. Subawards, and

ii. The total compensation of the five most highly compensated executives of any subrecipient.

e. *Definitions.* For purposes of this award term:

1. Federal Agency means a Federal agency as defined at 5 U.S.C. 551(1) and further clarified by 5 U.S.C. 552(f).

2. Non-Federal *entity* means all of the following, as defined in 2 CFR part 25:

i. A Governmental organization, which is a State, local government, or Indian tribe;

ii. A foreign public entity;

iii. A domestic or foreign nonprofit organization; and,

iv. A domestic or foreign for-profit organization

3. *Executive* means officers, managing partners, or any other employees in management positions.

4. Subaward:

i. This term means a legal instrument to provide support for the performance of any portion of the substantive project or program for which you received this award and that you as the recipient award to an eligible subrecipient.

ii. The term does not include your procurement of property and services needed to carry out the project or program (for further explanation, see 2 CFR 200.331).

iii. A subaward may be provided through any legal agreement, including an agreement that you or a subrecipient considers a contract.

5. *Subrecipient* means a non-Federal entity or Federal agency that:

i. Receives a subaward from you (the recipient) under this award; and

ii. Is accountable to you for the use of the Federal funds provided by the subaward.

6. *Total compensation* means the cash and noncash dollar value earned by the executive during the recipient's or subrecipient's preceding fiscal year and includes the following (for more information see 17 CFR 229.402(c)(2)).

· 31a. Add part 183 to read as follows:

PART 183—NEVER CONTRACT WITH THE ENEMY

Sec.

APPENDIX A TO PART 183—CLAUSES FOR AWARD AGREEMENTS

Authority: Pub. L. 113–291.

§ 183.5 Purpose of this part.

This part provides guidance to Federal awarding agencies on the implementation of the Never Contract with the Enemy requirements applicable to certain grants and cooperative agreements, as specified in subtitle E, title VIII of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113–291), as amended by Sec. 822 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92).

§ 183.10 Applicability.

(a) This part applies only to grants and cooperative agreements that are expected to exceed $50,000 and that are performed outside the United States, including U.S. territories, and that are in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities. It does not apply to the authorized intelligence or law enforcement activities of the Federal Government.

(b) All elements of this part are applicable until the date of expiration as provided in law.

§ 183.15 Responsibilities of Federal awarding agencies.

(a) Prior to making an award for a covered grant or cooperative agreement (see also § 183.35), the Federal awarding agency must check the current list of prohibited or restricted persons or entities in the System Award Management (SAM) Exclusions.

(b) The Federal awarding agency may include the award term provided in appendix A of this part in all covered grant and cooperative agreement awards in accordance with Never Contract with the Enemy.

(c) A Federal awarding agency may become aware of a person or entity that:

(1) Provides funds, including goods and services, received under a covered grant or cooperative agreement of an executive agency directly or indirectly to covered persons or entities; or

(2) Fails to exercise due diligence to ensure that none of the funds, including goods and services, received under a covered grant or cooperative agreement of an executive agency are provided directly or indirectly to covered persons or entities.

(d) When a Federal awarding agency becomes aware of such a person or entity, it may do any of the following actions:

(1) Restrict the future award of all Federal contracts, grants, and cooperative agreements to the person or entity based upon concerns that Federal awards to the entity would provide

grant funds directly or indirectly to a covered person or entity.

(2) Terminate any contract, grant, or cooperative agreement to a covered person or entity upon becoming aware that the recipient has failed to exercise due diligence to ensure that none of the award funds are provided directly or indirectly to a covered person or entity.

(3) Void in whole or in part any grant, cooperative agreement or contracts of the executive agency concerned upon a written determination by the head of contracting activity or other appropriate official that the grant or cooperative agreement provides funds directly or indirectly to a covered person or entity.

(e) The Federal awarding agency must notify recipients in writing regarding its decision to restrict all future awards and/or to terminate or void a grant or cooperative agreement. The agency must also notify the recipient in writing about the recipient's right to request an administrative review (using the agency's procedures) of the restriction, termination, or void of the grant or cooperative agreement within 30 days of receiving notification.

§ 183.20 Reporting responsibilities of Federal awarding agencies.

(a) If a Federal awarding agency restricts all future awards to a covered person or entity, it must enter information on the ineligible person or entity into SAM Exclusions as a prohibited or restricted source pursuant to Subtitle E, Title VIII of the NDAA for FY 2015 (Pub. L. 113–291).

(b) When a Federal awarding agency terminates or voids a grant or cooperative agreement due to Never Contract with the Enemy, it must report the termination as a Termination for Material Failure to Comply in the Office of Management and Budget (OMB)-designated integrity and performance system accessible through SAM (currently the Federal Awardee Performance and Integrity Information System (FAPIIS)).

(c) The Federal awarding agency shall document and report to the head of the executive agency concerned (or the designee of such head) and the commander of the covered combatant command concerned (or specific deputies):

(1) Any action to restrict all future awards or to terminate or void an award with a covered person or entity.

(2) Any decision not to restrict all future awards, terminate, or void an award along with the agency's reasoning for not taking one of these actions after the agency became aware that a person or entity is a prohibited or restricted source.

(d) Each report referenced in paragraph (c)(1) of this section shall include:

(1) The executive agency taking such action.

(2) An explanation of the basis for the action taken.

(3) The value of the terminated or voided grant or cooperative agreement.

(4) The value of all grants and cooperative agreements of the executive agency with the person or entity concerned at the time the grant or cooperative agreement was terminated or voided.

(e) Each report referenced in paragraph (c)(2) of this section shall include:

(1) The executive agency concerned.

(2) An explanation of the basis for not taking the action.

(f) For each instance in which an executive agency exercised the additional authority to examine recipient and lower tier entity (*e.g.*, subrecipient or contractor) records, the agency must report in writing to the head of the executive agency concerned (or the designee of such head) and the commander of the covered combatant command concerned (or specific deputies) the following:

(1) An explanation of the basis for the action taken; and

(2) A summary of the results of any examination of records.

§ 183.25 Responsibilities of recipients.

(a) Recipients of covered grants or cooperative agreements must fulfill the requirements outlined in the award term provided in appendix A to this part.

(b) Recipients must also flow down the provisions in award terms covered in appendix A to this part to all contracts and subawards under the award.

§ 183.30 Access to records.

In addition to any other existing examination-of-records authority, the Federal Government is authorized to examine any records of the recipient and its subawards, to the extent necessary, to ensure that funds, including supplies and services, received under a covered grant or cooperative agreement (see § 183.35) are not provided directly or indirectly to a covered person or entity in accordance with Never Contract with the Enemy. The Federal awarding agency may only exercise this authority upon a written determination by the Federal awarding agency that relies on a finding by the commander of a covered combatant command that there is reason to believe that funds, including supplies and services, received under the grant or cooperative agreement may have been provided directly or indirectly to a covered person or entity.

§ 183.35 Definitions.

Terms used in this part are defined as follows:

Contingency operation, as defined in 10 U.S.C. 101a, means a military operation that—

(1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under 10 U.S.C. 688, 12301a, 12302, 12304, 12304a, 12305, 12406 of 10 U.S.C. chapter 15, 14 U.S.C. 712 or any other provision of law during a war or during a national emergency declared by the President or Congress.

Covered combatant command means the following:

(1) The United States Africa Command.

(2) The United States Central Command.

(3) The United States European Command.

(4) The United States Pacific Command.

(5) The United States Southern Command.

(6) The United States Transportation Command.

Covered grant or cooperative agreement means a grant or cooperative agreement, as defined in 2 CFR 200.1 with an estimated value in excess of $50,000 that is performed outside the United States, including its possessions and territories, in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities. Except for U.S. Department of Defense grants and cooperative agreements that were awarded on or before December 19, 2017, that will be performed in the United States Central Command, where the estimated value is in excess of $100,000.

Covered person or entity means a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

Appendix A to Part 183—Award Terms for Never Contract With the Enemy

Federal awarding agencies may include the following award terms in all

awards for covered grants and cooperative agreements in accordance with Never Contract with the Enemy:

Term 1

Prohibition on Providing Funds to the Enemy

(a) The recipient must—

(1) Exercise due diligence to ensure that none of the funds, including supplies and services, received under this grant or cooperative agreement are provided directly or indirectly (including through subawards or contracts) to a person or entity who is actively opposing the United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities, which must be completed through 2 CFR 180.300 prior to issuing a subaward or contract and;

(2) Terminate or void in whole or in part any subaward or contract with a person or entity listed in SAM as a prohibited or restricted source pursuant to subtitle E of Title VIII of the NDAA for FY 2015, unless the Federal awarding agency provides written approval to continue the subaward or contract.

(b) The recipient may include the substance of this clause, including paragraph (a) of this clause, in subawards under this grant or cooperative agreement that have an estimated value over $50,000 and will be performed outside the United States, including its outlying areas.

(c) The Federal awarding agency has the authority to terminate or void this grant or cooperative agreement, in whole or in part, if the Federal awarding agency becomes aware that the recipient failed to exercise due diligence as required by paragraph (a) of this clause or if the Federal awarding agency becomes aware that any funds received under this grant or cooperative agreement have been provided directly or indirectly to a person or entity who is actively opposing coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

(End of term)

Term 2

Additional Access to Recipient Records

(a) In addition to any other existing examination-of-records authority, the Federal Government is authorized to examine any records of the recipient and its subawards or contracts to the extent necessary to ensure that funds, including supplies and services, available under this grant or cooperative agreement are not provided, directly or indirectly, to a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities, except for awards awarded by the Department of Defense on or before Dec 19, 2017 that will be performed in the United States Central Command (USCENTCOM) theater of operations.

(b) The substance of this clause, including this paragraph (b), is required to be included in subawards or contracts under this grant or cooperative agreement that have an estimated value over $50,000 and will be performed outside the United States, including its outlying areas.

(End of term)

PART 200—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

■ 32. The authority citation for part 200 continues to read as follows:

Authority: 31 U.S.C. 503

■ 33. Amend § 200.0 by removing the acronym CFDA, revising the acronym MTDC, adding in alphabetical order the acronym NFE, and revising the acronym SAM to read as follows:

§ 200.0 Acronyms.

* * * * *

MTDC Modified Total Direct Cost

NFE Non-Federal Entity

* * * * *

SAM System for Award Management

* * * * *

■ 34. Revise § 200.1 to read as follows:

§ 200.1 Definitions.

These are the definitions for terms used in this part. Different definitions may be found in Federal statutes or regulations that apply more specifically to particular programs or activities. These definitions could be supplemented by additional instructional information provided in governmentwide standard information collections. For purposes of this part, the following definitions apply:

Acquisition cost means the cost of the asset including the cost to ready the asset for its intended use. Acquisition cost for equipment, for example, means the net invoice price of the equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Acquisition costs for software includes those development costs capitalized in accordance with generally accepted accounting principles (GAAP). Ancillary charges, such as taxes, duty, protective in transit insurance, freight, and installation may be included in or excluded from the acquisition cost in accordance with the non-Federal entity's regular accounting practices.

Advance payment means a payment that a Federal awarding agency or pass-through entity makes by any appropriate payment mechanism, including a predetermined payment schedule, before the non-Federal entity disburses the funds for program purposes.

Allocation means the process of assigning a cost, or a group of costs, to one or more cost objective(s), in reasonable proportion to the benefit provided or other equitable relationship. The process may entail assigning a cost(s) directly to a final cost objective or through one or more intermediate cost objectives.

Assistance listings refers to the publicly available listing of Federal assistance programs managed and administered by the General Services Administration, formerly known as the Catalog of Federal Domestic Assistance (CFDA).

Assistance listing number means a unique number assigned to identify a Federal Assistance Listings, formerly known as the CFDA Number.

Assistance listing program title means the title that corresponds to the Federal Assistance Listings Number, formerly known as the CFDA program title.

Audit finding means deficiencies which the auditor is required by § 200.516(a) to report in the schedule of findings and questioned costs.

Auditee means any non-Federal entity that expends Federal awards which must be audited under subpart F of this part.

Auditor means an auditor who is a public accountant or a Federal, State, local government, or Indian tribe audit organization, which meets the general standards specified for external auditors in generally accepted government auditing standards (GAGAS). The term auditor does not include internal auditors of nonprofit organizations.

Budget means the financial plan for the Federal award that the Federal awarding agency or pass-through entity approves during the Federal award process or in subsequent amendments to the Federal award. It may include the Federal and non-Federal share or only the Federal share, as determined by the Federal awarding agency or pass-through entity.

Budget period means the time interval from the start date of a funded portion

of an award to the end date of that funded portion during which recipients are authorized to expend the funds awarded, including any funds carried forward or other revisions pursuant to § 200.308.

Capital assets means:

(1) Tangible or intangible assets used in operations having a useful life of more than one year which are capitalized in accordance with GAAP. Capital assets include:

(i) Land, buildings (facilities), equipment, and intellectual property (including software) whether acquired by purchase, construction, manufacture, exchange, or through a lease accounted for as financed purchase under Government Accounting Standards Board (GASB) standards or a finance lease under Financial Accounting Standards Board (FASB) standards; and

(ii) Additions, improvements, modifications, replacements, rearrangements, reinstallations, renovations or alterations to capital assets that materially increase their value or useful life (not ordinary repairs and maintenance).

(2) For purpose of this part, capital assets do not include intangible right-to-use assets (per GASB) and right-to-use operating lease assets (per FASB). For example, assets capitalized that recognize a lessee's right to control the use of property and/or equipment for a period of time under a lease contract. See also § 200.465.

Capital expenditures means expenditures to acquire capital assets or expenditures to make additions, improvements, modifications, replacements, rearrangements, reinstallations, renovations, or alterations to capital assets that materially increase their value or useful life.

Central service cost allocation plan means the documentation identifying, accumulating, and allocating or developing billing rates based on the allowable costs of services provided by a State or local government or Indian tribe on a centralized basis to its departments and agencies. The costs of these services may be allocated or billed to users.

Claim means, depending on the context, either:

(1) A written demand or written assertion by one of the parties to a Federal award seeking as a matter of right:

(i) The payment of money in a sum certain;

(ii) The adjustment or interpretation of the terms and conditions of the Federal award; or

(iii) Other relief arising under or relating to a Federal award.

(2) A request for payment that is not in dispute when submitted.

Class of Federal awards means a group of Federal awards either awarded under a specific program or group of programs or to a specific type of non-Federal entity or group of non-Federal entities to which specific provisions or exceptions may apply.

Closeout means the process by which the Federal awarding agency or pass-through entity determines that all applicable administrative actions and all required work of the Federal award have been completed and takes actions as described in § 200.344.

Cluster of programs means a grouping of closely related programs that share common compliance requirements. The types of clusters of programs are research and development (R&D), student financial aid (SFA), and other clusters. ''Other clusters'' are as defined by OMB in the compliance supplement or as designated by a State for Federal awards the State provides to its subrecipients that meet the definition of a cluster of programs. When designating an ''other cluster,'' a State must identify the Federal awards included in the cluster and advise the subrecipients of compliance requirements applicable to the cluster, consistent with § 200.332(a). A cluster of programs must be considered as one program for determining major programs, as described in § 200.518, and, with the exception of R&D as described in § 200.501(c), whether a program-specific audit may be elected.

Cognizant agency for audit means the Federal agency designated to carry out the responsibilities described in § 200.513(a). The cognizant agency for audit is not necessarily the same as the cognizant agency for indirect costs. A list of cognizant agencies for audit can be found on the Federal Audit Clearinghouse (FAC) website.

Cognizant agency for indirect costs means the Federal agency responsible for reviewing, negotiating, and approving cost allocation plans or indirect cost proposals developed under this part on behalf of all Federal agencies. The cognizant agency for indirect cost is not necessarily the same as the cognizant agency for audit. For assignments of cognizant agencies see the following:

(1) For Institutions of Higher Education (IHEs): Appendix III to this part, paragraph C.11.

(2) For nonprofit organizations: Appendix IV to this part, paragraph C.2.a.

(3) For State and local governments: Appendix V to this part, paragraph F.1.

(4) For Indian tribes: Appendix VII to this part, paragraph D.1.

Compliance supplement means an annually updated authoritative source for auditors that serves to identify existing important compliance requirements that the Federal Government expects to be considered as part of an audit. Auditors use it to understand the Federal program's objectives, procedures, and compliance requirements, as well as audit objectives and suggested audit procedures for determining compliance with the relevant Federal program.

Computing devices means machines used to acquire, store, analyze, process, and publish data and other information electronically, including accessories (or ''peripherals'') for printing, transmitting and receiving, or storing electronic information. See also the definitions of *supplies* and *information technology systems* in this section.

Contract means, for the purpose of Federal financial assistance, a legal instrument by which a recipient or subrecipient purchases property or services needed to carry out the project or program under a Federal award. For additional information on subrecipient and contractor determinations, see § 200.331. See also the definition of *subaward* in this section.

Contractor means an entity that receives a contract as defined in this section.

Cooperative agreement means a legal instrument of financial assistance between a Federal awarding agency and a recipient or a pass-through entity and a subrecipient that, consistent with 31 U.S.C. 6302–6305:

(1) Is used to enter into a relationship the principal purpose of which is to transfer anything of value to carry out a public purpose authorized by a law of the United States (see 31 U.S.C. 6101(3)); and not to acquire property or services for the Federal Government or pass-through entity's direct benefit or use;

(2) Is distinguished from a grant in that it provides for substantial involvement of the Federal awarding agency in carrying out the activity contemplated by the Federal award.

(3) The term does not include:

(i) A cooperative research and development agreement as defined in 15 U.S.C. 3710a; or

(ii) An agreement that provides only:

(A) Direct United States Government cash assistance to an individual;

(B) A subsidy;

(C) A loan;

(D) A loan guarantee; or

(E) Insurance.

Cooperative audit resolution means the use of audit follow-up techniques which promote prompt corrective action by improving communication, fostering collaboration, promoting trust, and developing an understanding between the Federal agency and the non-Federal entity. This approach is based upon:

(1) A strong commitment by Federal agency and non-Federal entity leadership to program integrity;

(2) Federal agencies strengthening partnerships and working cooperatively with non-Federal entities and their auditors; and non-Federal entities and their auditors working cooperatively with Federal agencies;

(3) A focus on current conditions and corrective action going forward;

(4) Federal agencies offering appropriate relief for past noncompliance when audits show prompt corrective action has occurred; and

(5) Federal agency leadership sending a clear message that continued failure to correct conditions identified by audits which are likely to cause improper payments, fraud, waste, or abuse is unacceptable and will result in sanctions.

Corrective action means action taken by the auditee that:

(1) Corrects identified deficiencies;

(2) Produces recommended improvements; or

(3) Demonstrates that audit findings are either invalid or do not warrant auditee action.

Cost allocation plan means central service cost allocation plan or public assistance cost allocation plan.

Cost objective means a program, function, activity, award, organizational subdivision, contract, or work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes, products, jobs, capital projects, etc. A cost objective may be a major function of the non-Federal entity, a particular service or project, a Federal award, or an indirect (Facilities & Administrative (F&A)) cost activity, as described in subpart E of this part. See also the definitions of *final cost objective* and *intermediate cost objective* in this section.

Cost sharing or matching means the portion of project costs not paid by Federal funds or contributions (unless otherwise authorized by Federal statute). See also § 200.306.

Cross-cutting audit finding means an audit finding where the same underlying condition or issue affects all Federal awards (including Federal awards of more than one Federal awarding agency or pass-through entity).

Disallowed costs means those charges to a Federal award that the Federal awarding agency or pass-through entity determines to be unallowable, in accordance with the applicable Federal statutes, regulations, or the terms and conditions of the Federal award.

Discretionary award means an award in which the Federal awarding agency, in keeping with specific statutory authority that enables the agency to exercise judgment (''discretion''), selects the recipient and/or the amount of Federal funding awarded through a competitive process or based on merit of proposals. A discretionary award may be selected on a non-competitive basis, as appropriate.

Equipment means tangible personal property (including information technology systems) having a useful life of more than one year and a per-unit acquisition cost which equals or exceeds the lesser of the capitalization level established by the non-Federal entity for financial statement purposes, or $5,000. See also the definitions of *capital assets, computing devices, general purpose equipment, information technology systems, special purpose equipment,* and *supplies* in this section.

Expenditures means charges made by a non-Federal entity to a project or program for which a Federal award was received.

(1) The charges may be reported on a cash or accrual basis, as long as the methodology is disclosed and is consistently applied.

(2) For reports prepared on a cash basis, expenditures are the sum of:

(i) Cash disbursements for direct charges for property and services;

(ii) The amount of indirect expense charged;

(iii) The value of third-party in-kind contributions applied; and

(iv) The amount of cash advance payments and payments made to subrecipients.

(3) For reports prepared on an accrual basis, expenditures are the sum of:

(i) Cash disbursements for direct charges for property and services;

(ii) The amount of indirect expense incurred;

(iii) The value of third-party in-kind contributions applied; and

(iv) The net increase or decrease in the amounts owed by the non-Federal entity for:

(A) Goods and other property received;

(B) Services performed by employees, contractors, subrecipients, and other payees; and

(C) Programs for which no current services or performance are required such as annuities, insurance claims, or other benefit payments.

Federal agency means an ''agency'' as defined at 5 U.S.C. 551(1) and further clarified by 5 U.S.C. 552(f).

Federal Audit Clearinghouse (FAC) means the clearinghouse designated by OMB as the repository of record where non-Federal entities are required to transmit the information required by subpart F of this part.

Federal award has the meaning, depending on the context, in either paragraph (1) or (2) of this definition:

(1)(i) The Federal financial assistance that a recipient receives directly from a Federal awarding agency or indirectly from a pass-through entity, as described in § 200.101; or

(ii) The cost-reimbursement contract under the Federal Acquisition Regulations that a non-Federal entity receives directly from a Federal awarding agency or indirectly from a pass-through entity, as described in § 200.101.

(2) The instrument setting forth the terms and conditions. The instrument is the grant agreement, cooperative agreement, other agreement for assistance covered in paragraph (2) of the definition of *Federal financial assistance* in this section, or the cost-reimbursement contract awarded under the Federal Acquisition Regulations.

(3) Federal award does not include other contracts that a Federal agency uses to buy goods or services from a contractor or a contract to operate Federal Government owned, contractor operated facilities (GOCOs).

(4) See also definitions of Federal financial assistance, grant agreement, and cooperative agreement.

Federal award date means the date when the Federal award is signed by the authorized official of the Federal awarding agency.

Federal financial assistance means

(1) Assistance that non-Federal entities receive or administer in the form of:

(i) Grants;

(ii) Cooperative agreements;

(iii) Non-cash contributions or donations of property (including donated surplus property);

(iv) Direct appropriations;

(v) Food commodities; and

(vi) Other financial assistance (except assistance listed in paragraph (2) of this definition).

(2) For § 200.203 and subpart F of this part, *Federal financial assistance* also includes assistance that non-Federal entities receive or administer in the form of:

(i) Loans;

(ii) Loan Guarantees;

(iii) Interest subsidies; and
(iv) Insurance.
(3) For § 200.216, Federal financial assistance includes assistance that non-Federal entities receive or administer in the form of:
(i) Grants;
(ii) Cooperative agreements;
(iii) Loans; and
(iv) Loan Guarantees.
(4) Federal financial assistance does not include amounts received as reimbursement for services rendered to individuals as described in § 200.502(h) and (i).

Federal interest means, for purposes of § 200.330 or when used in connection with the acquisition or improvement of real property, equipment, or supplies under a Federal award, the dollar amount that is the product of the:
(1) The percentage of Federal participation in the total cost of the real property, equipment, or supplies; and
(2) Current fair market value of the property, improvements, or both, to the extent the costs of acquiring or improving the property were included as project costs.

Federal program means:
(1) All Federal awards which are assigned a single Assistance Listings Number.
(2) When no Assistance Listings Number is assigned, all Federal awards from the same agency made for the same purpose must be combined and considered one program.
(3) Notwithstanding paragraphs (1) and (2) of this definition, a cluster of programs. The types of clusters of programs are:
(i) Research and development (R&D);
(ii) Student financial aid (SFA); and
(iii) ''Other clusters,'' as described in the definition of *cluster of programs* in this section.

Federal share means the portion of the Federal award costs that are paid using Federal funds.

Final cost objective means a cost objective which has allocated to it both direct and indirect costs and, in the non-Federal entity's accumulation system, is one of the final accumulation points, such as a particular award, internal project, or other direct activity of a non-Federal entity. See also the definitions of *cost objective* and *intermediate cost objective* in this section.

Financial obligations, when referencing a recipient's or subrecipient's use of funds under a Federal award, means orders placed for property and services, contracts and subawards made, and similar transactions that require payment.

Fixed amount awards means a type of grant or cooperative agreement under which the Federal awarding agency or pass-through entity provides a specific level of support without regard to actual costs incurred under the Federal award. This type of Federal award reduces some of the administrative burden and record-keeping requirements for both the non-Federal entity and Federal awarding agency or pass-through entity. Accountability is based primarily on performance and results. See §§ 200.102(c), 200.201(b), and 200.333.

Foreign organization means an entity that is:
(1) A public or private organization located in a country other than the United States and its territories that is subject to the laws of the country in which it is located, irrespective of the citizenship of project staff or place of performance;
(2) A private nongovernmental organization located in a country other than the United States that solicits and receives cash contributions from the general public;
(3) A charitable organization located in a country other than the United States that is nonprofit and tax exempt under the laws of its country of domicile and operation, and is not a university, college, accredited degree-granting institution of education, private foundation, hospital, organization engaged exclusively in research or scientific activities, church, synagogue, mosque or other similar entities organized primarily for religious purposes; or
(4) An organization located in a country other than the United States not recognized as a foreign public entity.

Foreign public entity means:
(1) A foreign government or foreign governmental entity;
(2) A public international organization, which is an organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288–288f);
(3) An entity owned (in whole or in part) or controlled by a foreign government; or
(4) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.

General purpose equipment means equipment which is not limited to research, medical, scientific or other technical activities. Examples include office equipment and furnishings, modular offices, telephone networks, information technology equipment and systems, air conditioning equipment, reproduction and printing equipment, and motor vehicles. See also the definitions of *equipment* and *special purpose equipment* in this section.

Generally accepted accounting principles (GAAP) has the meaning specified in accounting standards issued by the GASB and the FASB.

Generally accepted government auditing standards (GAGAS), also known as the Yellow Book, means generally accepted government auditing standards issued by the Comptroller General of the United States, which are applicable to financial audits.

Grant agreement means a legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a non-Federal entity that, consistent with 31 U.S.C. 6302, 6304:
(1) Is used to enter into a relationship the principal purpose of which is to transfer anything of value to carry out a public purpose authorized by a law of the United States (see 31 U.S.C. 6101(3)); and not to acquire property or services for the Federal awarding agency or pass-through entity's direct benefit or use;
(2) Is distinguished from a cooperative agreement in that it does not provide for substantial involvement of the Federal awarding agency in carrying out the activity contemplated by the Federal award.
(3) Does not include an agreement that provides only:
(i) Direct United States Government cash assistance to an individual;
(ii) A subsidy;
(iii) A loan;
(vi) A loan guarantee; or
(v) Insurance.

Highest level owner means the entity that owns or controls an immediate owner of the offeror, or that owns or controls one or more entities that control an immediate owner of the offeror. No entity owns or exercises control of the highest-level owner as defined in the Federal Acquisition Regulations (FAR) (48 CFR 52.204–17).

Hospital means a facility licensed as a hospital under the law of any state or a facility operated as a hospital by the United States, a state, or a subdivision of a state.

Improper payment means:
(1) Any payment that should not have been made or that was made in an incorrect amount under statutory, contractual, administrative, or other *legally applicable* requirements.
(i) Incorrect amounts are overpayments or underpayments that are made to eligible recipients (including inappropriate denials of payment or service, any payment that does not account for credit for applicable discounts, payments that are

for an incorrect amount, and duplicate payments). An improper payment also includes any payment that was made to an ineligible recipient or for an ineligible good or service, or payments for goods or services not received (except for such payments authorized by law).

Note 1 to paragraph (1)(i) of this definition. Applicable discounts are only those discounts where it is both advantageous and within the agency's control to claim them.

(ii) When an agency's review is unable to discern whether a payment was proper as a result of insufficient or lack of documentation, this payment should also be considered an improper payment. When establishing documentation requirements for payments, agencies should ensure that all documentation requirements are necessary and should refrain from imposing additional burdensome documentation requirements.

(iii) Interest or other fees that may result from an underpayment by an agency are not considered an improper payment if the interest was paid correctly. These payments are generally separate transactions and may be necessary under certain statutory, contractual, administrative, or other legally applicable requirements.

(iv) A ''questioned cost'' (as defined in this section) should not be considered an improper payment until the transaction has been completely reviewed and is confirmed to be improper.

(v) The term ''payment'' in this definition means any disbursement or transfer of Federal funds (including a commitment for future payment, such as cash, securities, loans, loan guarantees, and insurance subsidies) to any non-Federal person, non-Federal entity, or Federal employee, that is made by a Federal agency, a Federal contractor, a Federal grantee, or a governmental or other organization administering a Federal program or activity.

(vi) The term ''payment'' includes disbursements made pursuant to prime contracts awarded under the Federal Acquisition Regulation and Federal awards subject to this part that are expended by recipients.

(2) See definition of improper payment in OMB Circular A–123 appendix C, part I A (1) ''What is an improper payment?'' Questioned costs, including those identified in audits, are not an improper payment until reviewed and confirmed to be improper as defined in OMB Circular A–123 appendix C.

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. Chapter 33), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. 450b(e)). See annually published Bureau of Indian Affairs list of Indian Entities Recognized and Eligible to Receive Services.

Institutions of Higher Education (IHEs) is defined at 20 U.S.C. 1001.

Indirect (facilities & administrative (F&A)) costs means those costs incurred for a common or joint purpose benefitting more than one cost objective, and not readily assignable to the cost objectives specifically benefitted, without effort disproportionate to the results achieved. To facilitate equitable distribution of indirect expenses to the cost objectives served, it may be necessary to establish a number of pools of indirect (F&A) costs. Indirect (F&A) cost pools must be distributed to benefitted cost objectives on bases that will produce an equitable result in consideration of relative benefits derived.

Indirect cost rate proposal means the documentation prepared by a non-Federal entity to substantiate its request for the establishment of an indirect cost rate as described in appendices III through VII and appendix IX to this part.

Information technology systems means computing devices, ancillary equipment, software, firmware, and similar procedures, services (including support services), and related resources. See also the definitions of *computing devices* and *equipment* in this section.

Intangible property means property having no physical existence, such as trademarks, copyrights, patents and patent applications and property, such as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership (whether the property is tangible or intangible).

Intermediate cost objective means a cost objective that is used to accumulate indirect costs or service center costs that are subsequently allocated to one or more indirect cost pools or final cost objectives. See also the definitions of *cost objective* and *final cost objective* in this section.

Internal controls for non-Federal entities means:

(1) Processes designed and implemented by non-Federal entities to provide reasonable assurance regarding the achievement of objectives in the following categories:

(i) Effectiveness and efficiency of operations;

(ii) Reliability of reporting for internal and external use; and

(iii) Compliance with applicable laws and regulations.

(2) Federal awarding agencies are required to follow internal control compliance requirements in OMB Circular No. A–123, Management's Responsibility for Enterprise Risk Management and Internal Control.

Loan means a Federal loan or loan guarantee received or administered by a non-Federal entity, except as used in the definition of *program income* in this section.

(1) The term ''direct loan'' means a disbursement of funds by the Federal Government to a non-Federal borrower under a contract that requires the repayment of such funds with or without interest. The term includes the purchase of, or participation in, a loan made by another lender and financing arrangements that defer payment for more than 90 days, including the sale of a Federal Government asset on credit terms. The term does not include the acquisition of a federally guaranteed loan in satisfaction of default claims or the price support loans of the Commodity Credit Corporation.

(2) The term ''direct loan obligation'' means a binding agreement by a Federal awarding agency to make a direct loan when specified conditions are fulfilled by the borrower.

(3) The term ''loan guarantee'' means any Federal Government guarantee, insurance, or other pledge with respect to the payment of all or a part of the principal or interest on any debt obligation of a non-Federal borrower to a non-Federal lender, but does not include the insurance of deposits, shares, or other withdrawable accounts in financial institutions.

(4) The term ''loan guarantee commitment'' means a binding agreement by a Federal awarding agency to make a loan guarantee when specified conditions are fulfilled by the borrower, the lender, or any other party to the guarantee agreement.

Local government means any unit of government within a state, including a:

(1) County;

(2) Borough;

(3) Municipality;

(4) City;

(5) Town;

(6) Township;

(7) Parish;

(8) Local public authority, including any public housing agency under the United States Housing Act of 1937;

(9) Special district;
(10) School district;
(11) Intrastate district;
(12) Council of governments, whether or not incorporated as a nonprofit corporation under State law; and
(13) Any other agency or instrumentality of a multi-, regional, or intra-State or local government.

Major program means a Federal program determined by the auditor to be a major program in accordance with § 200.518 or a program identified as a major program by a Federal awarding agency or pass-through entity in accordance with § 200.503(e).

Management decision means the Federal awarding agency's or pass-through entity's written determination, provided to the auditee, of the adequacy of the auditee's proposed corrective actions to address the findings, based on its evaluation of the audit findings and proposed corrective actions.

Micro-purchase means a purchase of supplies or services, the aggregate amount of which does not exceed the micro-purchase threshold. Micro-purchases comprise a subset of a non-Federal entity's small purchases as defined in § 200.320.

Micro-purchase threshold means the dollar amount at or below which a non-Federal entity may purchase property or services using micro-purchase procedures (see § 200.320). Generally, the micro-purchase threshold for procurement activities administered under Federal awards is not to exceed the amount set by the FAR at 48 CFR part 2, subpart 2.1, unless a higher threshold is requested by the non-Federal entity and approved by the cognizant agency for indirect costs.

Modified Total Direct Cost (MTDC) means all direct salaries and wages, applicable fringe benefits, materials and supplies, services, travel, and up to the first $25,000 of each subaward (regardless of the period of performance of the subawards under the award). MTDC excludes equipment, capital expenditures, charges for patient care, rental costs, tuition remission, scholarships and fellowships, participant support costs and the portion of each subaward in excess of $25,000. Other items may only be excluded when necessary to avoid a serious inequity in the distribution of indirect costs, and with the approval of the cognizant agency for indirect costs.

Non-discretionary award means an award made by the Federal awarding agency to specific recipients in accordance with statutory, eligibility and compliance requirements, such that in keeping with specific statutory authority the agency has no ability to exercise judgement (''discretion''). A non-discretionary award amount could be determined specifically or by formula.

Non-Federal entity (NFE) means a State, local government, Indian tribe, Institution of Higher Education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient.

Nonprofit organization means any corporation, trust, association, cooperative, or other organization, not including IHEs, that:
(1) Is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest;
(2) Is not organized primarily for profit; and
(3) Uses net proceeds to maintain, improve, or expand the operations of the organization.

Notice of funding opportunity means a formal announcement of the availability of Federal funding through a financial assistance program from a Federal awarding agency. The notice of funding opportunity provides information on the award, who is eligible to apply, the evaluation criteria for selection of an awardee, required components of an application, and how to submit the application. The notice of funding opportunity is any paper or electronic issuance that an agency uses to announce a funding opportunity, whether it is called a ''program announcement,'' ''notice of funding availability,'' ''broad agency announcement,'' ''research announcement,'' ''solicitation,'' or some other term.

Office of Management and Budget (OMB) means the Executive Office of the President, Office of Management and Budget.

Oversight agency for audit means the Federal awarding agency that provides the predominant amount of funding directly (direct funding) (as listed on the schedule of expenditures of Federal awards, see § 200.510(b)) to a non-Federal entity unless OMB designates a specific cognizant agency for audit. When the direct funding represents less than 25 percent of the total Federal expenditures (as direct and sub-awards) by the non-Federal entity, then the Federal agency with the predominant amount of total funding is the designated cognizant agency for audit. When there is no direct funding, the Federal awarding agency which is the predominant source of pass-through funding must assume the oversight responsibilities. The duties of the oversight agency for audit and the process for any reassignments are described in § 200.513(b).

Participant support costs means direct costs for items such as stipends or subsistence allowances, travel allowances, and registration fees paid to or on behalf of participants or trainees (but not employees) in connection with conferences, or training projects.

Pass-through entity (PTE) means a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program.

Performance goal means a target level of performance expressed as a tangible, measurable objective, against which actual achievement can be compared, including a goal expressed as a quantitative standard, value, or rate. In some instances (*e.g.*, discretionary research awards), this may be limited to the requirement to submit technical performance reports (to be evaluated in accordance with agency policy).

Period of performance means the total estimated time interval between the start of an initial Federal award and the planned end date, which may include one or more funded portions, or budget periods. Identification of the period of performance in the Federal award per § 200.211(b)(5) does not commit the awarding agency to fund the award beyond the currently approved budget period.

Personal property means property other than real property. It may be tangible, having physical existence, or intangible.

Personally Identifiable Information (PII) means information that can be used to distinguish or trace an individual's identity, either alone or when combined with other personal or identifying information that is linked or linkable to a specific individual. Some information that is considered to be PII is available in public sources such as telephone books, public websites, and university listings. This type of information is considered to be Public PII and includes, for example, first and last name, address, work telephone number, email address, home telephone number, and general educational credentials. The definition of PII is not anchored to any single category of information or technology. Rather, it requires a case-by-case assessment of the specific risk that an individual can be identified. Non-PII can become PII whenever additional information is made publicly available, in any medium and from any source, that, when combined with other available information, could be used to identify an individual.

Program income means gross income earned by the non-Federal entity that is directly generated by a supported activity or earned as a result of the Federal award during the period of

performance except as provided in § 200.307(f). (See the definition of *period of performance* in this section.) Program income includes but is not limited to income from fees for services performed, the use or rental or real or personal property acquired under Federal awards, the sale of commodities or items fabricated under a Federal award, license fees and royalties on patents and copyrights, and principal and interest on loans made with Federal award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal statutes, regulations, or the terms and conditions of the Federal award, program income does not include rebates, credits, discounts, and interest earned on any of them. See also § 200.407. See also 35 U.S.C. 200–212 ''Disposition of Rights in Educational Awards'' applies to inventions made under Federal awards.

Project cost means total allowable costs incurred under a Federal award and all required cost sharing and voluntary committed cost sharing, including third-party contributions.

Property means real property or personal property. See also the definitions of *real property* and *personal property* in this section.

Protected Personally Identifiable Information (Protected PII) means an individual's first name or first initial and last name in combination with any one or more of types of information, including, but not limited to, social security number, passport number, credit card numbers, clearances, bank numbers, biometrics, date and place of birth, mother's maiden name, criminal, medical and financial records, educational transcripts. This does not include PII that is required by law to be disclosed. See also the definition of *Personally Identifiable Information (PII)* in this section.

Questioned cost means a cost that is questioned by the auditor because of an audit finding:

(1) Which resulted from a violation or possible violation of a statute, regulation, or the terms and conditions of a Federal award, including for funds used to match Federal funds;

(2) Where the costs, at the time of the audit, are not supported by adequate documentation; or

(3) Where the costs incurred appear unreasonable and do not reflect the actions a prudent person would take in the circumstances.

(4) Questioned costs are not an improper payment until reviewed and confirmed to be improper as defined in OMB Circular A–123 appendix C. (See also the definition of *Improper payment* in this section).

Real property means land, including land improvements, structures and appurtenances thereto, but excludes moveable machinery and equipment.

Recipient means an entity, usually but not limited to non-Federal entities that receives a Federal award directly from a Federal awarding agency. The term recipient does not include subrecipients or individuals that are beneficiaries of the award.

Renewal award means an award made subsequent to an expiring Federal award for which the start date is contiguous with, or closely follows, the end of the expiring Federal award. A renewal award's start date will begin a distinct period of performance.

Research and Development (R&D) means all research activities, both basic and applied, and all development activities that are performed by non-Federal entities. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function. ''Research'' is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. ''Development'' is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes.

Simplified acquisition threshold means the dollar amount below which a non-Federal entity may purchase property or services using small purchase methods (see § 200.320). Non-Federal entities adopt small purchase procedures in order to expedite the purchase of items at or below the simplified acquisition threshold. The simplified acquisition threshold for procurement activities administered under Federal awards is set by the FAR at 48 CFR part 2, subpart 2.1. The non-Federal entity is responsible for determining an appropriate simplified acquisition threshold based on internal controls, an evaluation of risk, and its documented procurement procedures. However, in no circumstances can this threshold exceed the dollar value established in the FAR (48 CFR part 2, subpart 2.1) for the simplified acquisition threshold. Recipients should determine if local government laws on purchasing apply.

Special purpose equipment means equipment which is used only for research, medical, scientific, or other technical activities. Examples of special purpose equipment include microscopes, x-ray machines, surgical instruments, and spectrometers. See also the definitions of *equipment* and *general purpose equipment* in this section.

State means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments.

Student Financial Aid (SFA) means Federal awards under those programs of general student assistance, such as those authorized by Title IV of the Higher Education Act of 1965, as amended, (20 U.S.C. 1070–1099d), which are administered by the U.S. Department of Education, and similar programs provided by other Federal agencies. It does not include Federal awards under programs that provide fellowships or similar Federal awards to students on a competitive basis, or for specified studies or research.

Subaward means an award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a Federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a Federal program. A subaward may be provided through any form of legal agreement, including an agreement that the pass-through entity considers a contract.

Subrecipient means an entity, usually but not limited to non-Federal entities, that receives a subaward from a pass-through entity to carry out part of a Federal award; but does not include an individual that is a beneficiary of such award. A subrecipient may also be a recipient of other Federal awards directly from a Federal awarding agency.

Subsidiary means an entity in which more than 50 percent of the entity is owned or controlled directly by a parent corporation or through another subsidiary of a parent corporation.

Supplies means all tangible personal property other than those described in the definition of *equipment* in this section. A computing device is a supply if the acquisition cost is less than the lesser of the capitalization level established by the non-Federal entity for financial statement purposes or $5,000, regardless of the length of its useful life. See also the definitions of *computing devices* and *equipment* in this section.

Telecommunications cost means the cost of using communication and telephony technologies such as mobile phones, land lines, and internet.

Termination means the ending of a Federal award, in whole or in part at any time prior to the planned end of period of performance. A lack of available funds is not a termination.

Third-party in-kind contributions means the value of non-cash contributions (*i.e.*, property or services) that—

(1) Benefit a federally-assisted project or program; and

(2) Are contributed by non-Federal third parties, without charge, to a non-Federal entity under a Federal award.

Unliquidated financial obligations means, for financial reports prepared on a cash basis, financial obligations incurred by the non-Federal entity that have not been paid (liquidated). For reports prepared on an accrual expenditure basis, these are financial obligations incurred by the non-Federal entity for which an expenditure has not been recorded.

Unobligated balance means the amount of funds under a Federal award that the non-Federal entity has not obligated. The amount is computed by subtracting the cumulative amount of the non-Federal entity's unliquidated financial obligations and expenditures of funds under the Federal award from the cumulative amount of the funds that the Federal awarding agency or pass-through entity authorized the non-Federal entity to obligate.

Voluntary committed cost sharing means cost sharing specifically pledged on a voluntary basis in the proposal's budget on the part of the non-Federal entity and that becomes a binding requirement of Federal award. See also § 200.306.

▪ 35. Amend § 200.100 by revising paragraphs (a)(1), (c), (d), and (e) to read as follows:

§ 200.100 Purpose.

(a) *Purpose.* (1) This part establishes uniform administrative requirements, cost principles, and audit requirements for Federal awards to non-Federal entities, as described in § 200.101. Federal awarding agencies must not impose additional or inconsistent requirements, except as provided in §§ 200.102 and 200.211, or unless specifically required by Federal statute, regulation, or Executive order.

* * * * *

(c) *Cost principles.* Subpart E of this part establishes principles for determining the allowable costs incurred by non-Federal entities under Federal awards. The principles are for the purpose of cost determination and are not intended to identify the circumstances or dictate the extent of Federal Government participation in the financing of a particular program or project. The principles are designed to provide that Federal awards bear their fair share of cost recognized under these principles except where restricted or prohibited by statute.

(d) Single Audit Requirements and Audit Follow-up. Subpart F of this part is issued pursuant to the Single Audit Act Amendments of 1996, (31 U.S.C. 7501–7507). It sets forth standards for obtaining consistency and uniformity among Federal agencies for the audit of non-Federal entities expending Federal awards. These provisions also provide the policies and procedures for Federal awarding agencies and pass-through entities when using the results of these audits.

(e) Guidance on challenges and prizes. For OMB guidance to Federal awarding agencies on challenges and prizes, please see memo M–10–11 Guidance on the Use of Challenges and Prizes to Promote Open Government, issued March 8, 2010, or its successor.

▪ 36. Revise § 200.101 to read as follows:

§ 200.101 Applicability.

(a) *General applicability to Federal agencies.* (1) The requirements established in this part apply to Federal agencies that make Federal awards to non-Federal entities. These requirements are applicable to all costs related to Federal awards.

(2) Federal awarding agencies may apply subparts A through E of this part to Federal agencies, for-profit entities, foreign public entities, or foreign organizations, except where the Federal awarding agency determines that the application of these subparts would be inconsistent with the international responsibilities of the United States or the statutes or regulations of a foreign government.

(b) *Applicability to different types of Federal awards.* (1) Throughout this part when the word ''must'' is used it indicates a requirement. Whereas, use of the word ''should'' or ''may'' indicates a best practice or recommended approach rather than a requirement and permits discretion.

(2) The following table describes what portions of this part apply to which types of Federal awards. The terms and conditions of Federal awards (including this part) flow down to subawards to subrecipients unless a particular section of this part or the terms and conditions of the Federal award specifically indicate otherwise. This means that non-Federal entities must comply with requirements in this part regardless of whether the non-Federal entity is a recipient or subrecipient of a Federal award. Pass-through entities must comply with the requirements described in subpart D of this part, §§ 200.331 through 200.333, but not any requirements in this part directed towards Federal awarding agencies unless the requirements of this part or the terms and conditions of the Federal award indicate otherwise.

TABLE 1 TO PARAGRAPH (b)

The following portions of this Part	Are applicable to the following types of Federal Awards and Fixed-Price Contracts and Subcontracts (except as noted in paragraphs (d) and (e) of this section):	Are NOT applicable to the following types of Federal Awards and Fixed-Price Contracts and Subcontracts:
Subpart A—Acronyms and Definitions	—All.	
Subpart B—General Provisions, except for §§ 200.111 English Language, 200.112 Conflict of Interest, 200.113 Mandatory Disclosures.	—All.	
§§ 200.111 English Language, 200.112 Conflict of Interest, 200.113 Mandatory Disclosures.	—Grant Agreements and cooperative agreements.	—Agreements for loans, loan guarantees, interest subsidies and insurance. —Procurement contracts awarded by Federal Agencies under the Federal Acquisition Regulation and subcontracts under those contracts.

TABLE 1 TO PARAGRAPH (b)—Continued

The following portions of this Part	Are applicable to the following types of Federal Awards and Fixed-Price Contracts and Subcontracts (except as noted in paragraphs (d) and (e) of this section):	Are NOT applicable to the following types of Federal Awards and Fixed-Price Contracts and Subcontracts:
Subparts C–D, except for §§ 200.203 Requirement to provide public notice of Federal financial assistance programs, 200.303 Internal controls, 200.331–333 Subrecipient Monitoring and Management.	—Grant Agreements and cooperative agreements.	—Agreements for loans, loan guarantees, interest subsidies and insurance. —Procurement contracts awarded by Federal Agencies under the Federal Acquisition Regulation and subcontracts under those contracts.
§ 200.203 Requirement to provide public notice of Federal financial assistance programs.	—Grant Agreements and cooperative agreements. —Agreements for loans, loan guarantees, interest subsidies and insurance.	—Procurement contracts awarded by Federal Agencies under the Federal Acquisition Regulation and subcontracts under those contracts.
§§ 200.303 Internal controls, 200.331–333 Subrecipient Monitoring and Management.	—All.	
Subpart E—Cost Principles	—Grant Agreements and cooperative agreements, except those providing food commodities. —All procurement contracts under the Federal Acquisition Regulations except those that are not negotiated.	—Grant agreements and cooperative agreements providing foods commodities. —Fixed amount awards. —Agreements for loans, loans guarantees, interest subsidies and insurance. —Federal awards to hospitals (see Appendix IX Hospital Cost Principles).
Subpart F—Audit Requirements	—Grant Agreements and cooperative agreements. —Contracts and subcontracts, except for fixed price contacts and subcontracts, awarded under the Federal Acquisition Regulation. —Agreements for loans, loans guarantees, interest subsidies and insurance and other forms of Federal Financial Assistance as defined by the Single Audit Act Amendment of 1996.	—Fixed-price contracts and subcontracts awarded under the Federal Acquisition Regulation.

(c) *Federal award of cost-reimbursement contract under the FAR to a non-Federal entity.* When a non-Federal entity is awarded a cost-reimbursement contract, only subpart D, §§ 200.331 through 200.333, and subparts E and F of this part are incorporated by reference into the contract, but the requirements of subparts D, E, and F are supplementary to the FAR and the contract. When the Cost Accounting Standards (CAS) are applicable to the contract, they take precedence over the requirements of this part, including subpart F of this part, which are supplementary to the CAS requirements. In addition, costs that are made unallowable under 10 U.S.C. 2324(e) and 41 U.S.C. 4304(a) as described in the FAR 48 CFR part 31, subpart 31.2, and 48 CFR 31.603 are always unallowable. For requirements other than those covered in subpart D, §§ 200.331 through 200.333, and subparts E and F of this part, the terms of the contract and the FAR apply. Note that when a non-Federal entity is awarded a FAR contract, the FAR applies, and the terms and conditions of the contract shall prevail over the requirements of this part.

(d) *Governing provisions.* With the exception of subpart F of this part, which is required by the Single Audit Act, in any circumstances where the provisions of Federal statutes or regulations differ from the provisions of this part, the provision of the Federal statutes or regulations govern. This includes, for agreements with Indian tribes, the provisions of the Indian Self-Determination and Education and Assistance Act (ISDEAA), as amended, 25 U.S.C 450–458ddd–2.

(e) *Program applicability.* Except for §§ 200.203 and 200.331 through 200.333, the requirements in subparts C, D, and E of this part do not apply to the following programs:

(1) The block grant awards authorized by the Omnibus Budget Reconciliation Act of 1981 (including Community Services), except to the extent that subpart E of this part apply to subrecipients of Community Services Block Grant funds pursuant to 42 U.S.C. 9916(a)(1)(B);

(2) Federal awards to local education agencies under 20 U.S.C. 7702–7703b, (portions of the Impact Aid program);

(3) Payments under the Department of Veterans Affairs' State Home Per Diem Program (38 U.S.C. 1741); and

(4) Federal awards authorized under the Child Care and Development Block Grant Act of 1990, as amended:

(i) Child Care and Development Block Grant (42 U.S.C. 9858).

(ii) Child Care Mandatory and Matching Funds of the Child Care and Development Fund (42 U.S.C. 9858).

(f) *Additional program applicability.* Except for § 200.203, the guidance in subpart C of this part does not apply to the following programs:

(1) Entitlement Federal awards to carry out the following programs of the Social Security Act:

(i) Temporary Assistance for Needy Families (title IV–A of the Social Security Act, 42 U.S.C. 601–619);

(ii) Child Support Enforcement and Establishment of Paternity (title IV–D of the Social Security Act, 42 U.S.C. 651–669b);

(iii) Foster Care and Adoption Assistance (title IV–E of the Act, 42 U.S.C. 670–679c);

(iv) Aid to the Aged, Blind, and Disabled (titles I, X, XIV, and XVI–AABD of the Act, as amended);

(v) Medical Assistance (Medicaid) (title XIX of the Act, 42 U.S.C. 1396–1396w–5) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B) of the Social Security Act (42 U.S.C. 1396b(a)(6)(B)); and

(vi) Children's Health Insurance Program (title XXI of the Act, 42 U.S.C. 1397aa–1397mm).

(2) A Federal award for an experimental, pilot, or demonstration project that is also supported by a Federal award listed in paragraph (f)(1) of this section.

(3) Federal awards under subsection 412(e) of the Immigration and Nationality Act and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96–422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits (8 U.S.C. 1522(e)).

(4) Entitlement awards under the following programs of The National School Lunch Act:

(i) National School Lunch Program (section 4 of the Act, 42 U.S.C. 1753);

(ii) Commodity Assistance (section 6 of the Act, 42 U.S.C. 1755);

(iii) Special Meal Assistance (section 11 of the Act, 42 U.S.C. 1759a);

(iv) Summer Food Service Program for Children (section 13 of the Act, 42 U.S.C. 1761); and

(v) Child and Adult Care Food Program (section 17 of the Act, 42 U.S.C. 1766).

(5) Entitlement awards under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk Program (section 3 of the Act, 42 U.S.C. 1772);

(ii) School Breakfast Program (section 4 of the Act, 42 U.S.C. 1773); and

(iii) State Administrative Expenses (section 7 of the Act, 42 U.S.C. 1776).

(6) Entitlement awards for State Administrative Expenses under The Food and Nutrition Act of 2008 (section 16 of the Act, 7 U.S.C. 2025).

(7) Non-discretionary Federal awards under the following non-entitlement programs:

(i) Special Supplemental Nutrition Program for Women, Infants and Children (section 17 of the Child Nutrition Act of 1966) 42 U.S.C. 1786;

(ii) The Emergency Food Assistance Programs (Emergency Food Assistance Act of 1983) 7 U.S.C. 7501 note; and

(iii) Commodity Supplemental Food Program (section 5 of the Agriculture and Consumer Protection Act of 1973) 7 U.S.C. 612c note.

▪ 37. Revise § 200.102 to read as follows:

§ 200.102 Exceptions.

(a) With the exception of subpart F of this part, OMB may allow exceptions for classes of Federal awards or non-Federal entities subject to the requirements of this part when exceptions are not prohibited by statute. In the interest of maximum uniformity, exceptions from the requirements of this part will be permitted as described in this section.

(b) Exceptions on a case-by-case basis for individual non-Federal entities may be authorized by the Federal awarding agency or cognizant agency for indirect costs, except where otherwise required by law or where OMB or other approval is expressly required by this part.

(c) The Federal awarding agency may apply adjust requirements to a class of Federal awards or non-Federal entities when approved by OMB, or when required by Federal statutes or regulations, except for the requirements in subpart F of this part. A Federal awarding agency may apply less restrictive requirements when making fixed amount awards as defined in subpart A of this part, except for those requirements imposed by statute or in subpart F of this part.

(d) Federal awarding agencies may request exceptions in support of innovative program designs that apply a risk-based, data-driven framework to alleviate select compliance requirements and hold recipients accountable for good performance. See also § 200.206.

▪ 38. Revise § 200.103 to read as follows:

§ 200.103 Authorities.

This part is issued under the following authorities.

(a) Subparts B through D of this part are authorized under 31 U.S.C. 503 (the Chief Financial Officers Act, Functions of the Deputy Director for Management), 41 U.S.C. 1101–1131 (the Office of Federal Procurement Policy Act), Reorganization Plan No. 2 of 1970, and Executive Order 11541 (''Prescribing the Duties of the Office of Management and Budget and the Domestic Policy Council in the Executive Office of the President''), the Single Audit Act Amendments of 1996, (31 U.S.C. 7501–7507), as well as The Federal Program Information Act (Pub. L. 95–220 and Pub. L. 98–169, as amended, codified at 31 U.S.C. 6101–6106).

(b) Subpart E of this part is authorized under the Budget and Accounting Act of 1921, as amended; the Budget and Accounting Procedures Act of 1950, as amended (31 U.S.C. 1101–1125); the Chief Financial Officers Act of 1990 (31 U.S.C. 503–504); Reorganization Plan No. 2 of 1970; and Executive Order 11541, ''Prescribing the Duties of the Office of Management and Budget and the Domestic Policy Council in the Executive Office of the President.''

(c) Subpart F of this part is authorized under the Single Audit Act Amendments of 1996, (31 U.S.C. 7501–7507).

▪ 39. Amend § 200.104 by revising the introductory text and paragraphs (g) and (h) to read as follows:

§ 200.104 Supersession.

As described in § 200.110, this part supersedes the following OMB guidance documents and regulations under title 2 of the Code of Federal Regulations:

* * * * *

(g) A–133, ''Audits of States, Local Governments and Non-Profit Organizations''; and

(h) Those sections of A–50 related to audits performed under subpart F of this part.

▪ 40. Revise § 200.105 to read as follows:

§ 200.105 Effect on other issuances.

(a) *Superseding inconsistent requirements*. For Federal awards subject to this part, all administrative requirements, program manuals, handbooks and other non-regulatory materials that are inconsistent with the requirements of this part must be superseded upon implementation of this part by the Federal agency, except to the extent they are required by statute or authorized in accordance with the provisions in § 200.102.

(b) *Imposition of requirements on recipients*. Agencies may impose legally binding requirements on recipients only through the notice and public comment process through an approved agency process, including as authorized by this part, other statutes or regulations, or as incorporated into the terms of a Federal award.

▪ 41. Revise § 200.106 to read as follows:

§ 200.106 Agency implementation.

The specific requirements and responsibilities of Federal agencies and non-Federal entities are set forth in this part. Federal agencies making Federal awards to non-Federal entities must implement the language in subparts C through F of this part in codified regulations unless different provisions are required by Federal statute or are approved by OMB.

▪ 42. Revise § 200.110 to read as follows:

§ 200.110 Effective/applicability date.

(a) The standards set forth in this part that affect the administration of Federal awards issued by Federal awarding agencies become effective once implemented by Federal awarding

agencies or when any future amendment to this part becomes final.

(b) Existing negotiated indirect cost rates (as of the publication date of the revisions to the guidance) will remain in place until they expire. The effective date of changes to indirect cost rates must be based upon the date that a newly re-negotiated rate goes into effect for a specific non-Federal entity's fiscal year. Therefore, for indirect cost rates and cost allocation plans, the revised Uniform Guidance (as of the publication date for revisions to the guidance) become effective in generating proposals and negotiating a new rate (when the rate is re-negotiated).

■ 43. Revise § 200.113 to read as follows:

§ 200.113 Mandatory disclosures.

The non-Federal entity or applicant for a Federal award must disclose, in a timely manner, in writing to the Federal awarding agency or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Non-Federal entities that have received a Federal award including the term and condition outlined in appendix XII to this part are required to report certain civil, criminal, or administrative proceedings to SAM (currently FAPIIS). Failure to make required disclosures can result in any of the remedies described in § 200.339. (See also 2 CFR part 180, 31 U.S.C. 3321, and 41 U.S.C. 2313.)

■ 44. Revise subpart C to read as follows:

Subpart C—Pre-Federal Award Requirements and Contents of Federal Awards

Sec.

Subpart C—Pre-Federal Award Requirements and Contents of Federal Awards

§ 200.200 Purpose.

Sections 200.201 through 200.216 prescribe instructions and other pre-award matters to be used by Federal awarding agencies in the program planning, announcement, application and award processes.

§ 200.201 Use of grant agreements (including fixed amount awards), cooperative agreements, and contracts.

(a) *Federal award instrument.* The Federal awarding agency or pass-through entity must decide on the appropriate instrument for the Federal award (*i.e.*, grant agreement, cooperative agreement, or contract) in accordance with the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301–08).

(b) *Fixed amount awards.* In addition to the options described in paragraph (a) of this section, Federal awarding agencies, or pass-through entities as permitted in § 200.333, may use fixed amount awards (see *Fixed amount awards* in § 200.1) to which the following conditions apply:

(1) The Federal award amount is negotiated using the cost principles (or other pricing information) as a guide. The Federal awarding agency or pass-through entity may use fixed amount awards if the project scope has measurable goals and objectives and if adequate cost, historical, or unit pricing data is available to establish a fixed amount award based on a reasonable estimate of actual cost. Payments are based on meeting specific requirements of the Federal award. Accountability is based on performance and results. Except in the case of termination before completion of the Federal award, there is no governmental review of the actual costs incurred by the non-Federal entity in performance of the award. Some of the ways in which the Federal award may be paid include, but are not limited to:

(i) In several partial payments, the amount of each agreed upon in advance, and the ''milestone'' or event triggering the payment also agreed upon in advance, and set forth in the Federal award;

(ii) On a unit price basis, for a defined unit or units, at a defined price or prices, agreed to in advance of performance of the Federal award and set forth in the Federal award; or,

(iii) In one payment at Federal award completion.

(2) A fixed amount award cannot be used in programs which require mandatory cost sharing or match.

(3) The non-Federal entity must certify in writing to the Federal awarding agency or pass-through entity at the end of the Federal award that the project or activity was completed or the level of effort was expended. If the required level of activity or effort was not carried out, the amount of the Federal award must be adjusted.

(4) Periodic reports may be established for each Federal award.

(5) Changes in principal investigator, project leader, project partner, or scope of effort must receive the prior written approval of the Federal awarding agency or pass-through entity.

§ 200.202 Program planning and design.

The Federal awarding agency must design a program and create an Assistance Listing before announcing the Notice of Funding Opportunity. The program must be designed with clear goals and objectives that facilitate the delivery of meaningful results consistent with the Federal authorizing legislation of the program. Program performance shall be measured based on the goals and objectives developed during program planning and design. See § 200.301 for more information on performance measurement. Performance measures may differ depending on the type of program. The program must align with the strategic goals and objectives within the Federal awarding agency's performance plan and should support the Federal awarding agency's performance measurement, management, and reporting as required by Part 6 of OMB Circular A–11 (Preparation, Submission, and Execution of the Budget). The program must also be designed to align with the Program Management Improvement Accountability Act (Pub. L. 114–264).

§ 200.203 Requirement to provide public notice of Federal financial assistance programs.

(a) The Federal awarding agency must notify the public of Federal programs in the Federal Assistance Listings maintained by the General Services Administration (GSA).

(1) The Federal Assistance Listings is the single, authoritative, governmentwide comprehensive source of Federal financial assistance program information produced by the executive branch of the Federal Government.

(2) The information that the Federal awarding agency must submit to GSA for approval by OMB is listed in

paragraph (b) of this section. GSA must prescribe the format for the submission in coordination with OMB.

(3) The Federal awarding agency may not award Federal financial assistance without assigning it to a program that has been included in the Federal Assistance Listings as required in this section unless there are exigent circumstances requiring otherwise, such as timing requirements imposed by statute.

(b) For each program that awards discretionary Federal awards, non-discretionary Federal awards, loans, insurance, or any other type of Federal financial assistance, the Federal awarding agency must, to the extent practicable, create, update, and manage Assistance Listings entries based on the authorizing statute for the program and comply with additional guidance provided by GSA in consultation with OMB to ensure consistent, accurate information is available to prospective applicants. Accordingly, Federal awarding agencies must submit the following information to GSA:

(1) *Program Description, Purpose, Goals, and Measurement.* A brief summary of the statutory or regulatory requirements of the program and its intended outcome. Where appropriate, the Program Description, Purpose, Goals, and Measurement should align with the strategic goals and objectives within the Federal awarding agency's performance plan and should support the Federal awarding agency's performance measurement, management, and reporting as required by Part 6 of OMB Circular A–11;

(2) *Identification.* Identification of whether the program makes Federal awards on a discretionary basis or the Federal awards are prescribed by Federal statute, such as in the case of formula grants.

(3) *Projected total amount of funds available for the program.* Estimates based on previous year funding are acceptable if current appropriations are not available at the time of the submission;

(4) *Anticipated source of available funds.* The statutory authority for funding the program and, to the extent possible, agency, sub-agency, or, if known, the specific program unit that will issue the Federal awards, and associated funding identifier (*e.g.,* Treasury Account Symbol(s));

(5) *General eligibility requirements.* The statutory, regulatory or other eligibility factors or considerations that determine the applicant's qualification for Federal awards under the program (*e.g.,* type of non-Federal entity); and

(6) *Applicability of Single Audit Requirements.* Applicability of Single Audit Requirements as required by subpart F of this part.

§ 200.204 Notices of funding opportunities.

For discretionary grants and cooperative agreements that are competed, the Federal awarding agency must announce specific funding opportunities by providing the following information in a public notice:

(a) Summary information in notices of funding opportunities. The Federal awarding agency must display the following information posted on the OMB-designated governmentwide website for funding and applying for Federal financial assistance, in a location preceding the full text of the announcement:

(1) Federal Awarding Agency Name;

(2) Funding Opportunity Title;

(3) Announcement Type (whether the funding opportunity is the initial announcement of this funding opportunity or a modification of a previously announced opportunity);

(4) Funding Opportunity Number (required, if applicable). If the Federal awarding agency has assigned or will assign a number to the funding opportunity announcement, this number must be provided;

(5) Assistance Listings Number(s);

(6) Key Dates. Key dates include due dates for applications or Executive Order 12372 submissions, as well as for any letters of intent or pre-applications. For any announcement issued before a program's application materials are available, key dates also include the date on which those materials will be released; and any other additional information, as deemed applicable by the relevant Federal awarding agency.

(b) *Availability period.* The Federal awarding agency must generally make all funding opportunities available for application for at least 60 calendar days. The Federal awarding agency may make a determination to have a less than 60 calendar day availability period but no funding opportunity should be available for less than 30 calendar days unless exigent circumstances require as determined by the Federal awarding agency head or delegate.

(c) Full text of funding opportunities. The Federal awarding agency must include the following information in the full text of each funding opportunity. For specific instructions on the content required in this section, refer to appendix I to this part.

(1) Full programmatic description of the funding opportunity.

(2) Federal award information, including sufficient information to help an applicant make an informed decision about whether to submit an application. (See also § 200.414(c)(4)).

(3) Specific eligibility information, including any factors or priorities that affect an applicant's or its application's eligibility for selection.

(4) Application Preparation and Submission Information, including the applicable submission dates and time.

(5) Application Review Information including the criteria and process to be used to evaluate applications. See also §§ 200.205 and 200.206.

(6) Federal Award Administration Information. See also § 200.211.

(7) Applicable terms and conditions for resulting awards, including any exceptions from these standard terms.

§ 200.205 Federal awarding agency review of merit of proposals.

For discretionary Federal awards, unless prohibited by Federal statute, the Federal awarding agency must design and execute a merit review process for applications, with the objective of selecting recipients most likely to be successful in delivering results based on the program objectives outlined in section § 200.202. A merit review is an objective process of evaluating Federal award applications in accordance with written standards set forth by the Federal awarding agency. This process must be described or incorporated by reference in the applicable funding opportunity (see appendix I to this part.). See also § 200.204. The Federal awarding agency must also periodically review its merit review process.

§ 200.206 Federal awarding agency review of risk posed by applicants.

(a) *Review of OMB-designated repositories of governmentwide data.* (1) Prior to making a Federal award, the Federal awarding agency is required by the Improper Payments Elimination and Recovery Improvement Act of 2012, 31 U.S.C. 3321 note, and 41 U.S.C. 2313 to review information available through any OMB-designated repositories of governmentwide eligibility qualification or financial integrity information as appropriate. See also suspension and debarment requirements at 2 CFR part 180 as well as individual Federal agency suspension and debarment regulations in title 2 of the Code of Federal Regulations.

(2) In accordance 41 U.S.C. 2313, the Federal awarding agency is required to review the non-public segment of the OMB-designated integrity and performance system accessible through SAM (currently the Federal Awardee

Performance and Integrity Information System (FAPIIS)) prior to making a Federal award where the Federal share is expected to exceed the simplified acquisition threshold, defined in 41 U.S.C. 134, over the period of performance. As required by Public Law 112–239, National Defense Authorization Act for Fiscal Year 2013, prior to making a Federal award, the Federal awarding agency must consider all of the information available through FAPIIS with regard to the applicant and any immediate highest level owner, predecessor (*i.e.;* a non-Federal entity that is replaced by a successor), or subsidiary, identified for that applicant in FAPIIS, if applicable. At a minimum, the information in the system for a prior Federal award recipient must demonstrate a satisfactory record of executing programs or activities under Federal grants, cooperative agreements, or procurement awards; and integrity and business ethics. The Federal awarding agency may make a Federal award to a recipient who does not fully meet these standards, if it is determined that the information is not relevant to the current Federal award under consideration or there are specific conditions that can appropriately mitigate the effects of the non-Federal entity's risk in accordance with § 200.208.

(b) *Risk evaluation.* (1) The Federal awarding agency must have in place a framework for evaluating the risks posed by applicants before they receive Federal awards. This evaluation may incorporate results of the evaluation of the applicant's eligibility or the quality of its application. If the Federal awarding agency determines that a Federal award will be made, special conditions that correspond to the degree of risk assessed may be applied to the Federal award. Criteria to be evaluated must be described in the announcement of funding opportunity described in § 200.204.

(2) In evaluating risks posed by applicants, the Federal awarding agency may use a risk-based approach and may consider any items such as the following:

(i) *Financial stability.* Financial stability;

(ii) *Management systems and standards.* Quality of management systems and ability to meet the management standards prescribed in this part;

(iii) *History of performance.* The applicant's record in managing Federal awards, if it is a prior recipient of Federal awards, including timeliness of compliance with applicable reporting requirements, conformance to the terms and conditions of previous Federal awards, and if applicable, the extent to which any previously awarded amounts will be expended prior to future awards;

(iv) Audit reports and findings. Reports and findings from audits performed under subpart F of this part or the reports and findings of any other available audits; and

(v) Ability to effectively implement requirements. The applicant's ability to effectively implement statutory, regulatory, or other requirements imposed on non-Federal entities.

(c) Risk-based requirements adjustment. The Federal awarding agency may adjust requirements when a risk-evaluation indicates that it may be merited either pre-award or post-award.

(d) Suspension and debarment compliance. (1) The Federal awarding agency must comply with the guidelines on governmentwide suspension and debarment in 2 CFR part 180, and must require non-Federal entities to comply with these provisions. These provisions restrict Federal awards, subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal programs or activities.

§ 200.207 Standard application requirements.

(a) *Paperwork clearances.* The Federal awarding agency may only use application information collections approved by OMB under the Paperwork Reduction Act of 1995 and OMB's implementing regulations in 5 CFR part 1320 and in alignment with OMB-approved, governmentwide data elements available from the OMB-designated standards lead. Consistent with these requirements, OMB will authorize additional information collections only on a limited basis.

(b) *Information collection.* If applicable, the Federal awarding agency may inform applicants and recipients that they do not need to provide certain information otherwise required by the relevant information collection.

§ 200.208 Specific conditions.

(a) Federal awarding agencies are responsible for ensuring that specific Federal award conditions are consistent with the program design reflected in § 200.202 and include clear performance expectations of recipients as required in § 200.301.

(b) The Federal awarding agency or pass-through entity may adjust specific Federal award conditions as needed, in accordance with this section, based on an analysis of the following factors:

(1) Based on the criteria set forth in § 200.206;

(2) The applicant or recipient's history of compliance with the general or specific terms and conditions of a Federal award;

(3) The applicant or recipient's ability to meet expected performance goals as described in § 200.211; or

(4) A responsibility determination of an applicant or recipient.

(c) Additional Federal award conditions may include items such as the following:

(1) Requiring payments as reimbursements rather than advance payments;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given performance period;

(3) Requiring additional, more detailed financial reports;

(4) Requiring additional project monitoring;

(5) Requiring the non-Federal entity to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(d) If the Federal awarding agency or pass-through entity is imposing additional requirements, they must notify the applicant or non-Federal entity as to:

(1) The nature of the additional requirements;

(2) The reason why the additional requirements are being imposed;

(3) The nature of the action needed to remove the additional requirement, if applicable;

(4) The time allowed for completing the actions if applicable; and

(5) The method for requesting reconsideration of the additional requirements imposed.

(e) Any additional requirements must be promptly removed once the conditions that prompted them have been satisfied.

§ 200.209 Certifications and representations.

Unless prohibited by the U.S. Constitution, Federal statutes or regulations, each Federal awarding agency or pass-through entity is authorized to require the non-Federal entity to submit certifications and representations required by Federal statutes, or regulations on an annual basis. Submission may be required more frequently if the non-Federal entity fails to meet a requirement of a Federal award.

§ 200.210 Pre-award costs.

For requirements on costs incurred by the applicant prior to the start date of the period of performance of the Federal award, see § 200.458.

§ 200.211 Information contained in a Federal award.

A Federal award must include the following information:

(a) *Federal award performance goals.* Performance goals, indicators, targets, and baseline data must be included in the Federal award, where applicable. The Federal awarding agency must also specify how performance will be assessed in the terms and conditions of the Federal award, including the timing and scope of expected performance. See §§ 200.202 and 200.301 for more information on Federal award performance goals.

(b) *General Federal award information.* The Federal awarding agency must include the following general Federal award information in each Federal award:

(1) Recipient name (which must match the name associated with its unique entity identifier as defined at 2 CFR 25.315);

(2) Recipient's unique entity identifier;

(3) Unique Federal Award Identification Number (FAIN);

(4) Federal Award Date (see Federal award date in § 200.201);

(5) Period of Performance Start and End Date;

(6) Budget Period Start and End Date;

(7) Amount of Federal Funds Obligated by this action;

(8) Total Amount of Federal Funds Obligated;

(9) Total Approved Cost Sharing or Matching, where applicable;

(10) Total Amount of the Federal Award including approved Cost Sharing or Matching;

(11) Budget Approved by the Federal Awarding Agency;

(11) Federal award description, (to comply with statutory requirements (*e.g.*, FFATA));

(12) Name of Federal awarding agency and contact information for awarding official,

(13) Assistance Listings Number and Title;

(14) Identification of whether the award is R&D; and

(15) Indirect cost rate for the Federal award (including if the de minimis rate is charged per § 200.414).

(c) *General terms and conditions.* (1) Federal awarding agencies must incorporate the following general terms and conditions either in the Federal award or by reference, as applicable:

(i) *Administrative requirements.* Administrative requirements implemented by the Federal awarding agency as specified in this part.

(ii) National policy requirements. These include statutory, executive order, other Presidential directive, or regulatory requirements that apply by specific reference and are not program-specific. See § 200.300 Statutory and national policy requirements.

(iii) *Recipient integrity and performance matters.* If the total Federal share of the Federal award may include more than $500,000 over the period of performance, the Federal awarding agency must include the term and condition available in appendix XII of this part. See also § 200.113.

(iv) *Future budget periods.* If it is anticipated that the period of performance will include multiple budget periods, the Federal awarding agency must indicate that subsequent budget periods are subject to the availability of funds, program authority, satisfactory performance, and compliance with the terms and conditions of the Federal award.

(v) *Termination provisions.* Federal awarding agencies must make recipients aware, in a clear and unambiguous manner, of the termination provisions in § 200.340, including the applicable termination provisions in the Federal awarding agency's regulations or in each Federal award.

(2) The Federal award must incorporate, by reference, all general terms and conditions of the award, which must be maintained on the agency's website.

(3) If a non-Federal entity requests a copy of the full text of the general terms and conditions, the Federal awarding agency must provide it.

(4) Wherever the general terms and conditions are publicly available, the Federal awarding agency must maintain an archive of previous versions of the general terms and conditions, with effective dates, for use by the non-Federal entity, auditors, or others.

(d) *Federal awarding agency, program, or Federal award specific terms and conditions.* The Federal awarding agency must include with each Federal award any terms and conditions necessary to communicate requirements that are in addition to the requirements outlined in the Federal awarding agency's general terms and conditions. See also § 200.208. Whenever practicable, these specific terms and conditions also should be shared on the agency's website and in notices of funding opportunities (as outlined in § 200.204) in addition to being included in a Federal award. See also § 200.207.

(e) *Federal awarding agency requirements.* Any other information required by the Federal awarding agency.

§ 200.212 Public access to Federal award information.

(a) In accordance with statutory requirements for Federal spending transparency (*e.g.*, FFATA), except as noted in this section, for applicable Federal awards the Federal awarding agency must announce all Federal awards publicly and publish the required information on a publicly available OMB-designated governmentwide website.

(b) All information posted in the designated integrity and performance system accessible through SAM (currently FAPIIS) on or after April 15, 2011 will be publicly available after a waiting period of 14 calendar days, except for:

(1) Past performance reviews required by Federal Government contractors in accordance with the Federal Acquisition Regulation (FAR) 48 CFR part 42, subpart 42.15;

(2) Information that was entered prior to April 15, 2011; or

(3) Information that is withdrawn during the 14-calendar day waiting period by the Federal Government official.

(c) Nothing in this section may be construed as requiring the publication of information otherwise exempt under the Freedom of Information Act (5 U.S.C 552), or controlled unclassified information pursuant to Executive Order 13556.

§ 200.213 Reporting a determination that a non-Federal entity is not qualified for a Federal award.

(a) If a Federal awarding agency does not make a Federal award to a non-Federal entity because the official determines that the non-Federal entity does not meet either or both of the minimum qualification standards as described in § 200.206(a)(2), the Federal awarding agency must report that determination to the designated integrity and performance system accessible through SAM (currently FAPIIS), only if all of the following apply:

(1) The only basis for the determination described in this paragraph (a) is the non-Federal entity's prior record of executing programs or activities under Federal awards or its record of integrity and business ethics, as described in § 200.206(a)(2) (*i.e.*, the entity was determined to be qualified based on all factors other than those two standards); and

(2) The total Federal share of the Federal award that otherwise would be made to the non-Federal entity is expected to exceed the simplified

acquisition threshold over the period of performance.

(b) The Federal awarding agency is not required to report a determination that a non-Federal entity is not qualified for a Federal award if they make the Federal award to the non-Federal entity and include specific award terms and conditions, as described in § 200.208.

(c) If a Federal awarding agency reports a determination that a non-Federal entity is not qualified for a Federal award, as described in paragraph (a) of this section, the Federal awarding agency also must notify the non-Federal entity that—

(1) The determination was made and reported to the designated integrity and performance system accessible through SAM, and include with the notification an explanation of the basis for the determination;

(2) The information will be kept in the system for a period of five years from the date of the determination, as required by section 872 of Public Law 110–417, as amended (41 U.S.C. 2313), then archived;

(3) Each Federal awarding agency that considers making a Federal award to the non-Federal entity during that five year period must consider that information in judging whether the non-Federal entity is qualified to receive the Federal award when the total Federal share of the Federal award is expected to include an amount of Federal funding in excess of the simplified acquisition threshold over the period of performance;

(4) The non-Federal entity may go to the awardee integrity and performance portal accessible through SAM (currently the Contractor Performance Assessment Reporting System (CPARS)) and comment on any information the system contains about the non-Federal entity itself; and

(5) Federal awarding agencies will consider that non-Federal entity's comments in determining whether the non-Federal entity is qualified for a future Federal award.

(d) If a Federal awarding agency enters information into the designated integrity and performance system accessible through SAM about a determination that a non-Federal entity is not qualified for a Federal award and subsequently:

(1) Learns that any of that information is erroneous, the Federal awarding agency must correct the information in the system within three business days; and

(2) Obtains an update to that information that could be helpful to other Federal awarding agencies, the Federal awarding agency is strongly encouraged to amend the information in the system to incorporate the update in a timely way.

(e) Federal awarding agencies must not post any information that will be made publicly available in the non-public segment of designated integrity and performance system that is covered by a disclosure exemption under the Freedom of Information Act. If the recipient asserts within seven calendar days to the Federal awarding agency that posted the information that some or all of the information made publicly available is covered by a disclosure exemption under the Freedom of Information Act, the Federal awarding agency that posted the information must remove the posting within seven calendar days of receiving the assertion. Prior to reposting the releasable information, the Federal awarding agency must resolve the issue in accordance with the agency's Freedom of Information Act procedures.

§ 200.214 Suspension and debarment.

Non-Federal entities are subject to the non-procurement debarment and suspension regulations implementing Executive Orders 12549 and 12689, 2 CFR part 180. The regulations in 2 CFR part 180 restrict awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

§ 200.215 Never contract with the enemy.

Federal awarding agencies and recipients are subject to the regulations implementing Never Contract with the Enemy in 2 CFR part 183. The regulations in 2 CFR part 183 affect covered contracts, grants and cooperative agreements that are expected to exceed $50,000 within the period of performance, are performed outside the United States and its territories, and are in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

§ 200.216 Prohibition on certain telecommunications and video surveillance services or equipment.

(a) Recipients and subrecipients are prohibited from obligating or expending loan or grant funds to:

(1) Procure or obtain;

(2) Extend or renew a contract to procure or obtain; or

(3) Enter into a contract (or extend or renew a contract) to procure or obtain equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. As described in Public Law 115–232, section 889, covered telecommunications equipment is telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).

(i) For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).

(ii) Telecommunications or video surveillance services provided by such entities or using such equipment.

(iii) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

(b) In implementing the prohibition under Public Law 115–232, section 889, subsection (f), paragraph (1), heads of executive agencies administering loan, grant, or subsidy programs shall prioritize available funding and technical support to assist affected businesses, institutions and organizations as is reasonably necessary for those affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained.

(c) See Public Law 115–232, section 889 for additional information.

(d) See also § 200.471.

■ 45. Revise subpart D to read as follows:

Subpart D—Post Federal Award Requirements

Sec.

Subpart D—Post Federal Award Requirements

§ 200.300 Statutory and national policy requirements.

(a) The Federal awarding agency must manage and administer the Federal award in a manner so as to ensure that Federal funding is expended and associated programs are implemented in full accordance with the U.S. Constitution, Federal Law, and public policy requirements: Including, but not limited to, those protecting free speech, religious liberty, public welfare, the environment, and prohibiting discrimination. The Federal awarding agency must communicate to the non-Federal entity all relevant public policy requirements, including those in general appropriations provisions, and incorporate them either directly or by reference in the terms and conditions of the Federal award.

(b) The non-Federal entity is responsible for complying with all requirements of the Federal award. For all Federal awards, this includes the provisions of FFATA, which includes requirements on executive compensation, and also requirements implementing the Act for the non-Federal entity at 2 CFR parts 25 and 170. See also statutory requirements for whistleblower protections at 10 U.S.C. 2409, 41 U.S.C. 4712, and 10 U.S.C. 2324, 41 U.S.C. 4304 and 4310.

§ 200.301 Performance measurement.

(a) The Federal awarding agency must measure the recipient's performance to show achievement of program goals and objectives, share lessons learned, improve program outcomes, and foster adoption of promising practices. Program goals and objectives should be derived from program planning and design. See § 200.202 for more information. Where appropriate, the Federal award may include specific program goals, indicators, targets, baseline data, data collection, or expected outcomes (such as outputs, or services performance or public impacts of any of these) with an expected timeline for accomplishment. Where applicable, this should also include any performance measures or independent sources of data that may be used to measure progress. The Federal awarding agency will determine how performance progress is measured, which may differ by program. Performance measurement progress must be both measured and reported. See § 200.329 for more information on monitoring program performance. The Federal awarding agency may include program-specific requirements, as applicable. These requirements must be aligned, to the extent permitted by law, with the Federal awarding agency strategic goals, strategic objectives or performance goals that are relevant to the program. See also OMB Circular A–11, Preparation, Submission, and Execution of the Budget Part 6.

(b) The Federal awarding agency should provide recipients with clear performance goals, indicators, targets, and baseline data as described in § 200.211. Performance reporting frequency and content should be established to not only allow the Federal awarding agency to understand the recipient progress but also to facilitate identification of promising practices among recipients and build the evidence upon which the Federal awarding agency's program and performance decisions are made. See § 200.328 for more information on reporting program performance.

(c) This provision is designed to operate in tandem with evidence-related statutes (*e.g.;* The Foundations for Evidence-Based Policymaking Act of 2018, which emphasizes collaboration and coordination to advance data and evidence-building functions in the Federal government). The Federal awarding agency should also specify any requirements of award recipients' participation in a federally funded evaluation, and any evaluation activities required to be conducted by the Federal award.

§ 200.302 Financial management.

(a) Each state must expend and account for the Federal award in accordance with state laws and procedures for expending and accounting for the state's own funds. In addition, the state's and the other non-Federal entity's financial management systems, including records documenting compliance with Federal statutes, regulations, and the terms and conditions of the Federal award, must be sufficient to permit the preparation of reports required by general and program-specific terms and conditions; and the tracing of funds to a level of expenditures adequate to establish that such funds have been used according to the Federal statutes, regulations, and the terms and conditions of the Federal award. See also § 200.450.

(b) The financial management system of each non-Federal entity must provide for the following (see also §§ 200.334, 200.335, 200.336, and 200.337):

(1) Identification, in its accounts, of all Federal awards received and expended and the Federal programs under which they were received. Federal program and Federal award

identification must include, as applicable, the Assistance Listings title and number, Federal award identification number and year, name of the Federal agency, and name of the pass-through entity, if any.

(2) Accurate, current, and complete disclosure of the financial results of each Federal award or program in accordance with the reporting requirements set forth in §§ 200.328 and 200.329. If a Federal awarding agency requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient must not be required to establish an accrual accounting system. This recipient may develop accrual data for its reports on the basis of an analysis of the documentation on hand. Similarly, a pass-through entity must not require a subrecipient to establish an accrual accounting system and must allow the subrecipient to develop accrual data for its reports on the basis of an analysis of the documentation on hand.

(3) Records that identify adequately the source and application of funds for federally-funded activities. These records must contain information pertaining to Federal awards, authorizations, financial obligations, unobligated balances, assets, expenditures, income and interest and be supported by source documentation.

(4) Effective control over, and accountability for, all funds, property, and other assets. The non-Federal entity must adequately safeguard all assets and assure that they are used solely for authorized purposes. See § 200.303.

(5) Comparison of expenditures with budget amounts for each Federal award.

(6) Written procedures to implement the requirements of § 200.305.

(7) Written procedures for determining the allowability of costs in accordance with subpart E of this part and the terms and conditions of the Federal award.

§ 200.303 Internal controls.

The non-Federal entity must:

(a) Establish and maintain effective internal control over the Federal award that provides reasonable assurance that the non-Federal entity is managing the Federal award in compliance with Federal statutes, regulations, and the terms and conditions of the Federal award. These internal controls should be in compliance with guidance in ''Standards for Internal Control in the Federal Government'' issued by the Comptroller General of the United States or the ''Internal Control Integrated Framework'', issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).

(b) Comply with the U.S. Constitution, Federal statutes, regulations, and the terms and conditions of the Federal awards.

(c) Evaluate and monitor the non-Federal entity's compliance with statutes, regulations and the terms and conditions of Federal awards.

(d) Take prompt action when instances of noncompliance are identified including noncompliance identified in audit findings.

(e) Take reasonable measures to safeguard protected personally identifiable information and other information the Federal awarding agency or pass-through entity designates as sensitive or the non-Federal entity considers sensitive consistent with applicable Federal, State, local, and tribal laws regarding privacy and responsibility over confidentiality.

§ 200.304 Bonds.

The Federal awarding agency may include a provision on bonding, insurance, or both in the following circumstances:

(a) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the Federal awarding agency, at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the non-Federal entity are not deemed adequate to protect the interest of the Federal Government.

(b) The Federal awarding agency may require adequate fidelity bond coverage where the non-Federal entity lacks sufficient coverage to protect the Federal Government's interest.

(c) Where bonds are required in the situations described above, the bonds must be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223.

§ 200.305 Federal payment.

(a) For states, payments are governed by Treasury-State Cash Management Improvement Act (CMIA) agreements and default procedures codified at 31 CFR part 205 and Treasury Financial Manual (TFM) 4A–2000, ''Overall Disbursing Rules for All Federal Agencies''.

(b) For non-Federal entities other than states, payments methods must minimize the time elapsing between the transfer of funds from the United States Treasury or the pass-through entity and the disbursement by the non-Federal entity whether the payment is made by electronic funds transfer, or issuance or redemption of checks, warrants, or payment by other means. See also § 200.302(b)(6). Except as noted elsewhere in this part, Federal agencies must require recipients to use only OMB-approved, governmentwide information collection requests to request payment.

(1) The non-Federal entity must be paid in advance, provided it maintains or demonstrates the willingness to maintain both written procedures that minimize the time elapsing between the transfer of funds and disbursement by the non-Federal entity, and financial management systems that meet the standards for fund control and accountability as established in this part. Advance payments to a non-Federal entity must be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the non-Federal entity in carrying out the purpose of the approved program or project. The timing and amount of advance payments must be as close as is administratively feasible to the actual disbursements by the non-Federal entity for direct program or project costs and the proportionate share of any allowable indirect costs. The non-Federal entity must make timely payment to contractors in accordance with the contract provisions.

(2) Whenever possible, advance payments must be consolidated to cover anticipated cash needs for all Federal awards made by the Federal awarding agency to the recipient.

(i) Advance payment mechanisms include, but are not limited to, Treasury check and electronic funds transfer and must comply with applicable guidance in 31 CFR part 208.

(ii) Non-Federal entities must be authorized to submit requests for advance payments and reimbursements at least monthly when electronic fund transfers are not used, and as often as they like when electronic transfers are used, in accordance with the provisions of the Electronic Fund Transfer Act (15 U.S.C. 1693–1693r).

(3) Reimbursement is the preferred method when the requirements in this paragraph (b) cannot be met, when the Federal awarding agency sets a specific condition per § 200.208, or when the non-Federal entity requests payment by reimbursement. This method may be used on any Federal award for construction, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal award constitutes a minor portion of the project. When the reimbursement method is used, the Federal awarding

agency or pass-through entity must make payment within 30 calendar days after receipt of the billing, unless the Federal awarding agency or pass-through entity reasonably believes the request to be improper.

(4) If the non-Federal entity cannot meet the criteria for advance payments and the Federal awarding agency or pass-through entity has determined that reimbursement is not feasible because the non-Federal entity lacks sufficient working capital, the Federal awarding agency or pass-through entity may provide cash on a working capital advance basis. Under this procedure, the Federal awarding agency or pass-through entity must advance cash payments to the non-Federal entity to cover its estimated disbursement needs for an initial period generally geared to the non-Federal entity's disbursing cycle. Thereafter, the Federal awarding agency or pass-through entity must reimburse the non-Federal entity for its actual cash disbursements. Use of the working capital advance method of payment requires that the pass-through entity provide timely advance payments to any subrecipients in order to meet the subrecipient's actual cash disbursements. The working capital advance method of payment must not be used by the pass-through entity if the reason for using this method is the unwillingness or inability of the pass-through entity to provide timely advance payments to the subrecipient to meet the subrecipient's actual cash disbursements.

(5) To the extent available, the non-Federal entity must disburse funds available from program income (including repayments to a revolving fund), rebates, refunds, contract settlements, audit recoveries, and interest earned on such funds before requesting additional cash payments.

(6) Unless otherwise required by Federal statutes, payments for allowable costs by non-Federal entities must not be withheld at any time during the period of performance unless the conditions of § 200.208, subpart D of this part, including § 200.339, or one or more of the following applies:

(i) The non-Federal entity has failed to comply with the project objectives, Federal statutes, regulations, or the terms and conditions of the Federal award.

(ii) The non-Federal entity is delinquent in a debt to the United States as defined in OMB Circular A–129, ''Policies for Federal Credit Programs and Non-Tax Receivables.'' Under such conditions, the Federal awarding agency or pass-through entity may, upon reasonable notice, inform the non-Federal entity that payments must not be made for financial obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

(iii) A payment withheld for failure to comply with Federal award conditions, but without suspension of the Federal award, must be released to the non-Federal entity upon subsequent compliance. When a Federal award is suspended, payment adjustments will be made in accordance with § 200.343.

(iv) A payment must not be made to a non-Federal entity for amounts that are withheld by the non-Federal entity from payment to contractors to assure satisfactory completion of work. A payment must be made when the non-Federal entity actually disburses the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(7) Standards governing the use of banks and other institutions as depositories of advance payments under Federal awards are as follows.

(i) The Federal awarding agency and pass-through entity must not require separate depository accounts for funds provided to a non-Federal entity or establish any eligibility requirements for depositories for funds provided to the non-Federal entity. However, the non-Federal entity must be able to account for funds received, obligated, and expended.

(ii) Advance payments of Federal funds must be deposited and maintained in insured accounts whenever possible.

(8) The non-Federal entity must maintain advance payments of Federal awards in interest-bearing accounts, unless the following apply:

(i) The non-Federal entity receives less than $250,000 in Federal awards per year.

(ii) The best reasonably available interest-bearing account would not be expected to earn interest in excess of $500 per year on Federal cash balances.

(iii) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(iv) A foreign government or banking system prohibits or precludes interest-bearing accounts.

(9) Interest earned amounts up to $500 per year may be retained by the non-Federal entity for administrative expense. Any additional interest earned on Federal advance payments deposited in interest-bearing accounts must be remitted annually to the Department of Health and Human Services Payment Management System (PMS) through an electronic medium using either Automated Clearing House (ACH) network or a Fedwire Funds Service payment.

(i) For returning interest on Federal awards paid through PMS, the refund should:

(A) Provide an explanation stating that the refund is for interest;

(B) List the PMS Payee Account Number(s) (PANs);

(C) List the Federal award number(s) for which the interest was earned; and

(D) Make returns payable to: Department of Health and Human Services.

(ii) For returning interest on Federal awards not paid through PMS, the refund should:

(A) Provide an explanation stating that the refund is for interest;

(B) Include the name of the awarding agency;

(C) List the Federal award number(s) for which the interest was earned; and

(D) Make returns payable to: Department of Health and Human Services.

(10) Funds, principal, and excess cash returns must be directed to the original Federal agency payment system. The non-Federal entity should review instructions from the original Federal agency payment system. Returns should include the following information:

(i) Payee Account Number (PAN), if the payment originated from PMS, or Agency information to indicate whom to credit the funding if the payment originated from ASAP, NSF, or another Federal agency payment system.

(ii) PMS document number and subaccount(s), if the payment originated from PMS, or relevant account numbers if the payment originated from another Federal agency payment system.

(iii) The reason for the return (*e.g.*, excess cash, funds not spent, interest, part interest part other, etc.)

(11) When returning funds or interest to PMS you must include the following as applicable:

(i) For ACH Returns:
Routing Number: 051036706
Account number: 303000
Bank Name and Location: Credit Gateway—ACH Receiver St. Paul, MN

(ii) For Fedwire Returns [1]:
Routing Number: 021030004
Account number: 75010501
Bank Name and Location: Federal Reserve Bank Treas NYC/Funds Transfer Division New York, NY

[1] Please note that the organization initiating payment is likely to incur a charge from their Financial Institution for this type of payment.

(iii) For International ACH Returns:
Beneficiary Account: Federal Reserve Bank of New York/ITS (FRBNY/ITS)
Bank: Citibank N.A. (New York)
Swift Code: CITIUS33
Account Number: 36838868
Bank Address: 388 Greenwich Street, New York, NY 10013 USA
Payment Details (Line 70): Agency Locator Code (ALC): 75010501
Name (abbreviated when possible) and ALC Agency POC

(iv) For recipients that do not have electronic remittance capability, please make check [2] payable to: ''The Department of Health and Human Services.''
Mail Check to Treasury approved lockbox:
HHS Program Support Center, P.O. Box 530231, Atlanta, GA 30353–0231

[2] Please allow 4–6 weeks for processing of a payment by check to be applied to the appropriate PMS account.

(v) Questions can be directed to PMS at 877–614–5533 or *PMSSupport@psc.hhs.gov.*

§ 200.306 Cost sharing or matching.

(a) Under Federal research proposals, voluntary committed cost sharing is not expected. It cannot be used as a factor during the merit review of applications or proposals, but may be considered if it is both in accordance with Federal awarding agency regulations and specified in a notice of funding opportunity. Criteria for considering voluntary committed cost sharing and any other program policy factors that may be used to determine who may receive a Federal award must be explicitly described in the notice of funding opportunity. See also §§ 200.414 and 200.204 and appendix I to this part.

(b) For all Federal awards, any shared costs or matching funds and all contributions, including cash and third-party in-kind contributions, must be accepted as part of the non-Federal entity's cost sharing or matching when such contributions meet all of the following criteria:

(1) Are verifiable from the non-Federal entity's records;

(2) Are not included as contributions for any other Federal award;

(3) Are necessary and reasonable for accomplishment of project or program objectives;

(4) Are allowable under subpart E of this part;

(5) Are not paid by the Federal Government under another Federal award, except where the Federal statute authorizing a program specifically provides that Federal funds made available for such program can be applied to matching or cost sharing requirements of other Federal programs;

(6) Are provided for in the approved budget when required by the Federal awarding agency; and

(7) Conform to other provisions of this part, as applicable.

(c) Unrecovered indirect costs, including indirect costs on cost sharing or matching may be included as part of cost sharing or matching only with the prior approval of the Federal awarding agency. Unrecovered indirect cost means the difference between the amount charged to the Federal award and the amount which could have been charged to the Federal award under the non-Federal entity's approved negotiated indirect cost rate.

(d) Values for non-Federal entity contributions of services and property must be established in accordance with the cost principles in subpart E of this part. If a Federal awarding agency authorizes the non-Federal entity to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching must be the lesser of paragraph (d)(1) or (2) of this section.

(1) The value of the remaining life of the property recorded in the non-Federal entity's accounting records at the time of donation.

(2) The current fair market value. However, when there is sufficient justification, the Federal awarding agency may approve the use of the current fair market value of the donated property, even if it exceeds the value described in paragraph (d)(1) of this section at the time of donation.

(e) Volunteer services furnished by third-party professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for third-party volunteer services must be consistent with those paid for similar work by the non-Federal entity. In those instances in which the required skills are not found in the non-Federal entity, rates must be consistent with those paid for similar work in the labor market in which the non-Federal entity competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, necessary, allocable, and otherwise allowable may be included in the valuation.

(f) When a third-party organization furnishes the services of an employee, these services must be valued at the employee's regular rate of pay plus an amount of fringe benefits that is reasonable, necessary, allocable, and otherwise allowable, and indirect costs at either the third-party organization's approved federally-negotiated indirect cost rate or, a rate in accordance with § 200.414(d) provided these services employ the same skill(s) for which the employee is normally paid. Where donated services are treated as indirect costs, indirect cost rates will separate the value of the donated services so that reimbursement for the donated services will not be made.

(g) Donated property from third parties may include such items as equipment, office supplies, laboratory supplies, or workshop and classroom supplies. Value assessed to donated property included in the cost sharing or matching share must not exceed the fair market value of the property at the time of the donation.

(h) The method used for determining cost sharing or matching for third-party-donated equipment, buildings and land for which title passes to the non-Federal entity may differ according to the purpose of the Federal award, if paragraph (h)(1) or (2) of this section applies.

(1) If the purpose of the Federal award is to assist the non-Federal entity in the acquisition of equipment, buildings or land, the aggregate value of the donated property may be claimed as cost sharing or matching.

(2) If the purpose of the Federal award is to support activities that require the use of equipment, buildings or land, normally only depreciation charges for equipment and buildings may be made. However, the fair market value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the Federal awarding agency has approved the charges. See also § 200.420.

(i) The value of donated property must be determined in accordance with the usual accounting policies of the non-Federal entity, with the following qualifications:

(1) The value of donated land and buildings must not exceed its fair market value at the time of donation to the non-Federal entity as established by an independent appraiser (*e.g.*, certified real property appraiser or General Services Administration representative) and certified by a responsible official of the non-Federal entity as required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (42 U.S.C. 4601–4655) (Uniform Act) except as provided in the implementing regulations at 49 CFR part 24, ''Uniform Relocation Assistance And Real Property

Acquisition For Federal And Federally-Assisted Programs''.

(2) The value of donated equipment must not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space must not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment must not exceed its fair rental value.

(j) For third-party in-kind contributions, the fair market value of goods and services must be documented and to the extent feasible supported by the same methods used internally by the non-Federal entity.

(k) For IHEs, see also OMB memorandum M–01–06, dated January 5, 2001, Clarification of OMB A–21 Treatment of Voluntary Uncommitted Cost Sharing and Tuition Remission Costs.

§ 200.307 Program income.

(a) *General.* Non-Federal entities are encouraged to earn income to defray program costs where appropriate.

(b) Cost of generating program income. If authorized by Federal regulations or the Federal award, costs incidental to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the Federal award.

(c) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a non-Federal entity are not program income unless the revenues are specifically identified in the Federal award or Federal awarding agency regulations as program income.

(d) *Property.* Proceeds from the sale of real property, equipment, or supplies are not program income; such proceeds will be handled in accordance with the requirements of the Property Standards §§ 200.311, 200.313, and 200.314, or as specifically identified in Federal statutes, regulations, or the terms and conditions of the Federal award.

(e) *Use of program income.* If the Federal awarding agency does not specify in its regulations or the terms and conditions of the Federal award, or give prior approval for how program income is to be used, paragraph (e)(1) of this section must apply. For Federal awards made to IHEs and nonprofit research institutions, if the Federal awarding agency does not specify in its regulations or the terms and conditions of the Federal award how program income is to be used, paragraph (e)(2) of this section must apply. In specifying alternatives to paragraphs (e)(1) and (2) of this section, the Federal awarding agency may distinguish between income earned by the recipient and income earned by subrecipients and between the sources, kinds, or amounts of income. When the Federal awarding agency authorizes the approaches in paragraphs (e)(2) and (3) of this section, program income in excess of any amounts specified must also be deducted from expenditures.

(1) *Deduction.* Ordinarily program income must be deducted from total allowable costs to determine the net allowable costs. Program income must be used for current costs unless the Federal awarding agency authorizes otherwise. Program income that the non-Federal entity did not anticipate at the time of the Federal award must be used to reduce the Federal award and non-Federal entity contributions rather than to increase the funds committed to the project.

(2) *Addition.* With prior approval of the Federal awarding agency (except for IHEs and nonprofit research institutions, as described in this paragraph (e)) program income may be added to the Federal award by the Federal agency and the non-Federal entity. The program income must be used for the purposes and under the conditions of the Federal award.

(3) *Cost sharing or matching.* With prior approval of the Federal awarding agency, program income may be used to meet the cost sharing or matching requirement of the Federal award. The amount of the Federal award remains the same.

(f) Income after the period of performance. There are no Federal requirements governing the disposition of income earned after the end of the period of performance for the Federal award, unless the Federal awarding agency regulations or the terms and conditions of the Federal award provide otherwise. The Federal awarding agency may negotiate agreements with recipients regarding appropriate uses of income earned after the period of performance as part of the grant closeout process. See also § 200.344.

(g) *License fees and royalties.* Unless the Federal statute, regulations, or terms and conditions for the Federal award provide otherwise, the non-Federal entity is not accountable to the Federal awarding agency with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions made under a Federal award to which 37 CFR part 401 is applicable.

§ 200.308 Revision of budget and program plans.

(a) The approved budget for the Federal award summarizes the financial aspects of the project or program as approved during the Federal award process. It may include either the Federal and non-Federal share (see definition for *Federal share* in § 200.1) or only the Federal share, depending upon Federal awarding agency requirements. The budget and program plans include considerations for performance and program evaluation purposes whenever required in accordance with the terms and conditions of the award.

(b) Recipients are required to report deviations from budget or project scope or objective, and request prior approvals from Federal awarding agencies for budget and program plan revisions, in accordance with this section.

(c) For non-construction Federal awards, recipients must request prior approvals from Federal awarding agencies for the following program or budget-related reasons:

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or the Federal award.

(3) The disengagement from the project for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The inclusion, unless waived by the Federal awarding agency, of costs that require prior approval in accordance with subpart E of this part as applicable.

(5) The transfer of funds budgeted for participant support costs to other categories of expense.

(6) Unless described in the application and funded in the approved Federal awards, the subawarding, transferring or contracting out of any work under a Federal award, including fixed amount subawards as described in § 200.333. This provision does not apply to the acquisition of supplies, material, equipment or general support services.

(7) Changes in the approved cost-sharing or matching provided by the non-Federal entity.

(8) The need arises for additional Federal funds to complete the project.

(d) No other prior approval requirements for specific items may be imposed unless an exception has been approved by OMB. See also §§ 200.102 and 200.407.

(e) Except for requirements listed in paragraphs (c)(1) through (8) of this section, the Federal awarding agency is

authorized, at its option, to waive other cost-related and administrative prior written approvals contained in subparts D and E of this part. Such waivers may include authorizing recipients to do any one or more of the following:

(1) Incur project costs 90 calendar days before the Federal awarding agency makes the Federal award. Expenses more than 90 calendar days pre-award require prior approval of the Federal awarding agency. All costs incurred before the Federal awarding agency makes the Federal award are at the recipient's risk (*i.e.,* the Federal awarding agency is not required to reimburse such costs if for any reason the recipient does not receive a Federal award or if the Federal award is less than anticipated and inadequate to cover such costs). See also § 200.458.

(2) Initiate a one-time extension of the period of performance by up to 12 months unless one or more of the conditions outlined in paragraphs (e)(2)(i) through (iii) of this section apply. For one-time extensions, the recipient must notify the Federal awarding agency in writing with the supporting reasons and revised period of performance at least 10 calendar days before the end of the period of performance specified in the Federal award. This one-time extension must not be exercised merely for the purpose of using unobligated balances. Extensions require explicit prior Federal awarding agency approval when:

(i) The terms and conditions of the Federal award prohibit the extension.

(ii) The extension requires additional Federal funds.

(iii) The extension involves any change in the approved objectives or scope of the project.

(3) Carry forward unobligated balances to subsequent budget periods.

(4) For Federal awards that support research, unless the Federal awarding agency provides otherwise in the Federal award or in the Federal awarding agency's regulations, the prior approval requirements described in this paragraph (e) are automatically waived (*i.e.,* recipients need not obtain such prior approvals) unless one of the conditions included in paragraph (e)(2) of this section applies.

(f) The Federal awarding agency may, at its option, restrict the transfer of funds among direct cost categories or programs, functions and activities for Federal awards in which the Federal share of the project exceeds the simplified acquisition threshold and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the Federal awarding agency. The Federal awarding agency cannot permit a transfer that would cause any Federal appropriation to be used for purposes other than those consistent with the appropriation.

(g) All other changes to non-construction budgets, except for the changes described in paragraph (c) of this section, do not require prior approval (see also § 200.407).

(h) For construction Federal awards, the recipient must request prior written approval promptly from the Federal awarding agency for budget revisions whenever paragraph (h)(1), (2), or (3) of this section applies:

(1) The revision results from changes in the scope or the objective of the project or program.

(2) The need arises for additional Federal funds to complete the project.

(3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with applicable OMB cost principles listed in subpart E.

(4) No other prior approval requirements for budget revisions may be imposed unless an exception has been approved by OMB.

(5) When a Federal awarding agency makes a Federal award that provides support for construction and non-construction work, the Federal awarding agency may require the recipient to obtain prior approval from the Federal awarding agency before making any fund or budget transfers between the two types of work supported.

(i) When requesting approval for budget revisions, the recipient must use the same format for budget information that was used in the application, unless the Federal awarding agency indicates a letter of request suffices.

(j) Within 30 calendar days from the date of receipt of the request for budget revisions, the Federal awarding agency must review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the Federal awarding agency must inform the recipient in writing of the date when the recipient may expect the decision.

§ 200.309 Modifications to Period of Performance.

If a Federal awarding agency or pass-through entity approves an extension, or if a recipient extends under § 200.308(e)(2), the Period of Performance will be amended to end at the completion of the extension. If a termination occurs, the Period of Performance will be amended to end upon the effective date of termination. If a renewal award is issued, a distinct Period of Performance will begin.

Property Standards

§ 200.310 Insurance coverage.

The non-Federal entity must, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired or improved with Federal funds as provided to property owned by the non-Federal entity. Federally-owned property need not be insured unless required by the terms and conditions of the Federal award.

§ 200.311 Real property.

(a) *Title.* Subject to the requirements and conditions set forth in this section, title to real property acquired or improved under a Federal award will vest upon acquisition in the non-Federal entity.

(b) *Use.* Except as otherwise provided by Federal statutes or by the Federal awarding agency, real property will be used for the originally authorized purpose as long as needed for that purpose, during which time the non-Federal entity must not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the non-Federal entity must obtain disposition instructions from the Federal awarding agency or pass-through entity. The instructions must provide for one of the following alternatives:

(1) Retain title after compensating the Federal awarding agency. The amount paid to the Federal awarding agency will be computed by applying the Federal awarding agency's percentage of participation in the cost of the original purchase (and costs of any improvements) to the fair market value of the property. However, in those situations where the non-Federal entity is disposing of real property acquired or improved with a Federal award and acquiring replacement real property under the same Federal award, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) Sell the property and compensate the Federal awarding agency. The amount due to the Federal awarding agency will be calculated by applying the Federal awarding agency's percentage of participation in the cost of the original purchase (and cost of any improvements) to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the Federal award has not been closed out, the net proceeds from sale may be offset against the original cost of the property. When the non-

Federal entity is directed to sell property, sales procedures must be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) Transfer title to the Federal awarding agency or to a third party designated/approved by the Federal awarding agency. The non-Federal entity is entitled to be paid an amount calculated by applying the non-Federal entity's percentage of participation in the purchase of the real property (and cost of any improvements) to the current fair market value of the property.

§ 200.312 Federally-owned and exempt property.

(a) Title to federally-owned property remains vested in the Federal Government. The non-Federal entity must submit annually an inventory listing of federally-owned property in its custody to the Federal awarding agency. Upon completion of the Federal award or when the property is no longer needed, the non-Federal entity must report the property to the Federal awarding agency for further Federal agency utilization.

(b) If the Federal awarding agency has no further need for the property, it must declare the property excess and report it for disposal to the appropriate Federal disposal authority, unless the Federal awarding agency has statutory authority to dispose of the property by alternative methods (*e.g.*, the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710 (i)) to donate research equipment to educational and nonprofit organizations in accordance with Executive Order 12999, ''Educational Technology: Ensuring Opportunity for All Children in the Next Century.''). The Federal awarding agency must issue appropriate instructions to the non-Federal entity.

(c) Exempt property means property acquired under a Federal award where the Federal awarding agency has chosen to vest title to the property to the non-Federal entity without further responsibility to the Federal Government, based upon the explicit terms and conditions of the Federal award. The Federal awarding agency may exercise this option when statutory authority exists. Absent statutory authority and specific terms and conditions of the Federal award, title to exempt property acquired under the Federal award remains with the Federal Government.

§ 200.313 Equipment.

See also § 200.439.

(a) *Title.* Subject to the requirements and conditions set forth in this section, title to equipment acquired under a Federal award will vest upon acquisition in the non-Federal entity. Unless a statute specifically authorizes the Federal agency to vest title in the non-Federal entity without further responsibility to the Federal Government, and the Federal agency elects to do so, the title must be a conditional title. Title must vest in the non-Federal entity subject to the following conditions:

(1) Use the equipment for the authorized purposes of the project during the period of performance, or until the property is no longer needed for the purposes of the project.

(2) Not encumber the property without approval of the Federal awarding agency or pass-through entity.

(3) Use and dispose of the property in accordance with paragraphs (b), (c), and (e) of this section.

(b) *General.* A state must use, manage and dispose of equipment acquired under a Federal award by the state in accordance with state laws and procedures. Other non-Federal entities must follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment must be used by the non-Federal entity in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by the Federal award, and the non-Federal entity must not encumber the property without prior approval of the Federal awarding agency. The Federal awarding agency may require the submission of the applicable common form for equipment. When no longer needed for the original program or project, the equipment may be used in other activities supported by the Federal awarding agency, in the following order of priority:

(i) Activities under a Federal award from the Federal awarding agency which funded the original program or project, then

(ii) Activities under Federal awards from other Federal awarding agencies. This includes consolidated equipment for information technology systems.

(2) During the time that equipment is used on the project or program for which it was acquired, the non-Federal entity must also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, provided that such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use must be given to other programs or projects supported by Federal awarding agency that financed the equipment and second preference must be given to programs or projects under Federal awards from other Federal awarding agencies. Use for non-federally-funded programs or projects is also permissible. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 200.307 to earn program income, the non-Federal entity must not use equipment acquired with the Federal award to provide services for a fee that is less than private companies charge for equivalent services unless specifically authorized by Federal statute for as long as the Federal Government retains an interest in the equipment.

(4) When acquiring replacement equipment, the non-Federal entity may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property.

(d) Management requirements. Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part under a Federal award, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of funding for the property (including the FAIN), who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the project costs for the Federal award under which the property was acquired, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft must be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the non-Federal entity is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a Federal award is no longer needed for the original project or program or for other activities currently or previously supported by a Federal awarding agency, except as otherwise provided in

Federal statutes, regulations, or Federal awarding agency disposition instructions, the non-Federal entity must request disposition instructions from the Federal awarding agency if required by the terms and conditions of the Federal award. Disposition of the equipment will be made as follows, in accordance with Federal awarding agency disposition instructions:

(1) Items of equipment with a current per unit fair market value of $5,000 or less may be retained, sold or otherwise disposed of with no further responsibility to the Federal awarding agency.

(2) Except as provided in § 200.312(b), or if the Federal awarding agency fails to provide requested disposition instructions within 120 days, items of equipment with a current per-unit fair market value in excess of $5,000 may be retained by the non-Federal entity or sold. The Federal awarding agency is entitled to an amount calculated by multiplying the current market value or proceeds from sale by the Federal awarding agency's percentage of participation in the cost of the original purchase. If the equipment is sold, the Federal awarding agency may permit the non-Federal entity to deduct and retain from the Federal share $500 or ten percent of the proceeds, whichever is less, for its selling and handling expenses.

(3) The non-Federal entity may transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the non-Federal entity must be entitled to compensation for its attributable percentage of the current fair market value of the property.

(4) In cases where a non-Federal entity fails to take appropriate disposition actions, the Federal awarding agency may direct the non-Federal entity to take disposition actions.

§ 200.314 Supplies.

See also § 200.453.

(a) Title to supplies will vest in the non-Federal entity upon acquisition. If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other Federal award, the non-Federal entity must retain the supplies for use on other activities or sell them, but must, in either case, compensate the Federal Government for its share. The amount of compensation must be computed in the same manner as for equipment. See § 200.313 (e)(2) for the calculation methodology.

(b) As long as the Federal Government retains an interest in the supplies, the non-Federal entity must not use supplies acquired under a Federal award to provide services to other organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute.

§ 200.315 Intangible property.

(a) Title to intangible property (see definition for *Intangible property* in § 200.1) acquired under a Federal award vests upon acquisition in the non-Federal entity. The non-Federal entity must use that property for the originally-authorized purpose, and must not encumber the property without approval of the Federal awarding agency. When no longer needed for the originally authorized purpose, disposition of the intangible property must occur in accordance with the provisions in § 200.313(e).

(b) The non-Federal entity may copyright any work that is subject to copyright and was developed, or for which ownership was acquired, under a Federal award. The Federal awarding agency reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(c) The non-Federal entity is subject to applicable regulations governing patents and inventions, including governmentwide regulations issued by the Department of Commerce at 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Awards, Contracts and Cooperative Agreements.''

(d) The Federal Government has the right to:

(1) Obtain, reproduce, publish, or otherwise use the data produced under a Federal award; and

(2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(e)(1) In response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under a Federal award that were used by the Federal Government in developing an agency action that has the force and effect of law, the Federal awarding agency must request, and the non-Federal entity must provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the Federal awarding agency obtains the research data solely in response to a FOIA request, the Federal awarding agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the Federal agency and the non-Federal entity. This fee is in addition to any fees the Federal awarding agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) Published research findings means when:

(i) Research findings are published in a peer-reviewed scientific or technical journal; or

(ii) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law. ''Used by the Federal Government in developing an agency action that has the force and effect of law'' is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(3) Research data means the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: Preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This ''recorded'' material excludes physical objects (*e.g.,* laboratory samples). Research data also do not include:

(i) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(ii) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

§ 200.316 Property trust relationship.

Real property, equipment, and intangible property, that are acquired or improved with a Federal award must be held in trust by the non-Federal entity as trustee for the beneficiaries of the project or program under which the property was acquired or improved. The Federal awarding agency may require the non-Federal entity to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with a Federal award and that use and disposition conditions apply to the property.

Procurement Standards

§ 200.317 Procurements by states.

When procuring property and services under a Federal award, a State must follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will comply with §§ 200.321, 200.322, and 200.323 and ensure that every purchase order or other contract includes any clauses required by § 200.327. All other non-Federal entities, including subrecipients of a State, must follow the procurement standards in §§ 200.318 through 200.327.

§ 200.318 General procurement standards.

(a) The non-Federal entity must have and use documented procurement procedures, consistent with State, local, and tribal laws and regulations and the standards of this section, for the acquisition of property or services required under a Federal award or subaward. The non-Federal entity's documented procurement procedures must conform to the procurement standards identified in §§ 200.317 through 200.327.

(b) Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(c)(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

(2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a State, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

(d) The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services. Competition requirements will be met with applied to documented procurement actions using strategic sourcing, shared services, and other similar procurement arrangements.

(f) The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(g) The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(h) The non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. See also § 200.214.

(i) The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to, the following: Rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(j)(1) The non-Federal entity may use a time-and-materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time-and-materials type contract means a contract whose cost to a non-Federal entity is the sum of:

(i) The actual cost of materials; and

(ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

(2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

(k) The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.

§ 200.319 Competition.

(a) All procurement transactions for the acquisition of property or services required under a Federal award must be conducted in a manner providing full and open competition consistent with the standards of this section and § 200.320.

(b) In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded

from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;

(2) Requiring unnecessary experience and excessive bonding;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive contracts to consultants that are on retainer contracts;

(5) Organizational conflicts of interest;

(6) Specifying only a ''brand name'' product instead of allowing ''an equal'' product to be offered and describing the performance or other relevant requirements of the procurement; and

(7) Any arbitrary action in the procurement process.

(c) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(d) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

(1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a ''brand name or equivalent'' description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and

(2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(e) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

(f) Noncompetitive procurements can only be awarded in accordance with § 200.320(c).

§ 200.320 Methods of procurement to be followed.

The non-Federal entity must have and use documented procurement procedures, consistent with the standards of this section and §§ 200.317, 200.318, and 200.319 for any of the following methods of procurement used for the acquisition of property or services required under a Federal award or sub-award.

(a) Informal procurement methods. When the value of the procurement for property or services under a Federal award does not exceed the *simplified acquisition threshold (SAT),* as defined in § 200.1, or a lower threshold established by a non-Federal entity, formal procurement methods are not required. The non-Federal entity may use informal procurement methods to expedite the completion of its transactions and minimize the associated administrative burden and cost. The informal methods used for procurement of property or services at or below the SAT include:

(1) Micro-purchases—(i) *Distribution.* The acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (See the definition of *micro-purchase* in § 200.1). To the maximum extent practicable, the non-Federal entity should distribute micro-purchases equitably among qualified suppliers.

(ii) *Micro-purchase awards.* Micro-purchases may be awarded without soliciting competitive price or rate quotations if the non-Federal entity considers the price to be reasonable based on research, experience, purchase history or other information and documents it files accordingly. Purchase cards can be used for micro-purchases if procedures are documented and approved by the non-Federal entity.

(iii) *Micro-purchase thresholds.* The non-Federal entity is responsible for determining and documenting an appropriate micro-purchase threshold based on internal controls, an evaluation of risk, and its documented procurement procedures. The micro-purchase threshold used by the non-Federal entity must be authorized or not prohibited under State, local, or tribal laws or regulations. Non-Federal entities may establish a threshold higher than the Federal threshold established in the Federal Acquisition Regulations (FAR) in accordance with paragraphs (a)(1)(iv) and (v) of this section.

(iv) Non-Federal entity increase to the micro-purchase threshold up to $50,000. Non-Federal entities may establish a threshold higher than the micro-purchase threshold identified in the FAR in accordance with the requirements of this section. The non-Federal entity may self-certify a threshold up to $50,000 on an annual basis and must maintain documentation to be made available to the Federal awarding agency and auditors in accordance with § 200.334. The self-certification must include a justification, clear identification of the threshold, and supporting documentation of any of the following:

(A) A qualification as a low-risk auditee, in accordance with the criteria in § 200.520 for the most recent audit;

(B) An annual internal institutional risk assessment to identify, mitigate, and manage financial risks; or,

(C) For public institutions, a higher threshold consistent with State law.

(v) *Non-Federal entity increase to the micro-purchase threshold over $50,000.* Micro-purchase thresholds higher than $50,000 must be approved by the cognizant agency for indirect costs. The non-federal entity must submit a request with the requirements included in paragraph (a)(1)(iv) of this section. The increased threshold is valid until there is a change in status in which the justification was approved.

(2) Small purchases—(i) *Small purchase procedures.* The acquisition of property or services, the aggregate dollar amount of which is higher than the micro-purchase threshold but does not exceed the simplified acquisition threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources as determined appropriate by the non-Federal entity.

(ii) *Simplified acquisition thresholds.* The non-Federal entity is responsible for determining an appropriate simplified acquisition threshold based on internal controls, an evaluation of risk and its documented procurement procedures which must not exceed the threshold established in the FAR. When applicable, a lower simplified

acquisition threshold used by the non-Federal entity must be authorized or not prohibited under State, local, or tribal laws or regulations.

(b) *Formal procurement methods.* When the value of the procurement for property or services under a Federal financial assistance award exceeds the SAT, or a lower threshold established by a non-Federal entity, formal procurement methods are required. Formal procurement methods require following documented procedures. Formal procurement methods also require public advertising unless a non-competitive procurement can be used in accordance with § 200.319 or paragraph (c) of this section. The following formal methods of procurement are used for procurement of property or services above the simplified acquisition threshold or a value below the simplified acquisition threshold the non-Federal entity determines to be appropriate:

(1) *Sealed bids.* A procurement method in which bids are publicly solicited and a firm fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bids method is the preferred method for procuring construction, if the conditions.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) Bids must be solicited from an adequate number of qualified sources, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publicly advertised;

(B) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

(C) All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly;

(D) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(2) *Proposals.* A procurement method in which either a fixed price or cost-reimbursement type contract is awarded. Proposals are generally used when conditions are not appropriate for the use of sealed bids. They are awarded in accordance with the following requirements:

(i) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Proposals must be solicited from an adequate number of qualified offerors. Any response to publicized requests for proposals must be considered to the maximum extent practical;

(ii) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and making selections;

(iii) Contracts must be awarded to the responsible offeror whose proposal is most advantageous to the non-Federal entity, with price and other factors considered; and

(iv) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby offeror's qualifications are evaluated and the most qualified offeror is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms that are a potential source to perform the proposed effort.

(c) *Noncompetitive procurement.* There are specific circumstances in which noncompetitive procurement can be used. Noncompetitive procurement can only be awarded if one or more of the following circumstances apply:

(1) The acquisition of property or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (see paragraph (a)(1) of this section);

(2) The item is available only from a single source;

(3) The public exigency or emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation;

(4) The Federal awarding agency or pass-through entity expressly authorizes a noncompetitive procurement in response to a written request from the non-Federal entity; or

(5) After solicitation of a number of sources, competition is determined inadequate.

§ 200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.

(a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

(b) Affirmative steps must include:

(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

(5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (b)(1) through (5) of this section.

§ 200.322 Domestic preferences for procurements.

(a) As appropriate and to the extent consistent with law, the non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this section must be included in all subawards including all contracts and purchase orders for work or products under this award.

(b) For purposes of this section:

(1) ''Produced in the United States'' means, for iron and steel products, that

all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

(2) ''Manufactured products'' means items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.

§ 200.323 Procurement of recovered materials.

A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired during the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

§ 200.324 Contract cost and price.

(a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under subpart E of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

§ 200.325 Federal awarding agency or pass-through entity review.

(a) The non-Federal entity must make available, upon request of the Federal awarding agency or pass-through entity, technical specifications on proposed procurements where the Federal awarding agency or pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the non-Federal entity desires to have the review accomplished after a solicitation has been developed, the Federal awarding agency or pass-through entity may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(b) The non-Federal entity must make available upon request, for the Federal awarding agency or pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:

(1) The non-Federal entity's procurement procedures or operation fails to comply with the procurement standards in this part;

(2) The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;

(3) The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a ''brand name'' product;

(4) The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.

(c) The non-Federal entity is exempt from the pre-procurement review in paragraph (b) of this section if the Federal awarding agency or pass-through entity determines that its procurement systems comply with the standards of this part.

(1) The non-Federal entity may request that its procurement system be reviewed by the Federal awarding agency or pass-through entity to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews must occur where there is continuous high-dollar funding, and third-party contracts are awarded on a regular basis;

(2) The non-Federal entity may self-certify its procurement system. Such self-certification must not limit the Federal awarding agency's right to survey the system. Under a self-certification procedure, the Federal awarding agency may rely on written assurances from the non-Federal entity that it is complying with these standards. The non-Federal entity must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review.

§ 200.326 Bonding requirements.

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-Federal entity provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

(a) A bid guarantee from each bidder equivalent to five percent of the bid price. The ''bid guarantee'' must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

(b) A performance bond on the part of the contractor for 100 percent of the contract price. A ''performance bond'' is one executed in connection with a contract to secure fulfillment of all the contractor's requirements under such contract.

(c) A payment bond on the part of the contractor for 100 percent of the contract price. A ''payment bond'' is one executed in connection with a contract to assure payment as required by law of

all persons supplying labor and material in the execution of the work provided for in the contract.

§ 200.327 Contract provisions.

The non-Federal entity's contracts must contain the applicable provisions described in appendix II to this part.

Performance and Financial Monitoring and Reporting

§ 200.328 Financial reporting.

Unless otherwise approved by OMB, the Federal awarding agency must solicit only the OMB-approved governmentwide data elements for collection of financial information (at time of publication the Federal Financial Report or such future, OMB-approved, governmentwide data elements available from the OMB-designated standards lead. This information must be collected with the frequency required by the terms and conditions of the Federal award, but no less frequently than annually nor more frequently than quarterly except in unusual circumstances, for example where more frequent reporting is necessary for the effective monitoring of the Federal award or could significantly affect program outcomes, and preferably in coordination with performance reporting. The Federal awarding agency must use OMB-approved common information collections, as applicable, when providing financial and performance reporting information.

§ 200.329 Monitoring and reporting program performance.

(a) *Monitoring by the non-Federal entity.* The non-Federal entity is responsible for oversight of the operations of the Federal award supported activities. The non-Federal entity must monitor its activities under Federal awards to assure compliance with applicable Federal requirements and performance expectations are being achieved. Monitoring by the non-Federal entity must cover each program, function or activity. See also § 200.332.

(b) Reporting program performance. The Federal awarding agency must use OMB-approved common information collections, as applicable, when providing financial and performance reporting information. As appropriate and in accordance with above mentioned information collections, the Federal awarding agency must require the recipient to relate financial data and accomplishments to performance goals and objectives of the Federal award. Also, in accordance with above mentioned common information collections, and when required by the terms and conditions of the Federal award, recipients must provide cost information to demonstrate cost effective practices (*e.g.*, through unit cost data). In some instances (*e.g.*, discretionary research awards), this will be limited to the requirement to submit technical performance reports (to be evaluated in accordance with Federal awarding agency policy). Reporting requirements must be clearly articulated such that, where appropriate, performance during the execution of the Federal award has a standard against which non-Federal entity performance can be measured.

(c) *Non-construction performance reports.* The Federal awarding agency must use standard, governmentwide OMB-approved data elements for collection of performance information including performance progress reports, Research Performance Progress Reports.

(1) The non-Federal entity must submit performance reports at the interval required by the Federal awarding agency or pass-through entity to best inform improvements in program outcomes and productivity. Intervals must be no less frequent than annually nor more frequent than quarterly except in unusual circumstances, for example where more frequent reporting is necessary for the effective monitoring of the Federal award or could significantly affect program outcomes. Reports submitted annually by the non-Federal entity and/or pass-through entity must be due no later than 90 calendar days after the reporting period. Reports submitted quarterly or semiannually must be due no later than 30 calendar days after the reporting period. Alternatively, the Federal awarding agency or pass-through entity may require annual reports before the anniversary dates of multiple year Federal awards. The final performance report submitted by the non-Federal entity and/or pass-through entity must be due no later than 120 calendar days after the period of performance end date. A subrecipient must submit to the pass-through entity, no later than 90 calendar days after the period of performance end date, all final performance reports as required by the terms and conditions of the Federal award. See also § 200.344. If a justified request is submitted by a non-Federal entity, the Federal agency may extend the due date for any performance report.

(2) As appropriate in accordance with above mentioned performance reporting, these reports will contain, for each Federal award, brief information on the following unless other data elements are approved by OMB in the agency information collection request:

(i) A comparison of actual accomplishments to the objectives of the Federal award established for the period. Where the accomplishments of the Federal award can be quantified, a computation of the cost (for example, related to units of accomplishment) may be required if that information will be useful. Where performance trend data and analysis would be informative to the Federal awarding agency program, the Federal awarding agency should include this as a performance reporting requirement.

(ii) The reasons why established goals were not met, if appropriate.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(d) Construction performance reports. For the most part, onsite technical inspections and certified percentage of completion data are relied on heavily by Federal awarding agencies and pass-through entities to monitor progress under Federal awards and subawards for construction. The Federal awarding agency may require additional performance reports only when considered necessary.

(e) *Significant developments.* Events may occur between the scheduled performance reporting dates that have significant impact upon the supported activity. In such cases, the non-Federal entity must inform the Federal awarding agency or pass-through entity as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the Federal award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more or different beneficial results than originally planned.

(f) *Site visits.* The Federal awarding agency may make site visits as warranted by program needs.

(g) Performance report requirement waiver. The Federal awarding agency may waive any performance report required by this part if not needed.

§ 200. 330 Reporting on real property.

The Federal awarding agency or pass-through entity must require a non-Federal entity to submit reports at least annually on the status of real property in which the Federal Government retains an interest, unless the Federal interest in the real property extends 15

years or longer. In those instances where the Federal interest attached is for a period of 15 years or more, the Federal awarding agency or pass-through entity, at its option, may require the non-Federal entity to report at various multi-year frequencies (*e.g.*, every two years or every three years, not to exceed a five-year reporting period; or a Federal awarding agency or pass-through entity may require annual reporting for the first three years of a Federal award and thereafter require reporting every five years).

Subrecipient Monitoring and Management

§ 200.331 Subrecipient and contractor determinations.

The non-Federal entity may concurrently receive Federal awards as a recipient, a subrecipient, and a contractor, depending on the substance of its agreements with Federal awarding agencies and pass-through entities. Therefore, a pass-through entity must make case-by-case determinations whether each agreement it makes for the disbursement of Federal program funds casts the party receiving the funds in the role of a subrecipient or a contractor. The Federal awarding agency may supply and require recipients to comply with additional guidance to support these determinations provided such guidance does not conflict with this section.

(a) *Subrecipients.* A subaward is for the purpose of carrying out a portion of a Federal award and creates a Federal assistance relationship with the subrecipient. See definition for *Subaward* in § 200.1 of this part. Characteristics which support the classification of the non-Federal entity as a subrecipient include when the non-Federal entity:

(1) Determines who is eligible to receive what Federal assistance;

(2) Has its performance measured in relation to whether objectives of a Federal program were met;

(3) Has responsibility for programmatic decision-making;

(4) Is responsible for adherence to applicable Federal program requirements specified in the Federal award; and

(5) In accordance with its agreement, uses the Federal funds to carry out a program for a public purpose specified in authorizing statute, as opposed to providing goods or services for the benefit of the pass-through entity.

(b) *Contractors.* A contract is for the purpose of obtaining goods and services for the non-Federal entity's own use and creates a procurement relationship with the contractor. See the definition of *contract* in § 200.1 of this part. Characteristics indicative of a procurement relationship between the non-Federal entity and a contractor are when the contractor:

(1) Provides the goods and services within normal business operations;

(2) Provides similar goods or services to many different purchasers;

(3) Normally operates in a competitive environment;

(4) Provides goods or services that are ancillary to the operation of the Federal program; and

(5) Is not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons.

(c) *Use of judgment in making determination.* In determining whether an agreement between a pass-through entity and another non-Federal entity casts the latter as a subrecipient or a contractor, the substance of the relationship is more important than the form of the agreement. All of the characteristics listed above may not be present in all cases, and the pass-through entity must use judgment in classifying each agreement as a subaward or a procurement contract.

§ 200.332 Requirements for pass-through entities.

All pass-through entities must:

(a) Ensure that every subaward is clearly identified to the subrecipient as a subaward and includes the following information at the time of the subaward and if any of these data elements change, include the changes in subsequent subaward modification. When some of this information is not available, the pass-through entity must provide the best information available to describe the Federal award and subaward. Required information includes:

(1) Federal award identification.

(i) Subrecipient name (which must match the name associated with its unique entity identifier);

(ii) Subrecipient's unique entity identifier;

(iii) Federal Award Identification Number (FAIN);

(iv) Federal Award Date (see the definition of *Federal award date* in § 200.1 of this part) of award to the recipient by the Federal agency;

(v) Subaward Period of Performance Start and End Date;

(vi) Subaward Budget Period Start and End Date;

(vii) Amount of Federal Funds Obligated by this action by the pass-through entity to the subrecipient;

(viii) Total Amount of Federal Funds Obligated to the subrecipient by the pass-through entity including the current financial obligation;

(ix) Total Amount of the Federal Award committed to the subrecipient by the pass-through entity;

(x) Federal award project description, as required to be responsive to the Federal Funding Accountability and Transparency Act (FFATA);

(xi) Name of Federal awarding agency, pass-through entity, and contact information for awarding official of the Pass-through entity;

(xii) Assistance Listings number and Title; the pass-through entity must identify the dollar amount made available under each Federal award and the Assistance Listings Number at time of disbursement;

(xiii) Identification of whether the award is R&D; and

(xiv) Indirect cost rate for the Federal award (including if the de minimis rate is charged) per § 200.414.

(2) All requirements imposed by the pass-through entity on the subrecipient so that the Federal award is used in accordance with Federal statutes, regulations and the terms and conditions of the Federal award;

(3) Any additional requirements that the pass-through entity imposes on the subrecipient in order for the pass-through entity to meet its own responsibility to the Federal awarding agency including identification of any required financial and performance reports;

(4)(i) An approved federally recognized indirect cost rate negotiated between the subrecipient and the Federal Government. If no approved rate exists, the pass-through entity must determine the appropriate rate in collaboration with the subrecipient, which is either:

(A) The negotiated indirect cost rate between the pass-through entity and the subrecipient; which can be based on a prior negotiated rate between a different PTE and the same subrecipient. If basing the rate on a previously negotiated rate, the pass-through entity is not required to collect information justifying this rate, but may elect to do so;

(B) The de minimis indirect cost rate.

(ii) The pass-through entity must not require use of a de minimis indirect cost rate if the subrecipient has a Federally approved rate. Subrecipients can elect to use the cost allocation method to account for indirect costs in accordance with § 200.405(d).

(5) A requirement that the subrecipient permit the pass-through entity and auditors to have access to the subrecipient's records and financial

statements as necessary for the pass-through entity to meet the requirements of this part; and

(6) Appropriate terms and conditions concerning closeout of the subaward.

(b) Evaluate each subrecipient's risk of noncompliance with Federal statutes, regulations, and the terms and conditions of the subaward for purposes of determining the appropriate subrecipient monitoring described in paragraphs (d) and (e) of this section, which may include consideration of such factors as:

(1) The subrecipient's prior experience with the same or similar subawards;

(2) The results of previous audits including whether or not the subrecipient receives a Single Audit in accordance with Subpart F of this part, and the extent to which the same or similar subaward has been audited as a major program;

(3) Whether the subrecipient has new personnel or new or substantially changed systems; and

(4) The extent and results of Federal awarding agency monitoring (*e.g.*, if the subrecipient also receives Federal awards directly from a Federal awarding agency).

(c) Consider imposing specific subaward conditions upon a subrecipient if appropriate as described in § 200.208.

(d) Monitor the activities of the subrecipient as necessary to ensure that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of the subaward; and that subaward performance goals are achieved. Pass-through entity monitoring of the subrecipient must include:

(1) Reviewing financial and performance reports required by the pass-through entity.

(2) Following-up and ensuring that the subrecipient takes timely and appropriate action on all deficiencies pertaining to the Federal award provided to the subrecipient from the pass-through entity detected through audits, on-site reviews, and written confirmation from the subrecipient, highlighting the status of actions planned or taken to address Single Audit findings related to the particular subaward.

(3) Issuing a management decision for applicable audit findings pertaining only to the Federal award provided to the subrecipient from the pass-through entity as required by § 200.521.

(4) The pass-through entity is responsible for resolving audit findings specifically related to the subaward and not responsible for resolving cross-cutting findings. If a subrecipient has a current Single Audit report posted in the Federal Audit Clearinghouse and has not otherwise been excluded from receipt of Federal funding (*e.g.*, has been debarred or suspended), the pass-through entity may rely on the subrecipient's cognizant audit agency or cognizant oversight agency to perform audit follow-up and make management decisions related to cross-cutting findings in accordance with section § 300.513(a)(3)(vii). Such reliance does not eliminate the responsibility of the pass-through entity to issue subawards that conform to agency and award-specific requirements, to manage risk through ongoing subaward monitoring, and to monitor the status of the findings that are specifically related to the subaward.

(e) Depending upon the pass-through entity's assessment of risk posed by the subrecipient (as described in paragraph (b) of this section), the following monitoring tools may be useful for the pass-through entity to ensure proper accountability and compliance with program requirements and achievement of performance goals:

(1) Providing subrecipients with training and technical assistance on program-related matters; and

(2) Performing on-site reviews of the subrecipient's program operations;

(3) Arranging for agreed-upon-procedures engagements as described in § 200.425.

(f) Verify that every subrecipient is audited as required by Subpart F of this part when it is expected that the subrecipient's Federal awards expended during the respective fiscal year equaled or exceeded the threshold set forth in § 200.501.

(g) Consider whether the results of the subrecipient's audits, on-site reviews, or other monitoring indicate conditions that necessitate adjustments to the pass-through entity's own records.

(h) Consider taking enforcement action against noncompliant subrecipients as described in § 200.339 of this part and in program regulations.

§ 200.333 Fixed amount subawards.

With prior written approval from the Federal awarding agency, a pass-through entity may provide subawards based on fixed amounts up to the Simplified Acquisition Threshold, provided that the subawards meet the requirements for fixed amount awards in § 200.201.

Record Retention and Access

§ 200.334 Retention requirements for records.

Financial records, supporting documents, statistical records, and all other non-Federal entity records pertinent to a Federal award must be retained for a period of three years from the date of submission of the final expenditure report or, for Federal awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, respectively, as reported to the Federal awarding agency or pass-through entity in the case of a subrecipient. Federal awarding agencies and pass-through entities must not impose any other record retention requirements upon non-Federal entities. The only exceptions are the following:

(a) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records must be retained until all litigation, claims, or audit findings involving the records have been resolved and final action taken.

(b) When the non-Federal entity is notified in writing by the Federal awarding agency, cognizant agency for audit, oversight agency for audit, cognizant agency for indirect costs, or pass-through entity to extend the retention period.

(c) Records for real property and equipment acquired with Federal funds must be retained for 3 years after final disposition.

(d) When records are transferred to or maintained by the Federal awarding agency or pass-through entity, the 3-year retention requirement is not applicable to the non-Federal entity.

(e) Records for program income transactions after the period of performance. In some cases recipients must report program income after the period of performance. Where there is such a requirement, the retention period for the records pertaining to the earning of the program income starts from the end of the non-Federal entity's fiscal year in which the program income is earned.

(f) Indirect cost rate proposals and cost allocations plans. This paragraph applies to the following types of documents and their supporting records: Indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) *If submitted for negotiation.* If the proposal, plan, or other computation is

required to be submitted to the Federal Government (or to the pass-through entity) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(2) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the pass-through entity) for negotiation purposes, then the 3-year retention period for the proposal, plan, or computation and its supporting records starts from the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

§ 200.335 Requests for transfer of records.

The Federal awarding agency must request transfer of certain records to its custody from the non-Federal entity when it determines that the records possess long-term retention value. However, in order to avoid duplicate recordkeeping, the Federal awarding agency may make arrangements for the non-Federal entity to retain any records that are continuously needed for joint use.

§ 200.336 Methods for collection, transmission, and storage of information.

The Federal awarding agency and the non-Federal entity should, whenever practicable, collect, transmit, and store Federal award-related information in open and machine-readable formats rather than in closed formats or on paper in accordance with applicable legislative requirements. A machine-readable format is a format in a standard computer language (not English text) that can be read automatically by a web browser or computer system. The Federal awarding agency or pass-through entity must always provide or accept paper versions of Federal award-related information to and from the non-Federal entity upon request. If paper copies are submitted, the Federal awarding agency or pass-through entity must not require more than an original and two copies. When original records are electronic and cannot be altered, there is no need to create and retain paper copies. When original records are paper, electronic versions may be substituted through the use of duplication or other forms of electronic media provided that they are subject to periodic quality control reviews, provide reasonable safeguards against alteration, and remain readable.

§ 200.337 Access to records.

(a) *Records of non-Federal entities.* The Federal awarding agency, Inspectors General, the Comptroller General of the United States, and the pass-through entity, or any of their authorized representatives, must have the right of access to any documents, papers, or other records of the non-Federal entity which are pertinent to the Federal award, in order to make audits, examinations, excerpts, and transcripts. The right also includes timely and reasonable access to the non-Federal entity's personnel for the purpose of interview and discussion related to such documents.

(b) Extraordinary and rare circumstances. Only under extraordinary and rare circumstances would such access include review of the true name of victims of a crime. Routine monitoring cannot be considered extraordinary and rare circumstances that would necessitate access to this information. When access to the true name of victims of a crime is necessary, appropriate steps to protect this sensitive information must be taken by both the non-Federal entity and the Federal awarding agency. Any such access, other than under a court order or subpoena pursuant to a bona fide confidential investigation, must be approved by the head of the Federal awarding agency or delegate.

(c) *Expiration of right of access.* The rights of access in this section are not limited to the required retention period but last as long as the records are retained. Federal awarding agencies and pass-through entities must not impose any other access requirements upon non-Federal entities.

§ 200.338 Restrictions on public access to records.

No Federal awarding agency may place restrictions on the non-Federal entity that limit public access to the records of the non-Federal entity pertinent to a Federal award, except for protected personally identifiable information (PII) or when the Federal awarding agency can demonstrate that such records will be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) or controlled unclassified information pursuant to Executive Order 13556 if the records had belonged to the Federal awarding agency. The Freedom of Information Act (5 U.S.C. 552) (FOIA) does not apply to those records that remain under a non-Federal entity's control except as required under § 200.315. Unless required by Federal, state, local, and tribal statute, non-Federal entities are not required to permit public access to their records. The non-Federal entity's records provided to a Federal agency generally will be subject to FOIA and applicable exemptions.

Remedies for Noncompliance

§ 200.339 Remedies for noncompliance.

If a non-Federal entity fails to comply with the U.S. Constitution, Federal statutes, regulations or the terms and conditions of a Federal award, the Federal awarding agency or pass-through entity may impose additional conditions, as described in § 200.208. If the Federal awarding agency or pass-through entity determines that noncompliance cannot be remedied by imposing additional conditions, the Federal awarding agency or pass-through entity may take one or more of the following actions, as appropriate in the circumstances:

(a) Temporarily withhold cash payments pending correction of the deficiency by the non-Federal entity or more severe enforcement action by the Federal awarding agency or pass-through entity.

(b) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(c) Wholly or partly suspend or terminate the Federal award.

(d) Initiate suspension or debarment proceedings as authorized under 2 CFR part 180 and Federal awarding agency regulations (or in the case of a pass-through entity, recommend such a proceeding be initiated by a Federal awarding agency).

(e) Withhold further Federal awards for the project or program.

(f) Take other remedies that may be legally available.

§ 200.340 Termination.

(a) The Federal award may be terminated in whole or in part as follows:

(1) By the Federal awarding agency or pass-through entity, if a non-Federal entity fails to comply with the terms and conditions of a Federal award;

(2) By the Federal awarding agency or pass-through entity, to the greatest extent authorized by law, if an award no longer effectuates the program goals or agency priorities;

(3) By the Federal awarding agency or pass-through entity with the consent of the non-Federal entity, in which case the two parties must agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated;

(4) By the non-Federal entity upon sending to the Federal awarding agency or pass-through entity written notification setting forth the reasons for

such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if the Federal awarding agency or pass-through entity determines in the case of partial termination that the reduced or modified portion of the Federal award or subaward will not accomplish the purposes for which the Federal award was made, the Federal awarding agency or pass-through entity may terminate the Federal award in its entirety; or

(5) By the Federal awarding agency or pass-through entity pursuant to termination provisions included in the Federal award.

(b) A Federal awarding agency should clearly and unambiguously specify termination provisions applicable to each Federal award, in applicable regulations or in the award, consistent with this section.

(c) When a Federal awarding agency terminates a Federal award prior to the end of the period of performance due to the non-Federal entity's material failure to comply with the Federal award terms and conditions, the Federal awarding agency must report the termination to the OMB-designated integrity and performance system accessible through SAM (currently FAPIIS).

(1) The information required under paragraph (c) of this section is not to be reported to designated integrity and performance system until the non-Federal entity either—

(i) Has exhausted its opportunities to object or challenge the decision, see § 200.342; or

(ii) Has not, within 30 calendar days after being notified of the termination, informed the Federal awarding agency that it intends to appeal the Federal awarding agency's decision to terminate.

(2) If a Federal awarding agency, after entering information into the designated integrity and performance system about a termination, subsequently:

(i) Learns that any of that information is erroneous, the Federal awarding agency must correct the information in the system within three business days;

(ii) Obtains an update to that information that could be helpful to other Federal awarding agencies, the Federal awarding agency is strongly encouraged to amend the information in the system to incorporate the update in a timely way.

(3) Federal awarding agencies, must not post any information that will be made publicly available in the non-public segment of designated integrity and performance system that is covered by a disclosure exemption under the Freedom of Information Act. If the non-Federal entity asserts within seven calendar days to the Federal awarding agency who posted the information, that some of the information made publicly available is covered by a disclosure exemption under the Freedom of Information Act, the Federal awarding agency who posted the information must remove the posting within seven calendar days of receiving the assertion. Prior to reposting the releasable information, the Federal agency must resolve the issue in accordance with the agency's Freedom of Information Act procedures.

(d) When a Federal award is terminated or partially terminated, both the Federal awarding agency or pass-through entity and the non-Federal entity remain responsible for compliance with the requirements in §§ 200.344 and 200.345.

§ 200.341 Notification of termination requirement.

(a) The Federal agency or pass-through entity must provide to the non-Federal entity a notice of termination.

(b) If the Federal award is terminated for the non-Federal entity's material failure to comply with the U.S. Constitution, Federal statutes, regulations, or terms and conditions of the Federal award, the notification must state that—

(1) The termination decision will be reported to the OMB-designated integrity and performance system accessible through SAM (currently FAPIIS);

(2) The information will be available in the OMB-designated integrity and performance system for a period of five years from the date of the termination, then archived;

(3) Federal awarding agencies that consider making a Federal award to the non-Federal entity during that five year period must consider that information in judging whether the non-Federal entity is qualified to receive the Federal award, when the Federal share of the Federal award is expected to exceed the simplified acquisition threshold over the period of performance;

(4) The non-Federal entity may comment on any information the OMB-designated integrity and performance system contains about the non-Federal entity for future consideration by Federal awarding agencies. The non-Federal entity may submit comments to the awardee integrity and performance portal accessible through SAM (currently (CPARS).

(5) Federal awarding agencies will consider non-Federal entity comments when determining whether the non-Federal entity is qualified for a future Federal award.

(c) Upon termination of a Federal award, the Federal awarding agency must provide the information required under FFATA to the Federal website established to fulfill the requirements of FFATA, and update or notify any other relevant governmentwide systems or entities of any indications of poor performance as required by 41 U.S.C. 417b and 31 U.S.C. 3321 and implementing guidance at 2 CFR part 77 (forthcoming at time of publication). See also the requirements for Suspension and Debarment at 2 CFR part 180.

§ 200.342 Opportunities to object, hearings, and appeals.

Upon taking any remedy for non-compliance, the Federal awarding agency must provide the non-Federal entity an opportunity to object and provide information and documentation challenging the suspension or termination action, in accordance with written processes and procedures published by the Federal awarding agency. The Federal awarding agency or pass-through entity must comply with any requirements for hearings, appeals or other administrative proceedings to which the non-Federal entity is entitled under any statute or regulation applicable to the action involved.

§ 200.343 Effects of suspension and termination.

Costs to the non-Federal entity resulting from financial obligations incurred by the non-Federal entity during a suspension or after termination of a Federal award or subaward are not allowable unless the Federal awarding agency or pass-through entity expressly authorizes them in the notice of suspension or termination or subsequently. However, costs during suspension or after termination are allowable if:

(a) The costs result from financial obligations which were properly incurred by the non-Federal entity before the effective date of suspension or termination, are not in anticipation of it; and

(b) The costs would be allowable if the Federal award was not suspended or expired normally at the end of the period of performance in which the termination takes effect.

Closeout

§ 200.344 Closeout.

The Federal awarding agency or pass-through entity will close out the Federal award when it determines that all applicable administrative actions and all required work of the Federal award have been completed by the non-Federal entity. If the non-Federal entity fails to

complete the requirements, the Federal awarding agency or pass-through entity will proceed to close out the Federal award with the information available. This section specifies the actions the non-Federal entity and Federal awarding agency or pass-through entity must take to complete this process at the end of the period of performance.

(a) The recipient must submit, no later than 120 calendar days after the end date of the period of performance, all financial, performance, and other reports as required by the terms and conditions of the Federal award. A subrecipient must submit to the pass-through entity, no later than 90 calendar days (or an earlier date as agreed upon by the pass-through entity and subrecipient) after the end date of the period of performance, all financial, performance, and other reports as required by the terms and conditions of the Federal award. The Federal awarding agency or pass-through entity may approve extensions when requested and justified by the non-Federal entity, as applicable.

(b) Unless the Federal awarding agency or pass-through entity authorizes an extension, a non-Federal entity must liquidate all financial obligations incurred under the Federal award no later than 120 calendar days after the end date of the period of performance as specified in the terms and conditions of the Federal award.

(c) The Federal awarding agency or pass-through entity must make prompt payments to the non-Federal entity for costs meeting the requirements in Subpart E of this part under the Federal award being closed out.

(d) The non-Federal entity must promptly refund any balances of unobligated cash that the Federal awarding agency or pass-through entity paid in advance or paid and that are not authorized to be retained by the non-Federal entity for use in other projects. See OMB Circular A–129 and see § 200.346, for requirements regarding unreturned amounts that become delinquent debts.

(e) Consistent with the terms and conditions of the Federal award, the Federal awarding agency or pass-through entity must make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The non-Federal entity must account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§ 200.310 through 200.316 and 200.330.

(g) When a recipient or subrecipient completes all closeout requirements, the Federal awarding agency or pass-through entity must promptly complete all closeout actions for Federal awards. The Federal awarding agency must make every effort to complete closeout actions no later than one year after the end of the period of performance unless otherwise directed by authorizing statutes. Closeout actions include Federal awarding agency actions in the grants management and payment systems.

(h) If the non-Federal entity does not submit all reports in accordance with this section and the terms and conditions of the Federal Award, the Federal awarding agency must proceed to close out with the information available within one year of the period of performance end date.

(i) If the non-Federal entity does not submit all reports in accordance with this section within one year of the period of performance end date, the Federal awarding agency must report the non-Federal entity's material failure to comply with the terms and conditions of the award with the OMB-designated integrity and performance system (currently FAPIIS). Federal awarding agencies may also pursue other enforcement actions per § 200.339.

Post-Closeout Adjustments and Continuing Responsibilities

§ 200.345 Post-closeout adjustments and continuing responsibilities.

(a) The closeout of a Federal award does not affect any of the following:

(1) The right of the Federal awarding agency or pass-through entity to disallow costs and recover funds on the basis of a later audit or other review. The Federal awarding agency or pass-through entity must make any cost disallowance determination and notify the non-Federal entity within the record retention period.

(2) The requirement for the non-Federal entity to return any funds due as a result of later refunds, corrections, or other transactions including final indirect cost rate adjustments.

(3) The ability of the Federal awarding agency to make financial adjustments to a previously closed award such as resolving indirect cost payments and making final payments.

(4) Audit requirements in subpart F of this part.

(5) Property management and disposition requirements in §§ 200.310 through 200.316 of this subpart.

(6) Records retention as required in §§ 200.334 through 200.337 of this subpart.

(b) After closeout of the Federal award, a relationship created under the Federal award may be modified or ended in whole or in part with the consent of the Federal awarding agency or pass-through entity and the non-Federal entity, provided the responsibilities of the non-Federal entity referred to in paragraph (a) of this section, including those for property management as applicable, are considered and provisions made for continuing responsibilities of the non-Federal entity, as appropriate.

Collection of Amounts Due

§ 200.346 Collection of amounts due.

(a) Any funds paid to the non-Federal entity in excess of the amount to which the non-Federal entity is finally determined to be entitled under the terms of the Federal award constitute a debt to the Federal Government. If not paid within 90 calendar days after demand, the Federal awarding agency may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursements;

(2) Withholding advance payments otherwise due to the non-Federal entity; or

(3) Other action permitted by Federal statute.

(b) Except where otherwise provided by statutes or regulations, the Federal awarding agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (31 CFR parts 900 through 999). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

Subpart E—Cost Principles

- 46. Amend § 200.400 by revising paragraph (e) and (g) to read as follows:

§ 200.400 Policy guide.

* * * * *

(e) In reviewing, negotiating and approving cost allocation plans or indirect cost proposals, the cognizant agency for indirect costs should generally assure that the non-Federal entity is applying these cost accounting principles on a consistent basis during their review and negotiation of indirect cost proposals. Where wide variations exist in the treatment of a given cost item by the non-Federal entity, the reasonableness and equity of such treatments should be fully considered. See the definition of *indirect (facilities & administrative (F&A)) costs* in § 200.1 of this part.

* * * * *

(g) The non-Federal entity may not earn or keep any profit resulting from Federal financial assistance, unless

explicitly authorized by the terms and conditions of the Federal award. See also § 200.307.

- 47. Amend § 200.401 by revising paragraphs (a)(3) and (4), (b), and (c) to read as follows:

§ 200.401 Application.

(a) * * *

(3) Fixed amount awards. See also § 200.1 Definitions and 200.201.

(4) Federal awards to hospitals (see appendix IX to this part).

* * * * *

(b) *Federal contract.* Where a Federal contract awarded to a non-Federal entity is subject to the Cost Accounting Standards (CAS), it incorporates the applicable CAS clauses, Standards, and CAS administration requirements per the 48 CFR Chapter 99 and 48 CFR part 30 (FAR Part 30). CAS applies directly to the CAS-covered contract and the Cost Accounting Standards at 48 CFR parts 9904 or 9905 takes precedence over the cost principles in this subpart E with respect to the allocation of costs. When a contract with a non-Federal entity is subject to full CAS coverage, the allowability of certain costs under the cost principles will be affected by the allocation provisions of the Cost Accounting Standards (*e.g.*, CAS 414—48 CFR 9904.414, Cost of Money as an Element of the Cost of Facilities Capital, and CAS 417—48 CFR 9904.417, Cost of Money as an Element of the Cost of Capital Assets Under Construction), apply rather the allowability provisions of § 200.449. In complying with those requirements, the non-Federal entity's application of cost accounting practices for estimating, accumulating, and reporting costs for other Federal awards and other cost objectives under the CAS-covered contract still must be consistent with its cost accounting practices for the CAS-covered contracts. In all cases, only one set of accounting records needs to be maintained for the allocation of costs by the non-Federal entity.

(c) *Exemptions.* Some nonprofit organizations, because of their size and nature of operations, can be considered to be similar to for-profit entities for purpose of applicability of cost principles. Such nonprofit organizations must operate under Federal cost principles applicable to for-profit entities located at 48 CFR 31.2. A listing of these organizations is contained in appendix VIII to this part. Other organizations, as approved by the cognizant agency for indirect costs, may be added from time to time.

- 48. Amend § 200.403 by revising paragraphs (f) and (g) and adding paragraph (h) to read as follows:

§ 200.403 Factors affecting allowability of costs.

* * * * *

(f) Not be included as a cost or used to meet cost sharing or matching requirements of any other federally-financed program in either the current or a prior period. See also § 200.306(b).

(g) Be adequately documented. See also §§ 200.300 through 200.309 of this part.

(h) Cost must be incurred during the approved budget period. The Federal awarding agency is authorized, at its discretion, to waive prior written approvals to carry forward unobligated balances to subsequent budget periods pursuant to § 200.308(e)(3).

- 49. Amend § 200.405 by revising paragraph (d) to read as follows:

§ 200.405 Allocable costs.

* * * * *

(d) Direct cost allocation principles: If a cost benefits two or more projects or activities in proportions that can be determined without undue effort or cost, the cost must be allocated to the projects based on the proportional benefit. If a cost benefits two or more projects or activities in proportions that cannot be determined because of the interrelationship of the work involved, then, notwithstanding paragraph (c) of this section, the costs may be allocated or transferred to benefitted projects on any reasonable documented basis. Where the purchase of equipment or other capital asset is specifically authorized under a Federal award, the costs are assignable to the Federal award regardless of the use that may be made of the equipment or other capital asset involved when no longer needed for the purpose for which it was originally required. See also §§ 200.310 through 200.316 and 200.439.

* * * * *

- 50. Amend § 200.406 by revising paragraph (b) to read as follows:

§ 200.406 Applicable credits.

* * * * *

(b) In some instances, the amounts received from the Federal Government to finance activities or service operations of the non-Federal entity should be treated as applicable credits. Specifically, the concept of netting such credit items (including any amounts used to meet cost sharing or matching requirements) must be recognized in determining the rates or amounts to be charged to the Federal award. (See §§ 200.436 and 200.468, for areas of potential application in the matter of Federal financing of activities.)

- 51. Amend § 200.407 by revising paragraphs (g) and (y) to read as follows:

§ 200.407 Prior written approval (prior approval).

* * * * *

(g) § 200.333 Fixed amount subawards;

* * * * *

(y) § 200.475 Travel costs.

- 52. Revise § 200.409 to read as follows:

§ 200.409 Special considerations.

In addition to the basic considerations regarding the allowability of costs highlighted in this subtitle, other subtitles in this part describe special considerations and requirements applicable to states, local governments, Indian tribes, and IHEs. In addition, certain provisions among the items of cost in this subpart are only applicable to certain types of non-Federal entities, as specified in the following sections:

(a) Direct and Indirect (F&A) Costs (§§ 200.412–200.415) of this subpart;

(b) Special Considerations for States, Local Governments and Indian Tribes (§§ 200.416 and 200.417) of this subpart; and

(c) Special Considerations for Institutions of Higher Education (§§ 200.418 and 200.419) of this subpart.

- 53. Revise § 200.410 to read as follows:

§ 200.410 Collection of unallowable costs.

Payments made for costs determined to be unallowable by either the Federal awarding agency, cognizant agency for indirect costs, or pass-through entity, either as direct or indirect costs, must be refunded (including interest) to the Federal Government in accordance with instructions from the Federal agency that determined the costs are unallowable unless Federal statute or regulation directs otherwise. See also §§ 200.300 through 200.309 in subpart D of this part.

- 54. Amend § 200.413 by revising paragraphs (a), (b), and (f) to read as follows:

§ 200.413 Direct costs.

(a) *General.* Direct costs are those costs that can be identified specifically with a particular final cost objective, such as a Federal award, or other internally or externally funded activity, or that can be directly assigned to such activities relatively easily with a high degree of accuracy. Costs incurred for the same purpose in like circumstances must be treated consistently as either

direct or indirect (F&A) costs. See also § 200.405.

(b) *Application to Federal awards.* Identification with the Federal award rather than the nature of the goods and services involved is the determining factor in distinguishing direct from indirect (F&A) costs of Federal awards. Typical costs charged directly to a Federal award are the compensation of employees who work on that award, their related fringe benefit costs, the costs of materials and other items of expense incurred for the Federal award. If directly related to a specific award, certain costs that otherwise would be treated as indirect costs may also be considered direct costs. Examples include extraordinary utility consumption, the cost of materials supplied from stock or services rendered by specialized facilities, program evaluation costs, or other institutional service operations.

* * * * *

(f) For nonprofit organizations, the costs of activities performed by the non-Federal entity primarily as a service to members, clients, or the general public when significant and necessary to the non-Federal entity's mission must be treated as direct costs whether or not allowable, and be allocated an equitable share of indirect (F&A) costs. Some examples of these types of activities include:

(1) Maintenance of membership rolls, subscriptions, publications, and related functions. See also § 200.454.

(2) Providing services and information to members, legislative or administrative bodies, or the public. See also §§ 200.454 and 200.450.

(3) Promotion, lobbying, and other forms of public relations. See also §§ 200.421 and 200.450.

(4) Conferences except those held to conduct the general administration of the non-Federal entity. See also § 200.432.

(5) Maintenance, protection, and investment of special funds not used in operation of the non-Federal entity. See also § 200.442.

(6) Administration of group benefits on behalf of members or clients, including life and hospital insurance, annuity or retirement plans, and financial aid. See also § 200.431.

- 55. Amend § 200.414 by revising paragraphs (a), (c) introductory text, (c)(3) and (4), (d), (f), and (g) and adding paragraph (h) to read as follows:

§ 200.414 Indirect (F&A) costs.

(a) *Facilities and administration classification.* For major Institutions of Higher Education (IHE) and major nonprofit organizations, indirect (F&A) costs must be classified within two broad categories: ''Facilities'' and ''Administration.'' ''Facilities'' is defined as depreciation on buildings, equipment and capital improvement, interest on debt associated with certain buildings, equipment and capital improvements, and operations and maintenance expenses. ''Administration'' is defined as general administration and general expenses such as the director's office, accounting, personnel and all other types of expenditures not listed specifically under one of the subcategories of ''Facilities'' (including cross allocations from other pools, where applicable). For nonprofit organizations, library expenses are included in the ''Administration'' category; for IHEs, they are included in the ''Facilities'' category. Major IHEs are defined as those required to use the Standard Format for Submission as noted in appendix III to this part, and Rate Determination for Institutions of Higher Education paragraph C. 11. Major nonprofit organizations are those which receive more than $10 million dollars in direct Federal funding.

* * * * *

(c) *Federal Agency Acceptance of Negotiated Indirect Cost Rates.* (See also § 200.306.)

* * * * *

(3) The Federal awarding agency must implement, and make publicly available, the policies, procedures and general decision-making criteria that their programs will follow to seek and justify deviations from negotiated rates.

(4) As required under § 200.204, the Federal awarding agency must include in the notice of funding opportunity the policies relating to indirect cost rate reimbursement, matching, or cost share as approved under paragraph (e)(1) of this section. As appropriate, the Federal agency should incorporate discussion of these policies into Federal awarding agency outreach activities with non-Federal entities prior to the posting of a notice of funding opportunity.

(d) Pass-through entities are subject to the requirements in § 200.332(a)(4).

* * * * *

(f) In addition to the procedures outlined in the appendices in paragraph (e) of this section, any non-Federal entity that does not have a current negotiated (including provisional) rate, except for those non-Federal entities described in appendix VII to this part, paragraph D.1.b, may elect to charge a de minimis rate of 10% of modified total direct costs (MTDC) which may be used indefinitely. No documentation is required to justify the 10% de minimis indirect cost rate. As described in § 200.403, costs must be consistently charged as either indirect or direct costs, but may not be double charged or inconsistently charged as both. If chosen, this methodology once elected must be used consistently for all Federal awards until such time as a non-Federal entity chooses to negotiate for a rate, which the non-Federal entity may apply to do at any time.

(g) Any non-Federal entity that has a current federally-negotiated indirect cost rate may apply for a one-time extension of the rates in that agreement for a period of up to four years. This extension will be subject to the review and approval of the cognizant agency for indirect costs. If an extension is granted the non-Federal entity may not request a rate review until the extension period ends. At the end of the 4-year extension, the non-Federal entity must re-apply to negotiate a rate. Subsequent one-time extensions (up to four years) are permitted if a renegotiation is completed between each extension request.

(h) The federally negotiated indirect rate, distribution base, and rate type for a non-Federal entity (except for the Indian tribes or tribal organizations, as defined in the Indian Self Determination, Education and Assistance Act, 25 U.S.C. 450b(1)) must be available publicly on an OMB-designated Federal website.

- 56. Amend § 200.415 by revising paragraphs (b)(1) and (2), (c), and (d) to read as follows:

§ 200.415 Required certifications.

* * * * *

(b) * * *

(1) A proposal to establish a cost allocation plan or an indirect (F&A) cost rate, whether submitted to a Federal cognizant agency for indirect costs or maintained on file by the non-Federal entity, must be certified by the non-Federal entity using the Certificate of Cost Allocation Plan or Certificate of Indirect Costs as set forth in appendices III through VII, and IX of this part. The certificate must be signed on behalf of the non-Federal entity by an individual at a level no lower than vice president or chief financial officer of the non-Federal entity that submits the proposal.

(2) Unless the non-Federal entity has elected the option under § 200.414(f), the Federal Government may either disallow all indirect (F&A) costs or unilaterally establish such a plan or rate when the non-Federal entity fails to submit a certified proposal for establishing such a plan or rate in accordance with the requirements. Such

a plan or rate may be based upon audited historical data or such other data that have been furnished to the cognizant agency for indirect costs and for which it can be demonstrated that all unallowable costs have been excluded. When a cost allocation plan or indirect cost rate is unilaterally established by the Federal Government because the non-Federal entity failed to submit a certified proposal, the plan or rate established will be set to ensure that potentially unallowable costs will not be reimbursed.

(c) Certifications by nonprofit organizations as appropriate that they did not meet the definition of a major nonprofit organization as defined in § 200.414(a).

(d) See also § 200.450 for another required certification.

- 57. Revise § 200.417 to read as follows:

§ 200.417 Interagency service.

The cost of services provided by one agency to another within the governmental unit may include allowable direct costs of the service plus a pro-rated share of indirect costs. A standard indirect cost allowance equal to ten percent of the direct salary and wage cost of providing the service (excluding overtime, shift premiums, and fringe benefits) may be used in lieu of determining the actual indirect costs of the service. These services do not include centralized services included in central service cost allocation plans as described in Appendix V to Part 200.

- 58. Amend § 200.418 by revising paragraph (a) to read as follows:

§ 200.418 Costs incurred by states and local governments.

* * * * *

(a) The costs meet the requirements of § 200.402–411 of this subpart;

* * * * *

- 59. Amend § 200.419 by revising paragraphs (a), (b) introductory text, and (b)(1) and (2) to read as follows:

§ 200.419 Cost accounting standards and disclosure statement.

(a) An IHE that receive an aggregate total $50 million or more in Federal awards and instruments subject to this subpart (as specified in § 200.101) in its most recently completed fiscal year must comply with the Cost Accounting Standards Board's cost accounting standards located at 48 CFR 9905.501, 9905.502, 9905.505, and 9905.506. CAS-covered contracts and subcontracts awarded to the IHEs are subject to the broader range of CAS requirements at 48 CFR 9900 through 9999 and 48 CFR part 30 (FAR Part 30).

(b) *Disclosure statement.* An IHE that receives an aggregate total $50 million or more in Federal awards and instruments subject to this subpart (as specified in § 200.101) during its most recently completed fiscal year must disclose their cost accounting practices by filing a Disclosure Statement (DS–2), which is reproduced in Appendix III to Part 200. With the approval of the cognizant agency for indirect costs, an IHE may meet the DS–2 submission by submitting the DS–2 for each business unit that received $50 million or more in Federal awards and instruments.

(1) The DS–2 must be submitted to the cognizant agency for indirect costs with a copy to the IHE's cognizant agency for audit. The initial DS–2 and revisions to the DS–2 must be submitted in coordination with the IHE's indirect (F&A) rate proposal, unless an earlier submission is requested by the cognizant agency for indirect costs. IHEs with CAS-covered contracts or subcontracts meeting the dollar threshold in 48 CFR 9903.202–1(f) must submit their initial DS–2 or revisions no later than prior to the award of a CAS-covered contract or subcontract.

(2) An IHE must maintain an accurate DS–2 and comply with disclosed cost accounting practices. An IHE must file amendments to the DS–2 to the cognizant agency for indirect costs in advance of a disclosed practice being changed to comply with a new or modified standard, or when a practice is changed for other reasons. An IHE may proceed with implementing the change after it has notified the Federal cognizant agency for indirect costs. If the change represents a variation from 2 CFR part 200, the change may require approval by the Federal cognizant agency for indirect costs, in accordance with § 200.102(b). Amendments of a DS–2 may be submitted at any time. Resubmission of a complete, updated DS–2 is discouraged except when there are extensive changes to disclosed practices.

* * * * *

- 60. Revise § 200.420 to read as follows:

§ 200.420 Considerations for selected items of cost.

This section provides principles to be applied in establishing the allowability of certain items involved in determining cost, in addition to the requirements of Subtitle II of this subpart. These principles apply whether or not a particular item of cost is properly treated as direct cost or indirect (F&A) cost. Failure to mention a particular item of cost is not intended to imply that it is either allowable or unallowable; rather, determination as to allowability in each case should be based on the treatment provided for similar or related items of cost, and based on the principles described in §§ 200.402 through 200.411. In case of a discrepancy between the provisions of a specific Federal award and the provisions below, the Federal award governs. Criteria outlined in § 200.403 must be applied in determining allowability. See also § 200.102.

- 61. Amend § 200.421 by revising paragraphs (b)(1) and (e)(2) to read as follows:

§ 200.421 Advertising and public relations.

* * * * *

(b) * * *

(1) The recruitment of personnel required by the non-Federal entity for performance of a Federal award (See also § 200.463);

* * * * *

(e) * * *

(2) Costs of meetings, conventions, convocations, or other events related to other activities of the entity (see also § 200.432), including:

* * * * *

- 62. Revise § 200.422 to read as follows:

§ 200.422 Advisory councils.

Costs incurred by advisory councils or committees are unallowable unless authorized by statute, the Federal awarding agency or as an indirect cost where allocable to Federal awards. See § 200.444, applicable to States, local governments, and Indian tribes.

- 63. Amend § 200.425 by revising paragraphs (a)(1) and (2) and (c) introductory text to read as follows:

§ 200.425 Audit services.

* * * * *

(a) * * *

(1) Any costs when audits required by the Single Audit Act and subpart F of this part have not been conducted or have been conducted but not in accordance therewith; and

(2) Any costs of auditing a non-Federal entity that is exempted from having an audit conducted under the Single Audit Act and subpart F of this part because its expenditures under Federal awards are less than $750,000 during the non-Federal entity's fiscal year.

* * * * *

(c) Pass-through entities may charge Federal awards for the cost of agreed-upon-procedures engagements to monitor subrecipients (in accordance with subpart D, §§ 200.331–333) who are exempted from the requirements of

the Single Audit Act and subpart F of this part. This cost is allowable only if the agreed-upon-procedures engagements are:
* * * * *

- 64. Revise § 200.426 to read as follows:

§ 200.426 Bad debts.

Bad debts (debts which have been determined to be uncollectable), including losses (whether actual or estimated) arising from uncollectable accounts and other claims, are unallowable. Related collection costs, and related legal costs, arising from such debts after they have been determined to be uncollectable are also unallowable. See also § 200.428.

- 65. Revise § 200.428 to read as follows:

§ 200.428 Collections of improper payments.

The costs incurred by a non-Federal entity to recover improper payments are allowable as either direct or indirect costs, as appropriate. Amounts collected may be used by the non-Federal entity in accordance with cash management standards set forth in § 200.305.

- 66. Revise § 200.429 to read as follows:

§ 200.429 Commencement and convocation costs.

For IHEs, costs incurred for commencements and convocations are unallowable, except as provided for in (B)(9) Student Administration and Services, in appendix III to this part, as activity costs.

- 67. Amend § 200.430 by revising paragraphs (a) introductory text and (a)(3), the paragraph (h) subject heading, and paragraphs (h)(3), (h)(8)(iv), and (h)(8)(viii)(C) to read as follows:

§ 200.430 Compensation—personal services.

(a) *General.* Compensation for personal services includes all remuneration, paid currently or accrued, for services of employees rendered during the period of performance under the Federal award, including but not necessarily limited to wages and salaries. Compensation for personal services may also include fringe benefits which are addressed in § 200.431. Costs of compensation are allowable to the extent that they satisfy the specific requirements of this part, and that the total compensation for individual employees:
* * * * *

(3) Is determined and supported as provided in paragraph (i) of this section, when applicable.
* * * * *

(h) *Institutions of Higher Education (IHEs).* * * *

(3) *Intra-Institution of Higher Education (IHE) consulting.* Intra-IHE consulting by faculty should be undertaken as an IHE responsibility requiring no compensation in addition to IBS. However, in unusual cases where consultation is across departmental lines or involves a separate or remote operation, and the work performed by the faculty member is in addition to his or her regular responsibilities, any charges for such work representing additional compensation above IBS are allowable provided that such consulting arrangements are specifically provided for in the Federal award or approved in writing by the Federal awarding agency.
* * * * *

(iv) Encompass federally-assisted and all other activities compensated by the non-Federal entity on an integrated basis, but may include the use of subsidiary records as defined in the non-Federal entity's written policy;
* * * * *

(viii) * * *

(C) The non-Federal entity's system of internal controls includes processes to review after-the-fact interim charges made to a Federal award based on budget estimates. All necessary adjustment must be made such that the final amount charged to the Federal award is accurate, allowable, and properly allocated.
* * * * *

- 68. Revise § 200.431 to read as follows:

§ 200.431 Compensation—fringe benefits.

(a) *General.* Fringe benefits are allowances and services provided by employers to their employees as compensation in addition to regular salaries and wages. Fringe benefits include, but are not limited to, the costs of leave (vacation, family-related, sick or military), employee insurance, pensions, and unemployment benefit plans. Except as provided elsewhere in these principles, the costs of fringe benefits are allowable provided that the benefits are reasonable and are required by law, non-Federal entity-employee agreement, or an established policy of the non-Federal entity.

(b) *Leave.* The cost of fringe benefits in the form of regular compensation paid to employees during periods of authorized absences from the job, such as for annual leave, family-related leave, sick leave, holidays, court leave, military leave, administrative leave, and other similar benefits, are allowable if all of the following criteria are met:

(1) They are provided under established written leave policies;

(2) The costs are equitably allocated to all related activities, including Federal awards; and,

(3) The accounting basis (cash or accrual) selected for costing each type of leave is consistently followed by the non-Federal entity or specified grouping of employees.

(i) When a non-Federal entity uses the cash basis of accounting, the cost of leave is recognized in the period that the leave is taken and paid for. Payments for unused leave when an employee retires or terminates employment are allowable in the year of payment.

(ii) The accrual basis may be only used for those types of leave for which a liability as defined by GAAP exists when the leave is earned. When a non-Federal entity uses the accrual basis of accounting, allowable leave costs are the lesser of the amount accrued or funded.

(c) *Fringe benefits.* The cost of fringe benefits in the form of employer contributions or expenses for social security; employee life, health, unemployment, and worker's compensation insurance (except as indicated in § 200.447); pension plan costs (see paragraph (i) of this section); and other similar benefits are allowable, provided such benefits are granted under established written policies. Such benefits, must be allocated to Federal awards and all other activities in a manner consistent with the pattern of benefits attributable to the individuals or group(s) of employees whose salaries and wages are chargeable to such Federal awards and other activities, and charged as direct or indirect costs in accordance with the non-Federal entity's accounting practices.

(d) *Cost objectives.* Fringe benefits may be assigned to cost objectives by identifying specific benefits to specific individual employees or by allocating on the basis of entity-wide salaries and wages of the employees receiving the benefits. When the allocation method is used, separate allocations must be made to selective groupings of employees, unless the non-Federal entity demonstrates that costs in relationship to salaries and wages do not differ significantly for different groups of employees.

(e) *Insurance.* See also § 200.447(d)(1) and (2).

(1) Provisions for a reserve under a self-insurance program for unemployment compensation or

workers' compensation are allowable to the extent that the provisions represent reasonable estimates of the liabilities for such compensation, and the types of coverage, extent of coverage, and rates and premiums would have been allowable had insurance been purchased to cover the risks. However, provisions for self-insured liabilities which do not become payable for more than one year after the provision is made must not exceed the present value of the liability.

(2) Costs of insurance on the lives of trustees, officers, or other employees holding positions of similar responsibility are allowable only to the extent that the insurance represents additional compensation. The costs of such insurance when the non-Federal entity is named as beneficiary are unallowable.

(3) Actual claims paid to or on behalf of employees or former employees for workers' compensation, unemployment compensation, severance pay, and similar employee benefits (*e.g.*, post-retirement health benefits), are allowable in the year of payment provided that the non-Federal entity follows a consistent costing policy.

(f) *Automobiles.* That portion of automobile costs furnished by the non-Federal entity that relates to personal use by employees (including transportation to and from work) is unallowable as fringe benefit or indirect (F&A) costs regardless of whether the cost is reported as taxable income to the employees.

(g) *Pension plan costs.* Pension plan costs which are incurred in accordance with the established policies of the non-Federal entity are allowable, provided that:

(1) Such policies meet the test of reasonableness.

(2) The methods of cost allocation are not discriminatory.

(3) Except for State and Local Governments, the cost assigned to each fiscal year should be determined in accordance with GAAP.

(4) The costs assigned to a given fiscal year are funded for all plan participants within six months after the end of that year. However, increases to normal and past service pension costs caused by a delay in funding the actuarial liability beyond 30 calendar days after each quarter of the year to which such costs are assignable are unallowable. Non-Federal entity may elect to follow the ''Cost Accounting Standard for Composition and Measurement of Pension Costs'' (48 CFR 9904.412).

(5) Pension plan termination insurance premiums paid pursuant to the Employee Retirement Income Security Act (ERISA) of 1974 (29 U.S.C. 1301–1461) are allowable. Late payment charges on such premiums are unallowable. Excise taxes on accumulated funding deficiencies and other penalties imposed under ERISA are unallowable.

(6) Pension plan costs may be computed using a pay-as-you-go method or an acceptable actuarial cost method in accordance with established written policies of the non-Federal entity.

(i) For pension plans financed on a pay-as-you-go method, allowable costs will be limited to those representing actual payments to retirees or their beneficiaries.

(ii) Pension costs calculated using an actuarial cost-based method recognized by GAAP are allowable for a given fiscal year if they are funded for that year within six months after the end of that year. Costs funded after the six-month period (or a later period agreed to by the cognizant agency for indirect costs) are allowable in the year funded. The cognizant agency for indirect costs may agree to an extension of the six-month period if an appropriate adjustment is made to compensate for the timing of the charges to the Federal Government and related Federal reimbursement and the non-Federal entity's contribution to the pension fund. Adjustments may be made by cash refund or other equitable procedures to compensate the Federal Government for the time value of Federal reimbursements in excess of contributions to the pension fund.

(iii) Amounts funded by the non-Federal entity in excess of the actuarially determined amount for a fiscal year may be used as the non-Federal entity's contribution in future periods.

(iv) When a non-Federal entity converts to an acceptable actuarial cost method, as defined by GAAP, and funds pension costs in accordance with this method, the unfunded liability at the time of conversion is allowable if amortized over a period of years in accordance with GAAP.

(v) The Federal Government must receive an equitable share of any previously allowed pension costs (including earnings thereon) which revert or inure to the non-Federal entity in the form of a refund, withdrawal, or other credit.

(h) *Post-retirement health.* Post-retirement health plans (PRHP) refers to costs of health insurance or health services not included in a pension plan covered by paragraph (g) of this section for retirees and their spouses, dependents, and survivors. PRHP costs may be computed using a pay-as-you-go method or an acceptable actuarial cost method in accordance with established written policies of the non-Federal entity.

(1) For PRHP financed on a pay-as-you-go method, allowable costs will be limited to those representing actual payments to retirees or their beneficiaries.

(2) PRHP costs calculated using an actuarial cost method recognized by GAAP are allowable if they are funded for that year within six months after the end of that year. Costs funded after the six-month period (or a later period agreed to by the cognizant agency) are allowable in the year funded. The Federal cognizant agency for indirect costs may agree to an extension of the six-month period if an appropriate adjustment is made to compensate for the timing of the charges to the Federal Government and related Federal reimbursements and the non-Federal entity's contributions to the PRHP fund. Adjustments may be made by cash refund, reduction in current year's PRHP costs, or other equitable procedures to compensate the Federal Government for the time value of Federal reimbursements in excess of contributions to the PRHP fund.

(3) Amounts funded in excess of the actuarially determined amount for a fiscal year may be used as the non-Federal entity contribution in a future period.

(4) When a non-Federal entity converts to an acceptable actuarial cost method and funds PRHP costs in accordance with this method, the initial unfunded liability attributable to prior years is allowable if amortized over a period of years in accordance with GAAP, or, if no such GAAP period exists, over a period negotiated with the cognizant agency for indirect costs.

(5) To be allowable in the current year, the PRHP costs must be paid either to:

(i) An insurer or other benefit provider as current year costs or premiums, or

(ii) An insurer or trustee to maintain a trust fund or reserve for the sole purpose of providing post-retirement benefits to retirees and other beneficiaries.

(6) The Federal Government must receive an equitable share of any amounts of previously allowed post-retirement benefit costs (including earnings thereon) which revert or inure to the non-Federal entity in the form of a refund, withdrawal, or other credit.

(i) *Severance pay.* (1) Severance pay, also commonly referred to as dismissal wages, is a payment in addition to regular salaries and wages, by non-Federal entities to workers whose

employment is being terminated. Costs of severance pay are allowable only to the extent that in each case, it is required by

(i) Law;

(ii) Employer-employee agreement;

(iii) Established policy that constitutes, in effect, an implied agreement on the non-Federal entity's part; or

(iv) Circumstances of the particular employment.

(2) Costs of severance payments are divided into two categories as follows:

(i) Actual normal turnover severance payments must be allocated to all activities; or, where the non-Federal entity provides for a reserve for normal severances, such method will be acceptable if the charge to current operations is reasonable in light of payments actually made for normal severances over a representative past period, and if amounts charged are allocated to all activities of the non-Federal entity.

(ii) Measurement of costs of abnormal or mass severance pay by means of an accrual will not achieve equity to both parties. Thus, accruals for this purpose are not allowable. However, the Federal Government recognizes its responsibility to participate, to the extent of its fair share, in any specific payment. Prior approval by the Federal awarding agency or cognizant agency for indirect cost, as appropriate, is required.

(3) Costs incurred in certain severance pay packages which are in an amount in excess of the normal severance pay paid by the non-Federal entity to an employee upon termination of employment and are paid to the employee contingent upon a change in management control over, or ownership of, the non-Federal entity's assets, are unallowable.

(4) Severance payments to foreign nationals employed by the non-Federal entity outside the United States, to the extent that the amount exceeds the customary or prevailing practices for the non-Federal entity in the United States, are unallowable, unless they are necessary for the performance of Federal programs and approved by the Federal awarding agency.

(5) Severance payments to foreign nationals employed by the non-Federal entity outside the United States due to the termination of the foreign national as a result of the closing of, or curtailment of activities by, the non-Federal entity in that country, are unallowable, unless they are necessary for the performance of Federal programs and approved by the Federal awarding agency.

(j) *For IHEs only.* (1) Fringe benefits in the form of undergraduate and graduate tuition or remission of tuition for individual employees are allowable, provided such benefits are granted in accordance with established non-Federal entity policies, and are distributed to all non-Federal entity activities on an equitable basis. Tuition benefits for family members other than the employee are unallowable.

(2) Fringe benefits in the form of tuition or remission of tuition for individual employees not employed by IHEs are limited to the tax-free amount allowed per section 127 of the Internal Revenue Code as amended.

(3) IHEs may offer employees tuition waivers or tuition reductions, provided that the benefit does not discriminate in favor of highly compensated employees. Employees can exercise these benefits at other institutions according to institutional policy. See § 200.466, for treatment of tuition remission provided to students.

(k) Fringe benefit programs and other benefit costs. For IHEs whose costs are paid by state or local governments, fringe benefit programs (such as pension costs and FICA) and any other benefits costs specifically incurred on behalf of, and in direct benefit to, the non-Federal entity, are allowable costs of such non-Federal entities whether or not these costs are recorded in the accounting records of the non-Federal entities, subject to the following:

(1) The costs meet the requirements of Basic Considerations in §§ 200.402 through 200.411;

(2) The costs are properly supported by approved cost allocation plans in accordance with applicable Federal cost accounting principles; and

(3) The costs are not otherwise borne directly or indirectly by the Federal Government.

- 69. Revise § 200.432 to read as follows:

§ 200.432 Conferences.

A conference is defined as a meeting, retreat, seminar, symposium, workshop or event whose primary purpose is the dissemination of technical information beyond the non-Federal entity and is necessary and reasonable for successful performance under the Federal award. Allowable conference costs paid by the non-Federal entity as a sponsor or host of the conference may include rental of facilities, speakers' fees, costs of meals and refreshments, local transportation, and other items incidental to such conferences unless further restricted by the terms and conditions of the Federal award. As needed, the costs of identifying, but not providing, locally available dependent-care resources are allowable. Conference hosts/sponsors must exercise discretion and judgment in ensuring that conference costs are appropriate, necessary and managed in a manner that minimizes costs to the Federal award. The Federal awarding agency may authorize exceptions where appropriate for programs including Indian tribes, children, and the elderly. See also §§ 200.438, 200.456, and 200.475.

- 70. Amend § 200.433 by revising paragraphs (b) and (c) to read as follows:

§ 200.433 Contingency provisions.

* * * * *

(b) It is permissible for contingency amounts other than those excluded in paragraph (a) of this section to be explicitly included in budget estimates, to the extent they are necessary to improve the precision of those estimates. Amounts must be estimated using broadly-accepted cost estimating methodologies, specified in the budget documentation of the Federal award, and accepted by the Federal awarding agency. As such, contingency amounts are to be included in the Federal award. In order for actual costs incurred to be allowable, they must comply with the cost principles and other requirements in this part (see also §§ 200.300 and 200.403 of this part); be necessary and reasonable for proper and efficient accomplishment of project or program objectives, and be verifiable from the non-Federal entity's records.

(c) Payments made by the Federal awarding agency to the non-Federal entity's ''contingency reserve'' or any similar payment made for events the occurrence of which cannot be foretold with certainty as to the time or intensity, or with an assurance of their happening, are unallowable, except as noted in §§ 200.431 and 200.447.

- 71. Amend § 200.434 by revising paragraphs (b), (c), (f), and (g)(2) to read as follows:

§ 200.434 Contributions and donations.

* * * * *

(b) The value of services and property donated to the non-Federal entity may not be charged to the Federal award either as a direct or indirect (F&A) cost. The value of donated services and property may be used to meet cost sharing or matching requirements (see § 200.306). Depreciation on donated assets is permitted in accordance with § 200.436, as long as the donated property is not counted towards cost sharing or matching requirements.

(c) Services donated or volunteered to the non-Federal entity may be furnished to a non-Federal entity by professional

and technical personnel, consultants, and other skilled and unskilled labor. The value of these services may not be charged to the Federal award either as a direct or indirect cost. However, the value of donated services may be used to meet cost sharing or matching requirements in accordance with the provisions of § 200.306.

* * * * *

(f) Fair market value of donated services must be computed as described in § 200.306.

* * * * *

(g) * * *

(2) The value of the donations may be used to meet cost sharing or matching share requirements under the conditions described in § 200.300 of this part. The value of the donations must be determined in accordance with § 200.300. Where donations are treated as indirect costs, indirect cost rates will separate the value of the donations so that reimbursement will not be made.

▪ 72. Amend § 200.436 by revising paragraphs (c) introductory text, (c)(3) and (4), and (e) to read as follows:

§ 200.436 Depreciation.

* * * * *

(c) Depreciation is computed applying the following rules. The computation of depreciation must be based on the acquisition cost of the assets involved. For an asset donated to the non-Federal entity by a third party, its fair market value at the time of the donation must be considered as the acquisition cost. Such assets may be depreciated or claimed as matching but not both. For the computation of depreciation, the acquisition cost will exclude:

* * * * *

(3) Any portion of the cost of buildings and equipment contributed by or for the non-Federal entity that are already claimed as matching or where law or agreement prohibits recovery;

(4) Any asset acquired solely for the performance of a non-Federal award; and

* * * * *

(e) Charges for depreciation must be supported by adequate property records, and physical inventories must be taken at least once every two years to ensure that the assets exist and are usable, used, and needed. Statistical sampling techniques may be used in taking these inventories. In addition, adequate depreciation records showing the amount of depreciation must be maintained.

▪ 73. Amend § 200.439 by revising paragraphs (a) and (b)(3) and (7) to read as follows:

§ 200.439 Equipment and other capital expenditures.

(a) See § 200.1 for the definitions of *capital expenditures, equipment, special purpose equipment, general purpose equipment, acquisition cost,* and *capital assets.*

* * * * *

(b) * * *

(3) Capital expenditures for improvements to land, buildings, or equipment which materially increase their value or useful life are unallowable as a direct cost except with the prior written approval of the Federal awarding agency, or pass-through entity. See § 200.436, for rules on the allowability of depreciation on buildings, capital improvements, and equipment. See also § 200.465.

* * * * *

(7) Equipment and other capital expenditures are unallowable as indirect costs. See § 200.436.

▪ 74. Revise § 200.441 to read as follows:

§ 200.441 Fines, penalties, damages and other settlements.

Costs resulting from non-Federal entity violations of, alleged violations of, or failure to comply with, Federal, state, tribal, local or foreign laws and regulations are unallowable, except when incurred as a result of compliance with specific provisions of the Federal award, or with prior written approval of the Federal awarding agency. See also § 200.435.

▪ 75. Revise § 200.442 to read as follows:

§ 200.442 Fund raising and investment management costs.

(a) Costs of organized fund raising, including financial campaigns, endowment drives, solicitation of gifts and bequests, and similar expenses incurred to raise capital or obtain contributions are unallowable. Fund raising costs for the purposes of meeting the Federal program objectives are allowable with prior written approval from the Federal awarding agency. Proposal costs are covered in § 200.460.

(b) Costs of investment counsel and staff and similar expenses incurred to enhance income from investments are unallowable except when associated with investments covering pension, self-insurance, or other funds which include Federal participation allowed by this part.

(c) Costs related to the physical custody and control of monies and securities are allowable.

(d) Both allowable and unallowable fund-raising and investment activities must be allocated as an appropriate share of indirect costs under the conditions described in § 200.413.

▪ 76. Amend § 200.443 by revising paragraphs (b)(1) and (3) and (d) to read as follows:

§ 200.443 Gains and losses on disposition of depreciable assets.

* * * * *

(b) * * *

(1) The gain or loss is processed through a depreciation account and is reflected in the depreciation allowable under §§ 200.436 and 200.439.

* * * * *

(3) A loss results from the failure to maintain permissible insurance, except as otherwise provided in § 200.447.

* * * * *

(d) When assets acquired with Federal funds, in part or wholly, are disposed of, the distribution of the proceeds must be made in accordance with §§ 200.310 through 200.316 of this part.

▪ 77. Amend § 200.444 by revising paragraphs (a) introductory text, (a)(4), and (b) to read as follows:

§ 200.444 General costs of government.

(a) For states, local governments, and Indian Tribes, the general costs of government are unallowable (except as provided in § 200.475). Unallowable costs include:

* * * * *

(4) Costs of prosecutorial activities unless treated as a direct cost to a specific program if authorized by statute or regulation (however, this does not preclude the allowability of other legal activities of the Attorney General as described in § 200.435); and

* * * * *

(b) For Indian tribes and Councils of Governments (COGs) (see definition for *Local government* in § 200.1 of this part), up to 50% of salaries and expenses directly attributable to managing and operating Federal programs by the chief executive and his or her staff can be included in the indirect cost calculation without documentation.

▪ 78. Amend § 200.447 by revising paragraph (a)(4) to read as follows:

§ 200.447 Insurance and indemnification.

(a) * * *

(4) Costs of insurance on the lives of trustees, officers, or other employees holding positions of similar responsibilities are allowable only to the extent that the insurance represents additional compensation (see § 200.431). The cost of such insurance when the non-Federal entity is

identified as the beneficiary is unallowable.

* * * * *

· 79. Amend § 200.448 by revising paragraph (a)(1)(iii) to read as follows:

§ 200.448 Intellectual property.

(a) * * *

(1) * * *

(iii) General counseling services relating to patent and copyright matters, such as advice on patent and copyright laws, regulations, clauses, and employee intellectual property agreements (See also § 200.459).

* * * * *

· 80. Amend § 200.449 by revising paragraphs (b)(1) and (c)(4) to read as follows:

§ 200.449 Interest.

* * * * *

(b) *Capital assets*. (1) Capital assets is defined as noted in § 200.1 of this part. An asset cost includes (as applicable) acquisition costs, construction costs, and other costs capitalized in accordance with GAAP.

* * * * *

(c) * * *

(4) The non-Federal entity limits claims for Federal reimbursement of interest costs to the least expensive alternative. For example, a lease contract that transfers ownership by the end of the contract may be determined less costly than purchasing through other types of debt financing, in which case reimbursement must be limited to the amount of interest determined if leasing had been used.

* * * * *

· 81. Amend § 200.450 by revising paragraphs (a), (c)(2)(v) and (vi), (c)(2)(vii)(A) introductory text to read as follows:

§ 200.450 Lobbying.

(a) The cost of certain influencing activities associated with obtaining grants, contracts, or cooperative agreements, or loans is an unallowable cost. Lobbying with respect to certain grants, contracts, cooperative agreements, and loans is governed by relevant statutes, including among others, the provisions of 31 U.S.C. 1352, as well as the common rule, ''New Restrictions on Lobbying'' published on February 26, 1990, including definitions, and the Office of Management and Budget ''Governmentwide Guidance for New Restrictions on Lobbying'' and notices published on December 20, 1989, June 15, 1990, January 15, 1992, and January 19, 1996.

* * * * *

(c) * * *

(2) * * *

(v) When a non-Federal entity seeks reimbursement for indirect (F&A) costs, total lobbying costs must be separately identified in the indirect (F&A) cost rate proposal, and thereafter treated as other unallowable activity costs in accordance with the procedures of § 200.413.

(vi) The non-Federal entity must submit as part of its annual indirect (F&A) cost rate proposal a certification that the requirements and standards of this section have been complied with. (See also § 200.415.)

(vii)(A) Time logs, calendars, or similar records are not required to be created for purposes of complying with the record keeping requirements in § 200.302 with respect to lobbying costs during any particular calendar month when:

* * * * *

· 82. Revise § 200.452 to read as follows:

§ 200.452 Maintenance and repair costs.

Costs incurred for utilities, insurance, security, necessary maintenance, janitorial services, repair, or upkeep of buildings and equipment (including Federal property unless otherwise provided for) which neither add to the permanent value of the property nor appreciably prolong its intended life, but keep it in an efficient operating condition, are allowable. Costs incurred for improvements which add to the permanent value of the buildings and equipment or appreciably prolong their intended life must be treated as capital expenditures (see § 200.439). These costs are only allowable to the extent not paid through rental or other agreements.

· 83. Amend § 200.454 by revising paragraph (e) to read as follows:

§ 200.454 Memberships, subscriptions, and professional activity costs.

* * * * *

(e) Costs of membership in organizations whose primary purpose is lobbying are unallowable. See also § 200.450.

· 84. Revise § 200.456 to read as follows:

§ 200.456 Participant support costs.

Participant support costs as defined in § 200.1 are allowable with the prior approval of the Federal awarding agency.

· 85. Revise § 200.457 to read as follows:

§ 200.457 Plant and security costs.

Necessary and reasonable expenses incurred for protection and security of facilities, personnel, and work products are allowable. Such costs include, but are not limited to, wages and uniforms of personnel engaged in security activities; equipment; barriers; protective (non-military) gear, devices, and equipment; contractual security services; and consultants. Capital expenditures for plant security purposes are subject to § 200.439.

· 86. Revise § 200.458 to read as follows:

§ 200.458 Pre-award costs.

Pre-award costs are those incurred prior to the effective date of the Federal award or subaward directly pursuant to the negotiation and in anticipation of the Federal award where such costs are necessary for efficient and timely performance of the scope of work. Such costs are allowable only to the extent that they would have been allowable if incurred after the date of the Federal award and only with the written approval of the Federal awarding agency. If charged to the award, these costs must be charged to the initial budget period of the award, unless otherwise specified by the Federal awarding agency or pass-through entity.

· 87. Amend § 200.459 by revising paragraph (a) to read as follows:

§ 200.459 Professional service costs.

(a) Costs of professional and consultant services rendered by persons who are members of a particular profession or possess a special skill, and who are not officers or employees of the non-Federal entity, are allowable, subject to paragraphs (b) and (c) of this section when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Federal Government. In addition, legal and related services are limited under § 200.435.

* * * * *

· 88. Amend § 200.461 by revising paragraph (b)(3) to read as follows:

§ 200.461 Publication and printing costs.

* * * * *

(b) * * *

(3) The non-Federal entity may charge the Federal award during closeout for the costs of publication or sharing of research results if the costs are not incurred during the period of performance of the Federal award. If charged to the award, these costs must be charged to the final budget period of the award, unless otherwise specified by the Federal awarding agency.

· 89. Amend § 200.463 by revising paragraph (c) to read as follows:

§ 200.463 Recruiting costs.

* * * * *

(c) Where relocation costs incurred incident to recruitment of a new employee have been funded in whole or in part to a Federal award, and the newly hired employee resigns for reasons within the employee's control within 12 months after hire, the non-Federal entity will be required to refund or credit the Federal share of such relocation costs to the Federal Government. See also § 200.464.

* * * * *

- 90. Amend § 200.464 by revising paragraph (c) to read as follows:

§ 200.464 Relocation costs of employees.

* * * * *

(c) Allowable relocation costs for new employees are limited to those described in paragraphs (b)(1) and (2) of this section. When relocation costs incurred incident to the recruitment of new employees have been charged to a Federal award and the employee resigns for reasons within the employee's control within 12 months after hire, the non-Federal entity must refund or credit the Federal Government for its share of the cost. If dependents are not permitted at the location for any reason and the costs do not include costs of transporting household goods, the costs of travel to an overseas location must be considered travel costs in accordance with § 200.474 Travel costs, and not this relocations costs of employees (See also § 200.464).

* * * * *

- 91. Amend § 200.465 by adding paragraphs (d) through (f) to read as follows:

§ 200.465 Rental costs of real property and equipment.

* * * * *

(d) Rental costs under leases which are required to be accounted for as a financed purchase under GASB standards or a finance lease under FASB standards under GAAP are allowable only up to the amount (as explained in paragraph (b) of this section) that would be allowed had the non-Federal entity purchased the property on the date the lease agreement was executed. Interest costs related to these leases are allowable to the extent they meet the criteria in § 200.449. Unallowable costs include amounts paid for profit, management fees, and taxes that would not have been incurred had the non-Federal entity purchased the property.

(e) Rental or lease payments are allowable under lease contracts where the non-Federal entity is required to recognize an intangible right-to-use lease asset (per GASB) or right of use operating lease asset (per FASB) for purposes of financial reporting in accordance with GAAP.

(f) The rental of any property owned by any individuals or entities affiliated with the non-Federal entity, to include commercial or residential real estate, for purposes such as the home office workspace is unallowable.

- 92. Amend § 200.466 by revising paragraph (b) to read as follows:

§ 200.466 Scholarships and student aid costs.

* * * * *

(b) Charges for tuition remission and other forms of compensation paid to students as, or in lieu of, salaries and wages must be subject to the reporting requirements in § 200.430, and must be treated as direct or indirect cost in accordance with the actual work being performed. Tuition remission may be charged on an average rate basis. See also § 200.431.

- 93. Revise § 200.467 to read as follows:

§ 200.467 Selling and marketing costs.

Costs of selling and marketing any products or services of the non-Federal entity (unless allowed under § 200.421) are unallowable, except as direct costs, with prior approval by the Federal awarding agency when necessary for the performance of the Federal award.

- 94. Amend § 200.468 by revising paragraph (a) and (b)(2) to read as follows:

§ 200.468 Specialized service facilities.

(a) The costs of services provided by highly complex or specialized facilities operated by the non-Federal entity, such as computing facilities, wind tunnels, and reactors are allowable, provided the charges for the services meet the conditions of either paragraph (b) or (c) of this section, and, in addition, take into account any items of income or Federal financing that qualify as applicable credits under § 200.406.

* * * * *

(b) * * *

(2) Is designed to recover only the aggregate costs of the services. The costs of each service must consist normally of both its direct costs and its allocable share of all indirect (F&A) costs. Rates must be adjusted at least biennially, and must take into consideration over/under-applied costs of the previous period(s).

* * * * *

§§ 200.471 through 200.475 [Redesignated as §§ 200.472 through 200.476]

- 95. Redesignate §§ 200.471 through 200.475 as §§ 200.472 through 200.476.

- 96. Add new § 200.471 to read as follows:

§ 200.471 Telecommunication costs and video surveillance costs

(a) Costs incurred for telecommunications and video surveillance services or equipment such as phones, internet, video surveillance, cloud servers are allowable except for the following circumstances:

(b) Obligating or expending covered telecommunications and video surveillance services or equipment or services as described in § 200.216 to:

(1) Procure or obtain, extend or renew a contract to procure or obtain;

(2) Enter into a contract (or extend or renew a contract) to procure; or

(3) Obtain the equipment, services, or systems.

- 97. Amend newly redesignated § 200.472 by revising paragraphs (c)(2), (e)(1)(i), and (f) to read as follows:

§ 200.472 Termination costs.

* * * * *

(c) * * *

(2) The interest of the Federal Government is protected by transfer of title or by other means deemed appropriate by the Federal awarding agency (see also § 200.313 (d)), and

* * * * *

(e) * * *

(1) * * *

(i) The preparation and presentation to the Federal awarding agency of settlement claims and supporting data with respect to the terminated portion of the Federal award, unless the termination is for cause (see subpart D, including §§ 200.339–200.343); and

* * * * *

(f) Claims under subawards, including the allocable portion of claims which are common to the Federal award and to other work of the non-Federal entity, are generally allowable. An appropriate share of the non-Federal entity's indirect costs may be allocated to the amount of settlements with contractors and/or subrecipients, provided that the amount allocated is otherwise consistent with the basic guidelines contained in § 200.414. The indirect costs so allocated must exclude the same and similar costs claimed directly or indirectly as settlement expenses.

- 98. Amend newly redesignated § 200.475 by revising paragraphs (a) and (c)(2) to read as follows:

§ 200.475 Travel costs.

(a) *General.* Travel costs are the expenses for transportation, lodging, subsistence, and related items incurred by employees who are in travel status on official business of the non-Federal entity. Such costs may be charged on an actual cost basis, on a per diem or mileage basis in lieu of actual costs incurred, or on a combination of the two, provided the method used is applied to an entire trip and not to selected days of the trip, and results in charges consistent with those normally allowed in like circumstances in the non-Federal entity's non-federally-funded activities and in accordance with non-Federal entity's written travel reimbursement policies. Notwithstanding the provisions of § 200.444, travel costs of officials covered by that section are allowable with the prior written approval of the Federal awarding agency or pass-through entity when they are specifically related to the Federal award.

* * * * *

(c) * * *

(2) Travel costs for dependents are unallowable, except for travel of duration of six months or more with prior approval of the Federal awarding agency. See also § 200.432.

* * * * *

· 99. Revise newly redesignated § 200.476 to read as follows:

§ 200.476 Trustees.

Travel and subsistence costs of trustees (or directors) at IHEs and nonprofit organizations are allowable. See also § 200.475.

Subpart F—Audit Requirements

· 100. Amend § 200.501 by revising paragraphs (b), (c), (d), (f), and (h) to read as follows:

§ 200.501 Audit requirements.

* * * * *

(b) *Single audit.* A non-Federal entity that expends $750,000 or more during the non-Federal entity's fiscal year in Federal awards must have a single audit conducted in accordance with § 200.514 except when it elects to have a program-specific audit conducted in accordance with paragraph (c) of this section.

(c) Program-specific audit election. When an auditee expends Federal awards under only one Federal program (excluding R&D) and the Federal program's statutes, regulations, or the terms and conditions of the Federal award do not require a financial statement audit of the auditee, the auditee may elect to have a program-specific audit conducted in accordance with § 200.507. A program-specific audit may not be elected for R&D unless all of the Federal awards expended were received from the same Federal agency, or the same Federal agency and the same pass-through entity, and that Federal agency, or pass-through entity in the case of a subrecipient, approves in advance a program-specific audit.

(d) Exemption when Federal awards expended are less than $750,000. A non-Federal entity that expends less than $750,000 during the non-Federal entity's fiscal year in Federal awards is exempt from Federal audit requirements for that year, except as noted in § 200.503, but records must be available for review or audit by appropriate officials of the Federal agency, pass-through entity, and Government Accountability Office (GAO).

* * * * *

(f) *Subrecipients and contractors.* An auditee may simultaneously be a recipient, a subrecipient, and a contractor. Federal awards expended as a recipient or a subrecipient are subject to audit under this part. The payments received for goods or services provided as a contractor are not Federal awards. Section § 200.331 sets forth the considerations in determining whether payments constitute a Federal award or a payment for goods or services provided as a contractor.

* * * * *

(h) *For-profit subrecipient.* Since this part does not apply to for-profit subrecipients, the pass-through entity is responsible for establishing requirements, as necessary, to ensure compliance by for-profit subrecipients. The agreement with the for-profit subrecipient must describe applicable compliance requirements and the for-profit subrecipient's compliance responsibility. Methods to ensure compliance for Federal awards made to for-profit subrecipients may include pre-award audits, monitoring during the agreement, and post-award audits. See also § 200.332.

· 101. Amend § 200.503 by revising paragraph (e) to read as follows:

§ 200.503 Relation to other audit requirements.

* * * * *

(e) Request for a program to be audited as a major program. A Federal awarding agency may request that an auditee have a particular Federal program audited as a major program in lieu of the Federal awarding agency conducting or arranging for the additional audits. To allow for planning, such requests should be made at least 180 calendar days prior to the end of the fiscal year to be audited. The auditee, after consultation with its auditor, should promptly respond to such a request by informing the Federal awarding agency whether the program would otherwise be audited as a major program using the risk-based audit approach described in § 200.518 and, if not, the estimated incremental cost. The Federal awarding agency must then promptly confirm to the auditee whether it wants the program audited as a major program. If the program is to be audited as a major program based upon this Federal awarding agency request, and the Federal awarding agency agrees to pay the full incremental costs, then the auditee must have the program audited as a major program. A pass-through entity may use the provisions of this paragraph for a subrecipient.

· 102. Revise § 200.505 to read as follows:

§ 200.505 Sanctions.

In cases of continued inability or unwillingness to have an audit conducted in accordance with this part, Federal agencies and pass-through entities must take appropriate action as provided in § 200.339.

· 103. Revise § 200.506 to read as follows:

§ 200.506 Audit costs.

See § 200.425.

· 104. Amend § 200.507 by revising paragraphs (a), (b)(2), (b)(3)(ii) through (v), (b)(4)(iv), (c)(2) and (3), and (d)(8) to read as follows:

§ 200.507 Program-specific audits.

(a) *Program-specific audit guide available.* In some cases, a program-specific audit guide will be available to provide specific guidance to the auditor with respect to internal controls, compliance requirements, suggested audit procedures, and audit reporting requirements. A listing of current program-specific audit guides can be found in the compliance supplement, Part 8, Appendix VI, Program-Specific Audit Guides, which includes a website where a copy of the guide can be obtained. When a current program-specific audit guide is available, the auditor must follow GAGAS and the guide when performing a program-specific audit.

* * * * *

(b) * * *

(2) The auditee must prepare the financial statement(s) for the Federal program that includes, at a minimum, a schedule of expenditures of Federal awards for the program and notes that

describe the significant accounting policies used in preparing the schedule, a summary schedule of prior audit findings consistent with the requirements of § 200.511(b), and a corrective action plan consistent with the requirements of § 200.511(c).

(3) * * *

(ii) Obtain an understanding of internal controls and perform tests of internal controls over the Federal program consistent with the requirements of § 200.514(c) for a major program;

(iii) Perform procedures to determine whether the auditee has complied with Federal statutes, regulations, and the terms and conditions of Federal awards that could have a direct and material effect on the Federal program consistent with the requirements of § 200.514(d) for a major program;

(iv) Follow up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with the requirements of § 200.511, and report, as a current year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding; and

(v) Report any audit findings consistent with the requirements of § 200.516.

(4) * * *

(iv) A schedule of findings and questioned costs for the Federal program that includes a summary of the auditor's results relative to the Federal program in a format consistent with § 200.515(d)(1) and findings and questioned costs consistent with the requirements of § 200.515(d)(3).

(c) * * *

(2) When a program-specific audit guide is available, the auditee must electronically submit to the FAC the data collection form prepared in accordance with § 200.512(b), as applicable to a program-specific audit, and the reporting required by the program-specific audit guide.

(3) When a program-specific audit guide is not available, the reporting package for a program-specific audit must consist of the financial statement(s) of the Federal program, a summary schedule of prior audit findings, and a corrective action plan as described in paragraph (b)(2) of this section, and the auditor's report(s) described in paragraph (b)(4) of this section. The data collection form prepared in accordance with § 200.512(b), as applicable to a program-specific audit, and one copy of this reporting package must be electronically submitted to the FAC.

(d) * * *

(8) 200.521 Management decision; and

* * * * *

· 105. Amend § 200.508 by revising paragraphs (a), (b), and (c) to read as follows:

§ 200.508 Auditee responsibilities.

* * * * *

(a) Procure or otherwise arrange for the audit required by this part in accordance with § 200.509, and ensure it is properly performed and submitted when due in accordance with § 200.512.

(b) Prepare appropriate financial statements, including the schedule of expenditures of Federal awards in accordance with § 200.510.

(c) Promptly follow up and take corrective action on audit findings, including preparation of a summary schedule of prior audit findings and a corrective action plan in accordance with § 200.511(b) and (c), respectively.

* * * * *

· 106. Amend § 200.509 by revising paragraph (a) to read as follows:

§ 200.509 Auditor selection.

(a) *Auditor procurement.* In procuring audit services, the auditee must follow the procurement standards prescribed by the Procurement Standards in §§ 200.317 through 200.326 of subpart D of this part or the FAR (48 CFR part 42), as applicable. When procuring audit services, the objective is to obtain high-quality audits. In requesting proposals for audit services, the objectives and scope of the audit must be made clear and the non-Federal entity must request a copy of the audit organization's peer review report which the auditor is required to provide under GAGAS. Factors to be considered in evaluating each proposal for audit services include the responsiveness to the request for proposal, relevant experience, availability of staff with professional qualifications and technical abilities, the results of peer and external quality control reviews, and price. Whenever possible, the auditee must make positive efforts to utilize small businesses, minority-owned firms, and women's business enterprises, in procuring audit services as stated in § 200.321, or the FAR (48 CFR part 42), as applicable.

* * * * *

· 107. Amend § 200.510 by revising paragraphs (a), (b) introductory text, and (b)(3), (5), and (6) to read as follows:

§ 200.510 Financial statements.

(a) *Financial statements.* The auditee must prepare financial statements that reflect its financial position, results of operations or changes in net assets, and, where appropriate, cash flows for the fiscal year audited. The financial statements must be for the same organizational unit and fiscal year that is chosen to meet the requirements of this part. However, non-Federal entity-wide financial statements may also include departments, agencies, and other organizational units that have separate audits in accordance with § 200.514(a) and prepare separate financial statements.

(b) *Schedule of expenditures of Federal awards.* The auditee must also prepare a schedule of expenditures of Federal awards for the period covered by the auditee's financial statements which must include the total Federal awards expended as determined in accordance with § 200.502. While not required, the auditee may choose to provide information requested by Federal awarding agencies and pass-through entities to make the schedule easier to use. For example, when a Federal program has multiple Federal award years, the auditee may list the amount of Federal awards expended for each Federal award year separately. At a minimum, the schedule must:

* * * * *

(3) Provide total Federal awards expended for each individual Federal program and the Assistance Listings Number or other identifying number when the Assistance Listings information is not available. For a cluster of programs also provide the total for the cluster.

* * * * *

(5) For loan or loan guarantee programs described in § 200.502(b), identify in the notes to the schedule the balances outstanding at the end of the audit period. This is in addition to including the total Federal awards expended for loan or loan guarantee programs in the schedule.

(6) Include notes that describe that significant accounting policies used in preparing the schedule, and note whether or not the auditee elected to use the 10% de minimis cost rate as covered in § 200.414.

· 108. Amend § 200.511 by revising paragraphs (a) and (c) to read as follows:

§ 200.511 Audit findings follow-up.

(a) *General.* The auditee is responsible for follow-up and corrective action on all audit findings. As part of this responsibility, the auditee must prepare a summary schedule of prior audit findings. The auditee must also prepare a corrective action plan for current year audit findings. The summary schedule

of prior audit findings and the corrective action plan must include the reference numbers the auditor assigns to audit findings under §200.516(c). Since the summary schedule may include audit findings from multiple years, it must include the fiscal year in which the finding initially occurred. The corrective action plan and summary schedule of prior audit findings must include findings relating to the financial statements which are required to be reported in accordance with GAGAS.

* * * * *

(c) *Corrective action plan.* At the completion of the audit, the auditee must prepare, in a document separate from the auditor's findings described in § 200.516, a corrective action plan to address each audit finding included in the current year auditor's reports. The corrective action plan must provide the name(s) of the contact person(s) responsible for corrective action, the corrective action planned, and the anticipated completion date. If the auditee does not agree with the audit findings or believes corrective action is not required, then the corrective action plan must include an explanation and specific reasons.

■ 109. Amend § 200.512 by revising paragraphs (b) introductory text, (b)(1), (c)(1) through (4), and (g) to read as follows:

§ 200.512 Report submission.

* * * * *

(b) *Data collection.* The FAC is the repository of record for subpart F of this part reporting packages and the data collection form. All Federal agencies, pass-through entities and others interested in a reporting package and data collection form must obtain it by accessing the FAC.

(1) The auditee must submit required data elements described in Appendix X to Part 200, which state whether the audit was completed in accordance with this part and provides information about the auditee, its Federal programs, and the results of the audit. The data must include information available from the audit required by this part that is necessary for Federal agencies to use the audit to ensure integrity for Federal programs. The data elements and format must be approved by OMB, available from the FAC, and include collections of information from the reporting package described in paragraph (c) of this section. A senior level representative of the auditee (*e.g.*, state controller, director of finance, chief executive officer, or chief financial officer) must sign a statement to be included as part of the data collection that says that the auditee complied with the requirements of this part, the data were prepared in accordance with this part (and the instructions accompanying the form), the reporting package does not include protected personally identifiable information, the information included in its entirety is accurate and complete, and that the FAC is authorized to make the reporting package and the form publicly available on a website.

* * * * *

(c) * * *

(1) Financial statements and schedule of expenditures of Federal awards discussed in § 200.510(a) and (b), respectively;

(2) Summary schedule of prior audit findings discussed in § 200.511(b);

(3) Auditor's report(s) discussed in § 200.515; and

(4) Corrective action plan discussed in § 200.511(c).

* * * * *

(g) *FAC responsibilities.* The FAC must make available the reporting packages received in accordance with paragraph (c) of this section and § 200.507(c) to the public, except for Indian tribes exercising the option in (b)(2) of this section, and maintain a data base of completed audits, provide appropriate information to Federal agencies, and follow up with known auditees that have not submitted the required data collection forms and reporting packages.

* * * * *

■ 110. Amend § 200.513 by revising paragraphs (a)(1) and (2), (a)(3)(ii) and (vii), (b) introductory text, (c) introductory text, and (c)(3)(i) and (iii) to read as follows:

§ 200.513 Responsibilities.

(a)(1) *Cognizant agency for audit responsibilities.* A non-Federal entity expending more than $50 million a year in Federal awards must have a cognizant agency for audit. The designated cognizant agency for audit must be the Federal awarding agency that provides the predominant amount of funding directly (direct funding) (as listed on the Schedule of expenditures of Federal awards, see § 200.510(b)) to a non-Federal entity unless OMB designates a specific cognizant agency for audit. When the direct funding represents less than 25 percent of the total expenditures (as direct and subawards) by the non-Federal entity, then the Federal agency with the predominant amount of total funding is the designated cognizant agency for audit.

(2) To provide for continuity of cognizance, the determination of the predominant amount of direct funding must be based upon direct Federal awards expended in the non-Federal entity's fiscal years ending in 2019, and every fifth year thereafter.

(3) * * *

(ii) Obtain or conduct quality control reviews on selected audits made by non-Federal auditors, and provide the results to other interested organizations. Cooperate and provide support to the Federal agency designated by OMB to lead a governmentwide project to determine the quality of single audits by providing a reliable estimate of the extent that single audits conform to applicable requirements, standards, and procedures; and to make recommendations to address noted audit quality issues, including recommendations for any changes to applicable requirements, standards and procedures indicated by the results of the project. The governmentwide project can rely on the current and on-going quality control review work performed by the agencies, State auditors, and professional audit associations. This governmentwide audit quality project must be performed once every 6 years (or at such other interval as determined by OMB), and the results must be public.

* * * * *

(vii) Coordinate a management decision for cross-cutting audit findings (see in § 200.1 of this part) that affect the Federal programs of more than one agency when requested by any Federal awarding agency whose awards are included in the audit finding of the auditee.

* * * * *

(b) *Oversight agency for audit responsibilities.* An auditee who does not have a designated cognizant agency for audit will be under the general oversight of the Federal agency determined in accordance with § 200.1 *oversight agency for audit.* A Federal agency with oversight for an auditee may reassign oversight to another Federal agency that agrees to be the oversight agency for audit. Within 30 calendar days after any reassignment, both the old and the new oversight agency for audit must provide notice of the change to the FAC, the auditee, and, if known, the auditor. The oversight agency for audit:

* * * * *

(c) *Federal awarding agency responsibilities.* The Federal awarding agency must perform the following for the Federal awards it makes (See also the requirements of § 200.211):

(3) * * *

(i) Issue a management decision as prescribed in § 200.521;

* * * * *

(iii) Use cooperative audit resolution mechanisms (see the definition of *cooperative audit resolution* in § 200.1 of this part) to improve Federal program outcomes through better audit resolution, follow-up, and corrective action; and

* * * * *

· 111. Amend § 200.514 by revising paragraphs (d)(4), (e), and (f) to read as follows:

§ 200.514 Scope of audit.

* * * * *

(d) * * *

(4) When internal control over some or all of the compliance requirements for a major program are likely to be ineffective in preventing or detecting noncompliance, the planning and performing of testing described in paragraph (c)(3) of this section are not required for those compliance requirements. However, the auditor must report a significant deficiency or material weakness in accordance with § 200.516, assess the related control risk at the

(e) *Audit follow-up.* The auditor must follow-up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with § 200.511(b), and report, as a current year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding. The auditor must perform audit follow-up procedures regardless of whether a prior audit finding relates to a major program in the current year.

(f) *Data collection form.* As required in § 200.512(b)(3), the auditor must complete and sign specified sections of the data collection form.

· 112. Amend § 200.515 by revising paragraphs (a), (d)(1)(vi) through (ix), (d)(3), and (e) to read as follows:

§ 200.515 Audit reporting.

* * * * *

(a) *Financial statements*. The auditor must determine and provide an opinion (or disclaimer of opinion) whether the financial statements of the auditee are presented fairly in all materials respects in accordance with generally accepted accounting principles (or a special purpose framework such as cash, modified cash, or regulatory as required by state law). The auditor must also decide whether the schedule of expenditures of Federal awards is stated fairly in all material respects in relation to the auditee's financial statements as a whole.

* * * * *

(d) * * *

(1) * * *

(vi) A statement as to whether the audit disclosed any audit findings that the auditor is required to report under § 200.516(a);

(vii) An identification of major programs by listing each individual major program; however, in the case of a cluster of programs, only the cluster name as shown on the Schedule of Expenditures of Federal Awards is required;

(viii) The dollar threshold used to distinguish between Type A and Type B programs, as described in § 200.518(b)(1) or (3) when a recalculation of the Type A threshold is required for large loan or loan guarantees; and

(ix) A statement as to whether the auditee qualified as a low-risk auditee under § 200.520.

* * * * *

(3) Findings and questioned costs for Federal awards which must include audit findings as defined in § 200.516(a).

* * * * *

(e) Nothing in this part precludes combining of the audit reporting required by this section with the reporting required by § 200.512(b) when allowed by GAGAS and appendix X to this part.

· 113. Amend § 200.516 by revising paragraphs (a)(1) and (7), (b)(1) and (6), and (c) to read as follows:

§ 200.516 Audit findings.

(a) * * *

(1) Significant deficiencies and material weaknesses in internal control over major programs and significant instances of abuse relating to major programs. The auditor's determination of whether a deficiency in internal control is a significant deficiency or a material weakness for the purpose of reporting an audit finding is in relation to a type of compliance requirement for a major program identified in the Compliance Supplement.

* * * * *

(7) Instances where the results of audit follow-up procedures disclosed that the summary schedule of prior audit findings prepared by the auditee in accordance with § 200.511(b) materially misrepresents the status of any prior audit finding.

(b) * * *

(1) Federal program and specific Federal award identification including the Assistance Listings title and number, Federal award identification number and year, name of Federal agency, and name of the applicable pass-through entity. When information, such as the Assistance Listings title and number or Federal award identification number, is not available, the auditor must provide the best information available to describe the Federal award.

* * * * *

(6) Identification of questioned costs and how they were computed. Known questioned costs must be identified by applicable Assistance Listings number(s) and applicable Federal award identification number(s).

* * * * *

(c) *Reference numbers.* Each audit finding in the schedule of findings and questioned costs must include a reference number in the format meeting the requirements of the data collection form submission required by § 200.512(b) to allow for easy referencing of the audit findings during follow-up.

· 114. Amend § 200.518 by revising paragraphs (b)(3) and (4), (c)(1) introductory text, (c)(1)(i) and (ii), (d)(1), and (f) to read as follows:

§ 200.518 Major program determination.

* * * * *

(b) * * *

(3) The inclusion of large loan and loan guarantees (loans) must not result in the exclusion of other programs as Type A programs. When a Federal program providing loans exceeds four times the largest non-loan program it is considered a large loan program, and the auditor must consider this Federal program as a Type A program and exclude its values in determining other Type A programs. This recalculation of the Type A program is performed after removing the total of all large loan programs. For the purposes of this paragraph a program is only considered to be a Federal program providing loans if the value of Federal awards expended for loans within the program comprises fifty percent or more of the total Federal awards expended for the program. A cluster of programs is treated as one program and the value of Federal awards expended under a loan program is determined as described in § 200.502.

(4) For biennial audits permitted under § 200.504, the determination of Type A and Type B programs must be based upon the Federal awards expended during the two-year period.

(c) * * *

(1) The auditor must identify Type A programs which are low-risk. In making

this determination, the auditor must consider whether the requirements in § 200.519(c), the results of audit follow-up, or any changes in personnel or systems affecting the program indicate significantly increased risk and preclude the program from being low risk. For a Type A program to be considered low-risk, it must have been audited as a major program in at least one of the two most recent audit periods (in the most recent audit period in the case of a biennial audit), and, in the most recent audit period, the program must have not had:

(i) Internal control deficiencies which were identified as material weaknesses in the auditor's report on internal control for major programs as required under § 200.515(c);

(ii) A modified opinion on the program in the auditor's report on major programs as required under § 200.515(c); or

* * * * *

(d) * * *

(1) The auditor must identify Type B programs which are high-risk using professional judgment and the criteria in § 200.519. However, the auditor is not required to identify more high-risk Type B programs than at least one fourth the number of low-risk Type A programs identified as low-risk under Step 2 (paragraph (c) of this section). Except for known material weakness in internal control or compliance problems as discussed in § 200.519(b)(1) and (2) and (c)(1), a single criterion in risk would seldom cause a Type B program to be considered high-risk. When identifying which Type B programs to risk assess, the auditor is encouraged to use an approach which provides an opportunity for different high-risk Type B programs to be audited as major over a period of time.

* * * * *

(f) *Percentage of coverage rule.* If the auditee meets the criteria in § 200.520, the auditor need only audit the major programs identified in Step 4 (paragraphs (e)(1) and (2) of this section) and such additional Federal programs with Federal awards expended that, in aggregate, all major programs encompass at least 20 percent (0.20) of total Federal awards expended. Otherwise, the auditor must audit the major programs identified in Step 4 (paragraphs (e)(1) and (2) of this section) and such additional Federal programs with Federal awards expended that, in aggregate, all major programs encompass at least 40 percent (0.40) of total Federal awards expended.

* * * * *

■ 115. Amend § 200.519 by revising paragraph (d)(1) to read as follows:

§ 200.519 Criteria for Federal program risk.

* * * * *

(d) * * *

(1) The nature of a Federal program may indicate risk. Consideration should be given to the complexity of the program and the extent to which the Federal program contracts for goods and services. For example, Federal programs that disburse funds through third-party contracts or have eligibility criteria may be of higher risk. Federal programs primarily involving staff payroll costs may have high risk for noncompliance with requirements of § 200.430, but otherwise be at low risk.

* * * * *

■ 116. Amend § 200.520 by revising the introductory text and paragraphs (a) and (e)(1) and (2) to read as follows:

§ 200.520 Criteria for a low-risk auditee.

An auditee that meets all of the following conditions for each of the preceding two audit periods must qualify as a low-risk auditee and be eligible for reduced audit coverage in accordance with § 200.518.

(a) Single audits were performed on an annual basis in accordance with the provisions of this Subpart, including submitting the data collection form and the reporting package to the FAC within the timeframe specified in § 200.512. A non-Federal entity that has biennial audits does not qualify as a low-risk auditee.

* * * * *

(e) * * *

(1) Internal control deficiencies that were identified as material weaknesses in the auditor's report on internal control for major programs as required under § 200.515(c);

(2) A modified opinion on a major program in the auditor's report on major programs as required under § 200.515(c); or

* * * * *

■ 117. Amend § 200.521 by revising paragraph (b), (c), and (e) to read as follows:

§ 200.521 Management decision.

* * * * *

(b) *Federal agency.* As provided in § 200.513(a)(3)(vii), the cognizant agency for audit must be responsible for coordinating a management decision for audit findings that affect the programs of more than one Federal agency. As provided in § 200.513(c)(3)(i), a Federal awarding agency is responsible for issuing a management decision for findings that relate to Federal awards it makes to non-Federal entities.

(c) *Pass-through entity.* As provided in § 200.332(d), the pass-through entity must be responsible for issuing a management decision for audit findings that relate to Federal awards it makes to subrecipients.

* * * * *

(e) *Reference numbers.* Management decisions must include the reference numbers the auditor assigned to each audit finding in accordance with § 200.516(c).

■ 118. Amend appendix I to part 200 by revising sections A, B, C paragraph 2, D paragraphs 3 through 5, E paragraph 3 introductory text, E paragraph 3.iii, and F paragraphs 1 and 3 to read as follows:

Appendix I to Part 200—Full Text of Notice of Funding Opportunity

* * * * *

A. Program Description—Required

This section contains the full program description of the funding opportunity. It may be as long as needed to adequately communicate to potential applicants the areas in which funding may be provided. It describes the Federal awarding agency's funding priorities or the technical or focus areas in which the Federal awarding agency intends to provide assistance. As appropriate, it may include any program history (*e.g.*, whether this is a new program or a new or changed area of program emphasis). This section must include program goals and objectives, a reference to the relevant Assistance Listings, a description of how the award will contribute to the achievement of the program's goals and objectives, and the expected performance goals, indicators, targets, baseline data, data collection, and other outcomes such Federal awarding agency expects to achieve, and may include examples of successful projects that have been funded previously. This section also may include other information the Federal awarding agency deems necessary, and must at a minimum include citations for authorizing statutes and regulations for the funding opportunity.

B. Federal Award Information—Required

This section provides sufficient information to help an applicant make an informed decision about whether to submit a proposal. Relevant information could include the total amount of funding that the Federal awarding agency expects to award through the announcement; the expected performance indicators, targets, baseline data, and data collection; the anticipated number of Federal awards;

the expected amounts of individual Federal awards (which may be a range); the amount of funding per Federal award, on average, experienced in previous years; and the anticipated start dates and periods of performance for new Federal awards. This section also should address whether applications for renewal or supplementation of existing projects are eligible to compete with applications for new Federal awards.

This section also must indicate the type(s) of assistance instrument (*e.g.*, grant, cooperative agreement) that may be awarded if applications are successful. If cooperative agreements may be awarded, this section either should describe the ''substantial involvement'' that the Federal awarding agency expects to have or should reference where the potential applicant can find that information (*e.g.*, in the funding opportunity description in Section A. or Federal award administration information in Section D. If procurement contracts also may be awarded, this must be stated.

C. Eligibility Information

* * * * *

2. *Cost Sharing or Matching—Required.* Announcements must state whether there is required cost sharing, matching, or cost participation without which an application would be ineligible (if cost sharing is not required, the announcement must explicitly say so). Required cost sharing may be a certain percentage or amount, or may be in the form of contributions of specified items or activities (*e.g.*, provision of equipment). It is important that the announcement be clear about any restrictions on the types of cost (*e.g.*, in-kind contributions) that are acceptable as cost sharing. Cost sharing as an eligibility criterion includes requirements based in statute or regulation, as described in § 200.306 of this Part. This section should refer to the appropriate portion(s) of section D. stating any pre-award requirements for submission of letters or other documentation to verify commitments to meet cost-sharing requirements if a Federal award is made.

* * * * *

D. Application and Submission Information

* * * * *

3. *Unique entity identifier and System for Award Management (SAM)—Required.* This paragraph must state clearly that each applicant (unless the applicant is an individual or Federal awarding agency that is excepted from those requirements under 2 CFR 25.110(b) or (c), or has an exception approved by the Federal awarding agency under 2 CFR 25.110(d)) is required to: (i) Be registered in SAM before submitting its application; (ii) Provide a valid unique entity identifier in its application; and (iii) Continue to maintain an active SAM registration with current information at all times during which it has an active Federal award or an application or plan under consideration by a Federal awarding agency. It also must state that the Federal awarding agency may not make a Federal award to an applicant until the applicant has complied with all applicable unique entity identifier and SAM requirements and, if an applicant has not fully complied with the requirements by the time the Federal awarding agency is ready to make a Federal award, the Federal awarding agency may determine that the applicant is not qualified to receive a Federal award and use that determination as a basis for making a Federal award to another applicant.

4. Submission Dates and Times—Required. Announcements must identify due dates and times for all submissions. This includes not only the full applications but also any preliminary submissions (*e.g.*, letters of intent, white papers, or pre-applications). It also includes any other submissions of information before Federal award that are separate from the full application. If the funding opportunity is a general announcement that is open for a period of time with no specific due dates for applications, this section should say so. Note that the information on dates that is included in this section also must appear with other overview information in a location preceding the full text of the announcement (see § 200.204 of this part).

5. Intergovernmental Review—Required, if applicable. If the funding opportunity is subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' the notice must say so and applicants must contact their state's Single Point of Contact (SPOC) to find out about and comply with the state's process under Executive Order 12372, it may be useful to inform potential applicants that the names and addresses of the SPOCs are listed in the Office of Management and Budget's website.

* * * * *

E. Application Review Information

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3. For any Federal award under a notice of funding opportunity, if the Federal awarding agency anticipates that the total Federal share will be greater than the simplified acquisition threshold on any Federal award under a notice of funding opportunity may include, over the period of performance, this section must also inform applicants:

* * * * *

iii. That the Federal awarding agency will consider any comments by the applicant, in addition to the other information in the designated integrity and performance system, in making a judgment about the applicant's integrity, business ethics, and record of performance under Federal awards when completing the review of risk posed by applicants as described in § 200.206.

* * * * *

F. Federal Award Administration Information

1. Federal Award Notices—Required. This section must address what a successful applicant can expect to receive following selection. If the Federal awarding agency's practice is to provide a separate notice stating that an application has been selected before it actually makes the Federal award, this section would be the place to indicate that the letter is not an authorization to begin performance (to the extent that it allows charging to Federal awards of pre-award costs at the non-Federal entity's own risk). This section should indicate that the notice of Federal award signed by the grants officer (or equivalent) is the authorizing document, and whether it is provided through postal mail or by electronic means and to whom. It also may address the timing, form, and content of notifications to unsuccessful applicants. See also § 200.211.

* * * * *

3. *Reporting—Required.* This section must include general information about the type (*e.g.*, financial or performance), frequency, and means of submission (paper or electronic) of post-Federal award reporting requirements. Highlight any special reporting requirements for Federal awards under this funding opportunity that differ (*e.g.*, by report type, frequency, form/format, or circumstances for use) from what the Federal awarding agency's Federal awards usually require. Federal awarding agencies must also describe in this section all relevant requirements such as those at 2 CFR 180.335 and 180.350.

If the Federal share of any Federal award may include more than $500,000 over the period of performance, this section must inform potential applicants about the post award reporting

requirements reflected in appendix XII to this part.

* * * * *

■ 119. Amend appendix II to part 200 by revising paragraphs (A) and (J) and adding paragraphs (K) and (L) to read as follows:

Appendix II to Part 200—Contract Provisions for Non-Federal Entity Contracts Under Federal Awards

* * * * *

(A) Contracts for more than the simplified acquisition threshold, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

* * * * *

(J) See § 200.323.

(K) See § 200.216.

(L) See § 200.322.

■ 120. Amend appendix III to part 200:

■ a. Under section A by revising the introductory text and paragraphs 1.d introductory text, 2.b, 2.d(4) introductory text, 2.d.(4)(b), 2.d.(5), and 2.e.(1); and

■ b. Under section B by revising paragraphs 1, 2.a and b introductory text, 3, 4.c.(2)(ii)B, 5.a, 6.a.(2)(a), 6.b.(1), 8.a., and 9.a;

■ c. Under section C by revising paragraphs 1.a.(1) and (3), 2., 7, 8.a., 9.a., 11.a. introductory text, 11.a.(1), 11.a.(2)b;

■ d. By revising section E;

■ e. Under section F by revising paragraph 2.c.

The revisions read as follows:

Appendix III to Part 200—Indirect (F&A) Costs Identification and Assignment, and Rate Determination for Institutions of Higher Education (IHEs)

A. General

This appendix provides criteria for identifying and computing indirect (or indirect (F&A)) rates at IHEs (institutions). Indirect (F&A) costs are those that are incurred for common or joint objectives and therefore cannot be identified readily and specifically with a particular sponsored project, an instructional activity, or any other institutional activity. See subsection B.1 for a discussion of the components of indirect (F&A) costs.

1. Major Functions of an Institution

* * * * *

d. *Other institutional activities* means all activities of an institution except for instruction, departmental research, organized research, and other sponsored activities, as defined in this section; indirect (F&A) cost activities identified in this Appendix paragraph B, Identification and assignment of indirect (F&A) costs; and specialized services facilities described in § 200.468 of this part.

* * * * *

2. Criteria for Distribution

* * * * *

b. *Need for cost groupings.* The overall objective of the indirect (F&A) cost allocation process is to distribute the indirect (F&A) costs described in Section B, Identification and assignment of indirect (F&A) costs, to the major functions of the institution in proportions reasonably consistent with the nature and extent of their use of the institution's resources. In order to achieve this objective, it may be necessary to provide for selective distribution by establishing separate groupings of cost within one or more of the indirect (F&A) cost categories referred to in subsection B.1. In general, the cost groupings established within a category should constitute, in each case, a pool of those items of expense that are considered to be of like nature in terms of their relative contribution to (or degree of remoteness from) the particular cost objectives to which distribution is appropriate. Cost groupings should be established considering the general guides provided in subsection c of this section. Each such pool or cost grouping should then be distributed individually to the related cost objectives, using the distribution base or method most appropriate in light of the guidelines set forth in subsection d of this section.

* * * * *

d. * * *

(4) If a cost analysis study is not performed, or if the study does not result in an equitable distribution of the costs, the distribution must be made in accordance with the appropriate base cited in Section B, unless one of the following conditions is met:

* * * * *

(b) The institution qualifies for, and elects to use, the simplified method for computing indirect (F&A) cost rates described in Section D.

(5) Notwithstanding subsection (3), effective July 1, 1998, a cost analysis or base other than that in Section B must not be used to distribute utility or student services costs. Instead, subsection B.4.c, may be used in the recovery of utility costs.

e. * * *

(1) Indirect (F&A) costs are the broad categories of costs discussed in Section B.1.

* * * * *

B. Identification and Assignment of Indirect (F&A) Costs

1. Definition of Facilities and Administration

See § 200.414 which provides the basis for these indirect cost requirements.

2. Depreciation

a. The expenses under this heading are the portion of the costs of the institution's buildings, capital improvements to land and buildings, and equipment which are computed in accordance with § 200.436.

b. In the absence of the alternatives provided for in Section A.2.d, the expenses included in this category must be allocated in the following manner:

3. Interest

Interest on debt associated with certain buildings, equipment and capital improvements, as defined in § 200.449, must be classified as an expenditure under the category Facilities. These costs must be allocated in the same manner as the depreciation on the buildings, equipment and capital improvements to which the interest relates.

4. Operation and Maintenance Expenses

* * * * *

c. * * *

(2) * * *

(ii) * * *

B. In July 2012, values for these two indices (taken respectively from the Lawrence Berkeley Laboratory ''Labs for the 21st Century'' benchmarking tool and the US Department of Energy ''Buildings Energy Databook'' and were 310 kBtu/sq ft-yr. and 155 kBtu/sq ft-yr., so that the adjustment ratio is 2.0 by this methodology. To retain currency, OMB will adjust the EUI numbers from time to time (no more often than annually nor less often than every 5 years), using reliable and publicly disclosed data. Current values of both the EUIs and the REUI will be posted on the OMB website.

5. General Administration and General Expenses

a. The expenses under this heading are those that have been incurred for the general executive and administrative

offices of educational institutions and other expenses of a general character which do not relate solely to any major function of the institution; *i.e.*, solely to (1) instruction, (2) organized research, (3) other sponsored activities, or (4) other institutional activities. The general administration and general expense category should also include its allocable share of fringe benefit costs, operation and maintenance expense, depreciation, and interest costs. Examples of general administration and general expenses include: Those expenses incurred by administrative offices that serve the entire university system of which the institution is a part; central offices of the institution such as the President's or Chancellor's office, the offices for institution-wide financial management, business services, budget and planning, personnel management, and safety and risk management; the office of the General Counsel; and the operations of the central administrative management information systems. General administration and general expenses must not include expenses incurred within non-university-wide deans' offices, academic departments, organized research units, or similar organizational units. (See subsection 6.)

* * * * *

6. Departmental Administration Expenses

a. * * *

(2) * * *

(a) Salaries and fringe benefits attributable to the administrative work (including bid and proposal preparation) of faculty (including department heads) and other professional personnel conducting research and/or instruction, must be allowed at a rate of 3.6 percent of modified total direct costs. This category does not include professional business or professional administrative officers. This allowance must be added to the computation of the indirect (F&A) cost rate for major functions in Section C; the expenses covered by the allowance must be excluded from the departmental administration cost pool. No documentation is required to support this allowance.

* * * * *

b. The following guidelines apply to the determination of departmental administrative costs as direct or indirect (F&A) costs.

(1) In developing the departmental administration cost pool, special care should be exercised to ensure that costs incurred for the same purpose in like circumstances are treated consistently as either direct or indirect (F&A) costs. For example, salaries of technical staff, laboratory supplies (*e.g.*, chemicals), telephone toll charges, animals, animal care costs, computer costs, travel costs, and specialized shop costs must be treated as direct costs wherever identifiable to a particular cost objective. Direct charging of these costs may be accomplished through specific identification of individual costs to benefitting cost objectives, or through recharge centers or specialized service facilities, as appropriate under the circumstances. See §§ 200.413(c) and 200.468.

* * * * *

8. Library Expenses

a. The expenses under this heading are those that have been incurred for the operation of the library, including the cost of books and library materials purchased for the library, less any items of library income that qualify as applicable credits under § 200.406. The library expense category should also include the fringe benefits applicable to the salaries and wages included therein, an appropriate share of general administration and general expense, operation and maintenance expense, and depreciation. Costs incurred in the purchases of rare books (museum-type books) with no value to Federal awards should not be allocated to them.

* * * * *

9. Student Administration and Services

a. The expenses under this heading are those that have been incurred for the administration of student affairs and for services to students, including expenses of such activities as deans of students, admissions, registrar, counseling and placement services, student advisers, student health and infirmary services, catalogs, and commencements and convocations. The salaries of members of the academic staff whose responsibilities to the institution require administrative work that benefits sponsored projects may also be included to the extent that the portion charged to student administration is determined in accordance with subpart E of this Part. This expense category also includes the fringe benefit costs applicable to the salaries and wages included therein, an appropriate share of general administration and general expenses, operation and maintenance, interest expense, and depreciation.

* * * * *

C. Determination and Application of Indirect (F&A) Cost Rate or Rates

1. Indirect (F&A) Cost Pools

a. (1) Subject to subsection b, the separate categories of indirect (F&A) costs allocated to each major function of the institution as prescribed in Section B, must be aggregated and treated as a common pool for that function. The amount in each pool must be divided by the distribution base described in subsection 2 to arrive at a single indirect (F&A) cost rate for each function.

* * * * *

(3) Each institution's indirect (F&A) cost rate process must be appropriately designed to ensure that Federal sponsors do not in any way subsidize the indirect (F&A) costs of other sponsors, specifically activities sponsored by industry and foreign governments. Accordingly, each allocation method used to identify and allocate the indirect (F&A) cost pools, as described in Sections A.2 and B.2 through B.9, must contain the full amount of the institution's modified total costs or other appropriate units of measurement used to make the computations. In addition, the final rate distribution base (as defined in subsection 2) for each major function (organized research, instruction, etc., as described in Section A.1 functions of an institution) must contain all the programs or activities which utilize the indirect (F&A) costs allocated to that major function. At the time an indirect (F&A) cost proposal is submitted to a cognizant agency for indirect costs, each institution must describe the process it uses to ensure that Federal funds are not used to subsidize industry and foreign government funded programs.

2. The Distribution Basis

Indirect (F&A) costs must be distributed to applicable Federal awards and other benefitting activities within each major function (see section A.1) on the basis of modified total direct costs (MTDC), consisting of all salaries and wages, fringe benefits, materials and supplies, services, travel, and up to the first $25,000 of each subaward (regardless of the period covered by the subaward). MTDC is defined in § 200.1. For this purpose, an indirect (F&A) cost rate should be determined for each of the separate indirect (F&A) cost pools developed pursuant to subsection 1. The rate in each case should be stated as the percentage which the amount of the particular indirect (F&A) cost pool is of the modified total direct costs identified with such pool.

* * * * *

7. Fixed Rates for the Life of the Sponsored Agreement

a. Except as provided in paragraph (c)(1) of § 200.414, Federal agencies must use the negotiated rates in effect at the time of the initial award throughout the life of the Federal award. Award levels for Federal awards may not be adjusted in future years as a result of changes in negotiated rates. ''Negotiated rates'' per the rate agreement include final, fixed, and predetermined rates and exclude provisional rates. ''Life'' for the purpose of this subsection means each competitive segment of a project. A competitive segment is a period of years approved by the Federal awarding agency at the time of the Federal award. If negotiated rate agreements do not extend through the life of the Federal award at the time of the initial award, then the negotiated rate for the last year of the Federal award must be extended through the end of the life of the Federal award.

b. Except as provided in §200.414, when an educational institution does not have a negotiated rate with the Federal Government at the time of an award (because the educational institution is a new recipient or the parties cannot reach agreement on a rate), the provisional rate used at the time of the award must be adjusted once a rate is negotiated and approved by the cognizant agency for indirect costs.

8. Limitation on Reimbursement of Administrative Costs

a. Notwithstanding the provisions of subsection C.1.a, the administrative costs charged to Federal awards awarded or amended (including continuation and renewal awards) with effective dates beginning on or after the start of the institution's first fiscal year which begins on or after October 1, 1991, must be limited to 26% of modified total direct costs (as defined in subsection 2) for the total of General Administration and General Expenses, Departmental Administration, Sponsored Projects Administration, and Student Administration and Services (including their allocable share of depreciation, interest costs, operation and maintenance expenses, and fringe benefits costs, as provided by Section B, and all other types of expenditures not listed specifically under one of the subcategories of facilities in Section B.

* * * * *

9. Alternative Method for Administrative Costs

a. Notwithstanding the provisions of subsection C.1.a, an institution may elect to claim a fixed allowance for the ''Administration'' portion of indirect (F&A) costs. The allowance could be either 24% of modified total direct costs or a percentage equal to 95% of the most recently negotiated fixed or predetermined rate for the cost pools included under ''Administration'' as defined in Section B.1, whichever is less. Under this alternative, no cost proposal need be prepared for the ''Administration'' portion of the indirect (F&A) cost rate nor is further identification or documentation of these costs required (see subsection c). Where a negotiated indirect (F&A) cost agreement includes this alternative, an institution must make no further charges for the expenditure categories described in Section B.5, Section B.6, Section B.7, and Section B.9.

* * * * *

11. Negotiation and Approval of Indirect (F&A) Rate

a. Cognizant agency for indirect costs is defined in Subpart A.

(1) Cost negotiation cognizance is assigned to the Department of Health and Human Services (HHS) or the Department of Defense's Office of Naval Research (DOD), normally depending on which of the two agencies (HHS or DOD) provides more funds directly to the educational institution for the most recent three years. Information on funding must be derived from relevant data gathered by the National Science Foundation. In cases where neither HHS nor DOD provides Federal funding directly to an educational institution, the cognizant agency for indirect costs assignment must default to HHS. Notwithstanding the method for cognizance determination described in this section, other arrangements for cognizance of a particular educational institution may also be based in part on the types of research performed at the educational institution and must be decided based on mutual agreement between HHS and DOD. Where a non-Federal entity only receives funds as a subrecipient, see § 200.332.

(2) * * *

b. Acceptance of rates. See § 200.414.

* * * * *

E. Documentation Requirements

The standard format for documentation requirements for indirect (indirect (F&A)) rate proposals for claiming costs under the regular method is available on the OMB website.

F. Certification

* * * * *

2. * * *

c. *Certificate.* The certificate required by this section must be in the following form:

Certificate of Indirect (F&A) Costs

This is to certify that to the best of my knowledge and belief:

(1) I have reviewed the indirect (F&A) cost proposal submitted herewith;

(2) All costs included in this proposal [identify date] to establish billing or final indirect (F&A) costs rate for [identify period covered by rate] are allowable in accordance with the requirements of the Federal agreement(s) to which they apply and with the cost principles applicable to those agreements.

(3) This proposal does not include any costs which are unallowable under subpart E of this part such as (without limitation): Public relations costs, contributions and donations, entertainment costs, fines and penalties, lobbying costs, and defense of fraud proceedings; and

(4) All costs included in this proposal are properly allocable to Federal agreements on the basis of a beneficial or causal relationship between the expenses incurred and the agreements to which they are allocated in accordance with applicable requirements.

I declare that the foregoing is true and correct.

Institution of Higher Education:
Signature: [redacted]
Name of Official: [redacted]
Title: [redacted]
Date of Execution: [redacted]

- 121. Amend appendix IV to part 200:
- a. By revising section A;
- b. Under section B by revising paragraphs 2.b through e, 3.b(1), (2), and (4), 3.c.(4), 3.f and g, and 4.b and c;
- c. Under section C by revising paragraphs 2.a through c; and
- d. Under section D by revising (D)(1), and under the center heading ''Certificate of Indirect (F&A) Costs'', paragraphs (2) and (3).

The revisions read as follows:

Appendix IV to Part 200—Indirect (F&A) Costs Identification and Assignment, and Rate Determination for Nonprofit Organizations

A. General

1. Indirect costs are those that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective. Direct cost of minor amounts may be treated as indirect costs under the conditions described in § 200.413(d). After direct costs have been determined and assigned directly

to awards or other work as appropriate, indirect costs are those remaining to be allocated to benefitting cost objectives. A cost may not be allocated to a Federal award as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been assigned to a Federal award as a direct cost.

2. ''Major nonprofit organizations'' are defined in paragraph (a) of § 200.414. See indirect cost rate reporting requirements in sections B.2.e and B.3.g of this Appendix.

B. Allocation of Indirect Costs and Determination of Indirect Cost Rates

* * * * *

2. Simplified Allocation Method

* * * * *

b. Both the direct costs and the indirect costs must exclude capital expenditures and unallowable costs. However, unallowable costs which represent activities must be included in the direct costs under the conditions described in § 200.413(e).

c. The distribution base may be total direct costs (excluding capital expenditures and other distorting items, such as subawards for $25,000 or more), direct salaries and wages, or other base which results in an equitable distribution. The distribution base must exclude participant support costs as defined in § 200.1.

d. Except where a special rate(s) is required in accordance with section B.5 of this Appendix, the indirect cost rate developed under the above principles is applicable to all Federal awards of the organization. If a special rate(s) is required, appropriate modifications must be made in order to develop the special rate(s).

e. For an organization that receives more than $10 million in direct Federal funding in a fiscal year, a breakout of the indirect cost component into two broad categories, Facilities and Administration as defined in paragraph (a) of § 200.414, is required. The rate in each case must be stated as the percentage which the amount of the particular indirect cost category (*i.e.*, Facilities or Administration) is of the distribution base identified with that category.

3. Multiple Allocation Base Method

* * * * *

(b) * * *

(1) Depreciation. The expenses under this heading are the portion of the costs of the organization's buildings, capital improvements to land and buildings, and equipment which are computed in accordance with § 200.436.

(2) Interest. Interest on debt associated with certain buildings, equipment and capital improvements are computed in accordance with § 200.449.

* * * * *

(4) General administration and general expenses. The expenses under this heading are those that have been incurred for the overall general executive and administrative offices of the organization and other expenses of a general nature which do not relate solely to any major function of the organization. This category must also include its allocable share of fringe benefit costs, operation and maintenance expense, depreciation, and interest costs. Examples of this category include central offices, such as the director's office, the office of finance, business services, budget and planning, personnel, safety and risk management, general counsel, management information systems, and library costs.

In developing this cost pool, special care should be exercised to ensure that costs incurred for the same purpose in like circumstances are treated consistently as either direct or indirect costs. For example, salaries of technical staff, project supplies, project publication, telephone toll charges, computer costs, travel costs, and specialized services costs must be treated as direct costs wherever identifiable to a particular program. The salaries and wages of administrative and pooled clerical staff should normally be treated as indirect costs. Direct charging of these costs may be appropriate as described in § 200.413. Items such as office supplies, postage, local telephone costs, periodicals and memberships should normally be treated as indirect costs.

(c) * * *

(4) General administration and general expenses. General administration and general expenses must be allocated to benefitting functions based on modified total costs (MTC). The MTC is the modified total direct costs (MTDC), as described in § 200.1, plus the allocated indirect cost proportion. The expenses included in this category could be grouped first according to major functions of the organization to which they render services or provide benefits. The aggregate expenses of each group must then be allocated to benefitting functions based on MTC.

* * * * *

f. Distribution basis. Indirect costs must be distributed to applicable Federal awards and other benefitting activities within each major function on the basis of MTDC (see definition in § 200.1).

g. Individual Rate Components. An indirect cost rate must be determined for each separate indirect cost pool developed. The rate in each case must be stated as the percentage which the amount of the particular indirect cost pool is of the distribution base identified with that pool. Each indirect cost rate negotiation or determination agreement must include development of the rate for each indirect cost pool as well as the overall indirect cost rate. The indirect cost pools must be classified within two broad categories: ''Facilities'' and ''Administration,'' as described in § 200.414(a).

4. Direct Allocation Method

* * * * *

b. This method is acceptable, provided each joint cost is prorated using a base which accurately measures the benefits provided to each Federal award or other activity. The bases must be established in accordance with reasonable criteria and be supported by current data. This method is compatible with the Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Organizations issued jointly by the National Health Council, Inc., the National Assembly of Voluntary Health and Social Welfare Organizations, and the United Way of America.

c. Under this method, indirect costs consist exclusively of general administration and general expenses. In all other respects, the organization's indirect cost rates must be computed in the same manner as that described in section B.2 of this Appendix.

* * * * *

C. Negotiation and Approval of Indirect Cost Rates

* * * * *

2. Negotiation and Approval of Rates

a. Unless different arrangements are agreed to by the Federal agencies concerned, the Federal agency with the largest dollar value of Federal awards directly funded to an organization will be designated as the cognizant agency for indirect costs for the negotiation and approval of the indirect cost rates and, where necessary, other rates such as fringe benefit and computer charge-out rates. Once an agency is assigned cognizance for a particular nonprofit organization, the assignment will not be changed unless there is a shift in the dollar volume of the Federal awards directly funded to the organization for at least three years. All concerned Federal agencies must be given the opportunity

to participate in the negotiation process but, after a rate has been agreed upon, it will be accepted by all Federal agencies. When a Federal agency has reason to believe that special operating factors affecting its Federal awards necessitate special indirect cost rates in accordance with section B.5 of this Appendix, it will, prior to the time the rates are negotiated, notify the cognizant agency for indirect costs. (See also § 200.414.) If the nonprofit does not receive any funding from any Federal agency, the pass-through entity is responsible for the negotiation of the indirect cost rates in accordance with § 200.332(a)(4).

b. Except as otherwise provided in § 200.414(f), a nonprofit organization which has not previously established an indirect cost rate with a Federal agency must submit its initial indirect cost proposal immediately after the organization is advised that a Federal award will be made and, in no event, later than three months after the effective date of the Federal award.

c. Unless approved by the cognizant agency for indirect costs in accordance with § 200.414(g), organizations that have previously established indirect cost rates must submit a new indirect cost proposal to the cognizant agency for indirect costs within six months after the close of each fiscal year.

* * * * *

D. Certification of Indirect (F&A) Costs

(1) Required Certification. No proposal to establish indirect (F&A) cost rates must be acceptable unless such costs have been certified by the nonprofit organization using the Certificate of Indirect (F&A) Costs set forth in section j. of this appendix. The certificate must be signed on behalf of the organization by an individual at a level no lower than vice president or chief financial officer for the organization.

* * * * *

Certificate of Indirect (F&A) Costs

* * * * *

(2) All costs included in this proposal [identify date] to establish billing or final indirect (F&A) costs rate for [identify period covered by rate] are allowable in accordance with the requirements of the Federal awards to which they apply and with subpart E of this part.

(3) This proposal does not include any costs which are unallowable under subpart E of this part such as (without limitation): Public relations costs, contributions and donations, entertainment costs, fines and penalties, lobbying costs, and defense of fraud proceedings; and

* * * * *

- 122. Amend appendix V to part 200 by revising:
- a. Section A, paragraph 2;
- b. Section B, paragraph 4;
- c. Section C
- d. Section E, paragraph 3.b.(1); and
- e. Section G, paragraph 5.

The revisions read as follows:

Appendix V to Part 200—State/Local Governmentwide Central Service Cost Allocation Plans

A. General

* * * * *

2. Guidelines and illustrations of central service cost allocation plans are provided in a brochure published by the Department of Health and Human Services entitled ''*A Guide for State, Local and Indian Tribal Governments: Cost Principles and Procedures for Developing Cost Allocation Plans and Indirect Cost Rates for Agreements with the Federal Government.*'' A copy of this brochure may be obtained from the HHS Cost Allocation Services or at their website.

B. Definitions

* * * * *

4. *Cognizant agency for indirect costs* is defined in § 200.1. The determination of cognizant agency for indirect costs for states and local governments is described in section F.1.

* * * * *

C. Scope of the Central Service Cost Allocation Plans

The central service cost allocation plan will include all central service costs that will be claimed (either as a billed or an allocated cost) under Federal awards and will be documented as described in section E. omitted from the plan will not be reimbursed.

E. Documentation Requirements for Submitted Plans

* * * * *

3. Billed Services

* * * * *

b. * * *

(1) For each internal service fund or similar activity with an operating budget of $5 million or more, the plan must include: A brief description of each service; a balance sheet for each fund based on individual accounts contained in the governmental unit's accounting system; a revenue/expenses statement, with revenues broken out by source, *e.g.*, regular billings, interest earned, etc.; a listing of all non-operating transfers (as defined by GAAP) into and out of the fund; a description of the procedures (methodology) used to charge the costs of each service to users, including how billing rates are determined; a schedule of current rates; and, a schedule comparing total revenues (including imputed revenues) generated by the service to the allowable costs of the service, as determined under this part, with an explanation of how variances will be handled.

* * * * *

G. Other Polices

* * * * *

5. Records Retention

All central service cost allocation plans and related documentation used as a basis for claiming costs under Federal awards must be retained for audit in accordance with the records retention requirements contained in subpart D of this part.

* * * * *

- 123. Amend appendix VI to part 200 by revising paragraph 2 in section D to read as follows:

Appendix VI to Part 200—Public Assistance Cost Allocation Plans

* * * * *

D. Submission, Documentation, and Approval of Public Assistance Cost Allocation Plans

* * * * *

2. Under the coordination process outlined in section E, affected Federal agencies will review all new plans and plan amendments and provide comments, as appropriate, to HHS. The effective date of the plan or plan amendment will be the first day of the calendar quarter following the event that required the amendment, unless another date is specifically approved by HHS. HHS, as the cognizant agency for indirect costs acting on behalf of all affected Federal agencies, will, as necessary, conduct negotiations with the state public assistance agency and will inform the state agency of the action taken on the plan or plan amendment.

* * * * *

- 124. Amend appendix VII to part 200 by revising:
- a. Section A, paragraphs 2, 3, 4, and 5;
- b. Section B, paragraph 3;
- c. Section D, paragraph 1a.; and
- d. Section E, paragraph 4.

The revisions read as follows:

Appendix VII to Part 200—States and Local Government and Indian Tribe Indirect Cost Proposals

A. General

* * * * *

2. Indirect costs include (a) the indirect costs originating in each department or agency of the governmental unit carrying out Federal awards and (b) the costs of central governmental services distributed through the central service cost allocation plan (as described in Appendix V to this part) and not otherwise treated as direct costs.

3. Indirect costs are normally charged to Federal awards by the use of an indirect cost rate. A separate indirect cost rate(s) is usually necessary for each department or agency of the governmental unit claiming indirect costs under Federal awards. Guidelines and illustrations of indirect cost proposals are provided in a brochure published by the Department of Health and Human Services entitled ''*A Guide for States and Local Government Agencies: Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government.*'' A copy of this brochure may be obtained from HHS Cost Allocation Services or at their website.

4. Because of the diverse characteristics and accounting practices of governmental units, the types of costs which may be classified as indirect costs cannot be specified in all situations. However, typical examples of indirect costs may include certain state/local-wide central service costs, general administration of the non-Federal entity accounting and personnel services performed within the non-Federal entity, depreciation on buildings and equipment, the costs of operating and maintaining facilities.

5. This Appendix does not apply to state public assistance agencies. These agencies should refer instead to Appendix VI to this part.

B. Definitions

* * * * *

3. *Cognizant agency for indirect costs* means the Federal agency responsible for reviewing and approving the governmental unit's indirect cost rate(s) on the behalf of the Federal Government. The cognizant agency for indirect costs assignment is described in Appendix V, section F.

* * * * *

D. Submission and Documentation of Proposals

1. Submission of Indirect Cost Rate Proposals

a. All departments or agencies of the governmental unit desiring to claim indirect costs under Federal awards must prepare an indirect cost rate proposal and related documentation to support those costs. The proposal and related documentation must be retained for audit in accordance with the records retention requirements contained in § 200.334.

* * * * *

E. Negotiation and Approval of Rates

* * * * *

4. Refunds must be made if proposals are later found to have included costs that (a) are unallowable (i) as specified by law or regulation, (ii) as identified in § 200.420, or (iii) by the terms and conditions of Federal awards, or (b) are unallowable because they are clearly not allocable to Federal awards. These adjustments or refunds will be made regardless of the type of rate negotiated (predetermined, final, fixed, or provisional).

* * * * *

■ 125. Amend appendix VIII to part 200 by revising the heading and paragraphs 32 and 33 to read as follows:

Appendix VIII to Part 200—Nonprofit Organizations Exempted From Subpart E of Part 200

* * * * *

32. Nonprofit insurance companies, such as Blue Cross and Blue Shield Organizations

33. Other nonprofit organizations as negotiated with Federal awarding agencies

■ 126. Appendix XI to part 200 is revised to read as follows:

Appendix XI to Part 200—Compliance Supplement

The compliance supplement is available on the OMB website.

■ 127. Amend appendix XII to part 200 by revising section A, paragraph 2.b to read as follows:

Appendix XII to Part 200—Award Term and Condition for Recipient Integrity and Performance Matters

A. Reporting of Matters Related to Recipient Integrity and Performance

* * * * *

2. Proceedings About Which You Must Report

* * * * *

b. Reached its final disposition during the most recent five-year period; and

* * * * *

[FR Doc. 2020–17468 Filed 8–11–20; 8:45 am]

BILLING CODE 3110–01–P

OFFICE OF MANAGEMENT AND BUDGET

2 CFR Parts 25, 170, 183, and 200

Guidance for Grants and Agreements

ACTION: Final guidance.

SUMMARY: The Office of Management and Budget (OMB) is revising sections of OMB Guidance for Grants and Agreements. This revision reflects the foundational shift outlined in the President's Management Agenda (PMA) to set the stage for enhanced result- oriented accountability for grants. This guidance is reflects the Administration's focus on improved stewardship and ensuring that the American people are receiving value for funds spent on grant programs. The revisions are limited in scope to support implementation of the President's Management Agenda, Results-Oriented Accountability for Grants Cross-Agency Priority Goal (Grants CAP Goal) and other Administration priorities; implementation of statutory requirements and alignment of these sections with other authoritative source requirements; and clarifications of existing requirements in particular areas within these sections.

DATES: These revisions to the guidance are effective November 12, 2020, except for the amendments to §§200.216 and 200.340, which are effective on August 13, 2020.

FOR FURTHER INFORMATION CONTACT: Nicole Waldeck or Gil Tran at the OMB Office of Federal Financial Management at *GrantsTeam@omb.eop.gov* or 202– 395–3993.

SUPPLEMENTARY INFORMATION:

Background and Objectives

In 2013, OMB partnered with the Council on Financial Assistance Reform (COFAR) to revise and streamline guidance to develop the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance) located in title 2 of the Code of Federal Regulations (2 CFR part 200) (79 FR 78589; December 26, 2013). The intent of this effort was to simultaneously reduce administrative burden and the risk of waste, fraud, and abuse while delivering better performance on behalf of the American people. Implementation of the Uniform Guidance became effective on December 26, 2014 (79 FR 75867, December 19, 2014) and must be reviewed every five years in accordance with 2 CFR 200.109.

Based on feedback and ongoing engagement with the grants management community, the Administration established the Results-Oriented Accountability for Grants Cross Agency Priority Goal (Grants CAP Goal) in the President's Management Agenda on March 20, 2018 (available at: *https://www.performance.gov/CAP/ grants/*). The Grants CAP Goal recognizes that grants managers report spending a disproportionate amount of time using antiquated processes to monitor compliance. Efficiencies could be gained from modernization and grants managers could instead shift their time to analyze data to improve results. To address this challenge, the Grants CAP Goal Executive Steering Committee (ESC), which reports to the Chief Financial Officer's Council (CFOC), has identified four strategies to work toward maximizing the value of grant funding by developing a risk-based, data-driven framework that balances compliance requirements with demonstrating successful results for the American taxpayer.

1. Strategy 1: Operationalize the Grants Management Standards
2. Strategy 2: Establish a Robust Marketplace of Modern Solutions
3. Strategy 3: Manage Risk
4. Strategy 4: Achieve Program Goals and Objectives

The revisions to 2 CFR support these four strategies. In support of Strategies 1 and 2, OMB is implementing changes throughout 2 CFR to modernize reporting by recipients of Federal grants by requiring Federal agencies to adopt standard data elements for the information recipients are required to report (available at: *https:// ussm.gsa.gov/fibf/*). This adoption will enable technology solutions to better manage the data the recipients report to the Federal government. These changes also support implementation of the Grants Reporting Efficiency and Agreements Transparency Act of 2019 (GREAT Act). OMB is also implementing revisions to strengthen the governmentwide approach to performance and risk, to support efforts under Strategies 3 and 4 by encouraging agencies to measure the recipient's performance in a way that will help Federal awarding agencies and non-Federal entities to improve program goals and objectives, share lessons learned, and spread the adoption of promising performance practices.

OMB is also revising 2 CFR to implement relevant statutory requirements. These revisions include requirements from several National Defense Authorization Acts (NDAAs) and the Federal Funding Accountability and Transparency Act (FFATA), as amended by the Digital Accountability and Transparency Act (DATA Act).

Finally, OMB is implementing revisions to 2 CFR to clarify areas of misinterpretation. The revisions are intended to reduce recipient burden by improving consistent interpretation. OMB consulted and collaborated with agency representatives identified by the Grants CAP Goal ESC to support the implementation of these revisions. OMB also solicited feedback from the broader Federal financial assistance community by publishing the proposed changes to 2 CFR in the **Federal Register** for a sixty (60) day public comment period (*https://www.federalregister.gov/d/2019-28524*). OMB received 215 submissions with over 1,200 comments from the public, around 1,200 comments from Federal agencies, and around 100 comments from the Council of the Inspectors General on Integrity and Efficiency (CIGIE) Grant Reform Workgroup for a total of over 2,500 comments. OMB reconvened agency representatives to review the comments and make changes to the proposed revisions as appropriate.

In summary and as discussed further in the sections below, OMB is revising 2 CFR parts 25, 170, and 200. Additionally, OMB is adding part 183 to 2 CFR to implement Never Contract with the Enemy. The sections are revised within the following scope. Comments received that were out of scope for the revision were not accepted by OMB.

I. To support implementation of the President's Management Agenda Results-Oriented Accountability for Grants CAP Goal and other Administration priorities;

II. To meet statutory requirements and to align with other authoritative source requirements; and

III. To clarify existing requirements.

I. Support Implementation of the President's Management Agenda and Other Administration Priorities

A. Emphasizing Stewardship and Results-Oriented Accountability for Grant Program Results

The President's Management Agenda, Results-Oriented Accountability for Grants CAP goal is working toward shifting the balance between compliance and performance while reducing burden. Agencies are encouraged to promote promising performance practices that support the achievement of program goals and objectives. Many Federal agencies are working together to innovate and develop a risk-based approach that incorporates performance to achieve results-oriented grants (where applicable). By shifting the focus to the balance between performance and compliance, agencies may have the opportunity to streamline burdensome compliance requirements for programs that demonstrate results. To support this goal, OMB is publishing revisions in multiple sections of the guidance that together emphasize the importance of focusing on performance to achieve program results throughout the Federal award lifecycle.

The provisions that were revised to improve the governmentwide approach to performance and risk emphasize stewardship and results-oriented grant making. Revisions to 2 CFR 200.102 *Exceptions* encourages Federal awarding agencies to apply a risk-based, data-driven framework to alleviate select

compliance requirements for programs that demonstrate results. 2 CFR 200.202 *Program planning and design* highlights the importance of developing a strong plan and design to set the stage for demonstrating program results. 2 CFR 200.205 *Federal awarding agency review of merit proposals* strengthens the merit review process which is linked to 2 CFR 200.301 *Performance measurement* requiring Federal awarding agencies to measure recipient performance, which is derived from program planning and design (§200.202). Performance information focused on results must be made available to recipients in the solicitation and in the award, which is reflected in 2 CFR 200.211 *Information contained in a Federal award.* Award recipients must also be aware of termination provisions in 2 CFR 200.340 *Termination* and reinforced in 2 CFR 200.211 *Information contained in a Federal award*, which are linked to performance goals of the program (§200.301). Revisions to 2 CFR 200.413 *Direct costs* were also made to include evaluation costs as an example of a direct cost, which demonstrates program results.

Revisions to 2 CFR 200.202 *Program planning and design* develops a new provision. This section formalizes a requirement that are already expected of Federal awarding agencies to develop a strong program design by establishing program goals, objectives, and indicators, to the extent permitted by law, before the applications are solicited. The development of 2 CFR 200.202 emphasizes the importance of sound program design as an essential component of performance management and program administration. Ideally, program design takes place before an agency drafts related projects. This enables Federal agency leadership and employees to codify program goals, objectives, and intended results before specifying the goals and objectives of in a solicitation. A well-designed program has clear goals and objectives that facilitate the delivery of meaningful results, whether a new scientific discovery, positive impact on citizen's daily life, or improvement of the Nation's infrastructure. Well-designed programs also represent a critical component of an agency's implementation strategies and efforts that contribute to and support the longer-term outcomes of an agency's strategic plan. OMB encourages Federal awarding agencies to reference the ''Managing for Results: The Performance Management Playbook for Federal Awarding Agencies'' for promising performance practices throughout the Federal award lifecycle, including steps to develop a strong program plan and design (*www.performance.gov/CAP/ grants/*).

Program design elements may include a problem or needs statement, goals and objectives; a logic model depicting the program's structure; program activities; a theory or theories of change and the evidence supporting them; performance and other indicators to measure program accomplishments and find ways to improve, set priorities, and identify targets of opportunity. In addition, it may include use or intended use of independently available sources of data, development and support of learning communities which may benefit from a shared understanding of promising practices and collaboration on common challenges and opportunities, and a system to periodically review award selection criteria.

OMB is revising to 2 CFR 200.205 *Federal awarding agency review of merit proposals,* 2 CFR 200.203 *Requirement to provide public notice of Federal financial assistance programs* and §200.204 *Notices of funding opportunities* to strengthen merit review, public notice of Federal financial assistance programs, and the notices of funding opportunities to further the goals of results-oriented grantmaking. These changes require Federal awarding agencies to extend their merit review process to discretionary Federal awards, unless prohibited by Federal statute, the Federal awarding agency must design and execute a merit review process for applications.

Additional language was included to articulate an explanation of the merit review process that Federal awarding agencies are expected to follow. Further, Federal awarding agencies are required to periodically review their Federal award merit review process. These changes support the Administration's priority to ensure a fair and transparent process for the selection of award recipients and supports efforts under the President's Management Agenda to ensure that Federal awards are designed to achieve program goals and objectives.

Changes to 2 CFR 200.206 *Federal awarding agency review of risk posed by applicants* allow Federal awarding agencies to adjust requirements when a risk-evaluation indicates that it may be merited. Changes are included in 2 CFR 200.211 *Information contained in a Federal award* and 2 CFR 200.301 *Performance measurement* further emphasize existing requirements for requiring Federal awarding agencies to provide recipients with clear performance goals, indicators, targets, and baseline data. OMB is adding language to §200.102 *Exceptions* to emphasize that Federal awarding agencies are encouraged to request exceptions to certain provisions of 2 CFR part 200 in support of innovative program designs that apply a risk-based, data-driven framework to alleviate select compliance requirements and hold recipients accountable for good performance. OMB recognizes that Federal financial assistance program goals and their intended results will differ by type of Federal program. For example, criminal justice grant programs may focus on specific goals such as reducing crime, basic scientific research grant programs may focus on expanding knowledge, and infrastructure projects may fund building or infrastructure projects.

Related to the above changes that aim to strengthen program planning and Federal award terms and conditions, OMB is revising §§200.211 *Information contained in a Federal award* and 200.340 *Termination* to strengthen the ability of the Federal awarding agency to terminate Federal awards, to the greatest extent authorized by law, when the Federal award no longer effectuates the program goals or Federal awarding agency priorities. Federal awarding agencies must clearly and unambiguously articulate the conditions under which a Federal award may be terminated in their applicable regulations and in the terms and conditions of Federal awards. The intent of this change is to ensure that Federal awarding agencies prioritize ongoing support to Federal awards that meet program goals. For instance, following the issuance of a Federal award, if additional evidence reveals that a specific award objective is ineffective at achieving program goals, it may be in the government's interest to terminate the Federal award. Further, additional evidence may cause the Federal awarding agency to significantly question the feasibility of the intended objective of the award, such that it may be in the interest of the government to terminate the Federal award. OMB is also eliminating the termination for cause provision because this term is not substantially different than the provision allowing Federal awarding agencies to terminate Federal awards when the recipient fails to comply with the terms and conditions.

In addition, OMB is expanding the definition of fixed amount awards in §200.1 to allow Federal awarding agencies to apply the provision to both grant agreements and cooperative agreements.

The revisions in 2 CFR 200.301 emphasize that agencies are encouraged to measure recipient performance to improve program goals and objectives, share lessons learned, and spread the adoption of promising practices. While understanding that grant program goals and their intended results will differ by type of program, the Grants CAP Goal is working to shift the culture of Federal grant making from a heavy focus on compliance to a balanced approach that includes a focus on the degree to which grant programs achieve their goals and intended results. To provide clarity and consistency among Federal awarding agencies, a revision to include program evaluation costs as an example of a direct cost under a Federal award has been included in 2 CFR 200.413 *Direct costs.* Please refer to OMB Circular A–11 for a definition on program evaluation. Evaluation costs are allowed as a direct cost in existing guidance. This language is intended to strengthen this intent and ensure that agencies are applying this consistently.

Agencies are reminded that evaluation costs are allowable costs (either as direct or indirect), unless prohibited by statute or regulation. The work under the Grants CAP

goal performance work group emphasizes evaluation as an important practice to understand the results achieved with Federal funding.

200.102 Exceptions

OMB received several comments on this section asking for clarification on the proposed revisions. Some commenters also noted that the addition of the ''or less restrictive requirements'' in 2 CFR 200.102(c) and 200.208 is confusing, redundant and not needed because Federal awarding agencies already have the discretion to impose conditions on the recipient. OMB deliberated upon these comments and ultimately agreed to replace the language ''or less restrictive requirements'' with ''adjust requirements'' within the final guidance. OMB strongly encourages Federal awarding agencies to add or remove requirements by applying a risk- based, data-driven framework to alleviate select compliance requirements and hold recipients accountable for good performance. One commenter felt that the inclusion of the requirement for agencies to ''apply more restrictive terms and conditions when merited as indicated by a risk evaluation'' did not warrant an exception from OMB and thus did not belong in the exceptions section. OMB concurred with the commenter and moved this language to 2 CFR 200.206 *Federal awarding agency review of risk posed by applicants.*

200.202 Program Planning and Design

Many commenters were supportive of this new section and the other revisions related to results-based grant making. Some commenters also thought the proposal could go further to better utilize federal grantees' activities to build and disseminate evidence of what works. One commenter expressed concern that revisions to the performance sections would lead to the unintended consequence of making research look like a contract agreement. OMB provided explicit language to state that performance measures for each program will be different. One commenter expressed concern that this new requirement would add burden. OMB respectfully disagrees, as this requirement is not new and does not add burden. This section reflects activities that were previously implied within 2 CFR and not explicitly included in its own section.

OMB appreciates the commenters who challenged OMB to go even further with the proposal with regards to evidence-building. OMB looks forward to furthering this discussion with stakeholder sessions in fall 2020 and will also consider these proposals in future revisions of 2 CFR. This provision is designed to operate in tandem with evidence-related statutes (*e.g.,* The Foundations for Evidence- Based Policymaking Act of 2018, which emphasizes collaboration and coordination to advance data and evidence-building functions in the Federal government) and related OMB implementation guidance (*e.g.,* OMB Memorandum M–19–23: Phase 1 implementation of the Foundations for Evidence-Based Policymaking Act of 2018. Learning Agendas, Personnel, and Planning Guidance).

200.203 Requirement To Provide Public Notice of Federal Financial Assistance Programs

There were several comments provided in response to the changes made to 2 CFR 200.203. One comment inquired as to why no similar requirements exist within the Uniform Guidance and is applicable to pass- through entities within 2 CFR 200.332. OMB notes that the Federal awarding agency does not have a direct relationship with the subaward recipient; that is the role of the pass- through entity. Mandating application of this requirement would require additional public comment as it would add burden to the process. Further, comments asked for OMB to develop guidance to help ensure that Federal awarding agencies have the appropriate controls in place with respect to their processes for making awarding decisions. OMB rejects this change for this iteration of 2 CFR as it would be a significant change that would require an opportunity for public comment based on the language and requirements imposed. Additionally, some commenters requested for language to be added regarding how often updates are expected. OMB rejects these suggestions as the language references guidance provided by General Services Administration (GSA) in consultation with OMB. That is where the requirement to update each Assistance Listing on an annual basis is specified, and it is not necessary to include this level of detail in 2 CFR 200.203.

200.204 Notice of Funding Opportunities

Commenters observed that the change in terminology from ''competitive'' to ''discretionary'' appears to broaden the requirement of these notices to not just competitive announcements, but also sole source discretionary announcements. Some commenters suggested for the language to be changed back to ''competitive'' and questioned the value of this revision. One commenter requested clarification as to whether or not this new requirement is intended to apply when the discretionary award is non-competitive. Another commenter suggested that it would be burdensome and inefficient to require agencies to have notices of funding opportunities for noncompetitive awards. OMB deliberated these comments and subsequently decided to change this language to reflect discretionary awards that are competed.

200.205 Federal Awarding Agency Review of Merit Proposals

Some of the comments received were from Federal agencies who wanted to know the purpose and the benefits behind the proposed revisions to justify the added burden. There were also concerns about the efficiency of the awarding process if these changes are made. Some commenters asked for clarity on what a systematic review meant and what would classify as ''effective.'' OMB considered all comments and made further revisions to specify that the merit review process should be periodically reviewed as a point of clarity on the process review.

OMB disagrees with the commenters that expressed these revisions will add burden. The purpose of these revisions is to add clarity to the merit review process which should already be occurring and is not a new requirement.

200.206 Federal Awarding Agency Review of Risk Posed by Applicants

As stated in the above section describing the comments received for §200.102, one commenter felt that the inclusion of the requirement for agencies to ''apply more restrictive terms and conditions when merited as indicated by a risk evaluation'' did not warrant an exception from OMB and thus did not belong in the exceptions section. OMB concurred with the commenter, moved this language to 2 CFR 200.206 *Federal awarding agency review of risk posed by applicants,* and provided revisions to the language to read ''. . . adjust requirements when a risk-evaluation indicates that it may be merited either pre-award or post- award.'' One commenter requested pass- through entities to have access to enter information into the FAPIIS system and require a pass-through entity review as part of the risk assessment process. OMB deliberated this comment and while it is an important topic for discussion, OMB feels the scope of this revision would be too substantial for finalization without receiving additional comments from the public. Thus, OMB respectfully declines this comment. Some commenters requested for OMB to include the requirement for Federal awarding agencies to leverage commercially available data management tools. OMB declines this comment and does not specify tools required for use.

200.208 Specific Conditions

As stated above in 2 CFR 200.102, some commenters were not supportive of the requirement of the language ''or less restrictive requirements'' in 2 CFR 200.102(c) and 200.208. Some commenters described this new language as confusing, redundant and not needed because Federal awarding agencies already have the discretion to impose conditions on the recipient. One commenter applauded OMB's decision to further emphasize the flexibilities afforded to Federal awarding agencies revise or remove certain requirements based on a risk analysis. After deliberation, OMB replaced this language with ''the Federal awarding agency may adjust requirements to a class of Federal

awards or non-Federal entities when approved by OMB . . . .''

200.211 Information Contained in a Federal Award

Some comments asked for clarity on the revisions that were proposed. One clarifying question was the difference between the data point for the ''Total Approved Cost Sharing or Matching, where applicable'' and ''Total Amount of the Federal Award including approved Cost Sharing or Matching.'' These are two completely separate data points which call for the approved cost sharing or matching to be identified, and then the total amount of the Federal award that is approved cost sharing or matching. OMB did not recommend that these were removed. Further, in response to various comments, the language in (a) was streamlined and users are referred to the relevant performance sections for additional information. The data points previously proposed in paragraph (b) related to performance were already captured in paragraph (a), and thus removed from (b). The proposed language for (e) was revised and moved to §200.105(b) within the guidance. Many comments received suggested revisions that would make the language more prescriptive. Title 2 CFR was written as guidance for a large array of users. If the language is too prescriptive, it doesn't provide sufficient flexibility for use by the large array of users. Additional technical corrections were made for clarity throughout this provision. Revisions were made to §200.211(c)(1)(iv) to clarify that if the underlying legal authority for a program changes, that may be a reason why there would be no future budget periods under an award.

200.301 Performance Measurement

Some commenters were in support of the revisions to this section. Many commenters provided suggestions for further revisions to the guidance. Several commenters provided suggestions with regards to the use of ''should'' and ''must'' throughout this section. Some commenters wanted the language to be written strongly and use the word ''must'' throughout, others preferred ''should'' and many suggested the use of these words should be consistent throughout this section. Some commenters also expressed the need for OMB to include data quality within this section. OMB concurs with the comments that consistent use of ''must'' and ''may'' should be used in this section. Some commenters also pointed out discrepancies between various performance sections and a few commenters pointed out that there are discrepancies between what is required in 2 CFR 200.211 and 200.301. In response to commenters, OMB re-wrote this section for clarity and consistency.

200.340 Termination

There were several comments received in response to the revisions proposed to this section. The comments can be group into the following discreet categories:

- Concern over arbitrary Federal award termination;
- Adding or editing language for clarity;
- Concern over how Federal awarding agencies will evaluate awards with long- term outcomes; • Request further OMB guidance; and
- Not relevant.

The largest number of commenters expressed a concern that the proposed language will provide Federal agencies too much leverage to arbitrarily terminate awards without sufficient cause. Several commenters requested OMB reinstate the language, *for cause,* to address this issue. Some commenters requested additional clarity and examples. OMB deliberated upon these requests and decided as written agencies are not able to terminate grants arbitrarily and that it was not appropriate to include examples in 2 CFR for this section. OMB made a technical correction to provide additional clarity. Some commenters expressed concerns over how Federal awarding agencies will evaluate awards with long-term outcomes. One example from the commenter was an environmental program where the performance will require years to measure. The example from the commenter should be determined in coordination with the Federal awarding agency. OMB respectfully declines this comment. Title 2 CFR is intended to be written and used by a large array of stakeholders and thus the language is not intended to be prescriptive, as the commenter has requested. Some commenters requested further OMB guidance on this provision. OMB appreciates the request for additional guidance and notes that guidance beyond what has been provided in the proposed rule is out of scope for this revision effort. Other comments provided were not relevant to the revisions proposed and thus OMB has rejected these comments.

200.413 Direct Costs

Most comments received for this 2 CFR 200.413 were in agreement of the revisions. The remaining comments were out of scope. Therefore, OMB did not make changes to the revised language. Some commenters requested OMB include additional examples for clarity that the activities are direct costs such as planning and program coordination, data technology, analytics, staff training, data collection, storage, communication of evaluation and analytics, and more. OMB appreciates the request to clarify additional examples as direct costs and would like to expand on this further in future revisions of 2 CFR. OMB does not think it is appropriate to include specific examples within the guidance because it could be unintentionally interpreted to be limited to only that list of items. However, as we think of ways to encourage promising performance practices, OMB would like to discuss this further during stakeholder sessions in the fall 2020.

200.328 Financial Reporting

There were some comments received in response to the revisions made to this provision. One commenter requested that the collection of information be no more frequently than semiannually to reduce burden. OMB declines this comment and notes that it was out of scope because there were no proposed changes to the frequency of financial reporting. One commenter requested that OMB add language to discourage pass-through entities from the practice of requiring more frequent and more detailed financial reporting. After discussion, OMB declines this comment as it is out of scope for this revision but will consider the comment for a future revision of 2 CFR. Several commenters sought clarification on the use of the term ''OMB-designated standards lead.'' Pursuant to the Grant Reporting Efficiency and Agreements Transparency Act of 2019 (GREAT Act), the OMB Director is required to designate a standard-setting agency (*i.e.,* the Executive department that administers the greatest number of programs under which Federal awards are issued in a calendar year). The Executive department designated by OMB as the standard-setting agency assists OMB with execution of the requirements of the GREAT Act.

In response to commenters' requests for clarity on the performance sections of the guidance, OMB moved the financial reporting requirement noted currently in 2 CFR 200.301 *Performance measurement* to 2 CFR 200.328 *Financial reporting.*

200.329 Monitoring and Reporting Program Performance

Several commenters requested clarity regarding the ''OMB-designated standards lead'' and notes that this terminology has been used throughout the guidance. As mentioned above, one commenter also suggested a technical correction to reference the Grant Reporting Efficiency and Agreements Transparency (GREAT) Act for clarity on this designation. One commenter suggested that this provision should be tied together with the closeout provision with regards to the timeframe to submission of reports. OMB concurred with this commenter and made revisions accordingly. One commenter noted concern and confusion regarding the requirement that ''costs must be charged to the approved budget period in which they were incurred.'' The commenter also suggested edits to clarify this requirement. OMB concurred with the commenter and accepted the edits for incorporation into the package.

Appendix I to Part 200—Full Text of the Notice of Funding Opportunity

A number of commenters suggested edits to this section. One commenter suggested including the term ''outcome'' to indicate the

end result and also include terms for tracking and determining if that end result is being or has been achieved. OMB agreed with this commenter and made the revisions accordingly. Another commenter suggested that OMB include the requirement for Federal awarding agencies to ensure SAM registration is current before making any advanced payments and/or issuing any reimbursements. OMB disagrees with this recommendation, as this requirements is already stated in 2 CFR 25.205.

B. Expanded Use of the De Minimis Rate

The revision to 2 CFR 200.414(f) expands use of the de minimis rate of 10 percent of modified total direct costs (MTDC) to all non-Federal entities (except for those described in Appendix VII to Part 200—State and Local Government and Indian Tribe Indirect Cost Proposals, paragraph D.1.b). Currently, the de minimis rate can only be used for non-Federal entities that have never received a negotiated indirect cost rate. The use of the de minimis rate has reduced burden for both the non-Federal entities and the Federal agencies for preparing, reviewing, and negotiating indirect cost rates. Since the publication of 2 CFR in 2013, both Federal agencies and non- Federal entities have advocated expansion of the de minimis rate for non-Federal entities that have negotiated an indirect cost rate previously, but for some circumstances, the negotiated rates have expired. The expiration may be due to breaks in Federal relationships and grant funding, or lack of resources for preparing an indirect cost proposal. This change will further reduce the administrative burden for non-Federal entities and Federal agencies and shift more resources toward accomplishing the program mission.

Another revision adds language to 2 CFR 200.414(f) to clarify that when a non-Federal entity is using the de minimis rate for its Federal grants, it is not required to provide proof of costs that are covered under that rate. The 10 percent de minimis rate was designed to reduce burden for small non-Federal entities and the requirement to document the actual indirect costs would eliminate the benefits of using the de minimis rate. Lastly, for transparency purposes, another revision adds a new paragraph (h) to §200.414 to require that negotiated agreements for indirect cost rates are collected and displayed on a public website.

200.414 Indirect (F&A) Costs

200.414(f)

OMB received several comments that were concerned with awarding a de minimis rate that is higher than a Negotiated Indirect Cost Rate Agreement (NICRA). OMB concurs with the concerns regarding applying a higher de minimis rate in cases where a NICRA rate is lower than 10 percent. However, the regulation states in paragraph (c)(1) that Federal agencies must honor negotiated rates. Additionally, some commenters expressed concern that guidance will be misinterpreted to allow provisional rates to be considered as expired. OMB intends to include provisional rates and added clarifying language to the section in response to these comments. Further, commenters were concerned with a lack of required documentation. OMB concurs with concerns that the language implies source documents rather than the indirect cost rate agreement and altered the language accordingly. There were several comments that suggested that the Modified Total Direct Cost (MTDC) be used as the base. However, this suggestion is out of the scope of this revision. Additionally, OMB would like to note that Federal agencies must accept the negotiated rate even if it is lower than the de minimis rate.

200.414(h)

OMB appreciated the many comments that supported the proposed requirement to post NICRAs to a public website. There were several comments that cited concerns over the sharing of proprietary information through the posting of NICRA information on a public website. To address these concerns, OMB clarified that the requirement is not for the entire rate agreement and added language to specify the exact information that is requested be provided for a non-Federal entity; the indirect negotiated rate; distribution base; and the rate type. In addition, the Indian tribes or tribal organizations, as defined in the Indian Self Determination, Education and Assistance Act, 25 U.S.C. 450b(1)) are excluded. Further, there were several comments that inquired about the applicability of this section. Lastly, there were comments that inquired about who is responsible for making sure this information is publically posted. OMB recognizes this concern and notes that the responsibility of the Federal government will be communicated appropriately.

C. Eliminate References to Non- Authoritative Guidance

To support implementation of E.O. 13892 of October 9, 2019 (Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication) and to prohibit Federal awarding agencies from including references to non- authoritative guidance in the terms and conditions of Federal awards, OMB proposed changes to §200.105 *Effect on other issuances.* The proposed change was intended to reduce recipient burden and prevent Federal awarding agencies from imposing non-binding guidance as award requirements for recipients that has not gone through appropriate public notice and comment. The proposed revisions related to eliminating references to non-authoritative guidance were included in 2 CFR 200.211(e) *Information contained in a Federal award.* Some commenters suggested for this requirement to be moved within the guidance to 2 CFR 200.105(b) *Effect on other issuances* for clarity of the policy intent. OMB concurred with the commenter's suggestion and moved the requirement accordingly.

200.105 Effect on Other Issuances

There were several commenters in strong support of this new provision while other commenters expressed concerns regarding the implementation. One commenter mentioned that finalizing this proposal would cause significant difficulties in effective implementation and effectively overseeing programs. OMB appreciates the comments received. To address concerns, the language was re-written to better align with E.O. 13892 and provide clarity.

D. Promoting Free Speech

Several provisions within 2 CFR are revised to align with E.O. 13798 ''Promoting Free Speech and Religious Liberty'' and E.O. 13864 ''Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities.'' These sections include 2 CFR 200.300 *Statutory and national policy requirements,* 200.303 *Internal controls,* 200.339 *Remedies for noncompliance,* and 200.341 *Notification of termination requirement.* These E.O.s advise Federal awarding agencies on the requirements of religious liberty laws, including those laws that apply to grants and provide a policy for free inquiry at institutions receiving Federal grants. The revision to 2 CFR underscores the importance of compliance with the First Amendment.

200.209 Certifications and Representations, 200.300 Statutory and National Policy Requirements, 200.303 Internal Controls, 200.339 Remedies for Noncompliance, 200.341 Notification of Termination Requirement

OMB received several comments in response to this policy proposal. Some commenters supported compliance with the Constitution while other commenters questioned the need to include a reference to the Constitution. OMB appreciates all comments received and after consideration has decided to retain the proposed language within these sections. One comment suggested the removal of the word ''statutory.'' OMB concurred with this recommendation and made the change.

E. Standardization of Terminology and Implementation of Standard Data Elements

OMB is standardizing terms across 2 CFR part 200 to support efforts under the Grants CAP Goal to standardize the grants management business process and data. OMB is replacing the term

''obligation'' to either ''financial obligation'' or ''responsibility'' within the guidance as appropriate, to ensure alignment with DATA Act definitions. OMB is adding changes across the entirety of 2 CFR to ensure consistent use of terms across parts 25, 170, 183, and 200 where possible, relying on 2 CFR part 200 as the primary source. As reflected in the changes, there are instances where the terms within 2 CFR cannot be made consistent. For example, the term ''non-Federal entity'' cannot be consistently defined across 2 CFR: Parts 25 and 170 apply to Federal awards to foreign organizations, foreign public entities, and for-profit organizations, while part 200 only applies to these type of non-Federal entities when a Federal awarding agency elects for part 200 to apply. For definitions that are consistent across 2 CFR parts 25, 170, and 200, revisions have been made to parts 25 and 170 to refer definitions to part 200 as the authoritative source.

The definitions ''Catalog for Federal Domestic Assistance (CFDA) number'' and ''CFDA program title'' have been replaced with the terms ''Assistance Listings number'' and ''Assistance Listings program title'' to reflect the change in terminology.

OMB is also revising several definitions for clarity. For example, the term management decision is revised to emphasize that it is a written determination provided by a Federal awarding agency or pass-through entity.

To promote uniform application of standard data elements in future information collection requests, OMB is also revising 2 CFR 200.207 and 200.328 to reflect that information collection requests must adhere to the standards available from the OMB-designated standards lead. This change further supports OMB Memorandum M–19–16 Centralized Mission Support Capabilities for the Federal Government, which requires that future shared service solutions must adhere to the Federal Integrated Business Framework standards (available at: *https://ussm.gsa.gov/fibf/*).

Further, OMB is revising 2 CFR part 200 to replace the term ''standard form'' with ''common form.'' Some commenters submitted feedback with concerns that the change in terminology would allow agencies to create unique forms with a lack of standardization. OMB did not make any changes to the final language based on these comments. Existing forms widely adopted by Federal awarding agencies that are regularly referred to as standard forms are in fact common forms. For instance, the SF–424 series, SF–425, and research performance progress report are all common forms/formats. OMB acknowledges that this is a significant change in how the community refers to these forms and will ensure that any future guidance on the adoption of standard data elements clarifies the use of common forms. More information regarding common forms and flexibility under the Paperwork Reduction Act is available at: *https://www.whitehouse.gov/omb/information-regulatory-affairs/federal-collection-information/*. Finally, OMB is reformatting the definitions section of 2 CFR part 200, subpart A—Acronyms and Definitions, by removing the section numbers to facilitate future additions to this section.

Subpart A—Acronyms and Definitions

New Defined Terms

Several commenters sought to clarify existing parts within 2 CFR and grant processes and procedures through the addition of several defined terms under 200.1 *Definitions*. Examples of recommended terms to include were formula grant, program beneficiary/ recipient, procurement, administrative costs, for-profit organization, conflict of interest, covered technology, architectural/engineering professional services, Federally-owned property, and demonstration.

In certain cases OMB agrees that additional terms may provide greater clarification to the regulation and the management of Federal financial assistance. OMB may consider the recommended definitions for the suggested terms in future updates to 2 CFR. In other cases, the terms are either not used in 2 CFR or are only applicable to a small number of Federal awarding agencies. OMB declined these recommendation either due to scope, or because they do not align with the intent of this regulation.

Inserting Programmatic Instruction in Definitions

Several commenters recommended inserting programmatic instruction for specific terms, which would provide more guidance for Federal agencies, non-Federal entities, auditors, or others.

OMB considered these comments, but determined that it was inappropriate to include programmatic guidance in the definition of terms for the regulation. The purpose of 2 CFR 200.1 *Definitions* is to provide meaning for specified terms within the regulation; guidance and instruction is more appropriate other parts of 2 CFR.

Modification to Existing Definitions

Several commenters sought to clarify existing definitions by providing technical corrections or clarification statements.

In several cases, OMB agrees that technical corrections are necessary. The updates to these definitions are minor and did not affect the intent of the term. In other cases, the recommendations were either too substantive or did not align with the intent of this update to the regulation. OMB may consider these recommendations in future updates to 2 CFR.

Formatting

Several commenters disagreed with the removal of the numbering of the definitions. The commenters were concerned about the overall changes to the numbering of 2 CFR part 200, which would add burden to updating the non- Federal entities' policies and procedures.

OMB appreciates these concerns, but does not believe that the removal of the definition numbering will generate any significant additional burden on non- Federal entities, because these groups already should regularly review and update their policies and procedures to ensure compliance with Federal, state, and local laws and regulations. This revision is expected to limit future burden for non-Federal entities in the event of new terms are added to this section of part 200, which would change the section's numeration.

Subpart A—Specific Definitions

Compliance Supplement

A number of commenters recommended clarifying the definition of compliance supplement and offered revised wording for the definition. OMB concurred and adapted the definition in consultation with members of the interagency working group. One commenter recommended revising the definition to frame the compliance supplement as the sole source of information for auditors. OMB did not include this recommendation because the compliance supplement is one of the authoritative sources that auditors can use when auditing Federal programs. Other sources include Federal awarding agency and program specific documents.

Contract

One commenter noted that the definition of contract was confusing, while another recommended cross- referencing the Subrecipient and Contractor Determinations subsection (§200.331). OMB agreed with this assessment and updated the definition to make it easier to read, understand, and use. Another commenter recommended the addition of mutual aid or intergovernmental agreements to the definition of contract. This change was not considered because it would substantively alter the definition without providing the public the opportunity to comment on the revision.

Cooperative Agreement, Grant Agreement

One commenter recommended specifically explaining ''transfer anything of value'' in the definitions of cooperative agreement and grant agreement. OMB opted to keep the existing language because both definitions cite 31 U.S.C. 6101(3), which provides the scope of the ''transfer of anything of value.'' A commenter recommended further describing substantial involvement in the definition of cooperative agreement. This change was not considered because the Federal awarding agency and the recipient are given the discretion to negotiate this relationship. Another commenter stated

that there was a conflict §§25.306 and 200.1 associated with the transfer of land or property. OMB disagrees as the two definitions align and are also in alignment with the associated legislation. Through the review of the definitions of cooperative agreement and grant agreement, OMB and members of the working group clarified that the relationship was between the Federal awarding agency and a recipient or a pass-through entity and a subrecipient.

Discretionary, Non-Discretionary Award

Technical edits were made to the definitions of discretionary award and non-discretionary award to provide clarity to the intended definitions.

Federal Interest

Two commenters recommended correcting the formula for determining *Federal interest,* noting that reliance on the Federal share of the total project costs does not appropriately account for the Federal interest in real property, equipment, or supplies. OMB agreed with this recommendation and amended the definition to appropriately rely on the percentage of Federal participation in the total cost of the real property, equipment, or supplies as part of the formula.

Recipient

One commenter recommended amending recipient be inclusive of entities that are not necessarily non- Federal entities such as for-profit and foreign entities as well as Federal agencies. OMB agreed with this assessment and updated the definition appropriately.

Subsidiary

One commenter recommended replacing non-Federal entity with entity, while another recommended adding ''or controlled'' after owned to be more inclusive of a diversity of organizations that may have subsidiaries. Several other commenters were confused by the reference to the FAR or found it to be redundant, recommending that it be removed from the definition. OMB agreed with these recommended changes to the definition and incorporated them, as appropriate.

Period of Performance, Budget Period, and Renewal

OMB also revised the proposed definitions of period of performance, budget period, and renewal in 2 CFR part 200, as there were a significant number of comments from varying stakeholders indicating that the proposed revised definitions of period of performance, budget period, and renewal created more confusion than clarity. In response, the final rule revises the definitions for these terms to clarify how period of performance, budget period, and renewal operationally relate. Additionally, the final rule revises 2 CFR 200.309 to better describe how the period of performance is modified if there is an extension or termination of a current award. Some commenters expressed concern about the removal of pass-through entities' authority to allow pre-award costs to subrecipients. It was not OMB's intention to remove the pass-through entities' authority to allow pre-award costs to subrecipients. OMB recognizes these concerns and added language to 2 CFR 200.458 for clarification in response to commenters. Further, there were many comments that expressed concern about removing 2 CFR 200.309 from the guidance due to burden with other entities that reference 2 CFR within their own rules and regulations. Including 2 CFR 200.309 in the final publication will eliminate that concern from commenters.

The definition of period of performance and renewal was revised to help clarify that the term period of performance reflects the total estimated time interval between the start of an initial Federal award and the planned end date, and that the period of performance may include one or more budget periods, but the identification of the period of performance does not commit funding beyond the currently approved budget period. The definition of budget period was edited to clarify that recipients are authorized to expend the current funds awarded, including any funds carried forward or other revisions pursuant to 2 CFR 200.308. Further, recipients may only incur costs during the first year budget period until subsequent budget periods are funded based on the availability of appropriations, satisfactory performance, and compliance with the terms and conditions of the award. The definition of renewal was edited to help clarify that a renewal award begins a distinct period of performance that starts contiguous with, or closely following, the end of the expiring award. This change also ensures consistent use of the term for purposes of transparency reporting as required by FFATA.

200.403 Factors Affecting Allowability of Costs

To maintain consistency within the guidance regarding the definition of *Budget Period,* 2 CFR 200.403(h) has been added to clarify that costs must be incurred during the approved budget period and the Federal awarding agency may waive prior written approval to carry forward unobligated balances to subsequent budget periods.

Improper Payment, Questioned Costs

Based on some confusion expressed in comments, the definition of improper payment was revised to accurately reflect how questioned costs, including costs questioned costs identified in audits, are not improper payments until reviewed and confirmed as such.

Internal Controls

Based on some confusion expressed in comments, minor modifications to the definition of internal controls were made to provide greater clarity on the internal controls requirements for non- Federal entities and Federal agencies.

Oversight Agency for Audit

Several commenters expressed confusion with the revision to this definition. Some commenters provided suggested edits for clarity. After deliberation and in response to the commenters, OMB made further edits to this definition for clarity.

Simplified Acquisition Threshold, Micro-Purchase

Multiple commenters were confused by the second paragraph proposed to be added to the definition for *simplified acquisition threshold.* Revisions were made to this paragraph to alleviate confusion and accurately reflect how the simplified acquisition may be determined. Minor technical edits were made to the definition for *micro- purchase,* based on comments, to clarify that the cognizant agency for indirect costs may approve a higher micro- purchase threshold if requested by the non-Federal entity.

F. Support for Domestic Preferences for Procurement

As expressed in Executive Order (E.O) 13788 of April 18, 2017 (Buy American and Hire American) and E.O. 13858 of January 21, 2019 (Executive Order on Strengthening Buy-American Preferences for Infrastructure Projects), it is the policy of this Administration to maximize, consistent with law, the use of goods, products, and materials produced in the United States, in Federal procurements and through the terms and conditions of Federal financial assistance awards. In support of this policy, OMB is adding a new section 2 CFR 200.322 *Domestic preferences for procurement,* encouraging Federal award recipients, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States when procuring goods and services under Federal awards. This Part will apply to procurements under a grant or cooperative agreement.

200.322 Domestic Preferences for Procurement

OMB appreciates the many comments were very supportive of this section. Several comments suggested including language in Appendix II because the proposed new 2 CFR 200.322 includes the requirement that such term be flowed down to all contracts and purchase orders. OMB accepts this change and has made the appropriate edits to the final language. Several comments asked for clarification regarding how preference is given. OMB rejects this change as the language gives Federal awarding agencies the flexibility to adjust their guidance accordingly. Further, another comment suggested to exempt purchases below the micro- purchase threshold from requirements in this section to reduce the burden on non-Federal entities. OMB rejects this suggestion as OMB does not agree with the assessment

that an additional burden is being placed. The language did not set a dollar threshold and instead states that domestic preference should be used as appropriate and to ''to the maximum extent practicable.'' One commenter suggested a reference to this section should also be included in *Appendix II to Part 200—Contract Provisions for Non-Federal Entity Contracts Under Federal Awards*. OMB concurred with this commenter and made the revision accordingly.

G. Changes to the Procurement Standards to Better Target Areas of Greater Risk and Conform to Statutory Requirements

To better target 2 CFR requirements on areas of greater risk consistent with the intent of the Grants CAP Goal, and to align with legislation related to procurement standards, OMB is revising the guidance to increase the micro- purchase threshold from $3,500 to $10,000, raising the simplified acquisition threshold from $100,000 to $250,000, and allowing non-Federal entities to request a micro-purchase threshold higher than $10,000 based on certain conditions. The NDAA 2017 increased the micro-purchase threshold from $3,500 to $10,000 for institutions of higher education, or related or affiliated nonprofit entities, nonprofit research organizations or independent research institutes (41 U.S.C. 1908).

The NDAA 2017 also established an interim uniform process by which these recipients can request, and Federal awarding agencies can approve requests to apply, a higher micro-purchase threshold. Specifically, the NDAA 2017 allowed a threshold above $10,000, if approved by the head of the relevant executive agency and consistent with clean audit findings under chapter 75 of title 31, internal institutional risk assessment, or State law. The NDAA for FY 2018 (NDAA 2018) increased the micro-purchase threshold to $10,000 for all recipients and also increased the simplified acquisition threshold from $100,000 to $250,000 for all recipients. The revisions to §200.320 outline a permanent process by which non- Federal entities may establish a micro- purchase level above the $10,000 threshold.

A proposal to increase the micro- purchase and simplified acquisition thresholds in the Federal Acquisition Regulation (FAR) was published in the **Federal Register** on October 2, 2019 (84 FR 52420), FAR Case 2018–004. The FAR Rules at 48 CFR part 2, subpart 2.1, were finalized on July 2, 2020 (85 FR 40060, 85 FR 40064) with the effective date of August 31, 2020. In addition, the American Innovation and Competitiveness Act of 2017 (AICA), section 207(b) required that 2 CFR part 200 be revised to conform to the requirements concerning the micro- purchase threshold.

In response to these statutory changes, OMB issued OMB Memorandum M–18–18, Implementing Statutory Changes to the Micro-Purchase and the Simplified Acquisition Thresholds for Financial Assistance (June 20, 2018) which is now incorporated in 200.320. With the final procurement guidance now implemented, OMB Memorandum M–18–18 is rescinded.

200.320 Methods of Procurement To Be Followed

There were nearly 100 comments received relating to this section. Many expressed confusion with the proposed revisions and provided recommendations for clarity. In response, the section was rewritten to incorporate many of the suggestions from commenters. The following revisions were made to 2 CFR 200.320: • The procurement types were grouped into three categories: (1) Informal (micro-purchase, small purchase); (2) formal (sealed bids, proposals) and (3) Non-Competitive (sole source)

- The micro-purchase threshold was raised from $3,500 to $10,000
- All non-Federal entities are now authorized to request a micro- purchase threshold higher than $10,000 based on certain conditions that include a requirement to maintain records for threshold up to $50,000 and a formal approval process by the Federal government for threshold above $50,000; and
- The simplified acquisition threshold was raised from $150,000 to $250,000

200.321 Contracting With Small and Minority Businesses, Women's Business Enterprises, and Labor Surplus Area Firms

Several comments were made regarding this section that were out of scope for the current set of revisions. As such, no changes to the proposed language will be made at this time.

200.317 Procurements by States

One commenter suggested that 2 CFR 200.317 should reference the procurement requirements in 2 CFR 200.322 Domestic preference for procurements, as it is applicable to all non-Federal entities. OMB concurred with the commenter and made revisions accordingly.

200.318 General Procurement Standards

One commenter expressed strong support for the revisions proposed for this provision. Most commenters provided suggested edits for clarity. One commenter provided suggested edits to clarify that the ''. . . non-Federal entity must use its own documented procurement procedures which must conform to applicable State, local, and tribal laws and regulations; and Federal law. In addition, procurements for goods and services that are directly charged to a Federal award must conform to the standards identified in this part.'' OMB agreed with this clarifying revision and incorporated it within 2 CFR 200.318.

200.319 Competition

One commenter expressed support for the revisions to 2 CFR 200.319. Other commenters provided suggested edits for clarity. One commenter asked for clarity of the meaning ''section'' and expressed the entire subpart D should be referenced. OMB declines this comment and notes that the term ''section'' should not be interpreted to mean the entire subpart D and the proposed revisions to 2 CFR 200.319 only adds a new reference to 2 CFR 200.320. This new language in no way infers that the other procurement provisions do not apply. One commenter expressed that it is unclear what ''required'' under an award means. OMB notes that this language is used throughout the document as no such change was made.

H. Emphasis on Machine-Readable Information Format

OMB aims to clarify the methods for collection, transmission, and storage of data in 2 CFR 200.336 to further explain and promote the collection of data in machine-readable formats. A machine- readable format is a format that can be easily processed by a computer without human intervention while ensuring no semantic meaning is lost (44 U.S.C. 3502(18)). The clarification reinforces the machine-readable requirements in *the Foundations of Evidence-Based Policymaking Act of 2018* (Pub. L. 115– 435) and accompanying OMB guidance. This requirement also reflects the need to continually evaluate which formats (and structures) maximize accessibility and usability for all stakeholders. Machine-readable formats will also help support the Leveraging Data as a Strategic Asset Cross-Agency Priority Goal (CAP Goal #2) and efforts under the Grants CAP Goal to Build Shared IT Infrastructure.

200.336 Methods for Collection, Transmission, and Storage of Information

OMB received some comments on 2 CFR 200.336 requesting the inclusion of PDFs in the language. OMB declined this suggestion since prescribing a specific format in official guidance was deemed inappropriate.

I. Changes to Closeout Provisions To Reduce Recipient Burden and Support GONE Act Implementation

Based on lessons learned from the implementation of 2 CFR part 200 and the Grants Oversight and New Efficiency Act (GONE Act), OMB is revising 2 CFR 200.344 *Closeout* to support timely closeout of awards, improve the accuracy of final closeout reporting, and reduce recipient burden.

The final language will increase the number of days for recipients to submit closeout reports and liquidate all financial obligations from 90 days to 120 days. This change takes into consideration the challenges faced by pass-through entities with respect to awards that contain a large number of subawards. These recipients must reconcile subawards and submit final reports to Federal awarding agencies within the same 90 day period. Recognizing the need for pass-through entities to receive timely reports from subrecipients to report back to Federal awarding agencies, OMB will continue to require subrecipients to submit their reports to the pass-through entity within 90 days. The intent of this change is to support financial reconciliation, help ease the burden associated with submitting reports for closeout, and promote improved accuracy. However, OMB recognizes that providing additional time may increase the likelihood that non-Federal entities will not submit their final closeout reports. To mitigate this risk, OMB is requiring Federal awarding agencies to report when a non-Federal entity does not submit final closeout reports as a failure to comply with the terms and conditions of the award to the OMB- designated integrity and performance system. Finally, OMB is publishing the requirement of Federal awarding agencies to make every effort to close out Federal awards within one year after the end of the period of performance unless otherwise directed by authorizing statute. The language is intended to promote timely closeout of awards, assist with reconciling closeout activities, and hold recipients accountable for submitting required closeout reports.

200.344 Closeout

Many of the comments in response to revisions to 2 CFR 200.344 were in support of the proposed revisions. The two sections listed below received the highest volume of comments.

200.344(a)

OMB is appreciative of the many commenters who supported the proposed extension of deadlines for the submission of reports. Due to the significant amount of support for the changes, OMB is keeping the language published in the proposed version. OMB also received comments to permit pass-through entities to establish earlier dates, in accordance with existing practice. OMB accepts this recommendation. OMB also received comments relating to final indirect cost rates after the end of the period of performance. OMB rejects these suggestions, as a revised final Federal financial report can be submitted after closeout. Therefore, lengthening the deadline would not have an impact. OMB is making several small changes based on received comments, such as changing ''non-Federal entity'' to ''recipient'' and adding ''or an earlier date as agreed upon by the pass-through entity and subrecipient.''

200. 344(i)

OMB received several comments that recommended making the Federal Awardee Performance and Integrity Information System (FAPIIS) entries optional. The intent of the added regulation was to hold recipients accountable and share performance across Federal agencies, which promotes results-oriented grantmaking. Therefore, OMB is finalizing the language that makes entry into FAPIIS mandatory. Further, it should be noted that entry into FAPIIS does not constitute a termination, which OMB has clarified in the final language.

200.345 Post-Closeout Adjustments and Continuing Responsibilities

Some commenters expressed concerns that the language proposed for this provision was too open-ended and the period could extend beyond record retention. OMB concurred with the commenters and made revisions to address these concerns.

J. Changes to Performing the Governmentwide Audit Quality Project

Revisions to 2 CFR 200.513 include a change in the date for the requirement for a governmentwide audit data quality project that must be performed once every 6 years beginning with audits submitted in 2018. This date has been changed to 2021, given the significant changes to the 2019 Compliance Supplement in support of the Grants CAP Goal.

200.513 Responsibilities

Comments in response to the change regarding the assignment of the cognizant agency for audit responsibilities based on the direct

funding and total funding were positive and thus OMB did not make changes to the language for the final publication. We clarified that the determination for funding is based the federal award expenditures as reported in the recipient's Schedule of expenditures of Federal Awards (see §200.510(b)). Commenters in response on the governmentwide project to determine the quality of single audits suggested a delay on such project by a few years due the changes in the 2019 Compliance Supplement regarding the maximum of review for compliance areas. Commenters also suggested the use of current and on-going quality review performed by agencies on single audits to substitute or complement the governmentwide project. We agreed on the suggested timing of the project and have removed the specific date listed in the proposal. OMB will work with the agencies and the single audit stakeholders to determine a future date for the project that is more optimal. OMB added language to address that current quality control review work performed by the agencies can be leveraged for the governmentwide project.

II. Meeting Statutory Requirements and Aligning 2 CFR With Other Authoritative Source Requirements

A. Prohibition on Certain Telecommunication and Video Surveillance Services or Equipment

OMB revised 2 CFR to align with section 889 of the NDAA for FY 2019 (NDAA 2019). The NDAA 2019 prohibits the head of an executive agency from obligating or expending loan or grant funds to procure or obtain, extend or renew a contract to procure or obtain, or enter into a contract (or extend or renew a contract) to procure or obtain the equipment, services, or systems prohibited systems as identified in NDAA 2019. To implement this requirement, OMB is adding a new section, 2 CFR 200.216 *Prohibition on certain telecommunication and video surveillance services or equipment,* which prohibit Federal award recipients from using government funds to enter into contracts (or extend or renew contracts) with entities that use covered telecommunications equipment or services. This prohibition applies even if the contract is not intended to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services. As described in section 889 of the NDAA 2019, covered telecommunications equipment or services includes:

- Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).
- For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).
- Telecommunications or video surveillance services provided by such entities or using such equipment.
- Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

200.216 Prohibition on Certain Telecommunication and Video Surveillance Services or Equipment

Commenters expressed widespread concerns on the impact and implementation of the statutory requirement. OMB sought to address commenter concerns by re-writing this section to align closely with the law, add a new definition for telecommunications and

video surveillance costs, and add a new section 2 CFR 200.471. The final language provides guidance describing the meaning of covered telecommunications as explained in the statute. The language also aligns with the requirements in the statute affecting the financial assistance community to include the prohibition of non-Federal entities from obligating or expending loan or grant funds to (1) procure or obtain, (2) extend or renew a contract to procure or obtain, or (3) enter into a contract (or extend or renew a contract) to procure or obtain, equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system.

Federal awarding agencies are also required by the law to work with OMB to prioritize available funding and technical support to assist affected businesses, institutions and organizations. In addition, the funds must be prioritized as reasonably necessary for affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained. Further, OMB added a new 2 CFR 200.471 *Telecommunication and video surveillance costs* to provide clarity that the telecommunications and video surveillance costs associated with 2 CFR 200.216 are unallowable. A new definition for *telecommunication and video surveillance costs*, which is described in 2 CFR 200.471, has also been added to 2 CFR for clarity.

B. Never Contract With the Enemy

To meet statutory requirements, OMB is adding part 183 to 2 CFR to implement Never Contract with the Enemy, consistent with the fact that the law applies to only a small number of grants and cooperative agreements. Never Contract with the Enemy applies only to grants and cooperative agreements that exceed $50,000, are performed outside the United States, including U.S. territories, to a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

To implement Never Contract with the Enemy and to reflect current practice, OMB requires Federal awarding agencies to utilize the System for Award Management (SAM) Exclusions and the FAPIIS to ensure compliance before awarding a grant or cooperative agreement. Federal awarding agencies are prohibited from making awards to persons or entities listed in SAM Exclusions (NDAA 2017) pursuant to Never Contract with the Enemy and are required to list in FAPIIS any grant or cooperative agreement terminated due to Never Contract with the Enemy as a Termination for Material Failure to Comply. The revisions also require agencies to insert terms and conditions in grants and cooperative agreements regarding non-Federal entities' responsibilities to ensure no Federal award funds are provided directly or indirectly to the enemy, to terminate subawards in violation of Never Contract with the Enemy, and to allow the Federal Government access to records to ensure that no Federal award funds are provided to the enemy.

The law allows Federal awarding agencies to terminate, in whole or in part any grant, cooperative agreement, or contract that provides funds to the enemy, as defined in the NDAA for FY 2015 (NDAA 2015). This statute applies

to procurement as well as to grants and cooperative agreements. OMB coordinated with the procurement community as appropriate before issuing this final guidance, including the roles and responsibilities of the covered combatant command and Federal awarding agencies.

Part 183 Never Contract With the Enemy

Many of the comments focused on aligning the regulation with the authorizing legislation and streamlining and using consistent terms in the regulatory language. OMB concurred with these comments and made the necessary changes to the language. OMB also agreed with several comments suggested the use of ''recipient'' rather than ''non-Federal entity.'' In addition, OMB revised part 183 to include a reference to void covered grants or cooperative agreements, and updated specific parts of the legislative authority that were set to expire by aligning with recently passed legislation for the extension of dates.

A couple commenters noted the potential burden associated with checking *SAM.gov* on a monthly basis. OMB concurred with these comments and revised the language accordingly.

C. Requirement for the FAPIIS To Include Information on a Non-Federal Entity's Parent, Subsidiary, or Successor Entities

To meet statutory requirements, OMB revised 2 CFR parts 25 and 200 to implement Sec. 852 of the NDAA for FY 2013 (NDAA 2013), which requires that the FAPIIS include information on a non-Federal entity's parent, subsidiary, or successor entities. OMB requires financial assistance applicants to provide information in SAM on their immediate owner and highest-level owner and subsidiaries, as well as on all predecessors that have been awarded a Federal contract, grant, or cooperative agreement within the last three years. In addition, OMB requires that prior to making a grant or cooperative agreement, agencies must consider all of the information in FAPIIS with regard to an applicant's immediate owner or highest-level owner and predecessor, or subsidiary, if applicable. These revisions are consistent with the Federal Acquisition Regulation (FAR) final rule regarding this law published at 81 FR 11988 on March 7, 2016.

Part 25 Universal Identifier and System for Award Management

OMB received a significant number of comments concerning subrecipient requirements and registration with the SAM database. These commenters expressed concern with requiring subrecipients to fully register with the SAM database. The commenters thought this requirement would be overly burdensome and was unnecessary.

It was not OMB's intention to require subrecipients to fully register with the SAM database. To address this concern, OMB added a new ''Subpart C-Recipient requirements of subrecipients'' and a note to the terms in appendix A to clearly state that subrecipients do not need to fully register with the SAM database.

Further, several commenters thought the addition of the requirement for subrecipients to register with the SAM database, Federal agencies applying for or receiving Federal awards register in the SAM database made sections of part 25 confusing. The commenters thought that using the term ''Federal agency'' could be misunderstood. Some commenters thought this was particularly true with regard to section 100.

OMB agreed that the addition of the term ''Federal agency'' in part 25 made the requirements in part 25 less clear. OMB and the interagency work group also thought that there was a need for additional clarity on who the requirements actually apply to and in what situation. As a result, OMB added definitions for ''applicant'' and ''recipient'' in part 25 and removed ''non-Federal entity'' and ''Federal agency'' where appropriate throughout part 25.

25.200 Requirements for Notice of Funding Opportunities, Regulations, and Application Instructions

Several commenters stated that their organizations do not have a higher level owner or subsidiaries and they may not have predecessors. OMB recognizes that not all entities will have the same organizational structure. The purpose of providing this information is for greater transparency in the awarding of Federal financial assistance. The regulatory language requires that applicants and recipients must provide the information ''if applicable.'' If the requested information is not applicable, an applicant or recipient would not be required to report it.

D. Increase Transparency Through FFATA, as Amended by the DATA Act

OMB made several revisions to increase transparency regarding Federal spending as required by FFATA, as amended by the DATA Act, which mandates Federal agencies to report Federal appropriations received or expended by Federal agencies and non-Federal entities. OMB has revised the reporting thresholds to further align financial

assistance requirements with those of the Federal acquisition community.

To increase transparency, OMB extended the applicability of Federal financial assistance in 2 CFR part 25 and 2 CFR part 170 beyond grants and cooperative agreements so that it includes other types of financial assistance that Federal agencies receive or administer such as loans, insurance, contributions, and direct appropriations.

OMB also made changes throughout 2 CFR to make it clear that Federal agencies may receive Federal financial assistance awards. This will increase transparency for Federal awards received by Federal agencies.

To further align implementation of FFATA, as amended by DATA Act, between the Federal financial assistance and acquisition communities, OMB revises the Federal awarding agency and pass-through entity reporting thresholds. For Federal awarding agencies, OMB revises 2 CFR part 170 to require agencies to report Federal awards that equal or exceed the micro- purchase threshold as set by the FAR at 48 CFR part 2, subpart 2.1. Consistent with the FAR threshold for subcontract reporting, OMB will raise the reporting threshold for subawards that equal or exceed $30,000.

OMB proposed to revise 2 CFR part 25 to allow agencies the flexibility to exempt a foreign entity applying for or receiving an award for a project or program performed outside the United States valued at less than $100,000. Currently, Federal awarding agencies have the flexibility to exempt this requirement for awards valued at less than $25,000. The exemption applies to cases where the Federal agency has conducted a risk-based analysis and deems it impractical for the entity to comply with the requirements(s). OMB proposed to make this revision after receiving feedback from the international community that requiring certain foreign entities to register in SAM introduces substantial burden with no significant value for the Federal awarding agency. Federal awarding agencies will continue to remain responsible for reporting these awards for transparency purposes.

Finally, OMB will require Federal awarding agencies to associate Federal Assistance Listings with the authorizing statute to make listings more consistent. This supports implementation of the DATA Act which requires agencies to report award level Federal Assistance Listings information for display on *www.usaspending.gov.*

Part 25 Universal Identifier and System for Award Management

Some commenters expressed concern regarding the proposal to expand SAM registration requirements to all type of Federal financial assistance as required by FFATA. Specifically, commenters requested clarity on who is considered the applicant or recipient in cases when the intended recipient does not have a direct relationship with the Federal awarding agency. For instance, for certain loan and loan guarantee programs, a third-party administers the program on behalf of the Federal awarding agency. One organization specifically expressed concern that these third-party administers may not participate in loan guarantee programs, if they are required to register in SAM. OMB disagrees that it is overly burdensome for third-party administrators to register in SAM, however, OMB agreed that it would be inappropriate to have the intended recipient who does not have a direct relationship with the Federal awarding agency to register in these instances. In response to these comments, OMB revised the definitions of applicant and recipient to clarify that SAM registration requirements apply to those entities that receive Federal awards directly from a Federal awarding agency and that applicants and recipients also include those entities that administer Federal awards on behalf of Federal awarding agencies.

25.110 Exceptions to This Part

Some commenters supported raising the threshold for foreign organizations or foreign public entities to $100,000 in 2 CFR 25.110. Other commenters expressed concerns that a thorough pre- award Federal review would not be conducted for foreign entity recipients under this higher threshold and it would be a disservice to the American taxpayer to raise the threshold. OMB also received comments that requiring Federal awarding agencies to only grant exemptions to foreign organizations or foreign public entities on a case-by-case basis to be overly burdensome.

OMB does not think that requiring Federal awarding agencies to determine whether to grant exemptions to foreign organizations or foreign public entities on a case-by-case basis is overly burdensome. Considering the comments received, OMB decided to retain the current threshold of $25,000.

Based on feedback provided by agencies and in light of the COVID–19 emergency and past emergency situations where this requirement has been waived, OMB added an exception in §25.110 allowing agencies to waive the requirement to register in SAM when there are exigent circumstances that would prevent an applicant from registering prior to the submission of an application. Federal awarding agencies are responsible for the determination on whether there are exigent circumstances that prevent an applicant from registering in SAM and are no longer required to request a waiver from OMB in these instances.

Part 170 Reporting Subaward and Executive Compensation Information

170 Definitions

Several commenters mentioned the difference between the term non-Federal entity in part 170 and part 200 and requested that part 170 reference part 200 for this definition. Related comments also were provided to the definitions of foreign organizations and foreign public entity. The definition of non-Federal entity in part 170 intentionally includes foreign organizations, foreign public entities, and for-profit organizations, which is not included in the definition of non- Federal entity in part 200. Part 200 only applies to these organization types when a Federal awarding agency chooses to apply the requirements in their adoption of part 200. Part 170 applies to foreign and for-profit organizations because of the Federal Funding Accountability and Transparency Act (Pub. L. 109–282, hereafter cited as ''Transparency Act'') requirements. Thus, the definition for non-Federal entity in part 200 and part 170 will remain different.

170.110 Types of Entities to Which This Part Applies

Several commenters requested clarification on the language surrounding ''non-Federal'' and ''Federal agencies.'' OMB concurred with these comments and made the corresponding changes to ensure clarity. Further, OMB also agreed with comments that suggested clarification to §170.110(b) in relation to Title IV funds and made the subsequent edits in the final language.

170.115 Deviations

OMB concurred with comments asking to define ''deviation'' to differentiate between exceptions by removing ''deviation'' and adding paragraph (c) to ''Types of Exemptions.'' 170.200 Federal Awarding Agency Reporting

OMB received several comments suggesting that a reference to the definition for micro-purchase in §200.1 be added to the end of the section. OMB concurred and made this change in the final language. Further, OMB received comments relating to the grammatical structuring of this section. After further review, OMB retained the existing language.

170.210 Requirements for Notices of Funding Opportunities, Regulations, and Application Instructions

OMB concurred with a comment that suggested including the information on the requirements for Notice of Funding Opportunity found in 2 CFR 200.204 and appendix I to part 200. OMB made the suggested changes to appendix I to include these references. Further, comments inquired if OMB has considered collecting the assurance from applicants when they register and renew in *beta.SAM.gov.* OMB would like to note that this is already part of the requirements for award terms and conditions, and the needed assurance should go into the Compliance Supplement for auditors to check that the assurance is received from the

recipient. Therefore, no changes related to obtaining assurances were made to the language in this section.

170.220 Award Term

Several commenters referenced the thresholds discussed in part 25. OMB would like to point out that the thresholds in part 25 are unrelated to the threshold in §170.220. Additionally, several comments suggested changes that were outside of the scope of this revision. OMB concurred with a suggestion to remove a reference to the Recovery Act in appendix A. Further, a comment suggested the deletion of the insertion of ''and Federal agency'' in paragraph (a) of this section. OMB notes that some agencies can make awards to other agencies, dependent on the authority. Therefore, it is necessary to keep the language that was used in the proposed version. One commenter noted that raising the subaward reporting threshold from $25,000 to $30,000 is unlikely to result in greater efficiencies or ease administrative requirements and recommended for the threshold to be increased to at least $75,000 or $100,000. OMB disagrees with this commenter's recommendation, as the purpose of this change was to further align implementation of FFATA, as amended by DATA Act, between the

Federal financial assistance and acquisition communities.

170.305 Federal Award

Commenters had questions relating to how this definition differs from part 200. OMB would like to note that the definition differs because this section is discussing Federal awards in the context of ''direct'' federal awards. Federal award in part 200 includes is more expansive to include caveats depending on which section it is applied to, so the definition cannot be the same. As such, the proposed language remains.

170.315 Executive

One comment suggested clarifying this definition as many recipients of Federal awards are state and local governments with elected officials. OMB rejected this change as this is already covered within the ''Exceptions'' to this section. Further, one comment requested that this definition be included in part 200. OMB aims to eliminate duplicative definitions and thus respectfully declines this comment to also include the definition in part 200.

170.320 Federal Financial Assistance Subject to the Transparency Act

A commenter noted that the term Federal financial assistance subject to the Transparency Act is not defined in part 200. OMB concurred with this comment and made edits to the definition in §170.320 to clarify that the term includes Federal financial assistance as defined in part 200, with some limited exceptions.

170.325 Subaward

Commenters recommended deleting the definition for ''Subaward'' and including a reference to the definition used in part 200 to reduce duplication. OMB concurred with this recommendation and made the subsequent change.

E. Aligning 2 CFR With Authoritative Sources

OMB revises 2 CFR 200.431 to allow states to conform with Generally Accepted Accounting Principles (GAAP), specifically Governmental Accounting Standards Board (GASB) Statement 68, and to continue to claim pension costs that are both actual and funded. OMB has made this revision because GASB issued Statement 68, *Accounting and Financial Reporting for Pensions* which amends GASB Statement 27 and allows non-Federal entities (NFE) to claim only estimated pension costs in their financial statements. OMB's revision will allow non-Federal entities to continue to claim pension costs that are both actual and funded.

200.431 Compensation

OMB appreciated the comments in support of the proposed changes. In response to several comments that asked for clarification, OMB is revising the final language to require state and local governments to be compliant with GASB #68 for pension costs. OMB would like to note that the cost associated with each fiscal year should be determined in accordance with GAAP.

The definition for ''Improper Payment'' has been revised to refer to the authoritative source for clarity, OMB Circular A–123—Management's Responsibility for Internal Control in Federal Agencies, Appendix C—Requirements for Payment Integrity Improvement. See above Section I for additional information on the changes to ''Improper Payment.''

Some commenters expressed that the reference to OMB Circular A–123 for the definition of ''Improper Payment'' added confusion and suggested retaining the original language. OMB considered this request and respectfully declined the comment in keeping with the practice to align the guidance with source documents, if possible.

III. Clarifying Requirements Regarding Areas of Misinterpretation

Following the publication of 2 CFR part 200, OMB received a substantial amount of questions from stakeholders requesting clarifications about key aspects of the guidance. In other instances, it has come to OMB's attention that the interpretation of certain provisions was not consistent with the intent of 2 CFR part 200. In response, OMB is publishing clarifications that are aimed at reducing recipient administration burden and ensuring consistent interpretation of guidance.

A. Responsibilities of the Pass-Through Entity To Address Only a Subrecipient's Audit Findings Related to Their Subaward

To clarify requirements regarding responsibility for audit findings, OMB revises 2 CFR 200.332 *Requirements for pass-through entities* to clarify that pass- through entities (PTE) are responsible for addressing only a subrecipient's audit findings that are specifically related to their subaward. For example, a PTE is not required to address all of the subrecipient's audit findings. In addition, the PTE may rely on the subrecipient's auditors and cognizant agency's oversight for routine audit follow-up and management decisions. These changes reduce the burden for PTEs by allowing a PTE to rely on the cognizant agency to address a subrecipient's entity-wide issues.

200.332 Requirements for Pass- Through Entities

OMB received substantial feedback relating to the changes made in this section. The two main changes for this section are related to the clarification of the pass-through entities responsibilities toward the establishment of the subrecipient indirect cost rates and the pass-through entities responsibilities for resolving the sub recipient's audit findings (§200.332(d)).

Although most commenters approved of the proposed changes regarding the pass-through entities responsibilities for the subrecipient indirect cost rates, some requested clarification on specific situations:

• Where the subrecipient has a federally approved indirect cost rate • where the subrecipient receives funds from multiple pass-through entities from which it may be already established an indirect cost rate with one of the pass-through entity; or • where the subrecipient decides to use the direct allocation method instead of the use of indirect cost rate for cost reimbursement.

OMB provides clarifications in the final language for all of the three situations above.

Most commenters supported the proposed changes to clarify the pass- through entities responsibility in the resolution of audit findings reported by the subrecipients and the required management decision letters to address the audit findings. Some commenters questioned the use of the term ''systemic findings'' to describe the findings that impact the whole organization. This section has been revised to streamline and clarify the original intent of the revision which limits the pass-through entity to review and resolve the audit findings that are specifically related to the subaward. OMB replaced the term ''systemic findings'' with ''cross-cutting findings.'' OMB also added that written confirmation by the subrecipients for corrective actions on

audit findings can be used as a means for follow-up and monitoring of the subrecipient's performance.

B. Reducing Burden on Universities by Clarifying Timing of the Disclosure Statement

OMB is adding language to the timing of submission of the disclosure statement (DS–2), which is only required for institutions of higher education that meet certain thresholds as defined in 48 CFR 9903.202–1(f). This revision reduces burden while maintaining the requirement for institutions of higher education to implement policies that are in compliance with 2 CFR.

200.419 Cost Accounting Standards and Disclosure Statement

OMB received several comments in response to 2 CFR 200.419 that focused on concerns with the legal instruments that were subject to this part. In response to these concerns, the language was revised to provide clarification.

C. Response to Frequently Asked Questions Related to the Prior Release of 2 CFR

In July 2017, OMB developed and posted Frequently Asked Questions (FAQs) on the Chief Financial Officers Council website in response to stakeholder requests for clarification on the first publication of 2 CFR *(https:// cfo.gov//wp-content/uploads/2017/08/July2017-UniformGuidanceFrequentlyAskedQuestions.pdf)*. Due to the volume of questions related to these topics, OMB is including revisions to clarify the following: The meaning of the words ''must'' and ''may'' as they pertain to requirements; applicability and documentation requirements when a non-Federal entity elects to charge the de minimis indirect cost rate of MTDC; PTE responsibilities related to indirect cost rates and audits; and applicability of 2 CFR to FAR based contracts. These proposed revisions are intended to improve clarity and reduce recipient burden by providing guidance on implementing 2 CFR.

The Words ''must'' and ''may'' as They Pertain to Requirements

All commenters that provided feedback on this section were in favor of incorporating the meaning of ''must'' and ''may'' within the guidance. One commenter suggested that the location for this change within the guidance could be within its own section. After consideration, OMB disagrees with the commenter and has determined that this change should remain in the applicability section of the guidance under the stated sub title.

De Minimis Indirect Cost Rate of MTDC Applicability and Documentation

See Section I (K) for additional information on the comments received.

PTE Responsibilities Related to Indirect Cost Rates and Audits

See Section III or additional information on the comments received.

Applicability of 2 CFR to FAR Based Contracts

Many commenters expressed confusion regarding the changes to this section. The intent of the changes to this section are to make clear that the FAR applies to Federal contracts awarded to non-Federal entities, and that these requirements supersede the requirements of 2 CFR part 200 in a Federal contract. Clarification was requested from a commenter to confirm if an audit conducted for a Cost Accounting Standards (CAS) applicable contract will take the place of a Single Audit and how an entity with multiple grants and only one CAS-contract would meet the requirements of the Single Audit Act.

The language clarified in §200.101(c) to state that for CAS covered contracts, the CAS requirements regarding audit would supersede the audit requirements in subpart F. In addition, in the case where an entity receives many grants and one CAS covered contracts, the entity must comply to both the Single Audits for its grants and the CAS audit requirements for the CAS covered contract.

D. Applicability of Guidance to Federal Agencies

OMB is making changes to 2 CFR 200.101 *Applicability* to clarify that Federal awarding agencies may apply the requirements of 2 CFR part 200 to other Federal agencies, to the extent permitted by law. This change recognizes that there are instances when Federal awarding agencies or pass- through entities have the authority to issue Federal awards to Federal agencies and in these instances, the provisions of 2 CFR part 200 may be applied, as appropriate. This change is consistent with how for-profit entities, foreign public entities, or foreign organizations are treated in the Uniform Guidance.

200.101 Applicability

Several comments expressed concerns as to whether or not it is appropriate to include awards to Federal agencies in the scope of 2 CFR. It was determined that it was appropriate to include Federal agencies in the scope of 2 CFR as some Federal agencies are authorized to receive grants or cooperative agreements as direct recipients or subrecipients. This addition clarifies that subparts A through E of 2 CFR part 200 is applicable when determined by the Federal awarding agency. There will be no change from the proposed version.

E. Other Clarifications

Parts 25 and 170

Many commenters expressed concerns that parts 25 and 170 were confusing, inconsistent and needed to be edited for clarity. In response to these comments, parts 25 and 170 have been revised throughout with many technical corrections to add clarity and consistency.

200.110 Effective/Applicability Date

A number of comments, particularly from Federal agencies, expressed concern about the effective date for negotiated indirect cost rate agreements (NICRAs) in paragraph (b). The intent of this section is to retain the existing NICRAs until they are renegotiated and incorporate the requirements from the revision to 2 CFR upon renegotiation. Non-Federal entities with a NIRCA are expected to work with their cognizant agency for indirect costs as appropriate. OMB clarified the intent for 2 CFR 200.110(b). One Federal agency commenter stated that OMB should specify if the applicability date is for the entire guidance or for the revisions. OMB accepted this comment and made revisions accordingly.

200.200 Purpose

All commenters provided recommendations to revise this section to better align the terms ''competitive'' and ''non-competitive'' with the new terms ''discretionary'' and ''non-discretionary.'' OMB concurs with the recommendation to revise this section to align with other changes within the guidance. In response to commenters, OMB has removed 2 CFR 200.200(b) and made other technical corrections accordingly.

200.207 Standard Application Requirements

OMB received one comment on this section that was out of scope for the current set of revisions, and therefore the proposed language remains the same.

Out of Scope Comments

Many commenters submitted comments that were either not part of the scope of the effort, were not relevant to the revisions proposed, pertained to sections of the guidance that were not proposed to be revised, or would be a change too drastic that would warrant a need for the public to have an opportunity to provide input before finalizing. All comments within these categories were not accepted by OMB.

Changes From the Proposed Revisions Not Recommended

Comments received for several provisions within 2 CFR were reviewed, deliberated, and determined that no changes were needed from the proposed revisions. Some of these provisions within 2 CFR include the following:

- 200.201 Use of grant agreements (including fixed amount awards), cooperative agreements, and contracts
- 200.207 Standard application requirements
- 200.311 Real property
- 200.312 Federally-owned and exempt property
- 200.313 Equipment
- 200.314 Supplies
- 200.331 Subrecipient and contractor determinations
- 200.430 Compensation—personal services
- 400.458 Pre-award costs

200.402 Composition of Costs

Some commenters requested clarity and noted that the use of ''approved budget period'' is specific to Federal financial assistance when 2 CFR 200.402 would apply to both contracts and Federal financial assistance awarded to non-Federal entities. Another commenter suggested that further clarification is needed for what ''cost principle'' and ''budget period'' mean. Based on the vast array of comments received and the revised definitions for finalization, OMB decided to remove the language proposed for 2 CFR 200.402.

200.449 Interest

One comment was received for this provision. The commenter suggested that OMB provide a different example within 2 CFR 200.449 because lease contracts that transfer ownership are essentially debt financing. The commenter explains that the example is comparing debt financing to debt financing, which doesn't work for the intent. The commenter provided a suggested edit that would enable the example to remain and retain the original intent. OMB concurred with the commenter and made the suggested edit accordingly.

200.461 Publication and Printing Costs

All commenters requested clarity and suggested revisions to this provision. One commenter objected to specifying that costs must be charged to the last budget period, citing that printing costs are historically charged at various stages of the award. One commenter noted that these costs have historically been allowable up until the closeout of the award. Edits were suggest to provide additional clarity in §200.461(b)(3) to specify that The non-Federal entity may charge the Federal award during closeout. OMB concurs with this suggested revision and made the change accordingly.

200.507 Program-Specific Audits

One comment was received for 2 CFR 200.507. The commenter requested a clarification on the first phase to indicate ''in some cases'' rather than ''in many cases'' because Appendix VI of the 2019 Compliance Supplement only shows two current program specific audit guides. OMB concurred with the commenter and made the revision accordingly. The commenter provided a second recommendation to remove the 2014 beginning date and instead include the current reference to the Compliance Supplement appendix. OMB also concurs with this suggestion from the commenter and made the revisions.

200.515 Audit Reporting

The comments submitted for 2 CFR 200.515 provided suggestions for clarity. One commenter suggested reviewing this subsection against what the Federal Audit Clearinghouse is collecting in Part III: Information from the Schedule of Findings and Questioned Costs, Item 2. Financial Statements, to ensure an appropriate alignment between the regulation and the Form. Another commenter inquired about the intent of the revisions to this provision. OMB considered and discussed all the comments for clarity and made revisions accordingly.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The revision of 2 CFR is not a significant regulatory action under Executive Order 12866.

Regulatory Flexibilities Act

The Regulatory Flexibility Act 5 U.S.C. 601, *et seq.*, requires a regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities. OMB expects this guidance to have a significant economic impact on a substantial number of such entities. There are some proposed revisions that may impose burden, however, there are more proposed revisions that reduce burden to small entities. When reviewing all the revisions, the burden that will be reduced for recipients is much greater than the burden imposed.

The revisions to 2 CFR are not applicable to Federal financial assistance awards issued prior to the effective dates provided in the **DATES** section of this Notice of Final Guidance, including financial assistance awards issued prior to those dates under the Coronavirus Aid, Relief, and Economic Support (CARES) Act of 2020 (Pub. L. 116–136). OMB plans to consult with applicable agencies to provide regulatory flexibility analyses in future revisions to 2 CFR and its subcomponents.

The applicability of Federal financial assistance in 2 CFR part 25 will be expanded beyond grants and cooperative agreements to include other types of financial assistance such as loans and insurance. This revision ensures compliance with FFATA, as amended by the DATA Act, and will impact small entities that voluntarily seek financial assistance. It will not have a significant impact on a substantial number of U.S. small entities as approximately 69,185 small entities who received awards for other types of financial assistance did not have a unique entity identifier in FY 2019, while the Small Business Administration's Office of Advocacy reported 30.7 million U.S. small businesses in that same calendar year. Currently, 2 CFR part 25 requires all non-Federal entities that apply for grants and cooperative agreements to register in the SAM. In alignment with FFATA, the guidance provides that all entities that apply directly to a Federal program for financial assistance such as loans and insurance must register in SAM, which requires the establishment of a unique entity identifier. Individuals who receive Federal financial assistance as a natural person remain exempt from this requirement. In practice, some Federal awarding agencies already require SAM registration for all types of Federal financial assistance and the change would make this practice consistent among agencies. OMB recognizes that this new requirement may be burdensome to small entities and there may be instances where it is appropriate for Federal awarding agencies to request an exception or delay implementation of this requirement for their programs. In response, Federal awarding agencies may exercise the flexibility provided in 2 CFR 25.110 to either exempt an applicant or recipient from this requirement or request an exception from OMB on a case-by-case for a class applicants or recipients, particularly in situations of national emergency such as natural disasters and pandemics.

As noted in the Paperwork Reduction Act section, as of July 1, 2020, there were 159,477 unique Federal financial assistance registrants in the SAM. According to data accessed from *USASpending.gov*, in FY 2018, approximately 2,952 small entities who received awards for other types of financial assistance did not have a unique entity identifier. Assuming that non-Federal entities with a unique entity identifier reported to *USASpending.gov* are already registered in SAM, this change will impact approximately 2,952 small entities annually. SAM registration is estimated to take 2.5 hours per response, which results in 7,380 burden hours annually.

The guidance also provides consistency among definitions and terms and proposes several provisions to increase transparency regarding Federal spending. These revisions are intended to reduce recipient burden and will not have a significant economic impact on a substantial number of small entities because they will affect Federal awarding agencies; they do not include any new requirements for non-Federal entities.

The guidance introduces a new provision to align with section 889 of the NDAA 2019, prohibition on certain telecommunication and video surveillance services or equipment. This statutory requirement will introduce burden to

small entities that are prohibited from obligating or expending grant or loan funds to procure or obtain, extend or renew a contract to procure or obtain, or enter in a contract with, as identified in the NDAA 2019. Since this is a new legal requirement, the burden estimate is difficult to calculate. It will impact all unique entities awarded Federal financial assistance, of which
69,185 are small entities.

The guidance implements a new statute that requires applicants of Federal assistance to provide information on their owner, predecessor and subsidiary, including the Commercial and Government Entity (CAGE) Code and name of all predecessors, if applicable. This will not have a significant economic impact on a substantial number of small entities because small entities typically do not have a complex corporate structure requiring them to report information on their owner, predecessor, and subsidiary. Further, the burden is minimal for a non-Federal entity to provide the name of its immediate owner and highest-level owner.

The NDAA for FY2018 increased the micro-purchase threshold from $3,500 to $10,000 and increased the simplified acquisition threshold from $100,000 to $250,000 for all recipients. OMB's revisions reduces burden and will not have a significant economic impact on a substantial number of small entities because it is likely to reduce burden for all non-Federal entities.

Paperwork Reduction Act

Consistent with the Regulatory Flexibility Act analysis discussion, the Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The guidance contains information collection requirements and will impact the current Information Collection Requests approved under OMB control number 3090–0290 managed by GSA. Accordingly, GSA will submit a request for approval to amend the existing Information Collection Requests for SAM registration requirements for Federal financial assistance recipients.

Annual Reporting Burden

The estimated annual reporting burden includes all possible entities for Federal financial assistance that may be required to register in SAM. The estimated annual reporting burden also includes entities that receive Federal financial assistance reported in *USASpending.gov* and either may or may not be required to register in SAM.

Previously, SAM only requires that applicants and recipients of Federal financial assistance in the form of grants register in the system. However, applicants and recipients are required to maintain accurate SAM registration at all times during which they have an active Federal award, an application, or a plan under consideration by a Federal awarding agency.

The burden estimates are approximations based on the best available data.

As of July 7, 2019, there were 159,477 unique Federal financial assistance registrants in SAM. However, not all registrants ultimately apply for, or receive, Federal financial assistance. OMB aggregated SAM data with Federal financial assistance recipient data from *USASpending.gov*, excluding grants, to determine the anticipated number of additional Federal financial assistance in SAM. OMB ran reports in *USASpending.gov* to identify the number of unique recipients of Federal financial assistance other than grants to isolate the total number of potential registrants in SAM as a result of the updates to the proposed guidance.

OMB removed duplicate recipients based on recipient Data Universal Numbering System Number (DUNS) numbers, from Dun & Bradstreet (D&B). At this time all Federal financial assistance recipients are required to register for DUNS numbers.

In FY 2019 there were 1,751 loan and 8,915 other Federal financial assistance recipients with unique DUNS numbers reported in *USASpending.gov.* Therefore, based on the number of entities with unique DUNS numbers that are registered in SAM (159,477), plus entities that receive loans (122) or other Federal financial assistance (8,915) reported in *USASpending.gov* that may not be reflected in SAM, the total number of entities that may be impacted by the proposed guidance associated Information Collection
Requests under OMB control number 3090–0290 could be 172,084 registrants.

Public reporting burden for Information Collection Requests under OMB control number 3090–0290 is managed by the GSA and estimated to average 2.5 hours per response, including the 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:

Respondents: 172,084.
Responses per Respondent: 1.
Total annual responses: 172,084.
Hours per Response: 2.5.
Total response Burden Hours: 430,210.

The guidance also requires that registrants for Federal financial assistance provide information on their owner, predecessor, and subsidiary, including the CAGE code and name of all predecessors, if applicable. This information is required to implement Sec. 852 of the NDAA of FY 2013, which requires that the FAPIIS include information on a non-Federal entity's parent, subsidiary, or successor entities. Non-Federal entities are already required to obtain a CAGE code for purposes of SAM registration. It is anticipated that including this information as part of SAM registration or for a renewal should not result in significant additional time. Public reporting burden for this collection of information is estimated to average 0.1 hours per response.

Based on the burden estimates for the total number of SAM registrants indicated in the previous section, the annual reporting burden for this proposal is estimated as follows:

Respondents: 172,084.
Responses per respondent: 1.
Total annual responses: 172,084.
Preparation hours per response: 0.1.
Total response Burden Hours: 17,208.

List of Subjects

2 CFR Part 25

Administrative practice and procedure, Grant programs, Grants administration, Loan programs.

2 CFR Part 170

Colleges and universities, Grant programs, Hospitals, International organizations, Loan programs, Reporting and recordkeeping requirements.

2 CFR Part 183

Foreign aid, Grant programs, Grants administration, International organizations, Reporting and recordkeeping requirements.

2 CFR Part 200

Accounting, Colleges and universities, Grant programs, Grants administration, Hospitals, Indians, Nonprofit organizations, Reporting and recordkeeping requirements, State and local governments.

Timothy F. Soltis, *Deputy Controller.*

For the reasons stated in the preamble, the Office of Management and Budget amends 2 CFR chapters I and II as set forth below:

PART 25—UNIVERSAL IDENTIFIER AND SYSTEM FOR AWARD MANAGEMENT

■ 1. The authority citation for part 25 continues to read as follows:

Authority: Pub. L. 109–282; 31 U.S.C. 6102.

■ 2. Amend §25.100 by revising the introductory text and paragraph (a) to read as follows:

§25.100 Purposes of this part.

This part provides guidance to Federal awarding agencies to establish:

(a) The unique entity identifier as a universal identifier for Federal financial assistance applicants, as well as recipients and their direct subrecipients, and;

* * * * *

■ 3. Revise §25.105 to read as follows:

§25.105 Types of awards to which this part applies.

This part applies to a Federal awarding agency's grants, cooperative agreements,

loans, and other types of Federal financial assistance as defined in §25.406.

■ 4. Revise §25.110 to read as follows:

§25.110 Exceptions to this part.

(a) *General.* Through a Federal awarding agency's implementation of the guidance in this part, this part applies to all applicants and recipients of Federal awards, other than those exempted by statute or exempted in paragraphs (b) and (c) of this section that apply for or receive agency awards.

(b) *Exceptions for individuals.* None of the requirements in this part apply to an individual who applies for or receives Federal financial assistance as a natural person (*i.e.,* unrelated to any business or nonprofit organization he or she may own or operate in his or her name).

(c) *Other exceptions.* (1) Under a condition identified in paragraph (c)(2) of this section, a Federal awarding agency may exempt an applicant or recipient from an applicable requirement to obtain a unique entity identifier and register in the SAM, or both.

(i) In that case, the Federal awarding agency must use a generic unique entity identifier in data it reports to *USAspending.gov* if reporting for a prime award to the recipient is required by the Federal Funding Accountability and Transparency Act (Pub. L. 109–282, hereafter cited as ''Transparency Act'').

(ii) Federal awarding agency use of a generic unique entity identifier should be used rarely for prime award reporting because it prevents prime awardees from being able to fulfill the subaward or executive compensation reporting required by the Transparency Act.

(2) The conditions under which a Federal awarding agency may exempt an applicant or recipient are—

(i) For any applicant or recipient, if the Federal awarding agency determines that it must protect information about the entity from disclosure if it is in the national security or foreign policy interests of the United States, or to avoid jeopardizing the personal safety of the applicant or recipient's staff or clients.

(ii) For a foreign organization or foreign public entity applying for or receiving a Federal award or subaward for a project or program performed outside the United States valued at less than $25,000, if the Federal awarding agency deems it to be impractical for the entity to comply with the requirement(s). This exemption must be determined by the Federal awarding agency on a case-by-case basis while utilizing a risk-based approach and does not apply if subawards are anticipated.

(iii) For an applicant, if the Federal awarding agency makes a determination that there are exigent circumstances that prohibit the applicant from receiving a unique entity identifier and completing SAM registration prior to receiving a Federal award. In these instances, Federal awarding agencies must require the recipient to obtain a unique entity identifier and complete SAM registration within 30 days of the Federal award date.

(3) Federal awarding agencies' use of generic unique entity identifier, as described in paragraphs (c)(1) and (2) of this section, should be rare. Having a generic unique entity identifier limits a recipient's ability to use Governmentwide systems that are needed to comply with some reporting requirements.

(d) *Class exceptions.* OMB may allow exceptions for classes of Federal awards, applicants, and recipients subject to the requirements of this part when exceptions are not prohibited by statute.

§25.115 [Removed] ■

5. Remove §25.115.

■ 6. Revise §25.200 to read as follows:

§25.200 Requirements for notice of funding opportunities, regulations, and application instructions.

(a) Each Federal awarding agency that awards the types of Federal financial assistance defined in §25.406 must include the requirements described in paragraph (b) of this section in each notice of funding opportunity, regulation, or other issuance containing instructions for applicants that is issued on or after August 13, 2020.

(b) The notice of funding opportunity, regulation, or other issuance must require each applicant that applies and does not have an exemption under §25.110 to:

(1) Be registered in the SAM prior to submitting an application or plan;

(2) Maintain an active SAM registration with current information, including information on a recipient's immediate and highest level owner and subsidiaries, as well as on all predecessors that have been awarded a Federal contract or grant within the last three years, if applicable, at all times during which it has an active Federal award or an application or plan under consideration by a Federal awarding agency; and

(3) Provide its unique entity identifier in each application or plan it submits to the Federal awarding agency.

(c) For purposes of this policy:

(1) The applicant meets the Federal awarding agency's eligibility criteria and has the legal authority to apply and to receive the Federal award. For example, if a consortium applies for a Federal award to be made to the consortium as the recipient, the consortium must have a unique entity identifier. If a consortium is eligible to receive funding under a Federal awarding agency program but the agency's policy is to make the Federal award to a lead entity for the consortium, the unique entity identifier of the lead applicant will be used.

(2) A notice of funding opportunity is any paper or electronic issuance that an agency uses to announce a funding opportunity, whether it is called a ''program announcement,'' ''notice of funding availability,'' ''broad agency announcement,'' ''research announcement,'' ''solicitation,'' or some other term.

(3) To remain registered in the SAM database after the initial registration, the applicant is required to review and update its information in the SAM database on an annual basis from the date of initial registration or subsequent updates to ensure it is current, accurate and complete. ■ 7. Revise §25.205 to read as follows:

§25.205 Effect of noncompliance with a requirement to obtain a unique entity identifier or register in the SAM.

(a) A Federal awarding agency may not make a Federal award or financial modification to an existing Federal award to an applicant or recipient until the entity has complied with the requirements described in §25.200 to provide a valid unique entity identifier and maintain an active SAM registration with current information (other than any requirement that is not applicable because the entity is exempted under §25.110).

(b) At the time a Federal awarding agency is ready to make a Federal award, if the intended recipient has not complied with an applicable requirement to provide a unique entity identifier or maintain an active SAM registration with current information, the Federal awarding agency:

(1) May determine that the applicant is not qualified to receive a Federal award; and

(2) May use that determination as a basis for making a Federal award to another applicant. ■ 8. Revise §25.210 to read as follows:

§25.210 Authority to modify agency application forms or formats.

To implement the policies in §§25.200 and 25.205, a Federal awarding agency may add a unique entity identifier field to information collections previously approved by OMB, without having to obtain further approval to add the field.

■ 9. Revise §25.215 to read as follows:

§25.215 Requirements for agency information systems.

Each Federal awarding agency that awards Federal financial assistance (as defined in §25.406) must ensure that systems processing information related to the Federal awards, and other systems as appropriate, are able to accept and use the unique entity identifier as the universal identifier for Federal financial assistance applicants and recipients.

■ 10. Revise §25.220 to read as follows:

§25.220 Use of award term.

(a) To accomplish the purposes described in §25.100, a Federal awarding

agency must include in each Federal award (as defined in §25.405) the award term in appendix A to this part.

(b) A Federal awarding agency may use different letters and numbers than those in appendix A to this part to designate the paragraphs of the Federal award term, if necessary, to conform the system of paragraph designations with the one used in other terms and conditions in the Federal awarding agency's Federal awards.

■ 11. Revise subpart C to read as follows:

Subpart C—Recipient Requirements of Subrecipients

§25.300 Requirement for recipients to ensure subrecipients have a unique entity identifier.

(a) A recipient may not make a subaward to a subrecipient unless that subrecipient has obtained and provided to the recipient a unique entity identifier. Subrecipients are not required to complete full SAM registration to obtain a unique entity identifier.

(b) A recipient must notify any potential subrecipients that the recipient cannot make a subaward unless the subrecipient has obtained a unique entity identifier as described in paragraph (a) of this section.

■ 12. Add subpart D to read as follows:

Subpart D—Definitions

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Subpart D—Definitions

§25.400 Applicant.

Applicant, for the purposes of this part, means a non-Federal entity or Federal agency that applies for Federal awards.

§25.401 Federal Awarding Agency.

Federal Awarding Agency has the meaning given in 2 CFR 200.1.

§25.405 Federal Award.

Federal Award, for the purposes of this part, means an award of Federal financial assistance that a non-Federal entity or Federal agency received from a Federal awarding agency.

§25.406 Federal financial assistance.

(a) *Federal financial assistance,* for the purposes of this part, means assistance that entities received or administer in the form of:

(1) Grant;

(2) Cooperative agreements (which does not include a cooperative research and development agreement pursuant to the Federal Technology Transfer Act of 1986, as amended (15 U.S.C. 3710a));

(3) Loans;

(4) Loan guarantees;

(5) Subsidies;

(6) Insurance;

(7) Food commodities;

(8) Direct appropriations; (9) Assessed or voluntary contributions; or

(10) Any other financial assistance transaction that authorizes the non- Federal entity's expenditure of Federal funds.

(b) *Federal financial assistance,* for the purposes of this part, does not include:

(1) Technical assistance, which provides services in lieu of money; and

(2) A transfer of title to federally owned property provided in lieu of money, even if the award is called a grant.

§25.407 Recipient.

Recipient, for the purposes of this part, means a non-Federal entity or Federal agency that received a Federal award. This term also includes a non- Federal entity who administers Federal financial assistance awards on behalf of a Federal agency.

§25.410 System for Award Management (SAM).

System for Award Management (SAM) has the meaning given in paragraph C.1 of the award term in appendix A to this part.

§25.415 Unique entity identifier.

Unique entity identifier has the meaning given in paragraph C.2 of the award term in appendix A to this part.

§25.425 For-profit organization.

For-profit organization means a non-Federal entity organized for profit. It includes, but is not limited to:

(a) An ''S corporation'' incorporated under Subchapter S of the Internal Revenue Code;

(b) A corporation incorporated under another authority;

(c) A partnership;

(d) A limited liability corporation or partnership; and

(e) A sole proprietorship.

§25.430 Foreign organization.

Foreign organization has the meaning given in 2 CFR 200.1.

§25.431 Foreign public entity.

Foreign public entity has the meaning given in 2 CFR 200.1.

§25.432 Highest level owner.

Highest level owner has the meaning given in 2 CFR 200.1.

§25.433 Indian Tribe (or "federally recognized Indian Tribe").

Indian Tribe (or ''federally recognized Indian Tribe'') has the meaning given in 2 CFR 200.1.

§25.440 Local government.

Local government has the meaning given in 2 CFR 200.1.

§25.443 Non-Federal entity.

Non-Federal entity, as it is used in this part, has the meaning given in paragraph C.3 of the award term in appendix A to this part.

§25.445 Nonprofit organization.

Non-Federal organization, has the meaning given in 2 CFR 200.1.

§25.447 Predecessor.

Predecessor means a non-Federal entity that is replaced by a successor and includes any predecessors of the predecessor.

§25.450 State.

State has the meaning given in 2 CFR 200.1.

§25.455 Subaward.

Subaward has the meaning given in 2 CFR 200.1.

§25.460 Subrecipient.

Subrecipient has the meaning given in 2 CR 200.1.

§25.462 Subsidiary.

Subsidiary has the meaning given in 2 CFR 200.1.

§25.465 Successor.

Successor means a non-Federal entity that has replaced a predecessor by acquiring the assets and carrying out the affairs of the predecessor under a new name (often through acquisition or merger). The term ''successor'' does not include new offices or divisions of the same company or a company that only changes its name. ■ 13. Revise appendix A to part 25 to read as follows:

Appendix A to Part 25—Award Term

I. System for Award Management and Universal Identifier Requirements

A. Requirement for System for Award Management

Unless you are exempted from this requirement under 2 CFR 25.110, you as the recipient must maintain current information in the SAM. This includes information on your immediate and highest level owner and subsidiaries, as well as on all of your predecessors that have been awarded a Federal contract or Federal financial

assistance within the last three years, if applicable, until you submit the final financial report required under this Federal award or receive the final payment, whichever is later. This requires that you review and update the information at least annually after the initial registration, and more frequently if required by changes in your information or another Federal award term.

B. Requirement for Unique Entity Identifier

If you are authorized to make subawards under this Federal award, you:

1. Must notify potential subrecipients that no entity (*see* definition in paragraph C of this award term) may receive a subaward from you until the entity has provided its Unique Entity Identifier to you.
2. May not make a subaward to an entity unless the entity has provided its Unique Entity Identifier to you. Subrecipients are not required to obtain an active SAM registration, but must obtain a Unique Entity Identifier.

C. Definitions

For purposes of this term:

1. *System for Award Management (SAM)* means the Federal repository into which a recipient must provide information required for the conduct of business as a recipient. Additional information about registration procedures may be found at the SAM internet site (currently at *https:// www.sam.gov*).
2. *Unique Entity Identifier* means the identifier assigned by SAM to uniquely identify business entities.
3. *Entity* includes non-Federal entities as defined at 2 CFR 200.1 and also includes all of the following, for purposes of this part:
   a. A foreign organization;
   b. A foreign public entity;
   c. A domestic for-profit organization; and
   d. A domestic or foreign for-profit organization; and
   d. A Federal agency.
4. *Subaward* has the meaning given in 2 CFR 200.1.
5. *Subrecipient* has the meaning given in 2 CFR 200.1.

PART 170—REPORTING SUBAWARD AND EXECUTIVE COMPENSATION INFORMATION

■ 14. The authority citation for part 170 continues to read as follows:

Authority: Pub. L. 109–282; 31 U.S.C. 6102.

■ 15. Revise §170.100 read as follows:

§170.100 Purposes of this part.

This part provides guidance to Federal awarding agencies on reporting Federal awards to establish requirements for recipients' reporting of information on subawards and executive total compensation, as required by the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282), as amended by section 6202 of Public Law 110–252, hereafter referred to as ''the Transparency Act''.

■ 16. Revise §170.105 to read as follows:

§170.105 Types of awards to which this part applies.

This part applies to Federal awarding agency's grants, cooperative agreements, loans, and other forms of Federal financial assistance subject to the Transparency Act, as defined in §170.320. ■ 17. Revise §170.110 to read as follows:

§170.110 Exceptions to which this part applies.

(a) *General.* Through a Federal awarding agency's implementation of the guidance in this part, this part applies to recipients, other than those exempted by law or excepted in accordance with paragraphs (b) and (c) of this section, that—

(1) Apply for or receive Federal awards; or

(2) Receive subawards under Federal awards.

(b) *Exceptions.* (1) None of the requirements in this part apply to an individual who applies for or receives a Federal award as a natural person (*i.e.*, unrelated to any business or nonprofit organization he or she may own or operate in his or her name).

(2) None of the requirements regarding reporting names and total compensation of a non-Federal entity's five most highly compensated executives apply unless in the non- Federal entity's preceding fiscal year, it received—

(i) 80 percent or more of its annual gross revenue in Federal procurement contracts (and subcontracts) and Federal financial assistance awards subject to the Transparency Act, as defined at §170.320 (and subawards); and

(ii) $25,000,000 or more in annual gross revenue from Federal procurement contracts (and subcontracts) and Federal financial assistance awards subject to the Transparency Act, as defined at §170.320; and

(3) The public does not have access to information about the compensation of senior executives, unless otherwise publicly available, through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

(c) *Exceptions for classes of Federal awards or recipients.* OMB may allow exceptions for classes of Federal awards or recipients subject to the requirements of this part when exceptions are not prohibited by statute.

§170.115 [Removed] ■ 18.

Remove §170.115.

■ 19. Revise §170.200 to read as follows:

§170.200 Federal awarding agency reporting requirements.

(a) Federal awarding agencies are required to publicly report Federal awards that equal or exceed the micro- purchase threshold and publish the required information on a public-facing, OMB-designated, governmentwide website and follow OMB guidance to support Transparency Act implementation.

(b) Federal awarding agencies that obtain post-award data on subaward obligations outside of this policy should take the necessary steps to ensure that their recipients are not required, due to the combination of agency-specific and Transparency Act reporting requirements, to submit the same or similar data multiple times during a given reporting period. ■ 20. Add §170.210 to read as follows:

§170.210 Requirements for notices of funding opportunities, regulations, and application instructions.

(a) Each Federal awarding agency that makes awards of Federal financial assistance subject to the Transparency Act must include the requirements described in paragraph (b) of this section in each notice of funding opportunity, regulation, or other issuance containing instructions for applicants under which Federal awards may be made that are subject to Transparency Act reporting requirements, and is issued on or after the effective date of this part.

(b) The notice of funding opportunity, regulation, or other issuance must require each non-Federal entity that applies for Federal financial assistance and that does not have an exception under §170.110(b) to have the necessary processes and systems in place to comply with the reporting requirements should they receive Federal funding.

■ 21. Revise §170.220 to read as follows:

§170.220 Award term.

(a) To accomplish the purposes described in §170.100, a Federal awarding agency must include the award term in appendix A to this part in each Federal award to a recipient under which the total funding is anticipated to equal or exceed $30,000 in Federal funding.

(b) A Federal awarding agency, consistent with paragraph (a) of this section, is not required to include the award term in appendix A to this part if it determines that there is no possibility that the total amount of Federal funding under the Federal award will equal or exceed $30,000. However, the Federal awarding agency must subsequently modify the award to add the award term if changes in circumstances increase the total Federal funding under the award is anticipated to equal or exceed $30,000 during the period of performance.

■ 22. Revise §170.300 to read as follows:

§170.300 Federal agency.

Federal agency means a Federal agency as defined at 5 U.S.C. 551(1) and further clarified by 5 U.S.C. 552(f).

■ 23. Add §170.301 to read as follows:

§170.301 Federal awarding agency.

Federal awarding agency has the meaning given in 2 CFR 200.1.

■ 24. Revise §170.305 to read as follows:

§170.305 Federal award.

Federal award, for the purposes of this part, means an award of Federal financial assistance that a recipient receives directly from a Federal awarding agency.

■ 25. Add §170.307 to read as follows:

§170.307 Foreign organization.

Foreign organization has the meaning given in 2 CFR 200.1.

■ 26. Add §170.308 to read as follows:

§170.308 Foreign public entity.

Foreign public entity has the meaning given in 2 CFR 200.1.

■ 27. Revise §170.310 to read as follows:

§170.310 Non-Federal entity.

Non-Federal entity has the meaning given in 2 CFR 200.1 and also includes all of the following, for the purposes of this part:

(a) A foreign organization;

(b) A foreign public entity; and

(c) A domestic or foreign for-profit organization. ■ 28. Amend §170.320 by correctly designating the paragraph (b) that follows paragraph (j) as paragraph (k) and by revising paragraphs (k) introductory text and (k)(2) to read as follows:

§170.320 Federal financial assistance subject to the Transparency Act.

* * * * *

(k) Federal financial assistance subject to the Transparency Act, does not include—

* * * * *

(2) A transfer of title to federally- owned property provided in lieu of money, even if the award is called a grant;

* * * * *

■ 29. Add §170.322 to read as follows:

§170.322 Recipient.

Recipient, for the purposes of this part, means a non-Federal entity or Federal agency that received a Federal award.

■ 30. Revise §170.325 to read as follows:

§170.325 Subaward.

Subaward has the meaning given in 2 CFR 200.1.

■ 31. Revise appendix A to part 170 to read as follows:

Appendix A to Part 170—Award Term

I. Reporting Subawards and Executive Compensation

a. *Reporting of first-tier subawards.*

Applicability. Unless you are exempt as provided in paragraph d. of this award term, you must report each action that equals or exceeds $30,000 in Federal funds for a subaward to a non- Federal entity or Federal agency (see definitions in paragraph e. of this award term).

2. *Where and when to report.*

i. The non-Federal entity or Federal agency must report each obligating action described in paragraph a.1. of this award term to *http://www.fsrs.gov.*

ii. For subaward information, report no later than the end of the month following the month in which the obligation was made. (For example, if the obligation was made on November 7, 2010, the obligation must be reported by no later than December 31, 2010.)

3. *What to report.* You must report the information about each obligating action that the submission instructions posted at *http://www.fsrs.gov specify.*

b. *Reporting total compensation of recipient executives for non-Federal entities.*

1. *Applicability and what to report.* You must report total compensation for each of your five most highly compensated executives for the preceding completed fiscal year, if—

i. The total Federal funding authorized to date under this Federal award equals or exceeds $30,000 as defined in 2 CFR 170.320;

ii. in the preceding fiscal year, you received—

(A) 80 percent or more of your annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards), and

(B) $25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards); and,

iii. The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at *http://www.sec.gov/answers/execomp.htm.*)

2. *Where and when to report.* You must report executive total compensation described in paragraph b.1. of this award term:

i. As part of your registration profile at *https://www.sam.gov.*

ii. By the end of the month following the month in which this award is made, and annually thereafter.

c. *Reporting of Total Compensation of Subrecipient Executives.*

1. *Applicability and what to report.* Unless you are exempt as provided in paragraph d. of this award term, for each first-tier non-Federal entity subrecipient under this award, you shall report the names and total compensation of each of the subrecipient's five most highly compensated executives for the subrecipient's preceding completed fiscal year, if—

i. in the subrecipient's preceding fiscal year, the subrecipient received—

(A) 80 percent or more of its annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards) and,

(B) $25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts), and Federal financial assistance subject to the Transparency Act (and subawards); and ii. The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at *http://www.sec.gov/answers/execomp.htm.*)

2. *Where and when to report.* You must report subrecipient executive total compensation described in paragraph c.1. of this award term:

i. To the recipient.

ii. By the end of the month following the month during which you make the subaward. For example, if a subaward is obligated on any date during the month of October of a given year (*i.e.,* between October 1 and 31), you must report any required compensation information of the subrecipient by November 30 of that year.

d. *Exemptions.*

If, in the previous tax year, you had gross income, from all sources, under $300,000, you are exempt from the requirements to report:

i. Subawards, and

ii. The total compensation of the five most highly compensated executives of any subrecipient.

e. *Definitions.* For purposes of this award term:

1. Federal Agency means a Federal agency as defined at 5 U.S.C. 551(1) and further clarified by 5 U.S.C. 552(f).

2. Non-Federal *entity* means all of the following, as defined in 2 CFR part 25:

i. A Governmental organization, which is a State, local government, or

Indian tribe; ii. A foreign public entity; iii. A domestic or foreign nonprofit organization; and, iv. A domestic or foreign for-profit organization

3. *Executive* means officers, managing partners, or any other employees in management positions.

4. *Subaward:*

i. This term means a legal instrument to provide support for the performance of any portion of the substantive project or program for which you received this award and that you as the recipient award to an eligible subrecipient.

ii. The term does not include your procurement of property and services needed to carry out the project or program (for further explanation, see 2 CFR 200.331). iii. A subaward may be provided through any legal agreement, including an agreement that you or a subrecipient considers a contract.

5. *Subrecipient* means a non-Federal entity or Federal agency that:

i. Receives a subaward from you (the recipient) under this award; and ii. Is accountable to you for the use of the Federal funds provided by the subaward.

6. *Total compensation* means the cash and noncash dollar value earned by the executive during the recipient's or subrecipient's preceding fiscal year and includes the following (for more information see 17 CFR 229.402(c)(2)). ■ 31a. Add part 183 to read as follows:

PART 183—NEVER CONTRACT WITH THE ENEMY

Sec.

APPENDIX A TO PART 183—CLAUSES FOR AWARD AGREEMENTS

Authority: Pub. L. 113–291.

§183.5 Purpose of this part.

This part provides guidance to Federal awarding agencies on the implementation of the Never Contract with the Enemy requirements applicable to certain grants and cooperative agreements, as specified in subtitle E, title VIII of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113–291), as amended by Sec. 822 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92).

§183.10 Applicability.

(a) This part applies only to grants and cooperative agreements that are expected to exceed $50,000 and that are performed outside the United States, including U.S. territories, and that are in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities. It does not apply to the authorized intelligence or law enforcement activities of the Federal Government.

(b) All elements of this part are applicable until the date of expiration as provided in law.

§183.15 Responsibilities of Federal awarding agencies.

(a) Prior to making an award for a covered grant or cooperative agreement (see also §183.35), the Federal awarding agency must check the current list of prohibited or restricted persons or entities in the System Award Management (SAM) Exclusions.

(b) The Federal awarding agency may include the award term provided in appendix A of this part in all covered grant and cooperative agreement awards in accordance with Never Contract with the Enemy.

(c) A Federal awarding agency may become aware of a person or entity that:

(1) Provides funds, including goods and services, received under a covered grant or cooperative agreement of an executive agency directly or indirectly to covered persons or entities; or

(2) Fails to exercise due diligence to ensure that none of the funds, including goods and services, received under a covered grant or cooperative agreement of an executive agency are provided directly or indirectly to covered persons or entities.

(d) When a Federal awarding agency becomes aware of such a person or entity, it may do any of the following actions:

(1) Restrict the future award of all Federal contracts, grants, and cooperative agreements to the person or entity based upon concerns that Federal awards to the entity would provide grant funds directly or indirectly to a covered person or entity.

(2) Terminate any contract, grant, or cooperative agreement to a covered person or entity upon becoming aware that the recipient has failed to exercise due diligence to ensure that none of the award funds are provided directly or indirectly to a covered person or entity.

(3) Void in whole or in part any grant, cooperative agreement or contracts of the executive agency concerned upon a written determination by the head of contracting activity or other appropriate official that the grant or cooperative agreement provides funds directly or indirectly to a covered person or entity.

(e) The Federal awarding agency must notify recipients in writing regarding its decision to restrict all future awards and/or to terminate or void a grant or cooperative agreement. The agency must also notify the recipient in writing about the recipient's right to request an administrative review (using the agency's procedures) of the restriction, termination, or void of the grant or cooperative agreement within 30 days of receiving notification.

§183.20 Reporting responsibilities of Federal awarding agencies.

(a) If a Federal awarding agency restricts all future awards to a covered person or entity, it must enter information on the ineligible person or entity into SAM Exclusions as a prohibited or restricted source pursuant to Subtitle E, Title VIII of the NDAA for FY 2015 (Pub. L. 113–291).

(b) When a Federal awarding agency terminates or voids a grant or cooperative agreement due to Never Contract with the Enemy, it must report the termination as a Termination for Material Failure to Comply in the Office of Management and Budget (OMB)- designated integrity and performance system accessible through SAM (currently the Federal Awardee Performance and Integrity Information System (FAPIIS)).

(c) The Federal awarding agency shall document and report to the head of the executive agency concerned (or the designee of such head) and the commander of the covered combatant command concerned (or specific deputies):

(1) Any action to restrict all future awards or to terminate or void an award with a covered person or entity.

(2) Any decision not to restrict all future awards, terminate, or void an award along with the agency's reasoning for not taking one of these actions after the agency became aware that a person or entity is a prohibited or restricted source.

(d) Each report referenced in paragraph (c)(1) of this section shall include:

(1) The executive agency taking such action.

(2) An explanation of the basis for the action taken.

(3) The value of the terminated or voided grant or cooperative agreement.

(4) The value of all grants and cooperative agreements of the executive agency with the person or entity concerned at the time the grant or cooperative agreement was terminated or voided.

(e) Each report referenced in paragraph (c)(2) of this section shall include:

(1) The executive agency concerned.

(2) An explanation of the basis for not taking the action.

(f) For each instance in which an executive agency exercised the additional authority to examine recipient and lower tier entity (*e.g.*, subrecipient or contractor) records, the agency must report in writing to the head of the executive agency concerned (or the designee of such head) and the commander of the covered combatant command concerned (or specific deputies) the following:

(1) An explanation of the basis for the action taken; and

(2) A summary of the results of any examination of records.

§183.25 Responsibilities of recipients.

(a) Recipients of covered grants or cooperative agreements must fulfill the requirements outlined in the award term provided in appendix A to this part.

(b) Recipients must also flow down the provisions in award terms covered in appendix A to this part to all contracts and subawards under the award.

§183.30 Access to records.

In addition to any other existing examination-of-records authority, the Federal Government is authorized to examine any records of the recipient and its subawards, to the extent necessary, to ensure that funds, including supplies and services, received under a covered grant or cooperative agreement (see §183.35) are not provided directly or indirectly to a covered person or entity in accordance with Never Contract with the Enemy. The Federal awarding agency may only exercise this authority upon a written determination by the Federal awarding agency that relies on a finding by the commander of a covered combatant command that there is reason to believe that funds, including supplies and services, received under the grant or cooperative agreement may have been provided directly or indirectly to a covered person or entity.

§183.35 Definitions.

Terms used in this part are defined as follows:

Contingency operation, as defined in 10 U.S.C. 101a, means a military operation that—

(1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under 10 U.S.C. 688, 12301a, 12302, 12304, 12304a, 12305, 12406 of 10 U.S.C. chapter 15, 14 U.S.C. 712 or any other provision of law during a war or during a national emergency declared by the President or Congress.

Covered combatant command means the following:

(1) The United States Africa Command.

(2) The United States Central Command.

(3) The United States European Command.

(4) The United States Pacific Command.

(5) The United States Southern Command.

(6) The United States Transportation Command.

Covered grant or cooperative agreement means a grant or cooperative agreement, as defined in 2 CFR 200.1 with an estimated value in excess of $50,000 that is performed outside the United States, including its possessions and territories, in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities. Except for U.S. Department of Defense grants and cooperative agreements that were awarded on or before December 19, 2017, that will be performed in the United States Central Command, where the estimated value is in excess of $100,000.

Covered person or entity means a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

Appendix A to Part 183—Award Terms for Never Contract With the Enemy

Federal awarding agencies may include the following award terms in all awards for covered grants and cooperative agreements in accordance with Never Contract with the Enemy:

Term 1

Prohibition on Providing Funds to the Enemy

(a) The recipient must—

(1) Exercise due diligence to ensure that none of the funds, including supplies and services, received under this grant or cooperative agreement are provided directly or indirectly (including through subawards or contracts) to a person or entity who is actively opposing the United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities, which must be completed through 2 CFR 180.300 prior to issuing a subaward or contract and;

(2) Terminate or void in whole or in part any subaward or contract with a person or entity listed in SAM as a prohibited or restricted source pursuant to subtitle E of Title VIII of the NDAA for FY 2015, unless the Federal awarding agency provides written approval to continue the subaward or contract.

(b) The recipient may include the substance of this clause, including paragraph (a) of this clause, in subawards under this grant or cooperative agreement that have an estimated value over $50,000 and will be performed outside the United States, including its outlying areas.

(c) The Federal awarding agency has the authority to terminate or void this grant or cooperative agreement, in whole or in part, if the Federal awarding agency becomes aware that the recipient failed to exercise due diligence as required by paragraph (a) of this clause or if the Federal awarding agency becomes aware that any funds received under this grant or cooperative agreement have been provided directly or indirectly to a person or entity who is actively opposing coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

(End of term)

Term 2

Additional Access to Recipient Records

(a) In addition to any other existing examination-of-records authority, the Federal Government is authorized to examine any records of the recipient and its subawards or contracts to the extent necessary to ensure that funds, including supplies and services, available under this grant or cooperative agreement are not provided, directly or indirectly, to a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities, except for awards awarded by the Department of Defense on or before Dec 19, 2017 that will be performed in the United States Central Command (USCENTCOM) theater of operations.

(b) The substance of this clause, including this paragraph (b), is required to be included in subawards or contracts under this grant or cooperative agreement that have an estimated value over $50,000 and will be performed outside the United States, including its outlying areas. (End of term)

PART 200—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

■ 32. The authority citation for part 200 continues to read as follows: **Authority:** 31 U.S.C. 503

■ 33. Amend §200.0 by removing the acronym CFDA, revising the acronym MTDC, adding in alphabetical order the acronym NFE, and revising the acronym SAM to read as follows:

§200.0 Acronyms.

* * * * *

MTDC Modified Total Direct Cost NFE Non-Federal Entity

* * * * *

SAM System for Award Management

* * * * *

■ 34. Revise §200.1 to read as follows:

§200.1 Definitions.

These are the definitions for terms used in this part. Different definitions may be found in Federal statutes or regulations that apply more specifically to particular programs or activities. These definitions could be supplemented by additional instructional information provided in governmentwide standard information collections. For purposes of this part, the following definitions apply:

Acquisition cost means the cost of the asset including the cost to ready the asset for its intended use. Acquisition cost for equipment, for example, means the net invoice price of the equipment, including the cost of any

modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Acquisition costs for software includes

those development costs capitalized in accordance with generally accepted accounting principles (GAAP). Ancillary charges, such as taxes, duty, protective in transit insurance, freight, and installation may be included in or excluded from the acquisition cost in accordance with the non-Federal entity's regular accounting practices.

Advance payment means a payment that a Federal awarding agency or pass- through entity makes by any appropriate payment mechanism, including a predetermined payment schedule, before the non-Federal entity disburses the funds for program purposes.

Allocation means the process of assigning a cost, or a group of costs, to one or more cost objective(s), in reasonable proportion to the benefit provided or other equitable relationship. The process may entail assigning a cost(s) directly to a final cost objective or through one or more intermediate cost objectives.

Assistance listings refers to the publicly available listing of Federal assistance programs managed and administered by the General Services Administration, formerly known as the
Catalog of Federal Domestic Assistance (CFDA).

Assistance listing number means a unique number assigned to identify a Federal Assistance Listings, formerly known as the CFDA Number.

Assistance listing program title means the title that corresponds to the Federal Assistance Listings Number, formerly known as the CFDA program title.

Audit finding means deficiencies which the auditor is required by §200.516(a) to report in the schedule of findings and questioned costs.

Auditee means any non-Federal entity that expends Federal awards which must be audited under subpart F of this part.

Auditor means an auditor who is a public accountant or a Federal, State, local government, or Indian tribe audit organization, which meets the general standards specified for external auditors in generally accepted government auditing standards (GAGAS). The term auditor does not include internal auditors of nonprofit organizations.

Budget means the financial plan for the Federal award that the Federal awarding agency or pass-through entity approves during the Federal award process or in subsequent amendments to the Federal award. It may include the Federal and non-Federal share or only the Federal share, as determined by the Federal awarding agency or pass- through entity.

Budget period means the time interval from the start date of a funded portion
of an award to the end date of that funded portion during which recipients are authorized to expend the funds awarded, including any funds carried forward or other revisions pursuant to §200.308.

Capital assets means:

(1) Tangible or intangible assets used in operations having a useful life of more than one year which are capitalized in accordance with GAAP.
Capital assets include:

(i) Land, buildings (facilities), equipment, and intellectual property (including software) whether acquired by purchase, construction, manufacture, exchange, or through a lease accounted for as financed purchase under Government Accounting Standards Board (GASB) standards or a finance lease under Financial Accounting Standards Board (FASB) standards; and

(ii) Additions, improvements, modifications, replacements, rearrangements, reinstallations, renovations or alterations to capital assets that materially increase their value or useful life (not ordinary repairs and maintenance).

(2) For purpose of this part, capital assets do not include intangible right-to- use assets (per GASB) and right-to-use operating lease assets (per FASB). For example, assets capitalized that recognize a lessee's right to control the use of property and/or equipment for a period of time under a lease contract. See also §200.465.

Capital expenditures means expenditures to acquire capital assets or expenditures to make additions, improvements, modifications, replacements, rearrangements, reinstallations, renovations, or alterations to capital assets that materially increase their value or useful life.

Central service cost allocation plan means the documentation identifying, accumulating, and allocating or developing billing rates based on the allowable costs of services provided by a State or local government or Indian tribe on a centralized basis to its departments and agencies. The costs of these services may be allocated or billed to users.

Claim means, depending on the context, either:

(1) A written demand or written assertion by one of the parties to a Federal award seeking as a matter of right:

(i) The payment of money in a sum certain;

(ii) The adjustment or interpretation of the terms and conditions of the
Federal award; or

(iii) Other relief arising under or relating to a Federal award.

(2) A request for payment that is not in dispute when submitted.

Class of Federal awards means a group of Federal awards either awarded under a specific program or group of programs or to a specific type of non- Federal entity or group of non-Federal entities to which specific provisions or exceptions may apply.

Closeout means the process by which the Federal awarding agency or pass- through entity determines that all applicable administrative actions and all required work of the Federal award have been completed and takes actions as described in §200.344.

Cluster of programs means a grouping of closely related programs that share common compliance requirements. The types of clusters of programs are research and development (R&D), student financial aid (SFA), and other clusters. ''Other clusters'' are as defined by OMB in the compliance supplement or as designated by a State for Federal awards the State provides to its subrecipients that meet the definition of a cluster of programs. When designating an ''other cluster,'' a State must identify the Federal awards included in the cluster and advise the subrecipients of compliance requirements applicable to the cluster, consistent with §200.332(a). A cluster of programs must be considered as one program for determining major programs, as described in §200.518, and, with the exception of R&D as described in §200.501(c), whether a program-specific audit may be elected.

Cognizant agency for audit means the Federal agency designated to carry out the responsibilities described in §200.513(a). The cognizant agency for audit is not necessarily the same as the cognizant agency for indirect costs. A list of cognizant agencies for audit can be found on the Federal Audit Clearinghouse (FAC) website.

Cognizant agency for indirect costs means the Federal agency responsible for reviewing, negotiating, and approving cost allocation plans or indirect cost proposals developed under this part on behalf of all Federal agencies. The cognizant agency for indirect cost is not necessarily the same as the cognizant agency for audit. For assignments of cognizant agencies see the following:

(1) For Institutions of Higher Education (IHEs): Appendix III to this part, paragraph C.11.

(2) For nonprofit organizations:

Appendix IV to this part, paragraph C.2.a.

(3) For State and local governments: Appendix V to this part, paragraph F.1.

(4) For Indian tribes: Appendix VII to this part, paragraph D.1.

Compliance supplement means an annually updated authoritative source for auditors that serves to identify existing important compliance requirements that the Federal Government expects to be considered as part of an audit. Auditors use it to understand the Federal program's objectives, procedures, and compliance requirements, as well as audit objectives and suggested audit procedures for determining compliance with the relevant Federal program.

Computing devices means machines used to acquire, store, analyze, process, and publish data and other information electronically, including accessories (or ''peripherals'') for printing, transmitting and receiving, or storing electronic information. See also the definitions of *supplies* and *information technology systems* in this section.

Contract means, for the purpose of Federal financial assistance, a legal instrument by which a recipient or subrecipient purchases property or services needed to carry out the project or program under a Federal award. For additional information on subrecipient and contractor determinations, see §200.331. See also the definition of *subaward* in this section.

Contractor means an entity that receives a contract as defined in this section.

Cooperative agreement means a legal instrument of financial assistance between a Federal awarding agency and a recipient or a pass-through entity and a subrecipient that, consistent with 31 U.S.C. 6302–6305:

(1) Is used to enter into a relationship the principal purpose of which is to transfer anything of value to carry out a public purpose authorized by a law of the United States (see 31 U.S.C. 6101(3)); and not to acquire property or services for the Federal Government or pass-through entity's direct benefit or use;

(2) Is distinguished from a grant in that it provides for substantial involvement of the Federal awarding agency in carrying out the activity contemplated by the Federal award.

(3) The term does not include:

(i) A cooperative research and development agreement as defined in 15 U.S.C. 3710a; or (ii) An agreement that provides only: (A) Direct United States Government cash assistance to an individual;

(B) A subsidy; (C)

A loan;

(D) A loan guarantee; or

(E) Insurance.

Cooperative audit resolution means the use of audit follow-up techniques which promote prompt corrective action by improving communication, fostering collaboration, promoting trust, and developing an understanding between the Federal agency and the non-Federal entity. This approach is based upon:

(1) A strong commitment by Federal agency and non-Federal entity leadership to program integrity;

(2) Federal agencies strengthening partnerships and working cooperatively with non-Federal entities and their auditors; and non-Federal entities and their auditors working cooperatively with Federal agencies;

(3) A focus on current conditions and corrective action going forward;

(4) Federal agencies offering appropriate relief for past noncompliance when audits show prompt corrective action has occurred; and

(5) Federal agency leadership sending a clear message that continued failure to correct conditions identified by audits which are likely to cause improper payments, fraud, waste, or abuse is unacceptable and will result in sanctions.

Corrective action means action taken by the auditee that:

(1) Corrects identified deficiencies;

(2) Produces recommended improvements; or

(3) Demonstrates that audit findings are either invalid or do not warrant auditee action.

Cost allocation plan means central service cost allocation plan or public assistance cost allocation plan.

Cost objective means a program, function, activity, award, organizational subdivision, contract, or work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes, products, jobs, capital projects, etc. A cost objective may be a major function of the non-Federal entity, a particular service or project, a Federal award, or an indirect (Facilities & Administrative (F&A)) cost activity, as described in subpart E of this part. See also the definitions of *final cost objective* and *intermediate cost objective* in this section.

Cost sharing or matching means the portion of project costs not paid by Federal funds or contributions (unless otherwise authorized by Federal statute). See also §200.306.

Cross-cutting audit finding means an audit finding where the same underlying condition or issue affects all Federal awards (including Federal awards of more than one Federal awarding agency or pass-through entity).

Disallowed costs means those charges to a Federal award that the Federal awarding agency or pass-through entity determines to be unallowable, in accordance with the applicable Federal statutes, regulations, or the terms and conditions of the Federal award.

Discretionary award means an award in which the Federal awarding agency, in keeping with specific statutory authority that enables the agency to exercise judgment (''discretion''), selects the recipient and/or the amount of Federal funding awarded through a competitive process or based on merit of proposals. A discretionary award may be selected on a non-competitive basis, as appropriate.

Equipment means tangible personal property (including information technology systems) having a useful life of more than one year and a per-unit acquisition cost which equals or exceeds the lesser of the capitalization level established by the non-Federal entity for financial statement purposes, or $5,000. See also the definitions of *capital assets, computing devices, general purpose equipment, information technology systems, special purpose equipment,* and *supplies* in this section.

Expenditures means charges made by a non-Federal entity to a project or program for which a Federal award was received.

(1) The charges may be reported on a cash or accrual basis, as long as the methodology is disclosed and is consistently applied.

(2) For reports prepared on a cash basis, expenditures are the sum of: (i) Cash disbursements for direct charges for property and services;

(ii) The amount of indirect expense charged;

(iii) The value of third-party in-kind contributions applied; and

(iv) The amount of cash advance payments and payments made to subrecipients.

(3) For reports prepared on an accrual basis, expenditures are the sum of: (i) Cash disbursements for direct charges for property and services;

(ii) The amount of indirect expense incurred;

(iii) The value of third-party in-kind contributions applied; and

(iv) The net increase or decrease in the amounts owed by the non-Federal entity for:

(A) Goods and other property received;

(B) Services performed by employees, contractors, subrecipients, and other payees; and

(C) Programs for which no current services or performance are required such as annuities, insurance claims, or other benefit payments.

Federal agency means an ''agency'' as defined at 5 U.S.C. 551(1) and further clarified by 5 U.S.C. 552(f).

Federal Audit Clearinghouse (FAC) means the clearinghouse designated by OMB as the repository of record where non-Federal entities are required to transmit the information required by subpart F of this part.

Federal award has the meaning, depending on the context, in either paragraph (1) or (2) of this definition:

(1)(i) The Federal financial assistance that a recipient receives directly from a Federal awarding agency or indirectly from a pass-through entity, as described in §200.101; or

(ii) The cost-reimbursement contract under the Federal Acquisition Regulations that a non-Federal entity receives directly from a Federal awarding agency or indirectly from a pass-through entity, as described in §200.101.

(2) The instrument setting forth the terms and conditions. The instrument is the grant agreement, cooperative agreement, other agreement for assistance covered in paragraph (2) of the definition of *Federal financial assistance* in this section, or the cost-reimbursement contract awarded under the Federal Acquisition Regulations.

(3) Federal award does not include other contracts that a Federal agency uses to buy goods or services from a contractor or a contract to operate Federal Government owned, contractor operated facilities (GOCOs).

(4) See also definitions of Federal financial assistance, grant agreement, and cooperative agreement.

Federal award date means the date when the Federal award is signed by the authorized official of the Federal awarding agency.

Federal financial assistance means

(1) Assistance that non-Federal entities receive or administer in the form of:

(i) Grants;

(ii) Cooperative agreements;

(iii) Non-cash contributions or donations of property (including donated surplus property);

(iv) Direct appropriations;

(v) Food commodities; and

(vi) Other financial assistance (except assistance listed in paragraph (2) of this definition).

(2) For §200.203 and subpart F of this part, *Federal financial assistance* also includes assistance that non-Federal entities receive or administer in the form of:

(i) Loans;

(ii) Loan Guarantees;

(iii) Interest subsidies; and (iv) Insurance.

(3) For §200.216, Federal financial assistance includes assistance that non-Federal entities receive or administer in the form of:

(i) Grants;

(ii) Cooperative agreements; (iii) Loans; and

(iv) Loan Guarantees.

(4) Federal financial assistance does not include amounts received as reimbursement for services rendered to individuals as described in §200.502(h) and (i).

Federal interest means, for purposes of §200.330 or when used in connection with the acquisition or improvement of real property, equipment, or supplies under a Federal award, the dollar amount that is the product of the:

(1) The percentage of Federal participation in the total cost of the real property, equipment, or supplies; and

(2) Current fair market value of the property, improvements, or both, to the extent the costs of acquiring or improving the property were included as project costs.

Federal program means:

(1) All Federal awards which are assigned a single Assistance Listings Number.

(2) When no Assistance Listings Number is assigned, all Federal awards from the same agency made for the same purpose must be combined and considered one program.

(3) Notwithstanding paragraphs (1) and (2) of this definition, a cluster of programs. The types of clusters of programs are:

(i) Research and development (R&D);

(ii) Student financial aid (SFA); and

(iii) ''Other clusters,'' as described in the definition of *cluster of programs* in this section.

Federal share means the portion of the Federal award costs that are paid using Federal funds.

Final cost objective means a cost objective which has allocated to it both direct and indirect costs and, in the non-Federal entity's accumulation system, is one of the final accumulation points, such as a particular award, internal project, or other direct activity of a non-Federal entity. See also the definitions of *cost objective* and *intermediate cost objective* in this section.

Financial obligations, when referencing a recipient's or subrecipient's use of funds under a Federal award, means orders placed for property and services, contracts and subawards made, and similar transactions that require payment.

Fixed amount awards means a type of grant or cooperative agreement under which the Federal awarding agency or pass-through entity provides a specific level of support without regard to actual costs incurred under the Federal award. This type of Federal award reduces some of the administrative burden and record-keeping requirements for both the non-Federal entity and Federal awarding agency or pass-through entity. Accountability is based primarily on performance and results. See §§200.102(c), 200.201(b), and 200.333.

Foreign organization means an entity that is:

(1) A public or private organization located in a country other than the United States and its territories that is subject to the laws of the country in which it is located, irrespective of the citizenship of project staff or place of performance;

(2) A private nongovernmental organization located in a country other than the United States that solicits and receives cash contributions from the general public;

(3) A charitable organization located in a country other than the United States that is nonprofit and tax exempt under the laws of its country of domicile and operation, and is not a university, college, accredited degree-granting institution of education, private foundation, hospital, organization engaged exclusively in research or scientific activities, church, synagogue, mosque or other similar entities organized primarily for religious purposes; or

(4) An organization located in a country other than the United States not recognized as a foreign public entity.

Foreign public entity means:

(1) A foreign government or foreign governmental entity;

(2) A public international organization, which is an organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288–288f);

(3) An entity owned (in whole or in part) or controlled by a foreign government; or

(4) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.

General purpose equipment means equipment which is not limited to research, medical, scientific or other technical activities. Examples include office equipment and furnishings, modular offices, telephone networks, information technology equipment and systems, air conditioning equipment, reproduction and printing equipment, and motor vehicles. See also the definitions of *equipment* and *special purpose equipment* in this section.

Generally accepted accounting principles (GAAP) has the meaning specified in accounting standards issued by the GASB and the FASB.

Generally accepted government auditing standards (GAGAS), also known as the Yellow Book, means generally accepted government auditing standards issued by the Comptroller General of the United States, which are applicable to financial audits.

Grant agreement means a legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a non-Federal entity that, consistent with 31 U.S.C. 6302, 6304:

(1) Is used to enter into a relationship the principal purpose of which is to transfer anything of value to carry out a public purpose authorized by a law of the United States (see 31 U.S.C. 6101(3)); and not to acquire property or services for the Federal awarding agency or pass-through entity's direct benefit or use;

(2) Is distinguished from a cooperative agreement in that it does not provide for substantial involvement of the Federal awarding agency in carrying out the activity contemplated by the Federal award.

(3) Does not include an agreement that provides only:

(i) Direct United States Government cash assistance to an individual;

(ii) A subsidy;

(iii) A loan;

(vi) A loan guarantee; or (v) Insurance.

Highest level owner means the entity that owns or controls an immediate owner of the offeror, or that owns or controls one or more entities that control an immediate owner of the offeror. No entity owns or exercises control of the highest-level owner as defined in the Federal Acquisition Regulations (FAR) (48 CFR 52.204–17).

Hospital means a facility licensed as a hospital under the law of any state or a facility operated as a hospital by the United States, a state, or a subdivision of a state.

Improper payment means:

(1) Any payment that should not have been made or that was made in an incorrect amount under statutory, contractual, administrative, or other *legally applicable* requirements.

(i) Incorrect amounts are overpayments or underpayments that are made to eligible recipients (including inappropriate denials of payment or service, any payment that does not account for credit for applicable discounts, payments that are for

an incorrect amount, and duplicate payments). An improper payment also includes any payment that was made to an ineligible recipient or for an ineligible good or service, or payments for goods or services not received (except for such payments authorized by law).

Note 1 to paragraph (1)(i) of this definition. Applicable discounts are only those discounts where it is both advantageous and within the agency's control to claim them.

(ii) When an agency's review is unable to discern whether a payment was proper as a result of insufficient or lack of documentation, this payment should also be considered an improper payment. When establishing documentation requirements for payments, agencies should ensure that all documentation requirements are necessary and should refrain from imposing additional burdensome documentation requirements.

(iii) Interest or other fees that may result from an underpayment by an agency are not considered an improper payment if the interest was paid correctly. These payments are generally separate transactions and may be necessary under certain statutory, contractual, administrative, or other legally applicable requirements.

(iv) A ''questioned cost'' (as defined in this section) should not be considered an improper payment until the transaction has been completely reviewed and is confirmed to be improper.

(v) The term ''payment'' in this definition means any disbursement or transfer of Federal funds (including a commitment for future payment, such as cash, securities, loans, loan guarantees, and insurance subsidies) to any non- Federal person, non-Federal entity, or
Federal employee, that is made by a Federal agency, a Federal contractor, a Federal grantee, or a governmental or other organization administering a Federal program or activity.

(vi) The term ''payment'' includes disbursements made pursuant to prime contracts awarded under the Federal Acquisition Regulation and Federal awards subject to this part that are expended by recipients.

(2) See definition of improper payment in OMB Circular A–123 appendix C, part I A (1) ''What is an improper payment?'' Questioned costs, including those identified in audits, are not an improper payment until reviewed and confirmed to be improper as defined in OMB Circular A–123 appendix C.

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. Chapter 33), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. 450b(e)). See annually published Bureau of Indian Affairs list of Indian Entities Recognized and Eligible to Receive Services.

Institutions of Higher Education (IHEs) is defined at 20 U.S.C. 1001.

Indirect (facilities & administrative (F&A)) costs means those costs incurred for a common or joint purpose benefitting more than one cost objective, and not readily assignable to the cost objectives specifically benefitted, without effort disproportionate to the results achieved. To facilitate equitable distribution of indirect expenses to the cost objectives served, it may be necessary to establish a number of pools of indirect (F&A) costs. Indirect (F&A) cost pools must be distributed to benefitted cost objectives on bases that will produce an equitable result in consideration of relative benefits derived.

Indirect cost rate proposal means the documentation prepared by a non- Federal entity to substantiate its request for the establishment of an indirect cost rate as described in appendices III through VII and appendix IX to this part.

Information technology systems means computing devices, ancillary equipment, software, firmware, and similar procedures, services (including support services), and related resources. See also the definitions of *computing devices* and *equipment* in this section.

Intangible property means property having no physical existence, such as trademarks, copyrights, patents and patent applications and property, such as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership (whether the property is tangible or intangible).

Intermediate cost objective means a cost objective that is used to accumulate indirect costs or service center costs that are subsequently allocated to one or more indirect cost pools or final cost objectives. See also the definitions of *cost objective* and *final cost objective* in this section.

Internal controls for non-Federal entities means:

(1) Processes designed and implemented by non-Federal entities to provide reasonable assurance regarding
the achievement of objectives in the following categories:

(i) Effectiveness and efficiency of operations;

(ii) Reliability of reporting for internal and external use; and

(iii) Compliance with applicable laws and regulations.

(2) Federal awarding agencies are required to follow internal control compliance requirements in OMB Circular No. A–123, Management's
Responsibility for Enterprise Risk Management and Internal Control.

Loan means a Federal loan or loan guarantee received or administered by a non-Federal entity, except as used in the definition of *program income* in this section.

(1) The term ''direct loan'' means a disbursement of funds by the Federal Government to a non-Federal borrower under a contract that requires the repayment of such funds with or without interest. The term includes the purchase of, or participation in, a loan made by another lender and financing arrangements that defer payment for more than 90 days, including the sale of a Federal Government asset on credit terms. The term does not include the acquisition of a federally guaranteed loan in satisfaction of default claims or the price support loans of the Commodity Credit Corporation.

(2) The term ''direct loan obligation'' means a binding agreement by a Federal awarding agency to make a direct loan when specified conditions are fulfilled by the borrower.

(3) The term ''loan guarantee'' means any Federal Government guarantee, insurance, or other pledge with respect to the payment of all or a part of the principal or interest on any debt obligation of a non-Federal borrower to a non-Federal lender, but does not include the insurance of deposits, shares, or other withdrawable accounts in financial institutions.

(4) The term ''loan guarantee commitment'' means a binding agreement by a Federal awarding agency to make a loan guarantee when specified conditions are fulfilled by the borrower, the lender, or any other party to the guarantee agreement.

Local government means any unit of government within a state, including a:

(1) County;

(2) Borough;

(3) Municipality;

(4) City;

(5) Town;

(6) Township;

(7) Parish;

(8) Local public authority, including any public housing agency under the United States Housing Act of 1937;

(9) Special district;

(10) School district;

(11) Intrastate district;

(12) Council of governments, whether or not incorporated as a nonprofit corporation under State law; and

(13) Any other agency or instrumentality of a multi-, regional, or intra-State or local government.

Major program means a Federal program determined by the auditor to be a major program in accordance with §200.518 or a program identified as a major program by a Federal awarding agency or pass-through entity in accordance with §200.503(e).

Management decision means the Federal awarding agency's or pass- through entity's written determination, provided to the auditee, of the adequacy of the auditee's proposed corrective actions to address the findings,

based on its evaluation of the audit findings and proposed corrective actions.

Micro-purchase means a purchase of supplies or services, the aggregate amount of which does not exceed the micro-purchase threshold. Micro- purchases comprise a subset of a non- Federal entity's small purchases as defined in §200.320.

Micro-purchase threshold means the dollar amount at or below which a non- Federal entity may purchase property or services using micro-purchase procedures (see §200.320). Generally, the micro-purchase threshold for procurement activities administered under Federal awards is not to exceed the amount set by the FAR at 48 CFR part 2, subpart 2.1, unless a higher threshold is requested by the non- Federal entity and approved by the cognizant agency for indirect costs.

Modified Total Direct Cost (MTDC) means all direct salaries and wages, applicable fringe benefits, materials and supplies, services, travel, and up to the first $25,000 of each subaward (regardless of the period of performance of the subawards under the award). MTDC excludes equipment, capital expenditures, charges for patient care, rental costs, tuition remission, scholarships and fellowships, participant support costs and the portion of each subaward in excess of $25,000. Other items may only be excluded when necessary to avoid a serious inequity in the distribution of indirect costs, and with the approval of the cognizant agency for indirect costs.

Non-discretionary award means an award made by the Federal awarding agency to specific recipients in accordance with statutory, eligibility and compliance requirements, such that in keeping with specific statutory authority the agency has no ability to exercise judgement (''discretion''). A non-discretionary award amount could be determined specifically or by formula.

Non-Federal entity (NFE) means a State, local government, Indian tribe, Institution of Higher Education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient.

Nonprofit organization means any corporation, trust, association, cooperative, or other organization, not including IHEs, that:

(1) Is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest;

(2) Is not organized primarily for profit; and

(3) Uses net proceeds to maintain, improve, or expand the operations of the organization.

Notice of funding opportunity means a formal announcement of the availability of Federal funding through a financial assistance program from a Federal awarding agency. The notice of funding opportunity provides information on the award, who is eligible to apply, the evaluation criteria for selection of an awardee, required components of an application, and how to submit the application. The notice of funding opportunity is any paper or electronic issuance that an agency uses to announce a funding opportunity, whether it is called a ''program announcement,'' ''notice of funding availability,'' ''broad agency announcement,'' ''research announcement,'' ''solicitation,'' or some other term.

Office of Management and Budget (OMB) means the Executive Office of the President, Office of Management and Budget.

Oversight agency for audit means the Federal awarding agency that provides the predominant amount of funding directly (direct funding) (as listed on the schedule of expenditures of Federal awards, see §200.510(b)) to a non- Federal entity unless OMB designates a specific cognizant agency for audit. When the direct funding represents less than 25 percent of the total Federal expenditures (as direct and sub-awards) by the non-Federal entity, then the Federal agency with the predominant amount of total funding is the designated cognizant agency for audit. When there is no direct funding, the Federal awarding agency which is the predominant source of pass-through funding must assume the oversight responsibilities. The duties of the oversight agency for audit and the process for any reassignments are described in §200.513(b).

Participant support costs means direct costs for items such as stipends or subsistence allowances, travel allowances, and registration fees paid to or on behalf of participants or trainees (but not employees) in connection with conferences, or training projects.

Pass-through entity (PTE) means a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program.

Performance goal means a target level of performance expressed as a tangible, measurable objective, against which actual achievement can be compared, including a goal expressed as a quantitative standard, value, or rate. In some instances (*e.g.*, discretionary research awards), this may be limited to the requirement to submit technical performance reports (to be evaluated in accordance with agency policy).

Period of performance means the total estimated time interval between the start of an initial Federal award and the planned end date, which may include one or more funded portions, or budget periods. Identification of the period of performance in the Federal award per §200.211(b)(5) does not commit the awarding agency to fund the award beyond the currently approved budget period.

Personal property means property other than real property. It may be tangible, having physical existence, or intangible.

Personally Identifiable Information (PII) means information that can be used to distinguish or trace an individual's identity, either alone or when combined with other personal or identifying information that is linked or linkable to a specific individual. Some information that is considered to be PII is available in public sources such as telephone books, public websites, and university listings. This type of information is considered to be Public PII and includes, for example, first and last name, address, work telephone number, email address, home telephone number, and general educational credentials. The definition of PII is not anchored to any single category of information or technology. Rather, it requires a case-by- case assessment of the specific risk that an individual can be identified. Non-PII can become PII whenever additional information is made publicly available, in any medium and from any source, that, when combined with other available information, could be used to identify an individual.

Program income means gross income earned by the non-Federal entity that is directly generated by a supported activity or earned as a result of the Federal award during the period of performance except as provided in §200.307(f). (See the definition of *period of performance* in this section.) Program income includes but is not limited to income from fees for services performed, the use or rental or real or personal property acquired under Federal awards, the sale of commodities or items fabricated under a Federal award, license fees and royalties on patents and copyrights, and principal and interest on loans made with Federal award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal statutes, regulations, or the terms and conditions of the Federal award, program income does not include rebates, credits, discounts, and interest earned on any of them. See also §200.407. See also 35 U.S.C. 200–212 ''Disposition of Rights in Educational Awards'' applies to inventions made under Federal awards.

Project cost means total allowable costs incurred under a Federal award and all required cost sharing and voluntary committed cost sharing, including third-party contributions.

Property means real property or personal property. See also the definitions of *real property* and *personal property* in this section.

Protected Personally Identifiable Information (Protected PII) means an individual's first name or first initial and last name in combination with any one or more of types of information, including, but not limited to, social security number, passport number, credit card numbers, clearances, bank numbers, biometrics, date and place of birth, mother's maiden name, criminal, medical and financial records, educational transcripts. This does not include PII that is required by law to be disclosed. See also the definition of *Personally Identifiable Information (PII)* in this section.

Questioned cost means a cost that is questioned by the auditor because of an audit finding:

(1) Which resulted from a violation or possible violation of a statute, regulation, or the terms and conditions of a Federal award, including for funds used to match Federal funds;

(2) Where the costs, at the time of the audit, are not supported by adequate documentation; or

(3) Where the costs incurred appear unreasonable and do not reflect the actions a prudent person would take in the circumstances.

(4) Questioned costs are not an improper payment until reviewed and confirmed to be improper as defined in OMB Circular A–123 appendix C. (See also the definition of *Improper payment* in this section).

Real property means land, including land improvements, structures and appurtenances thereto, but excludes moveable machinery and equipment.

Recipient means an entity, usually but not limited to non-Federal entities that receives a Federal award directly from a Federal awarding agency. The term recipient does not include subrecipients or individuals that are beneficiaries of the award.

Renewal award means an award made subsequent to an expiring Federal award for which the start date is contiguous with, or closely follows, the end of the expiring Federal award. A renewal award's start date will begin a distinct period of performance.

Research and Development (R&D) means all research activities, both basic and applied, and all development activities that are performed by non- Federal entities. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function. ''Research'' is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. ''Development'' is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes.

Simplified acquisition threshold means the dollar amount below which a non-Federal entity may purchase property or services using small purchase methods (see §200.320). Non- Federal entities adopt small purchase procedures in order to expedite the purchase of items at or below the simplified acquisition threshold. The simplified acquisition threshold for procurement activities administered under Federal awards is set by the FAR at 48 CFR part 2, subpart 2.1. The non- Federal entity is responsible for determining an appropriate simplified acquisition threshold based on internal controls, an evaluation of risk, and its documented procurement procedures. However, in no circumstances can this threshold exceed the dollar value established in the FAR (48 CFR part 2, subpart 2.1) for the simplified acquisition threshold. Recipients should determine if local government laws on purchasing apply.

Special purpose equipment means equipment which is used only for research, medical, scientific, or other technical activities. Examples of special purpose equipment include microscopes, x-ray machines, surgical instruments, and spectrometers. See also the definitions of *equipment* and *general purpose equipment* in this section.

State means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments.

Student Financial Aid (SFA) means Federal awards under those programs of general student assistance, such as those authorized by Title IV of the Higher Education Act of 1965, as amended, (20 U.S.C. 1070–1099d), which are administered by the U.S. Department of Education, and similar programs provided by other Federal agencies. It does not include Federal awards under programs that provide fellowships or similar Federal awards to students on a competitive basis, or for specified studies or research.

Subaward means an award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a Federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a Federal program. A subaward may be provided through any form of legal agreement, including an agreement that the pass- through entity considers a contract.

Subrecipient means an entity, usually but not limited to non-Federal entities, that receives a subaward from a pass- through entity to carry out part of a Federal award; but does not include an individual that is a beneficiary of such award. A subrecipient may also be a recipient of other Federal awards directly from a Federal awarding agency.

Subsidiary means an entity in which more than 50 percent of the entity is owned or controlled directly by a parent corporation or through another subsidiary of a parent corporation.

Supplies means all tangible personal property other than those described in the definition of *equipment* in this section. A computing device is a supply if the acquisition cost is less than the lesser of the capitalization level established by the non-Federal entity for financial statement purposes or $5,000, regardless of the length of its useful life. See also the definitions of *computing devices* and *equipment* in this section.

Telecommunications cost means the cost of using communication and telephony technologies such as mobile phones, land lines, and internet.

Termination means the ending of a Federal award, in whole or in part at any time prior to the planned end of period of performance. A lack of available funds is not a termination.

Third-party in-kind contributions means the value of non-cash contributions (*i.e.*, property or services) that—

(1) Benefit a federally-assisted project or program; and

(2) Are contributed by non-Federal third parties, without charge, to a non-Federal entity under a Federal award.

Unliquidated financial obligations means, for financial reports prepared on a cash basis, financial obligations incurred by the non-Federal entity that have not been paid (liquidated). For reports prepared on an accrual expenditure basis, these are financial obligations incurred by the non-Federal entity for which an expenditure has not been recorded.

Unobligated balance means the amount of funds under a Federal award that the non-Federal entity has not obligated. The amount is computed by subtracting the cumulative amount of the non-Federal entity's unliquidated financial obligations and expenditures of funds under the Federal award from the cumulative amount of the funds that the Federal awarding agency or pass- through entity authorized the non- Federal entity to obligate.

Voluntary committed cost sharing means cost sharing specifically pledged on a voluntary basis in the proposal's budget on the part of the non-Federal entity and that becomes a binding requirement of Federal award. See also §200.306.

■ 35. Amend §200.100 by revising paragraphs (a)(1), (c), (d), and (e) to read as follows:

§200.100 Purpose.

(a) *Purpose.* (1) This part establishes uniform administrative requirements, cost principles, and audit requirements for Federal awards to non-Federal entities, as described in §200.101. Federal awarding agencies must not impose additional or inconsistent requirements, except as provided in §§200.102 and 200.211, or unless specifically required by Federal statute, regulation, or Executive order.

* * * * *

(c) *Cost principles.* Subpart E of this part establishes principles for determining the allowable costs incurred by non-Federal entities under Federal awards. The principles are for the purpose of cost determination and are not intended to identify the circumstances or dictate the extent of Federal Government participation in the financing of a particular program or project. The principles are designed to provide that Federal awards bear their fair share of cost recognized under these principles except where restricted or prohibited by statute.

(d) *Single Audit Requirements and Audit Follow-up.* Subpart F of this part is issued pursuant to the Single Audit Act Amendments of 1996, (31 U.S.C. 7501–7507). It sets forth standards for obtaining consistency and uniformity among Federal agencies for the audit of non-Federal entities expending Federal awards. These provisions also provide the policies and procedures for Federal awarding agencies and pass-through entities when using the results of these audits.

(e) *Guidance on challenges and prizes.* For OMB guidance to Federal awarding agencies on challenges and prizes, please see memo M–10–11 Guidance on the Use of Challenges and Prizes to Promote Open Government, issued March 8, 2010, or its successor.

■ 36. Revise §200.101 to read as follows:

§200.101 Applicability.

(a) *General applicability to Federal agencies.* (1) The requirements established in this part apply to Federal agencies that make Federal awards to non-Federal entities. These requirements are applicable to all costs related to Federal awards.

(2) Federal awarding agencies may apply subparts A through E of this part to Federal agencies, for-profit entities, foreign public entities, or foreign organizations, except where the Federal awarding agency determines that the application of these subparts would be inconsistent with the international responsibilities of the United States or the statutes or regulations of a foreign government.

(b) *Applicability to different types of Federal awards.* (1) Throughout this part when the word ''must'' is used it indicates a requirement. Whereas, use of the word ''should'' or ''may'' indicates a best practice or recommended approach rather than a requirement and permits discretion.

(2) The following table describes what portions of this part apply to which types of Federal awards. The terms and conditions of Federal awards (including this part) flow down to subawards to subrecipients unless a particular section of this part or the terms and conditions of the Federal award specifically indicate otherwise. This means that non-Federal entities must comply with requirements in this part regardless of whether the non-Federal entity is a recipient or subrecipient of a Federal award. Pass-through entities must comply with the requirements described in subpart D of this part, §§200.331 through 200.333, but not any requirements in this part directed towards Federal awarding agencies unless the requirements of this part or the terms and conditions of the Federal award indicate otherwise.

TABLE 1 TO PARAGRAPH (b)

The following portions of this Part	Are applicable to the following types of Federal Awards and Fixed-Price Contracts and Subcontracts (except as noted in paragraphs (d) and (e) of this section):	Are NOT applicable to the following types of Federal Awards and Fixed-Price Contracts and Subcontracts:
Subpart A—Acronyms and Definitions	—All.	
Subpart B—General Provisions, except for §§200.111 English Language, 200.112 Conflict of Interest, 200.113 Mandatory Disclosures.	—All.	
§§200.111 English Language, 200.112 Conflict of Interest, 200.113 Mandatory Disclosures.	—Grant Agreements and cooperative agreements.	—Agreements for loans, loan guarantees, interest subsidies and insurance. —Procurement contracts awarded by Federal Agencies under the Federal Acquisition Regulation and subcontracts under those contracts.
Subparts C–D, except for §§200.203 Requirement to provide public notice of Federal financial assistance programs, 200.303 Internal controls, 200.331–333 Subrecipient Monitoring and Management.	—Grant Agreements and cooperative agreements.	—Agreements for loans, loan guarantees, interest subsidies and insurance. —Procurement contracts awarded by Federal Agencies under the Federal Acquisition Regulation and subcontracts under those contracts.
§200.203 Requirement to provide public notice of Federal financial assistance programs.	—Grant Agreements and cooperative agreements. —Agreements for loans, loan guarantees, interest subsidies and insurance.	—Procurement contracts awarded by Federal Agencies under the Federal Acquisition Regulation and subcontracts under those contracts.
§§200.303 Internal controls, 200.331–333 Subrecipient Monitoring and Management.	—All.	
Subpart E—Cost Principles	—Grant Agreements and cooperative agreements, except those providing food commodities. —All procurement contracts under the Federal Acquisition Regulations except those that are not negotiated.	—Grant agreements and cooperative agreements providing foods commodities. —Fixed amount awards. —Agreements for loans, loans guarantees, interest subsidies and insurance. —Federal awards to hospitals (see Appendix IX Hospital Cost Principles).

Subpart F—Audit Requirements	—Grant Agreements and cooperative agreements. —Contracts and subcontracts, except for fixed price contacts and subcontracts, awarded under the Federal Acquisition Regulation. —Agreements for loans, loans guarantees, interest subsidies and insurance and other forms of Federal Financial Assistance as defined by the Single Audit Act Amendment of 1996.	—Fixed-price contracts and subcontracts awarded under the Federal Acquisition Regulation.

(c) *Federal award of cost-reimbursement contract under the FAR to a non-Federal entity.* When a non- Federal entity is awarded a cost- reimbursement contract, only subpart D, §§200.331 through 200.333, and subparts E and F of this part are incorporated by reference into the contract, but the requirements of subparts D, E, and F are supplementary to the FAR and the contract. When the Cost Accounting Standards (CAS) are applicable to the contract, they take precedence over the requirements of this part, including subpart F of this part, which are supplementary to the CAS requirements. In addition, costs that are made unallowable under 10 U.S.C. 2324(e) and 41 U.S.C. 4304(a) as described in the FAR 48 CFR part 31, subpart 31.2, and 48 CFR 31.603 are always unallowable. For requirements other than those covered in subpart D, §§200.331 through 200.333, and subparts E and F of this part, the terms of the contract and the FAR apply. Note that when a non-Federal entity is awarded a FAR contract, the FAR applies, and the terms and conditions of the contract shall prevail over the requirements of this part.

(d) *Governing provisions.* With the exception of subpart F of this part, which is required by the Single Audit Act, in any circumstances where the provisions of Federal statutes or regulations differ from the provisions of this part, the provision of the Federal statutes or regulations govern. This includes, for agreements with Indian tribes, the provisions of the Indian Self-Determination and Education and Assistance Act (ISDEAA), as amended, 25 U.S.C 450–458ddd–2.

(e) *Program applicability.* Except for §§200.203 and 200.331 through 200.333, the requirements in subparts C, D, and E of this part do not apply to the following programs:

(1) The block grant awards authorized by the Omnibus Budget Reconciliation Act of 1981 (including Community Services), except to the extent that subpart E of this part apply to subrecipients of Community Services Block Grant funds pursuant to 42 U.S.C. 9916(a)(1)(B);

(2) Federal awards to local education agencies under 20 U.S.C. 7702–7703b, (portions of the Impact Aid program);

(3) Payments under the Department of Veterans Affairs' State Home Per Diem Program (38 U.S.C. 1741); and

(4) Federal awards authorized under the Child Care and Development Block Grant Act of 1990, as amended:

(i) Child Care and Development Block Grant (42 U.S.C. 9858).

(ii) Child Care Mandatory and Matching Funds of the Child Care and Development Fund (42 U.S.C. 9858).

(f) *Additional program applicability.* Except for §200.203, the guidance in subpart C of this part does not apply to the following programs:

(1) Entitlement Federal awards to carry out the following programs of the Social Security Act:

(i) Temporary Assistance for Needy Families (title IV–A of the Social Security Act, 42 U.S.C. 601–619);

(ii) Child Support Enforcement and Establishment of Paternity (title IV–D of the Social Security Act, 42 U.S.C. 651– 669b);

(iii) Foster Care and Adoption Assistance (title IV–E of the Act, 42 U.S.C. 670–679c);

(iv) Aid to the Aged, Blind, and Disabled (titles I, X, XIV, and XVI–AABD of the Act, as amended);

(v) Medical Assistance (Medicaid) (title XIX of the Act, 42 U.S.C. 1396–1396w–5) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B) of the Social Security Act (42 U.S.C. 1396b(a)(6)(B)); and

(vi) Children's Health Insurance Program (title XXI of the Act, 42 U.S.C. 1397aa–1397mm).

(2) A Federal award for an experimental, pilot, or demonstration project that is also supported by a Federal award listed in paragraph (f)(1) of this section.

(3) Federal awards under subsection 412(e) of the Immigration and Nationality Act and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96–422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits (8 U.S.C. 1522(e)).

(4) Entitlement awards under the following programs of The National School Lunch Act:

(i) National School Lunch Program (section 4 of the Act, 42 U.S.C. 1753);

(ii) Commodity Assistance (section 6 of the Act, 42 U.S.C. 1755);

(iii) Special Meal Assistance (section 11 of the Act, 42 U.S.C. 1759a);

(iv) Summer Food Service Program for Children (section 13 of the Act, 42 U.S.C. 1761); and

(v) Child and Adult Care Food Program (section 17 of the Act, 42 U.S.C. 1766).

(5) Entitlement awards under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk Program (section 3 of the Act, 42 U.S.C. 1772);

(ii) School Breakfast Program (section 4 of the Act, 42 U.S.C. 1773); and (iii) State Administrative Expenses (section 7 of the Act, 42 U.S.C. 1776).

(6) Entitlement awards for State Administrative Expenses under The Food and Nutrition Act of 2008 (section 16 of the Act, 7 U.S.C. 2025).

(7) Non-discretionary Federal awards under the following non-entitlement programs:

(i) Special Supplemental Nutrition Program for Women, Infants and Children (section 17 of the Child Nutrition Act of 1966) 42 U.S.C. 1786;

(ii) The Emergency Food Assistance Programs (Emergency Food Assistance Act of 1983) 7 U.S.C. 7501 note; and

(iii) Commodity Supplemental Food Program (section 5 of the Agriculture and Consumer Protection Act of 1973) 7 U.S.C. 612c note.

■ 37. Revise §200.102 to read as follows:

§200.102 Exceptions.

(a) With the exception of subpart F of this part, OMB may allow exceptions for classes of Federal awards or non-Federal entities subject to the requirements of this part when exceptions are not prohibited by statute. In the interest of maximum uniformity,

exceptions from the requirements of this part will be permitted as described in this section.

(b) Exceptions on a case-by-case basis for individual non-Federal entities may be authorized by the Federal awarding agency or cognizant agency for indirect costs, except where otherwise required by law or where OMB or other approval is expressly required by this part.

(c) The Federal awarding agency may apply adjust requirements to a class of Federal awards or non-Federal entities when approved by OMB, or when required by Federal statutes or regulations, except for the requirements in subpart F of this part. A Federal awarding agency may apply less restrictive requirements when making fixed amount awards as defined in subpart A of this part, except for those requirements imposed by statute or in subpart F of this part.

(d) Federal awarding agencies may request exceptions in support of innovative program designs that apply a risk-based, data-driven framework to alleviate select compliance requirements and hold recipients accountable for good performance. See also §200.206.

■ 38. Revise §200.103 to read as follows:

§200.103 Authorities.

This part is issued under the following authorities.

(a) Subparts B through D of this part are authorized under 31 U.S.C. 503 (the Chief Financial Officers Act, Functions of the Deputy Director for Management), 41 U.S.C. 1101–1131 (the Office of Federal Procurement Policy Act), Reorganization Plan No. 2 of 1970, and Executive Order 11541 (''Prescribing the Duties of the Office of Management and Budget and the Domestic Policy Council in the Executive Office of the President''), the Single Audit Act Amendments of 1996, (31 U.S.C. 7501–7507), as well as The Federal Program Information Act (Pub. L. 95–220 and Pub. L. 98–169, as amended, codified at 31 U.S.C. 6101–6106).

(b) Subpart E of this part is authorized under the Budget and Accounting Act of 1921, as amended; the Budget and Accounting Procedures Act of 1950, as amended (31 U.S.C. 1101–1125); the Chief Financial Officers Act of 1990 (31 U.S.C. 503–504); Reorganization Plan No. 2 of 1970; and Executive Order 11541, ''Prescribing the Duties of the Office of Management and Budget and the Domestic Policy Council in the Executive Office of the President.''

(c) Subpart F of this part is authorized under the Single Audit Act Amendments of 1996, (31 U.S.C. 7501– 7507).

■ 39. Amend §200.104 by revising the introductory text and paragraphs (g) and (h) to read as follows:

§200.104 Supersession.

As described in §200.110, this part supersedes the following OMB guidance documents and regulations under title 2 of the Code of Federal Regulations:

* * * * *

(g) A–133, ''Audits of States, Local Governments and Non-Profit Organizations''; and

(h) Those sections of A–50 related to audits performed under subpart F of this part.

■ 40. Revise §200.105 to read as follows:

§200.105 Effect on other issuances.

(a) *Superseding inconsistent requirements.* For Federal awards subject to this part, all administrative requirements, program manuals, handbooks and other non-regulatory materials that are inconsistent with the requirements of this part must be superseded upon implementation of this part by the Federal agency, except to the extent they are required by statute or authorized in accordance with the provisions in §200.102.

(b) *Imposition of requirements on recipients.* Agencies may impose legally binding requirements on recipients only through the notice and public comment process through an approved agency process, including as authorized by this part, other statutes or regulations, or as incorporated into the terms of a Federal award.

■ 41. Revise §200.106 to read as follows:

§200.106 Agency implementation. The specific requirements and responsibilities of Federal agencies and non-Federal entities are set forth in this part. Federal agencies making Federal awards to non-Federal entities must implement the language in subparts C through F of this part in codified regulations unless different provisions are required by Federal statute or are approved by OMB.

■ 42. Revise §200.110 to read as follows:

§200.110 Effective/applicability date.

(a) The standards set forth in this part that affect the administration of Federal awards issued by Federal awarding agencies become effective once implemented by Federal awarding agencies or when any future amendment to this part becomes final.

(b) Existing negotiated indirect cost rates (as of the publication date of the revisions to the guidance) will remain in place until they expire. The effective date of changes to indirect cost rates must be based upon the date that a newly re-negotiated rate goes into effect for a specific non-Federal entity's fiscal year. Therefore, for indirect cost rates and cost allocation plans, the revised Uniform Guidance (as of the publication date for revisions to the guidance) become effective in generating proposals and negotiating a new rate (when the rate is re-negotiated).

■ 43. Revise §200.113 to read as follows:

§200.113 Mandatory disclosures.

The non-Federal entity or applicant for a Federal award must disclose, in a timely manner, in writing to the Federal awarding agency or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Non-Federal entities that have received a Federal award including the term and condition outlined in appendix XII to this part are required to report certain civil, criminal, or administrative proceedings to SAM (currently FAPIIS). Failure to make required disclosures can result in any of the remedies described in §200.339. (See also 2 CFR part 180, 31 U.S.C. 3321, and 41 U.S.C. 2313.) ■ 44. Revise subpart C to read as follows:

Subpart C—Pre-Federal Award Requirements and Contents of Federal Awards

Sec.

Subpart C—Pre-Federal Award Requirements and Contents of Federal Awards

§200.200 Purpose.

Sections 200.201 through 200.216 prescribe instructions and other pre- award matters to be used by Federal awarding agencies in the program planning, announcement, application and award processes.

§200.201 Use of grant agreements (including fixed amount awards), cooperative agreements, and contracts.

(a) *Federal award instrument.* The Federal awarding agency or pass- through entity must decide on the appropriate instrument for the Federal award (*i.e.*, grant agreement, cooperative agreement, or contract) in accordance with the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301–08).

(b) *Fixed amount awards.* In addition to the options described in paragraph (a) of this section, Federal awarding agencies, or pass-through entities as permitted in §200.333, may use fixed amount awards (see *Fixed amount awards* in §200.1) to which the following conditions apply:

(1) The Federal award amount is negotiated using the cost principles (or other pricing information) as a guide. The Federal awarding agency or pass- through entity may use fixed amount awards if the project scope has measurable goals and objectives and if adequate cost, historical, or unit pricing data is available to establish a fixed amount award based on a reasonable estimate of actual cost. Payments are based on meeting specific requirements of the Federal award. Accountability is based on performance and results. Except in the case of termination before completion of the Federal award, there is no governmental review of the actual costs incurred by the non-Federal entity in performance of the award. Some of the ways in which the Federal award may be paid include, but are not limited to:

(i) In several partial payments, the amount of each agreed upon in advance, and the ''milestone'' or event triggering the payment also agreed upon in advance, and set forth in the Federal award;

(ii) On a unit price basis, for a defined unit or units, at a defined price or prices, agreed to in advance of performance of the Federal award and set forth in the Federal award; or,

(iii) In one payment at Federal award completion.

(2) A fixed amount award cannot be used in programs which require mandatory cost sharing or match.

(3) The non-Federal entity must certify in writing to the Federal awarding agency or pass-through entity at the end of the Federal award that the project or activity was completed or the level of effort was expended. If the required level of activity or effort was not carried out, the amount of the Federal award must be adjusted.

(4) Periodic reports may be established for each Federal award.

(5) Changes in principal investigator, project leader, project partner, or scope of effort must receive the prior written approval of the Federal awarding agency or pass-through entity.

§200.202 Program planning and design.

The Federal awarding agency must design a program and create an Assistance Listing before announcing the Notice of Funding Opportunity. The program must be designed with clear goals and objectives that facilitate the delivery of meaningful results consistent with the Federal authorizing legislation of the program. Program performance shall be measured based on the goals and objectives developed during program planning and design. See §200.301 for more information on performance measurement. Performance measures may differ depending on the type of program. The program must align with the strategic goals and objectives within the Federal awarding agency's performance plan and should support the Federal awarding agency's performance measurement, management, and reporting as required by Part 6 of OMB Circular A–11 (Preparation, Submission, and Execution of the Budget). The program must also be designed to align with the Program Management Improvement Accountability Act (Pub. L. 114–264).

§200.203 Requirement to provide public notice of Federal financial assistance programs.

(a) The Federal awarding agency must notify the public of Federal programs in the Federal Assistance Listings maintained by the General Services Administration (GSA).

(1) The Federal Assistance Listings is the single, authoritative, governmentwide comprehensive source of Federal financial assistance program information produced by the executive branch of the Federal Government.

(2) The information that the Federal awarding agency must submit to GSA for approval by OMB is listed in paragraph (b) of this section. GSA must prescribe the format for the submission in coordination with OMB.

(3) The Federal awarding agency may not award Federal financial assistance without assigning it to a program that has been included in the Federal Assistance Listings as required in this section unless there are exigent circumstances requiring otherwise, such as timing requirements imposed by statute.

(b) For each program that awards discretionary Federal awards, non-discretionary Federal awards, loans, insurance, or any other type of Federal financial assistance, the Federal awarding agency must, to the extent practicable, create, update, and manage Assistance Listings entries based on the authorizing statute for the program and comply with additional guidance provided by GSA in consultation with OMB to ensure consistent, accurate information is available to prospective applicants. Accordingly, Federal awarding agencies must submit the following information to GSA:

(1) *Program Description, Purpose, Goals, and Measurement.* A brief summary of the statutory or regulatory requirements of the program and its intended outcome. Where appropriate, the Program Description, Purpose, Goals, and Measurement should align with the strategic goals and objectives within the Federal awarding agency's performance plan and should support the Federal awarding agency's performance measurement, management, and reporting as required by Part 6 of OMB Circular A–11;

(2) *Identification.* Identification of whether the program makes Federal awards on a discretionary basis or the Federal awards are prescribed by Federal statute, such as in the case of formula grants.

(3) *Projected total amount of funds available for the program.* Estimates based on previous year funding are acceptable if current appropriations are not available at the time of the submission;

(4) *Anticipated source of available funds.* The statutory authority for funding the program and, to the extent possible, agency, sub-agency, or, if known, the specific program unit that will issue the Federal awards, and associated funding identifier (*e.g.,* Treasury Account Symbol(s)); (5) *General eligibility requirements.* The statutory, regulatory or other eligibility factors or considerations that determine the applicant's qualification for Federal awards under the program (*e.g.,* type of non-Federal entity); and

(6) *Applicability of Single Audit Requirements.* Applicability of Single Audit Requirements as required by subpart F of this part.

§200.204 Notices of funding opportunities.

For discretionary grants and cooperative agreements that are competed, the Federal awarding agency must announce specific funding opportunities by providing the following information in a public notice:

(a) *Summary information in notices of funding opportunities.* The Federal awarding agency must display the following information posted on the OMB-designated governmentwide website for funding and applying for Federal financial assistance, in a location preceding the full text of the announcement:

(1) Federal Awarding Agency Name;

(2) Funding Opportunity Title;

(3) Announcement Type (whether the funding opportunity is the initial announcement of this funding opportunity or a modification of a previously announced opportunity); (4) Funding Opportunity Number (required, if applicable). If the Federal awarding agency has assigned or will assign a number to the

funding opportunity announcement, this number must be provided;

(5) Assistance Listings Number(s);

(6) Key Dates. Key dates include due dates for applications or Executive Order 12372 submissions, as well as for any letters of intent or pre-applications. For any announcement issued before a program's application materials are available, key dates also include the date on which those materials will be released; and any other additional information, as deemed applicable by the relevant Federal awarding agency.

(b) *Availability period.* The Federal awarding agency must generally make all funding opportunities available for application for at least 60 calendar days. The Federal awarding agency may make a determination to have a less than 60 calendar day availability period but no funding opportunity should be available for less than 30 calendar days unless exigent circumstances require as determined by the Federal awarding agency head or delegate.

(c) *Full text of funding opportunities.* The Federal awarding agency must include the following information in the full text of each funding opportunity. For specific instructions on the content required in this section, refer to appendix I to this part.

(1) Full programmatic description of the funding opportunity.

(2) Federal award information, including sufficient information to help an applicant make an informed decision about whether to submit an application. (See also §200.414(c)(4)).

(3) Specific eligibility information, including any factors or priorities that affect an applicant's or its application's eligibility for selection.

(4) Application Preparation and Submission Information, including the applicable submission dates and time.

(5) Application Review Information including the criteria and process to be used to evaluate applications. See also §§200.205 and 200.206.

(6) Federal Award Administration Information. See also §200.211.

(7) Applicable terms and conditions for resulting awards, including any exceptions from these standard terms.

§200.205 Federal awarding agency review of merit of proposals.

For discretionary Federal awards, unless prohibited by Federal statute, the Federal awarding agency must design and execute a merit review process for applications, with the objective of selecting recipients most likely to be successful in delivering results based on the program objectives outlined in section §200.202. A merit review is an objective process of evaluating Federal award applications in accordance with written standards set forth by the Federal awarding agency. This process must be described or incorporated by reference in the applicable funding opportunity (see appendix I to this part.). See also §200.204. The Federal awarding agency must also periodically review its merit review process.

§200.206 Federal awarding agency review of risk posed by applicants.

(a) *Review of OMB-designated repositories of governmentwide data.* (1) Prior to making a Federal award, the Federal awarding agency is required by the Improper Payments Elimination and Recovery Improvement Act of 2012, 31 U.S.C. 3321 note, and 41 U.S.C. 2313 to review information available through any OMB-designated repositories of governmentwide eligibility qualification or financial integrity information as appropriate. See also suspension and debarment requirements at 2 CFR part 180 as well as individual Federal agency suspension and debarment regulations in title 2 of the Code of Federal Regulations.

(2) In accordance 41 U.S.C. 2313, the Federal awarding agency is required to review the non-public segment of the OMB-designated integrity and performance system accessible through SAM (currently the Federal Awardee Performance and Integrity Information System (FAPIIS)) prior to making a Federal award where the Federal share is expected to exceed the simplified acquisition threshold, defined in 41 U.S.C. 134, over the period of performance. As required by Public Law 112–239, National Defense Authorization Act for Fiscal Year 2013, prior to making a Federal award, the Federal awarding agency must consider all of the information available through FAPIIS with regard to the applicant and any immediate highest level owner, predecessor (*i.e.;* a non-Federal entity that is replaced by a successor), or subsidiary, identified for that applicant in FAPIIS, if applicable. At a minimum, the information in the system for a prior Federal award recipient must demonstrate a satisfactory record of executing programs or activities under Federal grants, cooperative agreements, or procurement awards; and integrity and business ethics. The Federal awarding agency may make a Federal award to a recipient who does not fully meet these standards, if it is determined that the information is not relevant to the current Federal award under consideration or there are specific conditions that can appropriately mitigate the effects of the non-Federal entity's risk in accordance with §200.208.

(b) *Risk evaluation.* (1) The Federal awarding agency must have in place a framework for evaluating the risks posed by applicants before they receive Federal awards. This evaluation may incorporate results of the evaluation of the applicant's eligibility or the quality of its application. If the Federal awarding agency determines that a Federal award will be made, special conditions that correspond to the degree of risk assessed may be applied to the Federal award. Criteria to be evaluated must be described in the announcement of funding opportunity described in §200.204.

(2) In evaluating risks posed by applicants, the Federal awarding agency may use a risk-based approach and may consider any items such as the following:

(i) *Financial stability.* Financial stability;

(ii) *Management systems and standards.* Quality of management systems and ability to meet the management standards prescribed in this part;

(iii) *History of performance.* The applicant's record in managing Federal awards, if it is a prior recipient of Federal awards, including timeliness of compliance with applicable reporting requirements, conformance to the terms and conditions of previous Federal awards, and if applicable, the extent to which any previously awarded amounts will be expended prior to future awards; (iv) *Audit reports and findings.* Reports and findings from audits performed under subpart F of this part or the reports and findings of any other available audits; and

(v) *Ability to effectively implement requirements.* The applicant's ability to effectively implement statutory, regulatory, or other requirements imposed on non-Federal entities.

(c) *Risk-based requirements adjustment.* The Federal awarding agency may adjust requirements when a risk-evaluation indicates that it may be merited either pre-award or post-award.

(d) *Suspension and debarment compliance.* (1) The Federal awarding agency must comply with the guidelines on governmentwide suspension and debarment in 2 CFR part 180, and must require non-Federal entities to comply with these provisions. These provisions restrict Federal awards, subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal programs or activities.

§200.207 Standard application requirements.

(a) *Paperwork clearances.* The Federal awarding agency may only use application information collections approved by OMB under the Paperwork Reduction Act of 1995 and OMB's implementing regulations in 5 CFR part 1320 and in alignment with OMB-approved, governmentwide data elements available from the OMB- designated standards lead. Consistent with these requirements, OMB will authorize additional information collections only on a limited basis.

(b) *Information collection.* If applicable, the Federal awarding agency may inform applicants and recipients that they do not need to provide certain information otherwise required by the relevant information collection.

§200.208 Specific conditions.

(a) Federal awarding agencies are responsible for ensuring that specific Federal award conditions are consistent with the program design reflected in §200.202 and include clear performance expectations of recipients as required in §200.301.

(b) The Federal awarding agency or pass-through entity may adjust specific Federal award conditions as needed, in accordance with this section, based on an analysis of the following factors:

(1) Based on the criteria set forth in §200.206;

(2) The applicant or recipient's history of compliance with the general or specific terms and conditions of a Federal award;

(3) The applicant or recipient's ability to meet expected performance goals as described in §200.211; or

(4) A responsibility determination of an applicant or recipient.

(c) Additional Federal award conditions may include items such as the following:

(1) Requiring payments as reimbursements rather than advance payments;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given performance period;

(3) Requiring additional, more detailed financial reports;

(4) Requiring additional project monitoring;

(5) Requiring the non-Federal entity to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(d) If the Federal awarding agency or pass-through entity is imposing additional requirements, they must notify the applicant or non-Federal entity as to:

(1) The nature of the additional requirements;

(2) The reason why the additional requirements are being imposed;

(3) The nature of the action needed to remove the additional requirement, if applicable;

(4) The time allowed for completing the actions if applicable; and

(5) The method for requesting reconsideration of the additional requirements imposed.

(e) Any additional requirements must be promptly removed once the conditions that prompted them have been satisfied.

§200.209 Certifications and representations.

Unless prohibited by the U.S. Constitution, Federal statutes or regulations, each Federal awarding agency or pass-through entity is authorized to require the non-Federal entity to submit certifications and representations required by Federal statutes, or regulations on an annual basis. Submission may be required more frequently if the non-Federal entity fails to meet a requirement of a Federal award.

§200.210 Pre-award costs.

For requirements on costs incurred by the applicant prior to the start date of the period of performance of the Federal award, see §200.458.

§200.211 Information contained in a Federal award.

A Federal award must include the following information:

(a) *Federal award performance goals.* Performance goals, indicators, targets, and baseline data must be included in the Federal award, where applicable. The Federal awarding agency must also specify how performance will be assessed in the terms and conditions of the Federal award, including the timing and scope of expected performance. See §§200.202 and 200.301 for more information on Federal award performance goals.

(b) *General Federal award information.* The Federal awarding agency must include the following general Federal award information in each Federal award:

(1) Recipient name (which must match the name associated with its unique entity identifier as defined at 2 CFR 25.315);

(2) Recipient's unique entity identifier;

(3) Unique Federal Award Identification Number (FAIN);

(4) Federal Award Date (see Federal award date in §200.201);

(5) Period of Performance Start and End Date;

(6) Budget Period Start and End Date;

(7) Amount of Federal Funds Obligated by this action;

(8) Total Amount of Federal Funds Obligated;

(9) Total Approved Cost Sharing or Matching, where applicable;

(10) Total Amount of the Federal Award including approved Cost Sharing or Matching;

(11) Budget Approved by the Federal Awarding Agency;

(11) Federal award description, (to comply with statutory requirements (*e.g.,* FFATA));

(12) Name of Federal awarding agency and contact information for awarding official,

(13) Assistance Listings Number and Title;

(14) Identification of whether the award is R&D; and

(15) Indirect cost rate for the Federal award (including if the de minimis rate is charged per §200.414).

(c) *General terms and conditions.* (1) Federal awarding agencies must incorporate the following general terms and conditions either in the Federal award or by reference, as applicable:

(i) *Administrative requirements.* Administrative requirements implemented by the Federal awarding agency as specified in this part.

(ii) *National policy requirements.* These include statutory, executive order, other Presidential directive, or regulatory requirements that apply by specific reference and are not program- specific. See §200.300 Statutory and national policy requirements.

(iii) *Recipient integrity and performance matters.* If the total Federal share of the Federal award may include more than $500,000 over the period of performance, the Federal awarding agency must include the term and condition available in appendix XII of this part. See also §200.113.

(iv) *Future budget periods.* If it is anticipated that the period of performance will include multiple budget periods, the Federal awarding agency must indicate that subsequent budget periods are subject to the availability of funds, program authority, satisfactory performance, and compliance with the terms and conditions of the Federal award.

(v) *Termination provisions.* Federal awarding agencies must make recipients aware, in a clear and unambiguous manner, of the termination provisions in §200.340, including the applicable termination provisions in the Federal awarding agency's regulations or in each Federal award.

(2) The Federal award must incorporate, by reference, all general terms and conditions of the award, which must be maintained on the agency's website.

(3) If a non-Federal entity requests a copy of the full text of the general terms and conditions, the Federal awarding agency must provide it.

(4) Wherever the general terms and conditions are publicly available, the Federal awarding agency must maintain an archive of previous versions of the general terms and conditions, with effective dates, for use by the non- Federal entity, auditors, or others.

(d) *Federal awarding agency, program, or Federal award specific terms and conditions.* The Federal awarding agency must include with each Federal award any terms and conditions necessary to communicate requirements that are in addition to the requirements outlined in the Federal awarding agency's general terms and conditions. See also §200.208. Whenever

practicable, these specific terms and conditions also should be shared on the agency's website and in notices of funding opportunities (as outlined in §200.204) in addition to being included in a Federal award. See also §200.207.

(e) *Federal awarding agency requirements.* Any other information required by the Federal awarding agency.

§200.212 Public access to Federal award information.

(a) In accordance with statutory requirements for Federal spending transparency (*e.g.*, FFATA), except as noted in this section, for applicable Federal awards the Federal awarding agency must announce all Federal awards publicly and publish the required information on a publicly available OMB-designated governmentwide website.

(b) All information posted in the designated integrity and performance system accessible through SAM (currently FAPIIS) on or after April 15, 2011 will be publicly available after a waiting period of 14 calendar days, except for:

(1) Past performance reviews required by Federal Government contractors in accordance with the Federal Acquisition Regulation (FAR) 48 CFR part 42, subpart 42.15;

(2) Information that was entered prior to April 15, 2011; or

(3) Information that is withdrawn during the 14-calendar day waiting period by the Federal Government official.

(c) Nothing in this section may be construed as requiring the publication of information otherwise exempt under the Freedom of Information Act (5 U.S.C 552), or controlled unclassified information pursuant to Executive Order 13556.

§200.213 Reporting a determination that a non-Federal entity is not qualified for a Federal award.

(a) If a Federal awarding agency does not make a Federal award to a non- Federal entity because the official determines that the non-Federal entity does not meet either or both of the minimum qualification standards as described in §200.206(a)(2), the Federal awarding agency must report that determination to the designated integrity and performance system accessible through SAM (currently FAPIIS), only if all of the following apply:

(1) The only basis for the determination described in this paragraph (a) is the non-Federal entity's prior record of executing programs or activities under Federal awards or its record of integrity and business ethics, as described in §200.206(a)(2) (*i.e.*, the entity was determined to be qualified based on all factors other than those two standards); and

(2) The total Federal share of the Federal award that otherwise would be made to the non-Federal entity is expected to exceed the simplified acquisition threshold over the period of performance.

(b) The Federal awarding agency is not required to report a determination that a non-Federal entity is not qualified for a Federal award if they make the Federal award to the non-Federal entity and include specific award terms and conditions, as described in §200.208.

(c) If a Federal awarding agency reports a determination that a non- Federal entity is not qualified for a Federal award, as described in paragraph (a) of this section, the Federal awarding agency also must notify the non-Federal entity that—

(1) The determination was made and reported to the designated integrity and performance system accessible through SAM, and include with the notification an explanation of the basis for the determination;

(2) The information will be kept in the system for a period of five years from the date of the determination, as required by section 872 of Public Law 110–417, as amended (41 U.S.C. 2313), then archived;

(3) Each Federal awarding agency that considers making a Federal award to the non-Federal entity during that five year period must consider that information in judging whether the non-Federal entity is qualified to receive the Federal award when the total Federal share of the Federal award is expected to include an amount of Federal funding in excess of the simplified acquisition threshold over the period of performance;

(4) The non-Federal entity may go to the awardee integrity and performance portal accessible through SAM (currently the Contractor Performance Assessment Reporting System (CPARS)) and comment on any information the system contains about the non-Federal entity itself; and

(5) Federal awarding agencies will consider that non-Federal entity's comments in determining whether the non-Federal entity is qualified for a future Federal award.

(d) If a Federal awarding agency enters information into the designated integrity and performance system accessible through SAM about a determination that a non-Federal entity is not qualified for a Federal award and subsequently:

(1) Learns that any of that information is erroneous, the Federal awarding agency must correct the information in the system within three business days; and

(2) Obtains an update to that information that could be helpful to other Federal awarding agencies, the Federal awarding agency is strongly encouraged to amend the information in the system to incorporate the update in a timely way.

(e) Federal awarding agencies must not post any information that will be made publicly available in the non- public segment of designated integrity and performance system that is covered by a disclosure exemption under the Freedom of Information Act. If the recipient asserts within seven calendar days to the Federal awarding agency that posted the information that some or all of the information made publicly available is covered by a disclosure exemption under the Freedom of Information Act, the Federal awarding agency that posted the information must remove the posting within seven calendar days of receiving the assertion. Prior to reposting the releasable information, the Federal awarding agency must resolve the issue in accordance with the agency's Freedom of Information Act procedures.

§200.214 Suspension and debarment.

Non-Federal entities are subject to the non-procurement debarment and suspension regulations implementing Executive Orders 12549 and 12689, 2 CFR part 180. The regulations in 2 CFR part 180 restrict awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

§200.215 Never contract with the enemy.

Federal awarding agencies and recipients are subject to the regulations implementing Never Contract with the Enemy in 2 CFR part 183. The regulations in 2 CFR part 183 affect covered contracts, grants and cooperative agreements that are expected to exceed $50,000 within the period of performance, are performed outside the United States and its territories, and are in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

§200.216 Prohibition on certain telecommunications and video surveillance services or equipment.

(a) Recipients and subrecipients are prohibited from obligating or expending loan or grant funds to:

(1) Procure or obtain;

(2) Extend or renew a contract to procure or obtain; or

(3) Enter into a contract (or extend or renew a contract) to procure or obtain equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system, or

as critical technology as part of any system. As described in Public Law 115–232, section 889, covered telecommunications equipment is telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).

(i) For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure,

and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision
Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).

(ii) Telecommunications or video surveillance services provided by such entities or using such equipment.

(iii) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

(b) In implementing the prohibition under Public Law 115–232, section 889, subsection (f), paragraph (1), heads of executive agencies administering loan, grant, or subsidy programs shall prioritize available funding and technical support to assist affected businesses, institutions and organizations as is reasonably necessary for those affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained.

(c) See Public Law 115–232, section 889 for additional information. (d) See also §200.471.

■ 45. Revise subpart D to read as follows:

Subpart D—Post Federal Award Requirements

Sec.

Subpart D—Post Federal Award Requirements

§200.300 Statutory and national policy requirements.

(a) The Federal awarding agency must manage and administer the Federal award in a manner so as to ensure that Federal funding is expended and associated programs are implemented in full accordance with the U.S. Constitution, Federal Law, and public policy requirements: Including, but not limited to, those protecting free speech, religious liberty, public welfare, the environment, and prohibiting discrimination. The Federal awarding agency must communicate to the non- Federal entity all relevant public policy requirements, including those in general appropriations provisions, and incorporate them either directly or by reference in the terms and conditions of the Federal award.

(b) The non-Federal entity is responsible for complying with all requirements of the Federal award. For all Federal awards, this includes the provisions of FFATA, which includes requirements on executive compensation, and also requirements implementing the Act for the non- Federal entity at 2 CFR parts 25 and 170. See also statutory requirements for whistleblower protections at 10 U.S.C. 2409, 41 U.S.C. 4712, and 10 U.S.C. 2324, 41 U.S.C. 4304 and 4310.

§200.301 Performance measurement.

(a) The Federal awarding agency must measure the recipient's performance to show achievement of program goals and objectives, share lessons learned, improve program outcomes, and foster adoption of promising practices. Program goals and objectives should be derived from program planning and design. See §200.202 for more information. Where appropriate, the Federal award may include specific program goals, indicators, targets, baseline data, data collection, or expected outcomes (such as outputs, or services performance or public impacts of any of these) with an expected timeline for accomplishment. Where applicable, this should also include any performance measures or independent sources of data that may be used to measure progress. The Federal awarding agency will determine how performance progress is measured, which may differ by program. Performance measurement progress must be both measured and reported. See §200.329 for more information on monitoring program performance. The Federal awarding agency may include program-specific requirements, as applicable. These requirements must be aligned, to the extent permitted by law, with the Federal awarding agency strategic goals, strategic objectives or performance goals that are relevant to the program. See also OMB Circular A–11,

Preparation, Submission, and Execution of the Budget Part 6.

(b) The Federal awarding agency should provide recipients with clear performance goals, indicators, targets, and baseline data as described in §200.211. Performance reporting frequency and content should be established to not only allow the Federal awarding agency to understand the recipient progress but also to facilitate identification of promising practices among recipients and build the evidence upon which the Federal awarding agency's program and performance decisions are made. See §200.328 for more information on reporting program performance.

(c) This provision is designed to operate in tandem with evidence-related statutes (*e.g.;* The Foundations for Evidence-Based Policymaking Act of 2018, which emphasizes collaboration and coordination to advance data and evidence-building functions in the Federal government). The Federal awarding agency should also specify any requirements of award recipients' participation in a federally funded evaluation, and any evaluation activities required to be conducted by the Federal award.

§200.302 Financial management.

(a) Each state must expend and account for the Federal award in accordance with state laws and procedures for expending and accounting for the state's own funds. In addition, the state's and the other non-Federal entity's financial management systems, including records documenting compliance with Federal statutes, regulations, and the terms and conditions of the Federal award, must be sufficient to permit the preparation of reports required by general and program-specific terms and conditions; and the tracing of funds to a level of expenditures adequate to establish that such funds have been used according to the Federal statutes, regulations, and the terms and conditions of the Federal award. See also §200.450.

(b) The financial management system of each non-Federal entity must provide for the following (see also §§200.334, 200.335, 200.336, and 200.337):

(1) Identification, in its accounts, of all Federal awards received and expended and the Federal programs under which they were received. Federal program and Federal award identification must include, as applicable, the Assistance Listings title and number, Federal award identification number and year, name of the Federal agency, and name of the pass-through entity, if any.

(2) Accurate, current, and complete disclosure of the financial results of each Federal award or program in accordance with the reporting requirements set forth in §§200.328 and 200.329. If a Federal awarding agency requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient must not be required to establish an accrual accounting system. This recipient may develop accrual data for its reports on the basis of an analysis of the documentation on hand. Similarly, a pass-through entity must not require a subrecipient to establish an accrual accounting system and must allow the subrecipient to develop accrual data for its reports on the basis of an analysis of the documentation on hand.

(3) Records that identify adequately the source and application of funds for federally-funded activities. These records must contain information pertaining to Federal awards, authorizations, financial obligations, unobligated balances, assets, expenditures, income and interest and be supported by source documentation.

(4) Effective control over, and accountability for, all funds, property, and other assets. The non-Federal entity must adequately safeguard all assets and assure that they are used solely for authorized purposes. See §200.303.

(5) Comparison of expenditures with budget amounts for each Federal award.

(6) Written procedures to implement the requirements of §200.305.

(7) Written procedures for determining the allowability of costs in accordance with subpart E of this part and the terms and conditions of the Federal award.

§200.303 Internal controls.

The non-Federal entity must:

(a) Establish and maintain effective internal control over the Federal award that provides reasonable assurance that the non-Federal entity is managing the Federal award in compliance with Federal statutes, regulations, and the terms and conditions of the Federal award. These internal controls should be in compliance with guidance in ''Standards for Internal Control in the Federal Government'' issued by the Comptroller General of the United States or the ''Internal Control Integrated Framework'', issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).

(b) Comply with the U.S. Constitution, Federal statutes, regulations, and the terms and conditions of the Federal awards.

(c) Evaluate and monitor the non-Federal entity's compliance with statutes, regulations and the terms and conditions of Federal awards.

(d) Take prompt action when instances of noncompliance are identified including noncompliance identified in audit findings.

(e) Take reasonable measures to safeguard protected personally identifiable information and other information the Federal awarding agency or pass-through entity designates as sensitive or the non-Federal entity considers sensitive consistent with applicable Federal, State, local, and tribal laws regarding privacy and responsibility over confidentiality.

§200.304 Bonds.

The Federal awarding agency may include a provision on bonding, insurance, or both in the following circumstances:

(a) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the Federal awarding agency, at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the non- Federal entity are not deemed adequate to protect the interest of the Federal Government.

(b) The Federal awarding agency may require adequate fidelity bond coverage where the non-Federal entity lacks sufficient coverage to protect the Federal Government's interest.

(c) Where bonds are required in the situations described above, the bonds must be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223.

§200.305 Federal payment.

(a) For states, payments are governed by Treasury-State Cash Management Improvement Act (CMIA) agreements and default procedures codified at 31 CFR part 205 and Treasury Financial Manual (TFM) 4A–2000, ''Overall Disbursing Rules for All Federal Agencies''.

(b) For non-Federal entities other than states, payments methods must minimize the time elapsing between the transfer of funds from the United States Treasury or the pass-through entity and the disbursement by the non-Federal entity whether the payment is made by electronic funds transfer, or issuance or redemption of checks, warrants, or payment by other means. See also §200.302(b)(6). Except as noted elsewhere in this part, Federal agencies must require recipients to use only OMB-approved, governmentwide information collection requests to request payment.

(1) The non-Federal entity must be paid in advance, provided it maintains or demonstrates the willingness to maintain both written procedures that minimize the time elapsing between the transfer of funds and disbursement by the non-Federal entity, and financial management systems that meet the standards for fund control and accountability as established in this part. Advance payments to a non- Federal entity must be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the non-Federal entity in carrying out the purpose of the approved program or project. The timing and amount of advance payments must be as close as is administratively feasible to the actual disbursements by the non-Federal entity for direct program or project costs and the

proportionate share of any allowable indirect costs. The non-Federal entity must make timely payment to contractors in accordance with the contract provisions.

(2) Whenever possible, advance payments must be consolidated to cover anticipated cash needs for all Federal awards made by the Federal awarding agency to the recipient.

(i) Advance payment mechanisms include, but are not limited to, Treasury check and electronic funds transfer and must comply with applicable guidance in 31 CFR part 208.

(ii) Non-Federal entities must be authorized to submit requests for advance payments and reimbursements at least monthly when electronic fund transfers are not used, and as often as they like when electronic transfers are used, in accordance with the provisions of the Electronic Fund Transfer Act (15 U.S.C. 1693–1693r).

(3) Reimbursement is the preferred method when the requirements in this paragraph (b) cannot be met, when the Federal awarding agency sets a specific condition per §200.208, or when the non-Federal entity requests payment by reimbursement. This method may be used on any Federal award for construction, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal award constitutes a minor portion of the project. When the reimbursement method is used, the Federal awarding agency or pass-through entity must make payment within 30 calendar days after receipt of the billing, unless the Federal awarding agency or pass-through entity reasonably believes the request to be improper.

(4) If the non-Federal entity cannot meet the criteria for advance payments and the Federal awarding agency or pass-through entity has determined that reimbursement is not feasible because the non-Federal entity lacks sufficient working capital, the Federal awarding agency or pass-through entity may provide cash on a working capital advance basis. Under this procedure, the Federal awarding agency or pass- through entity must advance cash payments to the non-Federal entity to cover its estimated disbursement needs for an initial period generally geared to the non-Federal entity's disbursing cycle. Thereafter, the Federal awarding agency or pass-through entity must reimburse the non-Federal entity for its actual cash disbursements. Use of the working capital advance method of payment requires that the pass-through entity provide timely advance payments to any subrecipients in order to meet the subrecipient's actual cash disbursements. The working capital advance method of payment must not be used by the pass-through entity if the reason for using this method is the unwillingness or inability of the pass- through entity to provide timely advance payments to the subrecipient to meet the subrecipient's actual cash disbursements.

(5) To the extent available, the non-Federal entity must disburse funds available from program income (including repayments to a revolving fund), rebates, refunds, contract settlements, audit recoveries, and interest earned on such funds before requesting additional cash payments. (6) Unless otherwise required by Federal statutes, payments for allowable costs by non-Federal entities must not be withheld at any time during the period of performance unless the conditions of §200.208, subpart D of this part, including §200.339, or one or more of the following applies:

(i) The non-Federal entity has failed to comply with the project objectives, Federal statutes, regulations, or the terms and conditions of the Federal award.

(ii) The non-Federal entity is delinquent in a debt to the United States as defined in OMB Circular A–129, ''Policies for Federal Credit Programs and Non-Tax Receivables.'' Under such conditions, the Federal awarding agency or pass-through entity may, upon reasonable notice, inform the non- Federal entity that payments must not be made for financial obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

(iii) A payment withheld for failure to comply with Federal award conditions, but without suspension of the Federal award, must be released to the non- Federal entity upon subsequent compliance. When a Federal award is suspended, payment adjustments will be made in accordance with §200.343.

(iv) A payment must not be made to a non-Federal entity for amounts that are withheld by the non-Federal entity from payment to contractors to assure satisfactory completion of work. A payment must be made when the non- Federal entity actually disburses the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(7) Standards governing the use of banks and other institutions as depositories of advance payments under Federal awards are as follows.

(i) The Federal awarding agency and pass-through entity must not require separate depository accounts for funds provided to a non-Federal entity or establish any eligibility requirements for depositories for funds provided to the non-Federal entity. However, the non- Federal entity must be able to account for funds received, obligated, and expended.

(ii) Advance payments of Federal funds must be deposited and maintained in insured accounts whenever possible.

(8) The non-Federal entity must maintain advance payments of Federal awards in interest-bearing accounts, unless the following apply:

(i) The non-Federal entity receives less than $250,000 in Federal awards per year.

(ii) The best reasonably available interest-bearing account would not be expected to earn interest in excess of $500 per year on Federal cash balances.

(iii) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(iv) A foreign government or banking system prohibits or precludes interest- bearing accounts.

(9) Interest earned amounts up to $500 per year may be retained by the non-Federal entity for administrative expense. Any additional interest earned on Federal advance payments deposited in interest-bearing accounts must be remitted annually to the Department of
Health and Human Services Payment Management System (PMS) through an electronic medium using either Automated Clearing House (ACH) network or a Fedwire Funds Service payment.

(i) For returning interest on Federal awards paid through PMS, the refund should:

(A) Provide an explanation stating that the refund is for interest;

(B) List the PMS Payee Account Number(s) (PANs);

(C) List the Federal award number(s) for which the interest was earned; and (D) Make returns payable to: Department of Health and Human Services.

(ii) For returning interest on Federal awards not paid through PMS, the refund should:

(A) Provide an explanation stating that the refund is for interest;

(B) Include the name of the awarding agency;

(C) List the Federal award number(s) for which the interest was earned; and (D) Make returns payable to: Department of Health and Human Services.

(10) Funds, principal, and excess cash returns must be directed to the original Federal agency payment system. The non-Federal entity should review instructions from the original Federal agency payment system. Returns should include the following information:

(i) Payee Account Number (PAN), if the payment originated from PMS, or Agency information to indicate whom to credit the funding if the payment originated from ASAP, NSF, or another Federal agency payment system.

(ii) PMS document number and subaccount(s), if the payment originated from PMS, or relevant account numbers if the payment originated from another Federal agency payment system.

(iii) The reason for the return (*e.g.*, excess cash, funds not spent, interest, part interest part other, etc.)

(11) When returning funds or interest to PMS you must include the following as applicable:

(i) For ACH Returns:

Routing Number: 051036706
Account number: 303000
Bank Name and Location: Credit Gateway—ACH Receiver St. Paul, MN (ii) For Fedwire Returns[1]:

Routing Number: 021030004
Account number: 75010501
Bank Name and Location: Federal Reserve Bank Treas NYC/Funds Transfer Division New York, NY

(iii) For International ACH Returns:

Beneficiary Account: Federal Reserve Bank of New York/ITS (FRBNY/ITS)
Bank: Citibank N.A. (New York)
Swift Code: CITIUS33
Account Number: 36838868
Bank Address: 388 Greenwich Street, New York, NY 10013 USA
Payment Details (Line 70): Agency Locator Code (ALC): 75010501
Name (abbreviated when possible) and ALC Agency POC

(iv) For recipients that do not have electronic remittance capability, please make check[2] payable to: ''The Department of Health and Human Services.''

Mail Check to Treasury approved lockbox: HHS Program Support Center, P.O. Box 530231, Atlanta, GA 30353–0231

[2]Please allow 4–6 weeks for processing of a payment by check to be applied to the appropriate PMS account.

(v) Questions can be directed to PMS at 877–614–5533 or *PMSSupport@ psc.hhs.gov.*

§200.306 Cost sharing or matching.

(a) Under Federal research proposals, voluntary committed cost sharing is not expected. It cannot be used as a factor during the merit review of applications or proposals, but may be considered if it is both in accordance with Federal awarding agency regulations and specified in a notice of funding opportunity. Criteria for considering voluntary committed cost sharing and any other program policy factors that may be used to determine who may receive a Federal award must be explicitly described in the notice of funding opportunity. See also §§200.414 and 200.204 and appendix I to this part.

(b) For all Federal awards, any shared costs or matching funds and all contributions, including cash and third- party in-kind contributions, must be accepted as part of the non-Federal entity's cost sharing or matching when such contributions meet all of the following criteria:

(1) Are verifiable from the non-Federal entity's records;

(2) Are not included as contributions for any other Federal award;

(3) Are necessary and reasonable for accomplishment of project or program objectives;

(4) Are allowable under subpart E of this part;

(5) Are not paid by the Federal Government under another Federal award, except where the Federal statute authorizing a program specifically provides that Federal funds made available for such program can be applied to matching or cost sharing requirements of other Federal programs;

(6) Are provided for in the approved budget when required by the Federal awarding agency; and

(7) Conform to other provisions of this part, as applicable.

(c) Unrecovered indirect costs, including indirect costs on cost sharing or matching may be included as part of cost sharing or matching only with the prior approval of the Federal awarding agency. Unrecovered indirect cost means the difference between the amount charged to the Federal award and the amount which could have been charged to the Federal award under the non-Federal entity's approved negotiated indirect cost rate.

(d) Values for non-Federal entity contributions of services and property must be established in accordance with the cost principles in subpart E of this part. If a Federal awarding agency authorizes the non-Federal entity to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching must be the lesser of paragraph (d)(1) or (2) of this section.

(1) The value of the remaining life of the property recorded in the non- Federal entity's accounting records at the time of donation.

(2) The current fair market value. However, when there is sufficient justification, the Federal awarding agency may approve the use of the current fair market value of the donated property, even if it exceeds the value described in paragraph (d)(1) of this section at the time of donation.

(e) Volunteer services furnished by third-party professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for third-party volunteer services must be consistent with those paid for similar work by the non-Federal entity. In those instances in which the required skills are not found in the non-Federal entity, rates must be consistent with those paid for similar work in the labor market in which the non-Federal entity competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, necessary, allocable, and otherwise allowable may be included in the valuation.

(f) When a third-party organization furnishes the services of an employee, these services must be valued at the employee's regular rate of pay plus an amount of fringe benefits that is reasonable, necessary, allocable, and otherwise allowable, and indirect costs at either the third-party organization's approved federally-negotiated indirect cost rate or, a rate in accordance with §200.414(d) provided these services employ the same skill(s) for which the employee is normally paid. Where donated services are treated as indirect costs, indirect cost rates will separate the value of the donated services so that reimbursement for the donated services will not be made.

(g) Donated property from third parties may include such items as equipment, office supplies, laboratory supplies, or workshop and classroom supplies. Value assessed to donated property included in the cost sharing or matching share must not exceed the fair market value of the property at the time of the donation.

(h) The method used for determining cost sharing or matching for third-party-donated equipment, buildings and land for which title passes to the non-Federal entity may differ according to the purpose of the Federal award, if paragraph (h)(1) or (2) of this section applies.

(1) If the purpose of the Federal award is to assist the non-Federal entity in the acquisition of equipment, buildings or land, the aggregate value of the donated property may be claimed as cost sharing or matching.

(2) If the purpose of the Federal award is to support activities that require the use of equipment, buildings or land, normally only depreciation charges for equipment and buildings may be made. However, the fair market value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the Federal awarding agency has approved the charges. See also §200.420.

(i) The value of donated property must be determined in accordance with the usual accounting policies of the non-Federal entity, with the following qualifications:

[1] Please note that the organization initiating payment is likely to incur a charge from their Financial Institution for this type of payment.

(1) The value of donated land and buildings must not exceed its fair market value at the time of donation to the non-Federal entity as established by an independent appraiser (*e.g.*, certified real property appraiser or General Services Administration representative) and certified by a responsible official of the non-Federal entity as required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (42 U.S.C. 4601– 4655) (Uniform Act) except as provided in the implementing regulations at 49 CFR part 24, ''Uniform Relocation Assistance And Real Property Acquisition For Federal And Federally-Assisted Programs''.

(2) The value of donated equipment must not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space must not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment must not exceed its fair rental value.

(j) For third-party in-kind contributions, the fair market value of goods and services must be documented and to the extent feasible supported by the same methods used internally by the non-Federal entity.

(k) For IHEs, see also OMB memorandum M–01–06, dated January 5, 2001, Clarification of OMB A–21 Treatment of Voluntary Uncommitted Cost Sharing and Tuition Remission Costs.

§200.307 Program income.

(a) *General.* Non-Federal entities are encouraged to earn income to defray program costs where appropriate.

(b) *Cost of generating program income.* If authorized by Federal regulations or the Federal award, costs incidental to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the Federal award.

(c) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a non- Federal entity are not program income unless the revenues are specifically identified in the Federal award or Federal awarding agency regulations as program income.

(d) *Property.* Proceeds from the sale of real property, equipment, or supplies are not program income; such proceeds will be handled in accordance with the requirements of the Property Standards §§200.311, 200.313, and 200.314, or as specifically identified in Federal statutes, regulations, or the terms and conditions of the Federal award.

(e) *Use of program income.* If the Federal awarding agency does not specify in its regulations or the terms and conditions of the Federal award, or give prior approval for how program income is to be used, paragraph (e)(1) of this section must apply. For Federal awards made to IHEs and nonprofit research institutions, if the Federal awarding agency does not specify in its regulations or the terms and conditions of the Federal award how program income is to be used, paragraph (e)(2) of this section must apply. In specifying alternatives to paragraphs (e)(1) and (2) of this section, the Federal awarding agency may distinguish between income earned by the recipient and income earned by subrecipients and between the sources, kinds, or amounts of income. When the Federal awarding agency authorizes the approaches in paragraphs (e)(2) and (3) of this section, program income in excess of any amounts specified must also be deducted from expenditures.

(1) *Deduction.* Ordinarily program income must be deducted from total allowable costs to determine the net allowable costs. Program income must be used for current costs unless the Federal awarding agency authorizes otherwise. Program income that the non-Federal entity did not anticipate at the time of the Federal award must be used to reduce the Federal award and non-Federal entity contributions rather than to increase the funds committed to the project.

(2) *Addition.* With prior approval of the Federal awarding agency (except for IHEs and nonprofit research institutions, as described in this paragraph (e)) program income may be added to the Federal award by the Federal agency and the non-Federal entity. The program income must be used for the purposes and under the conditions of the Federal award.

(3) *Cost sharing or matching.* With prior approval of the Federal awarding agency, program income may be used to meet the cost sharing or matching requirement of the Federal award. The amount of the Federal award remains the same.

(f) *Income after the period of performance.* There are no Federal requirements governing the disposition of income earned after the end of the period of performance for the Federal award, unless the Federal awarding agency regulations or the terms and conditions of the Federal award provide otherwise. The Federal awarding agency may negotiate agreements with recipients regarding appropriate uses of income earned after the period of performance as part of the grant closeout process. See also §200.344.

(g) *License fees and royalties.* Unless the Federal statute, regulations, or terms and conditions for the Federal award provide otherwise, the non-Federal entity is not accountable to the Federal awarding agency with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions made under a Federal award to which 37 CFR part 401 is applicable.

§200.308 Revision of budget and program plans.

(a) The approved budget for the Federal award summarizes the financial aspects of the project or program as approved during the Federal award process. It may include either the Federal and non-Federal share (see definition for *Federal share* in §200.1) or only the Federal share, depending upon Federal awarding agency requirements. The budget and program plans include considerations for performance and program evaluation purposes whenever required in accordance with the terms and conditions of the award.

(b) Recipients are required to report deviations from budget or project scope or objective, and request prior approvals from Federal awarding agencies for budget and program plan revisions, in accordance with this section.

(c) For non-construction Federal awards, recipients must request prior approvals from Federal awarding agencies for the following program or budget-related reasons:

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or the Federal award.

(3) The disengagement from the project for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The inclusion, unless waived by the Federal awarding agency, of costs that require prior approval in accordance with subpart E of this part as applicable.

(5) The transfer of funds budgeted for participant support costs to other categories of expense.

(6) Unless described in the application and funded in the approved Federal awards, the subawarding, transferring or contracting out of any work under a Federal award, including fixed amount subawards as described in §200.333. This provision does not apply to the acquisition of supplies, material, equipment or general support services.

(7) Changes in the approved cost-sharing or matching provided by the non-Federal entity.

(8) The need arises for additional Federal funds to complete the project.

(d) No other prior approval requirements for specific items may be imposed unless an exception has been

approved by OMB. See also §§200.102 and 200.407.

(e) Except for requirements listed in paragraphs (c)(1) through (8) of this section, the Federal awarding agency is authorized, at its option, to waive other cost-related and administrative prior written approvals contained in subparts D and E of this part. Such waivers may include authorizing recipients to do any one or more of the following:

(1) Incur project costs 90 calendar days before the Federal awarding agency makes the Federal award. Expenses more than 90 calendar days pre-award require prior approval of the Federal awarding agency. All costs incurred before the Federal awarding agency makes the Federal award are at the recipient's risk (*i.e.,* the Federal awarding agency is not required to reimburse such costs if for any reason the recipient does not receive a Federal award or if the Federal award is less than anticipated and inadequate to cover such costs). See also §200.458.

(2) Initiate a one-time extension of the period of performance by up to 12 months unless one or more of the conditions outlined in paragraphs (e)(2)(i) through (iii) of this section apply. For one-time extensions, the recipient must notify the Federal awarding agency in writing with the supporting reasons and revised period of performance at least 10 calendar days before the end of the period of performance specified in the Federal award. This one-time extension must not be exercised merely for the purpose of using unobligated balances. Extensions require explicit prior Federal awarding agency approval when:

(i) The terms and conditions of the Federal award prohibit the extension. (ii) The extension requires additional Federal funds.

(iii) The extension involves any change in the approved objectives or scope of the project.

(3) Carry forward unobligated balances to subsequent budget periods.

(4) For Federal awards that support research, unless the Federal awarding agency provides otherwise in the Federal award or in the Federal awarding agency's regulations, the prior approval requirements described in this paragraph (e) are automatically waived (*i.e.,* recipients need not obtain such prior approvals) unless one of the conditions included in paragraph (e)(2) of this section applies.

(f) The Federal awarding agency may, at its option, restrict the transfer of funds among direct cost categories or programs, functions and activities for Federal awards in which the Federal share of the project exceeds the simplified acquisition threshold and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the Federal awarding agency. The Federal awarding agency cannot permit a transfer that would cause any Federal appropriation to be used for purposes other than those consistent with the appropriation.

(g) All other changes to non-construction budgets, except for the changes described in paragraph (c) of this section, do not require prior approval (see also §200.407).

(h) For construction Federal awards, the recipient must request prior written approval promptly from the Federal awarding agency for budget revisions whenever paragraph (h)(1), (2), or (3) of this section applies:

(1) The revision results from changes in the scope or the objective of the project or program.

(2) The need arises for additional Federal funds to complete the project.

(3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with applicable OMB cost principles listed in subpart E.

(4) No other prior approval requirements for budget revisions may be imposed unless an exception has been approved by OMB.

(5) When a Federal awarding agency makes a Federal award that provides support for construction and non- construction work, the Federal awarding agency may require the recipient to obtain prior approval from the Federal awarding agency before making any fund or budget transfers between the two types of work supported.

(i) When requesting approval for budget revisions, the recipient must use the same format for budget information that was used in the application, unless the Federal awarding agency indicates a letter of request suffices.

(j) Within 30 calendar days from the date of receipt of the request for budget revisions, the Federal awarding agency must review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the Federal awarding agency must inform the recipient in writing of the date when the recipient may expect the decision.

§200.309 Modifications to Period of Performance.

If a Federal awarding agency or pass-through entity approves an extension, or if a recipient extends under §200.308(e)(2), the Period of Performance will be amended to end at the completion of the extension. If a termination occurs, the Period of Performance will be amended to end upon the effective date of termination.

If a renewal award is issued, a distinct Period of Performance will begin.

Property Standards

§200.310 Insurance coverage.

The non-Federal entity must, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired or improved with Federal funds as provided to property owned by the non-Federal entity. Federally-owned property need not be insured unless required by the terms and conditions of the Federal award.

§200.311 Real property.

(a) *Title.* Subject to the requirements and conditions set forth in this section, title to real property acquired or improved under a Federal award will vest upon acquisition in the non-Federal entity.

(b) *Use.* Except as otherwise provided by Federal statutes or by the Federal awarding agency, real property will be used for the originally authorized purpose as long as needed for that purpose, during which time the non- Federal entity must not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the non-Federal entity must obtain disposition instructions from the Federal awarding agency or pass-through entity. The instructions must provide for one of the following alternatives:

(1) Retain title after compensating the Federal awarding agency. The amount paid to the Federal awarding agency will be computed by applying the Federal awarding agency's percentage of participation in the cost of the original purchase (and costs of any improvements) to the fair market value of the property. However, in those situations where the non-Federal entity is disposing of real property acquired or improved with a Federal award and acquiring replacement real property under the same Federal award, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) Sell the property and compensate the Federal awarding agency. The amount due to the Federal awarding agency will be calculated by applying the Federal awarding agency's percentage of participation in the cost of the original purchase (and cost of any improvements) to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the Federal award has not been closed out, the net proceeds from sale may be offset against the original cost of the property. When the non-Federal entity is directed to sell property, sales procedures must be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) Transfer title to the Federal awarding agency or to a third party designated/approved by the Federal awarding agency. The non-Federal entity is entitled to be paid an amount calculated by applying the

non-Federal entity's percentage of participation in the purchase of the real property (and cost of any improvements) to the current fair market value of the property.

§200.312 Federally-owned and exempt property.

(a) Title to federally-owned property remains vested in the Federal Government. The non-Federal entity must submit annually an inventory listing of federally-owned property in its custody to the Federal awarding agency. Upon completion of the Federal award or when the property is no longer needed, the non-Federal entity must report the property to the Federal awarding agency for further Federal agency utilization.

(b) If the Federal awarding agency has no further need for the property, it must declare the property excess and report it for disposal to the appropriate Federal disposal authority, unless the Federal awarding agency has statutory authority to dispose of the property by alternative methods (*e.g.*, the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710 (i)) to donate research equipment to educational and nonprofit organizations in accordance with Executive Order 12999, ''Educational Technology: Ensuring Opportunity for All Children in the Next Century.''). The Federal awarding agency must issue appropriate instructions to the non- Federal entity.

(c) Exempt property means property acquired under a Federal award where the Federal awarding agency has chosen to vest title to the property to the non- Federal entity without further responsibility to the Federal Government, based upon the explicit terms and conditions of the Federal award. The Federal awarding agency may exercise this option when statutory authority exists. Absent statutory authority and specific terms and conditions of the Federal award, title to exempt property acquired under the Federal award remains with the Federal Government.

§200.313 Equipment.

See also §200.439.

(a) *Title.* Subject to the requirements and conditions set forth in this section, title to equipment acquired under a Federal award will vest upon acquisition in the non-Federal entity. Unless a statute specifically authorizes the Federal agency to vest title in the non-Federal entity without further responsibility to the Federal Government, and the Federal agency elects to do so, the title must be a conditional title. Title must vest in the non-Federal entity subject to the following conditions:

(1) Use the equipment for the authorized purposes of the project during the period of performance, or until the property is no longer needed for the purposes of the project.

(2) Not encumber the property without approval of the Federal awarding agency or pass-through entity. (3) Use and dispose of the property in accordance with paragraphs (b), (c), and
(e) of this section.

(b) *General.* A state must use, manage and dispose of equipment acquired under a Federal award by the state in accordance with state laws and procedures. Other non-Federal entities must follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment must be used by the non-Federal entity in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by the Federal award, and the non-Federal entity must not encumber the property without prior approval of the Federal awarding agency. The Federal awarding agency may require the submission of the applicable common form for equipment. When no longer needed for the original program or project, the equipment may be used in other activities supported by the Federal awarding agency, in the following order of priority:

(i) Activities under a Federal award from the Federal awarding agency which funded the original program or project, then

(ii) Activities under Federal awards from other Federal awarding agencies. This includes consolidated equipment for information technology systems.

(2) During the time that equipment is used on the project or program for which it was acquired, the non-Federal entity must also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, provided that such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use must be given to other programs or projects supported by Federal awarding agency that financed the equipment and second preference must be given to programs or projects under Federal awards from other Federal awarding agencies. Use for non-federally-funded programs or projects is also permissible. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in §200.307 to earn program income, the non-Federal entity must not use equipment acquired with the Federal award to provide services for a fee that is less than private companies charge for equivalent services unless specifically authorized by Federal statute for as long as the Federal Government retains an interest in the equipment.

(4) When acquiring replacement equipment, the non-Federal entity may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part under a Federal award, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of funding for the property (including the FAIN), who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the project costs for the Federal award under which the property was acquired, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft must be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the non-Federal entity is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a Federal award is no longer needed for the original project or program or for other activities currently or previously supported by a Federal awarding agency, except as otherwise provided in Federal statutes, regulations, or Federal awarding agency disposition instructions, the non-Federal entity must request disposition instructions from the Federal awarding agency if required by the terms and conditions of the Federal award. Disposition of the equipment will be made as follows, in accordance with Federal awarding agency disposition instructions:

(1) Items of equipment with a current per unit fair market value of $5,000 or less may be retained, sold or otherwise disposed of with no further responsibility to the Federal awarding agency.

(2) Except as provided in §200.312(b), or if the Federal awarding agency fails to provide requested disposition instructions within 120 days, items of equipment with a current per-unit fair market value in excess of $5,000 may be retained by the non-Federal entity or sold. The Federal awarding agency is entitled to an amount calculated by multiplying the current market value or proceeds from sale by the Federal awarding agency's percentage of participation in the cost of the original purchase. If the equipment is sold, the Federal awarding agency may permit the non-Federal entity to deduct and

retain from the Federal share $500 or ten percent of the proceeds, whichever is less, for its selling and handling expenses.

(3) The non-Federal entity may transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the non-Federal entity must be entitled to compensation for its attributable percentage of the current fair market value of the property.

(4) In cases where a non-Federal entity fails to take appropriate disposition actions, the Federal awarding agency may direct the non- Federal entity to take disposition actions.

§200.314 Supplies.

See also §200.453.

(a) Title to supplies will vest in the non-Federal entity upon acquisition. If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other Federal award, the non-Federal entity must retain the supplies for use on other activities or sell them, but must, in either case, compensate the Federal Government for its share. The amount of compensation must be computed in the same manner as for equipment. See §200.313 (e)(2) for the calculation methodology.

(b) As long as the Federal Government retains an interest in the supplies, the non-Federal entity must not use supplies acquired under a Federal award to provide services to other organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute.

§200.315 Intangible property.

(a) Title to intangible property (see definition for *Intangible property* in §200.1) acquired under a Federal award vests upon acquisition in the non- Federal entity. The non-Federal entity must use that property for the originally-authorized purpose, and must not encumber the property without approval of the Federal awarding agency. When no longer needed for the originally authorized purpose, disposition of the intangible property must occur in accordance with the provisions in §200.313(e).

(b) The non-Federal entity may copyright any work that is subject to copyright and was developed, or for which ownership was acquired, under a Federal award. The Federal awarding agency reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(c) The non-Federal entity is subject to applicable regulations governing patents and inventions, including governmentwide regulations issued by the Department of Commerce at 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Awards, Contracts and Cooperative Agreements.''

(d) The Federal Government has the right to:

(1) Obtain, reproduce, publish, or otherwise use the data produced under a Federal award; and

(2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(e)(1) In response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under a Federal award that were used by the Federal Government in developing an agency action that has the force and effect of law, the Federal awarding agency must request, and the non- Federal entity must provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the Federal awarding agency obtains the research data solely in response to a FOIA request, the Federal awarding agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the Federal agency and the non-Federal entity. This fee is in addition to any fees the Federal awarding agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) Published research findings means when:

(i) Research findings are published in a peer-reviewed scientific or technical journal; or

(ii) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law. ''Used by the Federal Government in developing an agency action that has the force and effect of law'' is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(3) Research data means the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: Preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This ''recorded'' material excludes physical objects (*e.g.,* laboratory samples). Research data also do not include:

(i) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(ii) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

§200.316 Property trust relationship.

Real property, equipment, and intangible property, that are acquired or improved with a Federal award must be held in trust by the non-Federal entity as trustee for the beneficiaries of the project or program under which the property was acquired or improved. The Federal awarding agency may require the non-Federal entity to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with a Federal award and that use and disposition conditions apply to the property.

Procurement Standards

§200.317 Procurements by states.

When procuring property and services under a Federal award, a State must follow the same policies and procedures it uses for procurements from its non- Federal funds. The State will comply with §§200.321, 200.322, and 200.323 and ensure that every purchase order or other contract includes any clauses required by §200.327. All other non-Federal entities, including subrecipients of a State, must follow the procurement standards in §§200.318 through 200.327.

§200.318 General procurement standards.

(a) The non-Federal entity must have and use documented procurement procedures, consistent with State, local, and tribal laws and regulations and the standards of this section, for the acquisition of property or services required under a Federal award or subaward. The non-Federal entity's documented procurement procedures must conform to the procurement standards identified in §§200.317 through 200.327.

(b) Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(c)(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers,

employees, and agents of the non- Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non- Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

(2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a State, local government, or Indian tribe, the non- Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

(d) The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter- entity agreements where appropriate for procurement or use of common or shared goods and services. Competition requirements will be met with applied to documented procurement actions using strategic sourcing, shared services, and other similar procurement arrangements.

(f) The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(g) The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(h) The non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. See also §200.214.

(i) The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to, the following: Rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(j)(1) The non-Federal entity may use a time-and-materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time-and-materials type contract means a contract whose cost to a non-Federal entity is the sum of:

(i) The actual cost of materials; and

(ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

(2) Since this formula generates an open-ended contract price, a time-and- materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

(k) The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.

§200.319 Competition.

(a) All procurement transactions for the acquisition of property or services required under a Federal award must be conducted in a manner providing full and open competition consistent with the standards of this section and
§200.320.

(b) In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;

(2) Requiring unnecessary experience and excessive bonding;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive contracts to consultants that are on retainer contracts;

(5) Organizational conflicts of interest;

(6) Specifying only a ''brand name'' product instead of allowing ''an equal'' product to be offered and describing the performance or other relevant requirements of the procurement; and

(7) Any arbitrary action in the procurement process.

(c) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(d) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

(1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a ''brand name or equivalent'' description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and

(2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(e) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods

and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

(f) Noncompetitive procurements can only be awarded in accordance with §200.320(c).

§200.320 Methods of procurement to be followed.

The non-Federal entity must have and use documented procurement procedures, consistent with the standards of this section and §§200.317, 200.318, and 200.319 for any of the following methods of procurement used for the acquisition of property or services required under a Federal award or sub-award.

(a) *Informal procurement methods.* When the value of the procurement for property or services under a Federal award does not exceed the *simplified acquisition threshold (SAT),* as defined in §200.1, or a lower threshold established by a non-Federal entity, formal procurement methods are not required. The non-Federal entity may use informal procurement methods to expedite the completion of its transactions and minimize the associated administrative burden and cost. The informal methods used for procurement of property or services at or below the SAT include:

(1) *Micro-purchases*—(i) *Distribution.* The acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (See the definition of *micro- purchase* in §200.1). To the maximum extent practicable, the non-Federal entity should distribute micro-purchases equitably among qualified suppliers.

(ii) *Micro-purchase awards.* Micro-purchases may be awarded without soliciting competitive price or rate quotations if the non-Federal entity considers the price to be reasonable based on research, experience, purchase history or other information and documents it files accordingly. Purchase cards can be used for micro-purchases if procedures are documented and approved by the non-Federal entity.

(iii) *Micro-purchase thresholds.* The non-Federal entity is responsible for determining and documenting an appropriate micro-purchase threshold based on internal controls, an evaluation of risk, and its documented procurement procedures. The micro- purchase threshold used by the non-Federal entity must be authorized or not prohibited under State, local, or tribal laws or regulations. Non-Federal entities may establish a threshold higher than the Federal threshold established in the Federal Acquisition Regulations (FAR) in accordance with paragraphs (a)(1)(iv) and (v) of this section.

(iv) *Non-Federal entity increase to the micro-purchase threshold up to $50,000.* Non-Federal entities may establish a threshold higher than the micro- purchase threshold identified in the FAR in accordance with the requirements of this section. The non- Federal entity may self-certify a threshold up to $50,000 on an annual basis and must maintain documentation to be made available to the Federal awarding agency and auditors in accordance with §200.334. The self- certification must include a justification, clear identification of the threshold, and supporting documentation of any of the following:

(A) A qualification as a low-risk auditee, in accordance with the criteria in §200.520 for the most recent audit;

(B) An annual internal institutional risk assessment to identify, mitigate, and manage financial risks; or,

(C) For public institutions, a higher threshold consistent with State law.

(v) *Non-Federal entity increase to the micro-purchase threshold over $50,000.* Micro-purchase thresholds higher than $50,000 must be approved by the cognizant agency for indirect costs. The non-federal entity must submit a request with the requirements included in paragraph (a)(1)(iv) of this section. The increased threshold is valid until there is a change in status in which the justification was approved.

(2) *Small purchases*—(i) *Small purchase procedures.* The acquisition of property or services, the aggregate dollar amount of which is higher than the micro-purchase threshold but does not exceed the simplified acquisition threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources as determined appropriate by the non-Federal entity.

(ii) *Simplified acquisition thresholds.* The non-Federal entity is responsible for determining an appropriate simplified acquisition threshold based on internal controls, an evaluation of risk and its documented procurement procedures which must not exceed the threshold established in the FAR. When applicable, a lower simplified acquisition threshold used by the non- Federal entity must be authorized or not prohibited under State, local, or tribal laws or regulations.

(b) *Formal procurement methods.* When the value of the procurement for property or services under a Federal financial assistance award exceeds the SAT, or a lower threshold established by a non-Federal entity, formal procurement methods are required. Formal procurement methods require following documented procedures. Formal procurement methods also require public advertising unless a non- competitive procurement can be used in accordance with §200.319 or paragraph (c) of this section. The following formal methods of procurement are used for procurement of property or services above the simplified acquisition threshold or a value below the simplified acquisition threshold the non-Federal entity determines to be appropriate:

(1) *Sealed bids.* A procurement method in which bids are publicly solicited and a firm fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bids method is the preferred method for procuring construction, if the conditions.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) Bids must be solicited from an adequate number of qualified sources, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publicly advertised;

(B) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

(C) All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly;

(D) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(2) *Proposals.* A procurement method in which either a fixed price or cost-reimbursement type contract is awarded. Proposals are generally used when conditions are not appropriate for the use of sealed bids. They are awarded in accordance with the following requirements:

(i) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Proposals must be solicited from an adequate number of qualified offerors. Any response to publicized requests for proposals must be considered to the maximum extent practical;

(ii) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and making selections;

(iii) Contracts must be awarded to the responsible offeror whose proposal is most advantageous to the non-Federal entity, with price and other factors considered; and

(iv) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby offeror's qualifications are evaluated and the most qualified offeror is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms that are a potential source to perform the proposed effort.

(c) *Noncompetitive procurement.* There are specific circumstances in which noncompetitive procurement can be used. Noncompetitive procurement can only be awarded if one or more of the following circumstances apply:

(1) The acquisition of property or services, the aggregate dollar amount of which does not exceed the micro- purchase threshold (see paragraph (a)(1) of this section);

(2) The item is available only from a single source;

(3) The public exigency or emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation;

(4) The Federal awarding agency or pass-through entity expressly authorizes a noncompetitive procurement in response to a written request from the non-Federal entity; or

(5) After solicitation of a number of sources, competition is determined inadequate.

§200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.

(a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

(b) Affirmative steps must include:

(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

(5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (b)(1) through (5) of this section.

§200.322 Domestic preferences for procurements.

(a) As appropriate and to the extent consistent with law, the non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this section must be included in all subawards including all contracts and purchase orders for work or products under this award.

(b) For purposes of this section:

(1) ''Produced in the United States'' means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

(2) ''Manufactured products'' means items and construction materials composed in whole or in part of non- ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.

§200.323 Procurement of recovered materials.

A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired during the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

§200.324 Contract cost and price.

(a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under subpart E of this part. The non- Federal entity may reference its own cost principles that comply with the Federal cost principles.

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

§200.325 Federal awarding agency or pass-through entity review.

(a) The non-Federal entity must make available, upon request of the Federal awarding agency or pass-through entity, technical specifications on proposed procurements where the Federal awarding agency or pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the non-Federal entity desires to have the review accomplished after a solicitation has been developed, the Federal awarding agency or pass-through entity may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(b) The non-Federal entity must make available upon request, for the Federal awarding agency or pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:

(1) The non-Federal entity's procurement procedures or operation fails to

comply with the procurement standards in this part;

(2) The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;

(3) The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a ''brand name'' product;

(4) The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.

(c) The non-Federal entity is exempt from the pre-procurement review in paragraph (b) of this section if the Federal awarding agency or pass- through entity determines that its procurement systems comply with the standards of this part.

(1) The non-Federal entity may request that its procurement system be reviewed by the Federal awarding agency or pass-through entity to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews must occur where there is continuous high-dollar funding, and third-party contracts are awarded on a regular basis;

(2) The non-Federal entity may self-certify its procurement system. Such self-certification must not limit the Federal awarding agency's right to survey the system. Under a self- certification procedure, the Federal awarding agency may rely on written assurances from the non-Federal entity that it is complying with these standards. The non-Federal entity must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review.

§200.326 Bonding requirements.

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-Federal entity provided that the Federal awarding agency or pass- through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

(a) A bid guarantee from each bidder equivalent to five percent of the bid price. The ''bid guarantee'' must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

(b) A performance bond on the part of the contractor for 100 percent of the contract price. A ''performance bond'' is one executed in connection with a contract to secure fulfillment of all the contractor's requirements under such contract.

(c) A payment bond on the part of the contractor for 100 percent of the contract price. A ''payment bond'' is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

§200.327 Contract provisions.

The non-Federal entity's contracts must contain the applicable provisions described in appendix II to this part.

Performance and Financial Monitoring and Reporting

§200.328 Financial reporting.

Unless otherwise approved by OMB, the Federal awarding agency must solicit only the OMB-approved governmentwide data elements for collection of financial information (at time of publication the Federal Financial Report or such future, OMB-approved, governmentwide data elements available from the OMB- designated standards lead. This information must be collected with the frequency required by the terms and conditions of the Federal award, but no less frequently than annually nor more frequently than quarterly except in unusual circumstances, for example where more frequent reporting is necessary for the effective monitoring of the Federal award or could significantly affect program outcomes, and preferably in coordination with performance reporting. The Federal awarding agency must use OMB-approved common information collections, as applicable, when providing financial and performance reporting information.

§200.329 Monitoring and reporting program performance.

(a) *Monitoring by the non-Federal entity.* The non-Federal entity is responsible for oversight of the operations of the Federal award supported activities. The non-Federal entity must monitor its activities under Federal awards to assure compliance with applicable Federal requirements and performance expectations are being achieved. Monitoring by the non- Federal entity must cover each program, function or activity. See also §200.332. (b) *Reporting program performance.*

The Federal awarding agency must use OMB-approved common information collections, as applicable, when providing financial and performance reporting information. As appropriate and in accordance with above mentioned information collections, the Federal awarding agency must require the recipient to relate financial data and accomplishments to performance goals and objectives of the Federal award. Also, in accordance with above mentioned common information collections, and when required by the terms and conditions of the Federal award, recipients must provide cost information to demonstrate cost effective practices (*e.g.,* through unit cost data). In some instances (*e.g.,* discretionary research awards), this will be limited to the requirement to submit technical performance reports (to be evaluated in accordance with Federal awarding agency policy). Reporting requirements must be clearly articulated such that, where appropriate, performance during the execution of the Federal award has a standard against which non-Federal entity performance can be measured.

(c) *Non-construction performance reports.* The Federal awarding agency must use standard, governmentwide OMB-approved data elements for collection of performance information including performance progress reports, Research Performance Progress Reports.

(1) The non-Federal entity must submit performance reports at the interval required by the Federal awarding agency or pass-through entity to best inform improvements in program outcomes and productivity. Intervals must be no less frequent than annually nor more frequent than quarterly except in unusual circumstances, for example where more frequent reporting is necessary for the effective monitoring of the Federal award or could significantly affect program outcomes. Reports submitted annually by the non-Federal entity and/or pass-through entity must be due no later than 90 calendar days after the reporting period. Reports submitted quarterly or semiannually must be due no later than 30 calendar days after the reporting period. Alternatively, the Federal awarding agency or pass-through entity may require annual reports before the anniversary dates of multiple year Federal awards. The final performance report submitted by the non-Federal entity and/or pass-through entity must be due no later than 120 calendar days after the period of performance end date. A subrecipient must submit to the pass-through entity, no later than 90 calendar days after the period of performance end date, all final performance reports as required by the terms and conditions of the Federal award. See also §200.344. If a justified request is submitted by a non-Federal entity, the Federal agency may extend the due date for any performance report.

(2) As appropriate in accordance with above mentioned performance reporting, these reports will contain, for each Federal award, brief information on the following unless other data elements are approved by OMB in the agency information collection request:

(i) A comparison of actual accomplishments to the objectives of the Federal award established for the period. Where the accomplishments of the Federal award can be quantified, a computation of the cost (for example, related to units of accomplishment) may be required if that information will be useful. Where performance trend data and analysis would be informative to the Federal awarding agency program, the Federal awarding agency should include this as a performance reporting requirement.

(ii) The reasons why established goals were not met, if appropriate.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(d) *Construction performance reports.* For the most part, onsite technical inspections and certified percentage of completion data are relied on heavily by Federal awarding agencies and pass- through entities to monitor progress under Federal awards and subawards for construction. The Federal awarding agency may require additional performance reports only when considered necessary.

(e) *Significant developments.* Events may occur between the scheduled performance reporting dates that have significant impact upon the supported activity. In such cases, the non-Federal entity must inform the Federal awarding agency or pass-through entity as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the Federal award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more or different beneficial results than originally planned.

(f) *Site visits.* The Federal awarding agency may make site visits as warranted by program needs.

(g) *Performance report requirement waiver.* The Federal awarding agency may waive any performance report required by this part if not needed.

§200. 330 Reporting on real property.

The Federal awarding agency or pass-through entity must require a non- Federal entity to submit reports at least annually on the status of real property in which the Federal Government retains an interest, unless the Federal interest in the real property extends 15 years or longer. In those instances where the Federal interest attached is for a period of 15 years or more, the Federal awarding agency or pass-through entity, at its option, may require the non- Federal entity to report at various multi- year frequencies (*e.g.*, every two years or every three years, not to exceed a five- year reporting period; or a Federal awarding agency or pass-through entity may require annual reporting for the first three years of a Federal award and thereafter require reporting every five years).

Subrecipient Monitoring and Management

§200.331 Subrecipient and contractor determinations.

The non-Federal entity may concurrently receive Federal awards as a recipient, a subrecipient, and a contractor, depending on the substance of its agreements with Federal awarding agencies and pass-through entities. Therefore, a pass-through entity must make case-by-case determinations whether each agreement it makes for the disbursement of Federal program funds casts the party receiving the funds in the role of a subrecipient or a contractor. The Federal awarding agency may supply and require recipients to comply with additional guidance to support these determinations provided such guidance does not conflict with this section.

(a) *Subrecipients.* A subaward is for the purpose of carrying out a portion of a Federal award and creates a Federal assistance relationship with the subrecipient. See definition for *Subaward* in §200.1 of this part. Characteristics which support the classification of the non-Federal entity as a subrecipient include when the non- Federal entity:

(1) Determines who is eligible to receive what Federal assistance;

(2) Has its performance measured in relation to whether objectives of a Federal program were met;

(3) Has responsibility for programmatic decision-making;

(4) Is responsible for adherence to applicable Federal program requirements specified in the Federal award; and

(5) In accordance with its agreement, uses the Federal funds to carry out a program for a public purpose specified in authorizing statute, as opposed to providing goods or services for the benefit of the pass-through entity.

(b) *Contractors.* A contract is for the purpose of obtaining goods and services for the non-Federal entity's own use and creates a procurement relationship with the contractor. See the definition of *contract* in §200.1 of this part. Characteristics indicative of a procurement relationship between the non-Federal entity and a contractor are when the contractor:

(1) Provides the goods and services within normal business operations;

(2) Provides similar goods or services to many different purchasers;

(3) Normally operates in a competitive environment;

(4) Provides goods or services that are ancillary to the operation of the Federal program; and

(5) Is not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons.

(c) *Use of judgment in making determination.* In determining whether an agreement between a pass-through entity and another non-Federal entity casts the latter as a subrecipient or a contractor, the substance of the relationship is more important than the form of the agreement. All of the characteristics listed above may not be present in all cases, and the pass- through entity must use judgment in classifying each agreement as a subaward or a procurement contract.

§200.332 Requirements for pass-through entities.

All pass-through entities must:

(a) Ensure that every subaward is clearly identified to the subrecipient as a subaward and includes the following information at the time of the subaward and if any of these data elements change, include the changes in subsequent subaward modification. When some of this information is not available, the pass-through entity must provide the best information available to describe the Federal award and subaward. Required information includes:

(1) Federal award identification.

(i) Subrecipient name (which must match the name associated with its unique entity identifier);

(ii) Subrecipient's unique entity identifier;

(iii) Federal Award Identification Number (FAIN);

(iv) Federal Award Date (see the definition of *Federal award date* in §200.1 of this part) of award to the recipient by the Federal agency;

(v) Subaward Period of Performance Start and End Date;

(vi) Subaward Budget Period Start and End Date;

(vii) Amount of Federal Funds Obligated by this action by the pass- through entity to the subrecipient;

(viii) Total Amount of Federal Funds Obligated to the subrecipient by the pass-through entity including the current financial obligation;

(ix) Total Amount of the Federal Award committed to the subrecipient by the pass-through entity;

(x) Federal award project description, as required to be responsive to the Federal Funding Accountability and Transparency Act (FFATA);

(xi) Name of Federal awarding agency, pass-through entity, and contact information for awarding official of the Pass-through entity;

(xii) Assistance Listings number and Title; the pass-through entity must identify the dollar amount made available under each Federal award and the Assistance Listings Number at time of disbursement;

(xiii) Identification of whether the award is R&D; and

(xiv) Indirect cost rate for the Federal award (including if the de minimis rate is charged) per §200.414.

(2) All requirements imposed by the pass-through entity on the subrecipient so that the Federal award is used in accordance with Federal statutes, regulations and the terms and conditions of the Federal award;

(3) Any additional requirements that the pass-through entity imposes on the subrecipient in order for the pass- through entity to meet its own responsibility to the Federal awarding agency including identification of any required financial and performance reports;

(4)(i) An approved federally recognized indirect cost rate negotiated between the subrecipient and the Federal Government. If no approved rate exists, the pass-through entity must determine the appropriate rate in collaboration with the subrecipient, which is either:

(A) The negotiated indirect cost rate between the pass-through entity and the subrecipient; which can be based on a prior negotiated rate between a different PTE and the same subrecipient. If basing the rate on a previously negotiated rate, the pass-through entity is not required to collect information justifying this rate, but may elect to do so;

(B) The de minimis indirect cost rate.

(ii) The pass-through entity must not require use of a de minimis indirect cost rate if the subrecipient has a Federally approved rate. Subrecipients can elect to use the cost allocation method to account for indirect costs in accordance with §200.405(d).

(5) A requirement that the subrecipient permit the pass-through entity and auditors to have access to the subrecipient's records and financial statements as necessary for the pass-through entity to meet the requirements of this part; and

(6) Appropriate terms and conditions concerning closeout of the subaward.

(b) Evaluate each subrecipient's risk of noncompliance with Federal statutes, regulations, and the terms and conditions of the subaward for purposes of determining the appropriate subrecipient monitoring described in paragraphs (d) and (e) of this section, which may include consideration of such factors as:

(1) The subrecipient's prior experience with the same or similar subawards;

(2) The results of previous audits including whether or not the subrecipient receives a Single Audit in accordance with Subpart F of this part, and the extent to which the same or similar subaward has been audited as a major program;

(3) Whether the subrecipient has new personnel or new or substantially changed systems; and

(4) The extent and results of Federal awarding agency monitoring (*e.g.*, if the subrecipient also receives Federal awards directly from a Federal awarding agency).

(c) Consider imposing specific subaward conditions upon a subrecipient if appropriate as described in §200.208.

(d) Monitor the activities of the subrecipient as necessary to ensure that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of the subaward; and that subaward performance goals are achieved. Pass-through entity monitoring of the subrecipient must include:

(1) Reviewing financial and performance reports required by the pass-through entity.

(2) Following-up and ensuring that the subrecipient takes timely and appropriate action on all deficiencies pertaining to the Federal award provided to the subrecipient from the pass-through entity detected through audits, on-site reviews, and written confirmation from the subrecipient, highlighting the status of actions planned or taken to address Single Audit findings related to the particular subaward.

(3) Issuing a management decision for applicable audit findings pertaining only to the Federal award provided to the subrecipient from the pass-through entity as required by §200.521.

(4) The pass-through entity is responsible for resolving audit findings specifically related to the subaward and not responsible for resolving cross- cutting findings. If a subrecipient has a current Single Audit report posted in the Federal Audit Clearinghouse and has not otherwise been excluded from receipt of Federal funding (*e.g.,* has been debarred or suspended), the pass- through entity may rely on the subrecipient's cognizant audit agency or cognizant oversight agency to perform audit follow-up and make management decisions related to cross-cutting findings in accordance with section §300.513(a)(3)(vii). Such reliance does not eliminate the responsibility of the pass-through entity to issue subawards that conform to agency and award- specific requirements, to manage risk through ongoing subaward monitoring, and to monitor the status of the findings that are specifically related to the subaward.

(e) Depending upon the pass-through entity's assessment of risk posed by the subrecipient (as described in paragraph (b) of this section), the following monitoring tools may be useful for the pass-through entity to ensure proper accountability and compliance with program requirements and achievement of performance goals:

(1) Providing subrecipients with training and technical assistance on program-related matters; and

(2) Performing on-site reviews of the subrecipient's program operations;

(3) Arranging for agreed-upon-procedures engagements as described in §200.425.

(f) Verify that every subrecipient is audited as required by Subpart F of this part when it is expected that the subrecipient's Federal awards expended during the respective fiscal year equaled or exceeded the threshold set forth in §200.501.

(g) Consider whether the results of the subrecipient's audits, on-site reviews, or other monitoring indicate conditions that necessitate adjustments to the pass- through entity's own records.

(h) Consider taking enforcement action against noncompliant subrecipients as described in §200.339 of this part and in program regulations.

§200.333 Fixed amount subawards.

With prior written approval from the Federal awarding agency, a pass- through entity may provide subawards based on fixed amounts up to the Simplified Acquisition Threshold, provided that the subawards meet the requirements for fixed amount awards in §200.201.

Record Retention and Access

§200.334 Retention requirements for records.

Financial records, supporting documents, statistical records, and all other non-Federal entity records pertinent to a Federal award must be retained for a period of three years from the date of submission of the final expenditure report or, for Federal awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, respectively, as reported to the Federal awarding agency or pass-through entity in the case of a subrecipient. Federal awarding agencies and pass-through entities must not impose any other record retention requirements upon non-Federal entities. The only exceptions are the following:

(a) If any litigation, claim, or audit is started before the expiration of the 3- year period, the records must be retained until all litigation, claims, or audit findings involving the records have been resolved and final action taken.

(b) When the non-Federal entity is notified in writing by the Federal awarding agency, cognizant agency for audit, oversight

agency for audit, cognizant agency for indirect costs, or pass-through entity to extend the retention period.

(c) Records for real property and equipment acquired with Federal funds must be retained for 3 years after final disposition.

(d) When records are transferred to or maintained by the Federal awarding agency or pass-through entity, the 3-year retention requirement is not applicable to the non-Federal entity.

(e) Records for program income transactions after the period of performance. In some cases recipients must report program income after the period of performance. Where there is such a requirement, the retention period for the records pertaining to the earning of the program income starts from the end of the non-Federal entity's fiscal year in which the program income is earned.

(f) Indirect cost rate proposals and cost allocations plans. This paragraph applies to the following types of documents and their supporting records: Indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the pass-through entity) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(2) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the pass- through entity) for negotiation purposes, then the 3-year retention period for the proposal, plan, or computation and its supporting records starts from the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

§200.335 Requests for transfer of records.

The Federal awarding agency must request transfer of certain records to its custody from the non-Federal entity when it determines that the records possess long-term retention value. However, in order to avoid duplicate recordkeeping, the Federal awarding agency may make arrangements for the non-Federal entity to retain any records that are continuously needed for joint use.

§200.336 Methods for collection, transmission, and storage of information.

The Federal awarding agency and the non-Federal entity should, whenever practicable, collect, transmit, and store Federal award-related information in open and machine-readable formats rather than in closed formats or on paper in accordance with applicable legislative requirements. A machine- readable format is a format in a standard computer language (not English text) that can be read automatically by a web browser or computer system. The Federal awarding agency or pass-through entity must always provide or accept paper versions of Federal award- related information to and from the non- Federal entity upon request. If paper copies are submitted, the Federal awarding agency or pass-through entity must not require more than an original and two copies. When original records are electronic and cannot be altered, there is no need to create and retain paper copies. When original records are paper, electronic versions may be substituted through the use of duplication or other forms of electronic media provided that they are subject to periodic quality control reviews, provide reasonable safeguards against alteration, and remain readable.

§200.337 Access to records.

(a) *Records of non-Federal entities.* The Federal awarding agency, Inspectors General, the Comptroller General of the United States, and the pass-through entity, or any of their authorized representatives, must have the right of access to any documents, papers, or other records of the non- Federal entity which are pertinent to the Federal award, in order to make audits, examinations, excerpts, and transcripts. The right also includes timely and reasonable access to the non-Federal entity's personnel for the purpose of interview and discussion related to such documents.

(b) *Extraordinary and rare circumstances.* Only under extraordinary and rare circumstances would such access include review of the true name of victims of a crime. Routine monitoring cannot be considered extraordinary and rare circumstances that would necessitate access to this information. When access to the true name of victims of a crime is necessary, appropriate steps to protect this sensitive information must be taken by both the non-Federal entity and the Federal awarding agency. Any such access, other than under a court order or subpoena pursuant to a bona fide confidential investigation, must be approved by the head of the Federal awarding agency or delegate.

(c) *Expiration of right of access.* The rights of access in this section are not limited to the required retention period but last as long as the records are retained. Federal awarding agencies and pass-through entities must not impose any other access requirements upon non-Federal entities.

§200.338 Restrictions on public access to records.

No Federal awarding agency may place restrictions on the non-Federal entity that limit public access to the records of the non-Federal entity pertinent to a Federal award, except for protected personally identifiable information (PII) or when the Federal awarding agency can demonstrate that such records will be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) or controlled unclassified information pursuant to Executive Order 13556 if the records had belonged to the Federal awarding agency. The Freedom of Information Act (5 U.S.C. 552) (FOIA) does not apply to those records that remain under a non-Federal entity's control except as required under §200.315. Unless required by Federal, state, local, and tribal statute, non- Federal entities are not required to permit public access to their records. The non-Federal entity's records provided to a Federal agency generally will be subject to FOIA and applicable exemptions.

Remedies for Noncompliance

§200.339 Remedies for noncompliance.

If a non-Federal entity fails to comply with the U.S. Constitution, Federal statutes, regulations or the terms and conditions of a Federal award, the Federal awarding agency or pass- through entity may impose additional conditions, as described in §200.208. If the Federal awarding agency or pass- through entity determines that noncompliance cannot be remedied by imposing additional conditions, the Federal awarding agency or pass- through entity may take one or more of the following actions, as appropriate in the circumstances:

(a) Temporarily withhold cash payments pending correction of the deficiency by the non-Federal entity or more severe enforcement action by the Federal awarding agency or pass- through entity.

(b) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(c) Wholly or partly suspend or terminate the Federal award.

(d) Initiate suspension or debarment proceedings as authorized under 2 CFR part 180 and Federal awarding agency regulations (or in the case of a pass- through entity, recommend such a proceeding be initiated by a Federal awarding agency).

(e) Withhold further Federal awards for the project or program.

(f) Take other remedies that may be legally available.

§200.340 Termination.

(a) The Federal award may be terminated in whole or in part as follows:

(1) By the Federal awarding agency or pass-through entity, if a non-Federal entity fails to comply with the terms and conditions of a Federal award;

(2) By the Federal awarding agency or pass-through entity, to the greatest extent

authorized by law, if an award no longer effectuates the program goals or agency priorities;

(3) By the Federal awarding agency or pass-through entity with the consent of the non-Federal entity, in which case the two parties must agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated;

(4) By the non-Federal entity upon sending to the Federal awarding agency or pass-through entity written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if the Federal awarding agency or pass- through entity determines in the case of partial termination that the reduced or modified portion of the Federal award or subaward will not accomplish the purposes for which the Federal award was made, the Federal awarding agency or pass-through entity may terminate the Federal award in its entirety; or

(5) By the Federal awarding agency or pass-through entity pursuant to termination provisions included in the Federal award.

(b) A Federal awarding agency should clearly and unambiguously specify termination provisions applicable to each Federal award, in applicable regulations or in the award, consistent with this section.

(c) When a Federal awarding agency terminates a Federal award prior to the end of the period of performance due to the non-Federal entity's material failure to comply with the Federal award terms and conditions, the Federal awarding agency must report the termination to the OMB-designated integrity and performance system accessible through SAM (currently FAPIIS).

(1) The information required under paragraph (c) of this section is not to be reported to designated integrity and performance system until the non- Federal entity either—

(i) Has exhausted its opportunities to object or challenge the decision, see §200.342; or

(ii) Has not, within 30 calendar days after being notified of the termination, informed the Federal awarding agency that it intends to appeal the Federal awarding agency's decision to terminate.

(2) If a Federal awarding agency, after entering information into the designated integrity and performance system about a termination, subsequently:

(i) Learns that any of that information is erroneous, the Federal awarding agency must correct the information in the system within three business days;

(ii) Obtains an update to that information that could be helpful to other Federal awarding agencies, the Federal awarding agency is strongly encouraged to amend the information in the system to incorporate the update in a timely way.

(3) Federal awarding agencies, must not post any information that will be made publicly available in the non- public segment of designated integrity and performance system that is covered by a disclosure exemption under the Freedom of Information Act. If the non- Federal entity asserts within seven calendar days to the Federal awarding agency who posted the information, that some of the information made publicly available is covered by a disclosure exemption under the Freedom of Information Act, the Federal awarding agency who posted the information must remove the posting within seven calendar days of receiving the assertion. Prior to reposting the releasable information, the Federal agency must resolve the issue in accordance with the agency's Freedom of Information Act procedures.

(d) When a Federal award is terminated or partially terminated, both the Federal awarding agency or pass- through entity and the non-Federal entity remain responsible for compliance with the requirements in §§200.344 and 200.345.

§200.341 Notification of termination requirement.

(a) The Federal agency or pass-through entity must provide to the non-Federal entity a notice of termination.

(b) If the Federal award is terminated for the non-Federal entity's material failure to comply with the U.S. Constitution, Federal statutes, regulations, or terms and conditions of the Federal award, the notification must state that—

(1) The termination decision will be reported to the OMB-designated integrity and performance system accessible through SAM (currently FAPIIS);

(2) The information will be available in the OMB-designated integrity and performance system for a period of five years from the date of the termination, then archived;

(3) Federal awarding agencies that consider making a Federal award to the non-Federal entity during that five year period must consider that information in judging whether the non-Federal entity is qualified to receive the Federal award, when the Federal share of the Federal award is expected to exceed the simplified acquisition threshold over the period of performance;

(4) The non-Federal entity may comment on any information the OMB-designated integrity and performance system contains about the non-Federal entity for future consideration by Federal awarding agencies. The non- Federal entity may submit comments to the awardee integrity and performance portal accessible through SAM (currently (CPARS).

(5) Federal awarding agencies will consider non-Federal entity comments when determining whether the non- Federal entity is qualified for a future Federal award.

(c) Upon termination of a Federal award, the Federal awarding agency must provide the information required under FFATA to the Federal website established to fulfill the requirements of FFATA, and update or notify any other relevant governmentwide systems or entities of any indications of poor performance as required by 41 U.S.C. 417b and 31 U.S.C. 3321 and implementing guidance at 2 CFR part 77 (forthcoming at time of publication). See also the requirements for Suspension and Debarment at 2 CFR part 180.

§200.342 Opportunities to object, hearings, and appeals.

Upon taking any remedy for non-compliance, the Federal awarding agency must provide the non-Federal entity an opportunity to object and provide information and documentation challenging the suspension or termination action, in accordance with written processes and procedures published by the Federal awarding agency. The Federal awarding agency or pass-through entity must comply with any requirements for hearings, appeals or other administrative proceedings to which the non-Federal entity is entitled under any statute or regulation applicable to the action involved.

§200.343 Effects of suspension and termination.

Costs to the non-Federal entity resulting from financial obligations incurred by the non-Federal entity during a suspension or after termination of a Federal award or subaward are not allowable unless the Federal awarding agency or pass-through entity expressly authorizes them in the notice of suspension or termination or subsequently. However, costs during suspension or after termination are allowable if:

(a) The costs result from financial obligations which were properly incurred by the non-Federal entity before the effective date of suspension or termination, are not in anticipation of
it; and

(b) The costs would be allowable if the Federal award was not suspended or expired normally at the end of the period of performance in which the termination takes effect. *Closeout*

§200.344 Closeout.

The Federal awarding agency or pass-through entity will close out the Federal award when it determines that all applicable administrative actions and all required work of the Federal award have been completed by the non-Federal entity. If the non-Federal entity fails to complete the requirements, the Federal awarding agency or pass-through entity will proceed to close out the Federal award with the information available. This section specifies the actions the non-Federal entity and Federal awarding agency or pass-

through entity must take to complete this process at the end of the period of performance.

(a) The recipient must submit, no later than 120 calendar days after the end date of the period of performance, all financial, performance, and other reports as required by the terms and conditions of the Federal award. A subrecipient must submit to the pass-through entity, no later than 90 calendar days (or an earlier date as agreed upon by the pass-through entity and subrecipient) after the end date of the period of performance, all financial, performance, and other reports as required by the terms and conditions of the Federal award. The Federal awarding agency or pass-through entity may approve extensions when requested and justified by the non-Federal entity, as applicable.

(b) Unless the Federal awarding agency or pass-through entity authorizes an extension, a non-Federal entity must liquidate all financial obligations incurred under the Federal award no later than 120 calendar days after the end date of the period of performance as specified in the terms and conditions of the Federal award.

(c) The Federal awarding agency or pass-through entity must make prompt payments to the non-Federal entity for costs meeting the requirements in Subpart E of this part under the Federal award being closed out.

(d) The non-Federal entity must promptly refund any balances of unobligated cash that the Federal awarding agency or pass-through entity paid in advance or paid and that are not authorized to be retained by the non- Federal entity for use in other projects. See OMB Circular A–129 and see §200.346, for requirements regarding unreturned amounts that become delinquent debts.

(e) Consistent with the terms and conditions of the Federal award, the Federal awarding agency or pass- through entity must make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The non-Federal entity must account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§200.310 through 200.316 and 200.330.

(g) When a recipient or subrecipient completes all closeout requirements, the Federal awarding agency or pass- through entity must promptly complete all closeout actions for Federal awards. The Federal awarding agency must make every effort to complete closeout actions no later than one year after the end of the period of performance unless otherwise directed by authorizing statutes. Closeout actions include Federal awarding agency actions in the grants management and payment systems.

(h) If the non-Federal entity does not submit all reports in accordance with this section and the terms and conditions of the Federal Award, the Federal awarding agency must proceed to close out with the information available within one year of the period of performance end date.

(i) If the non-Federal entity does not submit all reports in accordance with this section within one year of the period of performance end date, the Federal awarding agency must report the non-Federal entity's material failure to comply with the terms and conditions of the award with the OMB-designated integrity and performance system (currently FAPIIS). Federal awarding agencies may also pursue other enforcement actions per §200.339.

Post-Closeout Adjustments and Continuing Responsibilities

§200.345 Post-closeout adjustments and continuing responsibilities.

(a) The closeout of a Federal award does not affect any of the following:

(1) The right of the Federal awarding agency or pass-through entity to disallow costs and recover funds on the basis of a later audit or other review. The Federal awarding agency or pass- through entity must make any cost disallowance determination and notify the non-Federal entity within the record retention period.

(2) The requirement for the non-Federal entity to return any funds due as a result of later refunds, corrections, or other transactions including final indirect cost rate adjustments.

(3) The ability of the Federal awarding agency to make financial adjustments to a previously closed award such as resolving indirect cost payments and making final payments.

(4) Audit requirements in subpart F of this part.

(5) Property management and disposition requirements in §§200.310 through 200.316 of this subpart.

(6) Records retention as required in §§200.334 through 200.337 of this subpart.

(b) After closeout of the Federal award, a relationship created under the Federal award may be modified or ended in whole or in part with the consent of the Federal awarding agency or pass-through entity and the non- Federal entity, provided the responsibilities of the non-Federal entity referred to in paragraph (a) of this section, including those for property management as applicable, are considered and provisions made for continuing responsibilities of the non- Federal entity, as appropriate.

Collection of Amounts Due

§200.346 Collection of amounts due.

(a) Any funds paid to the non-Federal entity in excess of the amount to which the non-Federal entity is finally determined to be entitled under the terms of the Federal award constitute a debt to the Federal Government. If not paid within 90 calendar days after demand, the Federal awarding agency may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursements;

(2) Withholding advance payments otherwise due to the non-Federal entity; or

(3) Other action permitted by Federal statute.

(b) Except where otherwise provided by statutes or regulations, the Federal awarding agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (31 CFR parts 900 through 999). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

Subpart E—Cost Principles

■ 46. Amend §200.400 by revising paragraph (e) and (g) to read as follows:

§200.400 Policy guide.

* * * * *

(e) In reviewing, negotiating and approving cost allocation plans or indirect cost proposals, the cognizant agency for indirect costs should generally assure that the non-Federal entity is applying these cost accounting principles on a consistent basis during their review and negotiation of indirect cost proposals. Where wide variations exist in the treatment of a given cost item by the non-Federal entity, the reasonableness and equity of such treatments should be fully considered. See the definition of *indirect (facilities & administrative (F&A)) costs* in §200.1 of this part.

* * * * *

(g) The non-Federal entity may not earn or keep any profit resulting from Federal financial assistance, unless explicitly authorized by the terms and conditions of the Federal award. See also §200.307.

■ 47. Amend §200.401 by revising paragraphs (a)(3) and (4), (b), and (c) to read as follows:

§200.401 Application.

(a) * * *

(3) Fixed amount awards. See also §200.1 Definitions and 200.201.

(4) Federal awards to hospitals (see appendix IX to this part).

* * * * *

(b) *Federal contract.* Where a Federal contract awarded to a non-Federal entity is subject to the Cost Accounting Standards (CAS), it incorporates the applicable CAS clauses, Standards, and CAS administration requirements per the 48 CFR Chapter 99 and 48 CFR part 30 (FAR Part 30). CAS applies directly to the CAS-covered contract and the

Cost Accounting Standards at 48 CFR parts 9904 or 9905 takes precedence over the cost principles in this subpart E with respect to the allocation of costs. When a contract with a non-Federal entity is subject to full CAS coverage, the allowability of certain costs under the cost principles will be affected by the allocation provisions of the Cost Accounting Standards (*e.g.,* CAS 414—48 CFR 9904.414, Cost of Money as an Element of the Cost of Facilities Capital, and CAS 417—48 CFR 9904.417, Cost of Money as an Element of the Cost of Capital Assets Under Construction), apply rather the allowability provisions of §200.449. In complying with those requirements, the non-Federal entity's application of cost accounting practices for estimating, accumulating, and reporting costs for other Federal awards and other cost objectives under the CAS-covered contract still must be consistent with its cost accounting practices for the CAS-covered contracts. In all cases, only one set of accounting records needs to be maintained for the allocation of costs by the non-Federal entity.

(c) *Exemptions.* Some nonprofit organizations, because of their size and nature of operations, can be considered to be similar to for-profit entities for purpose of applicability of cost principles. Such nonprofit organizations must operate under Federal cost principles applicable to for-profit entities located at 48 CFR 31.2. A listing of these organizations is contained in appendix VIII to this part. Other organizations, as approved by the cognizant agency for indirect costs, may be added from time to time.

■ 48. Amend §200.403 by revising paragraphs (f) and (g) and adding paragraph (h) to read as follows:

§200.403 Factors affecting allowability of costs.

* * * * *

(f) Not be included as a cost or used to meet cost sharing or matching requirements of any other federally- financed program in either the current or a prior period. See also §200.306(b).

(g) Be adequately documented. See also §§200.300 through 200.309 of this part.

(h) Cost must be incurred during the approved budget period. The Federal awarding agency is authorized, at its discretion, to waive prior written approvals to carry forward unobligated balances to subsequent budget periods pursuant to §200.308(e)(3).

■ 49. Amend §200.405 by revising paragraph (d) to read as follows:

§200.405 Allocable costs.

* * * * *

(d) Direct cost allocation principles: If a cost benefits two or more projects or activities in proportions that can be determined without undue effort or cost, the cost must be allocated to the projects based on the proportional benefit. If a cost benefits two or more projects or activities in proportions that cannot be determined because of the interrelationship of the work involved, then, notwithstanding paragraph (c) of this section, the costs may be allocated or transferred to benefitted projects on any reasonable documented basis. Where the purchase of equipment or other capital asset is specifically authorized under a Federal award, the costs are assignable to the Federal award regardless of the use that may be made of the equipment or other capital asset involved when no longer needed for the purpose for which it was originally required. See also §§200.310 through 200.316 and 200.439.

* * * * *

■ 50. Amend §200.406 by revising paragraph (b) to read as follows:

§200.406 Applicable credits.

* * * * *

(b) In some instances, the amounts received from the Federal Government to finance activities or service operations of the non-Federal entity should be treated as applicable credits. Specifically, the concept of netting such credit items (including any amounts used to meet cost sharing or matching requirements) must be recognized in determining the rates or amounts to be charged to the Federal award. (See §§200.436 and 200.468, for areas of potential application in the matter of Federal financing of activities.)

■ 51. Amend §200.407 by revising paragraphs (g) and (y) to read as follows:

§200.407 Prior written approval (prior approval).

* * * * *

(g) §200.333 Fixed amount subawards;

* * * * *

(y) §200.475 Travel costs.

■ 52. Revise §200.409 to read as follows:

§200.409 Special considerations.

In addition to the basic considerations regarding the allowability of costs highlighted in this subtitle, other subtitles in this part describe special considerations and requirements applicable to states, local governments, Indian tribes, and IHEs. In addition, certain provisions among the items of cost in this subpart are only applicable to certain types of non-Federal entities, as specified in the following sections: (a) Direct and Indirect (F&A) Costs (§§200.412–200.415) of this subpart;

(b) Special Considerations for States, Local Governments and Indian Tribes (§§200.416 and 200.417) of this subpart; and

(c) Special Considerations for Institutions of Higher Education (§§200.418 and 200.419) of this subpart.

■ 53. Revise §200.410 to read as follows:

§200.410 Collection of unallowable costs.

Payments made for costs determined to be unallowable by either the Federal awarding agency, cognizant agency for indirect costs, or pass-through entity, either as direct or indirect costs, must be refunded (including interest) to the Federal Government in accordance with instructions from the Federal agency that determined the costs are unallowable unless Federal statute or regulation directs otherwise. See also §§200.300 through 200.309 in subpart D of this part.

■ 54. Amend §200.413 by revising paragraphs (a), (b), and (f) to read as follows:

§200.413 Direct costs.

(a) *General.* Direct costs are those costs that can be identified specifically with a particular final cost objective, such as a Federal award, or other internally or externally funded activity, or that can be directly assigned to such activities relatively easily with a high degree of accuracy. Costs incurred for the same purpose in like circumstances must be treated consistently as either direct or indirect (F&A) costs. See also §200.405.

(b) *Application to Federal awards.* Identification with the Federal award rather than the nature of the goods and services involved is the determining factor in distinguishing direct from indirect (F&A) costs of Federal awards. Typical costs charged directly to a Federal award are the compensation of employees who work on that award, their related fringe benefit costs, the costs of materials and other items of expense incurred for the Federal award. If directly related to a specific award, certain costs that otherwise would be treated as indirect costs may also be considered direct costs. Examples include extraordinary utility consumption, the cost of materials supplied from stock or services rendered by specialized facilities, program evaluation costs, or other institutional service operations.

* * * * *

(f) For nonprofit organizations, the costs of activities performed by the non- Federal entity primarily as a service to members, clients, or the general public when significant and necessary to the non-Federal entity's mission must be treated as direct costs whether or not allowable, and be allocated an equitable share of indirect (F&A) costs. Some examples of these types of activities include:

(1) Maintenance of membership rolls, subscriptions, publications, and related functions. See also §200.454.

(2) Providing services and information to members, legislative or administrative bodies, or the public. See also §§200.454 and 200.450.

(3) Promotion, lobbying, and other forms of public relations. See also §§200.421 and 200.450.

(4) Conferences except those held to conduct the general administration of the non-Federal entity. See also §200.432.

(5) Maintenance, protection, and investment of special funds not used in operation of the non-Federal entity. See also §200.442.

(6) Administration of group benefits on behalf of members or clients, including life and hospital insurance, annuity or retirement plans, and financial aid. See also §200.431.

■ 55. Amend §200.414 by revising paragraphs (a), (c) introductory text, (c)(3) and (4), (d), (f), and (g) and adding paragraph (h) to read as follows:

§200.414 Indirect (F&A) costs.

(a) *Facilities and administration classification.* For major Institutions of Higher Education (IHE) and major nonprofit organizations, indirect (F&A) costs must be classified within two broad categories: ''Facilities'' and ''Administration.'' ''Facilities'' is defined as depreciation on buildings, equipment and capital improvement, interest on debt associated with certain buildings, equipment and capital improvements, and operations and maintenance expenses. ''Administration'' is defined as general administration and general expenses such as the director's office, accounting, personnel and all other types of expenditures not listed specifically under one of the subcategories of ''Facilities'' (including cross allocations from other pools, where applicable). For nonprofit organizations, library expenses are included in the ''Administration'' category; for IHEs, they are included in the ''Facilities'' category. Major IHEs are defined as those required to use the Standard Format for Submission as noted in appendix III to this part, and Rate Determination for Institutions of Higher Education paragraph C. 11. Major nonprofit organizations are those which receive more than $10 million dollars in direct Federal funding.

* * * * *

(c) *Federal Agency Acceptance of Negotiated Indirect Cost Rates.* (See also §200.306.)

* * * * *

(3) The Federal awarding agency must implement, and make publicly available, the policies, procedures and general decision-making criteria that their programs will follow to seek and justify deviations from negotiated rates. (4) As required under §200.204, the Federal awarding agency must include in the notice of funding opportunity the policies relating to indirect cost rate reimbursement, matching, or cost share as approved under paragraph (e)(1) of this section. As appropriate, the Federal agency should incorporate discussion of these policies into Federal awarding agency outreach activities with non- Federal entities prior to the posting of a notice of funding opportunity.

(d) Pass-through entities are subject to the requirements in §200.332(a)(4).

* * * * *

(f) In addition to the procedures outlined in the appendices in paragraph (e) of this section, any non-Federal entity that does not have a current negotiated (including provisional) rate, except for those non-Federal entities described in appendix VII to this part, paragraph D.1.b, may elect to charge a de minimis rate of 10% of modified total direct costs (MTDC) which may be used indefinitely. No documentation is required to justify the 10% de minimis indirect cost rate. As described in §200.403, costs must be consistently charged as either indirect or direct costs, but may not be double charged or inconsistently charged as both. If chosen, this methodology once elected must be used consistently for all Federal awards until such time as a non-Federal entity chooses to negotiate for a rate, which the non-Federal entity may apply to do at any time.

(g) Any non-Federal entity that has a current federally-negotiated indirect cost rate may apply for a one-time extension of the rates in that agreement for a period of up to four years. This extension will be subject to the review and approval of the cognizant agency for indirect costs. If an extension is granted the non-Federal entity may not request a rate review until the extension period ends. At the end of the 4-year extension, the non-Federal entity must re-apply to negotiate a rate. Subsequent one-time extensions (up to four years) are permitted if a renegotiation is completed between each extension request.

(h) The federally negotiated indirect rate, distribution base, and rate type for a non-Federal entity (except for the Indian tribes or tribal organizations, as defined in the Indian Self Determination, Education and Assistance Act, 25 U.S.C. 450b(1)) must be available publicly on an OMB- designated Federal website.

■ 56. Amend §200.415 by revising paragraphs (b)(1) and (2), (c), and (d) to read as follows:

§200.415 Required certifications.

* * * * *

(b) * * *

(1) A proposal to establish a cost allocation plan or an indirect (F&A) cost rate, whether submitted to a Federal cognizant agency for indirect costs or maintained on file by the non-Federal entity, must be certified by the non- Federal entity using the Certificate of Cost Allocation Plan or Certificate of Indirect Costs as set forth in appendices III through VII, and IX of this part. The certificate must be signed on behalf of the non-Federal entity by an individual at a level no lower than vice president or chief financial officer of the non-Federal entity that submits the proposal.

(2) Unless the non-Federal entity has elected the option under §200.414(f), the Federal Government may either disallow all indirect (F&A) costs or unilaterally establish such a plan or rate when the non-Federal entity fails to submit a certified proposal for establishing such a plan or rate in accordance with the requirements. Such a plan or rate may be based upon audited historical data or such other data that have been furnished to the cognizant agency for indirect costs and for which it can be demonstrated that all unallowable costs have been excluded. When a cost allocation plan or indirect cost rate is unilaterally established by the Federal Government because the non-Federal entity failed to submit a certified proposal, the plan or rate established will be set to ensure that potentially unallowable costs will not be reimbursed.

(c) Certifications by nonprofit organizations as appropriate that they did not meet the definition of a major nonprofit organization as defined in §200.414(a).

(d) See also §200.450 for another required certification.

■ 57. Revise §200.417 to read as follows:

§200.417 Interagency service.

The cost of services provided by one agency to another within the governmental unit may include allowable direct costs of the service plus a pro-rated share of indirect costs. A standard indirect cost allowance equal to ten percent of the direct salary and wage cost of providing the service (excluding overtime, shift premiums, and fringe benefits) may be used in lieu of determining the actual indirect costs of the service. These services do not include centralized services included in central service cost allocation plans as described in Appendix V to Part 200.

■ 58. Amend §200.418 by revising paragraph (a) to read as follows:

§200.418 Costs incurred by states and local governments.

* * * * *

(a) The costs meet the requirements of §200.402–411 of this subpart;

* * * * *

■ 59. Amend §200.419 by revising paragraphs (a), (b) introductory text, and (b)(1) and (2) to read as follows:

§200.419 Cost accounting standards and disclosure statement.

(a) An IHE that receive an aggregate total $50 million or more in Federal awards and instruments subject to this subpart (as specified in §200.101) in its most recently

completed fiscal year must comply with the Cost Accounting Standards Board's cost accounting standards located at 48 CFR 9905.501, 9905.502, 9905.505, and 9905.506. CAS- covered contracts and subcontracts awarded to the IHEs are subject to the broader range of CAS requirements at 48 CFR 9900 through 9999 and 48 CFR part 30 (FAR Part 30).

(b) *Disclosure statement.* An IHE that receives an aggregate total $50 million or more in Federal awards and instruments subject to this subpart (as specified in §200.101) during its most recently completed fiscal year must disclose their cost accounting practices by filing a Disclosure Statement (DS–2), which is reproduced in Appendix III to Part 200. With the approval of the cognizant agency for indirect costs, an IHE may meet the DS–2 submission by submitting the DS–2 for each business unit that received $50 million or more in Federal awards and instruments.

(1) The DS–2 must be submitted to the cognizant agency for indirect costs with a copy to the IHE's cognizant agency for audit. The initial DS–2 and revisions to the DS–2 must be submitted in coordination with the IHE's indirect (F&A) rate proposal, unless an earlier submission is requested by the cognizant agency for indirect costs. IHEs with CAS-covered contracts or subcontracts meeting the dollar threshold in 48 CFR 9903.202–1(f) must submit their initial DS–2 or revisions no later than prior to the award of a CAS- covered contract or subcontract.

(2) An IHE must maintain an accurate DS–2 and comply with disclosed cost accounting practices. An IHE must file amendments to the DS–2 to the cognizant agency for indirect costs in advance of a disclosed practice being changed to comply with a new or modified standard, or when a practice is changed for other reasons. An IHE may proceed with implementing the change after it has notified the Federal cognizant agency for indirect costs. If the change represents a variation from 2 CFR part 200, the change may require approval by the Federal cognizant agency for indirect costs, in accordance with §200.102(b). Amendments of a DS–2 may be submitted at any time. Resubmission of a complete, updated DS–2 is discouraged except when there are extensive changes to disclosed practices.

* * * * *

■ 60. Revise §200.420 to read as follows:

§200.420 Considerations for selected items of cost.

This section provides principles to be applied in establishing the allowability of certain items involved in determining cost, in addition to the requirements of Subtitle II of this subpart. These principles apply whether or not a particular item of cost is properly treated as direct cost or indirect (F&A) cost. Failure to mention a particular item of cost is not intended to imply that it is either allowable or unallowable; rather, determination as to allowability in each case should be based on the treatment provided for similar or related items of cost, and based on the principles described in §§200.402 through 200.411. In case of a discrepancy between the provisions of a specific Federal award and the provisions below, the Federal award governs. Criteria outlined in §200.403 must be applied in determining allowability. See also §200.102.

■ 61. Amend §200.421 by revising paragraphs (b)(1) and (e)(2) to read as follows:

§200.421 Advertising and public relations.

* * * * *

(b) * * *

(1) The recruitment of personnel required by the non-Federal entity for performance of a Federal award (See also §200.463);

* * * * *

(e) * * *

(2) Costs of meetings, conventions, convocations, or other events related to other activities of the entity (see also §200.432), including:

* * * * *

■ 62. Revise §200.422 to read as follows:

§200.422 Advisory councils.

Costs incurred by advisory councils or committees are unallowable unless authorized by statute, the Federal awarding agency or as an indirect cost where allocable to Federal awards. See §200.444, applicable to States, local governments, and Indian tribes.

■ 63. Amend §200.425 by revising paragraphs (a)(1) and (2) and (c) introductory text to read as follows:

§200.425 Audit services.

* * * * *

(a) * * *

(1) Any costs when audits required by the Single Audit Act and subpart F of this part have not been conducted or have been conducted but not in accordance therewith; and

(2) Any costs of auditing a non-Federal entity that is exempted from having an audit conducted under the Single Audit Act and subpart F of this part because its expenditures under Federal awards are less than $750,000 during the non-Federal entity's fiscal year.

* * * * *

(c) Pass-through entities may charge Federal awards for the cost of agreed- upon-procedures engagements to monitor subrecipients (in accordance with subpart D, §§200.331–333) who are exempted from the requirements of the Single Audit Act and subpart F of this part. This cost is allowable only if the agreed-upon-procedures engagements are:

* * * * *

■ 64. Revise §200.426 to read as follows:

§200.426 Bad debts.

Bad debts (debts which have been determined to be uncollectable), including losses (whether actual or estimated) arising from uncollectable accounts and other claims, are unallowable. Related collection costs, and related legal costs, arising from such debts after they have been determined to be uncollectable are also unallowable. See also §200.428.

■ 65. Revise §200.428 to read as follows:

§200.428 Collections of improper payments.

The costs incurred by a non-Federal entity to recover improper payments are allowable as either direct or indirect costs, as appropriate. Amounts collected may be used by the non-Federal entity in accordance with cash management standards set forth in §200.305.

■ 66. Revise §200.429 to read as follows:

§200.429 Commencement and convocation costs.

For IHEs, costs incurred for commencements and convocations are unallowable, except as provided for in (B)(9) Student Administration and Services, in appendix III to this part, as activity costs.

■ 67. Amend §200.430 by revising paragraphs (a) introductory text and (a)(3), the paragraph (h) subject heading, and paragraphs (h)(3), (h)(8)(iv), and (h)(8)(viii)(C) to read as follows:

§200.430 Compensation—personal services.

(a) *General.* Compensation for personal services includes all remuneration, paid currently or accrued, for services of employees rendered during the period of performance under the Federal award, including but not necessarily limited to wages and salaries. Compensation for personal services may also include fringe benefits which are addressed in §200.431. Costs of compensation are allowable to the extent that they satisfy the specific requirements of this part, and that the total compensation for individual employees:

* * * * *

(3) Is determined and supported as provided in paragraph (i) of this section, when applicable.

* * * * *

(h) *Institutions of Higher Education (IHEs).* * * *

(3) *Intra-Institution of Higher Education (IHE) consulting.* Intra-IHE consulting by faculty should be undertaken as an IHE responsibility requiring no compensation in addition to IBS. However, in unusual cases where consultation is across departmental lines or involves a separate or remote operation, and the work performed by the faculty member is in addition to his or her regular responsibilities, any charges for such work representing additional compensation above IBS are allowable provided that such consulting arrangements are specifically provided for in the Federal award or approved in writing by the Federal awarding agency.

* * * * *

(iv) Encompass federally-assisted and all other activities compensated by the non-Federal entity on an integrated basis, but may include the use of subsidiary records as defined in the non-Federal entity's written policy;

* * * * *

(viii) * * *

(C) The non-Federal entity's system of internal controls includes processes to review after-the-fact interim charges made to a Federal award based on budget estimates. All necessary adjustment must be made such that the final amount charged to the Federal award is accurate, allowable, and properly allocated.

* * * * *

■ 68. Revise §200.431 to read as follows:

§200.431 Compensation—fringe benefits.

(a) *General.* Fringe benefits are allowances and services provided by employers to their employees as compensation in addition to regular salaries and wages. Fringe benefits include, but are not limited to, the costs of leave (vacation, family-related, sick or military), employee insurance, pensions, and unemployment benefit plans. Except as provided elsewhere in these principles, the costs of fringe benefits are allowable provided that the benefits are reasonable and are required by law, non-Federal entity-employee agreement, or an established policy of the non-Federal entity.

(b) *Leave.* The cost of fringe benefits in the form of regular compensation paid to employees during periods of authorized absences from the job, such as for annual leave, family-related leave, sick leave, holidays, court leave, military leave, administrative leave, and other similar benefits, are allowable if all of the following criteria are met:

(1) They are provided under established written leave policies;

(2) The costs are equitably allocated to all related activities, including Federal awards; and,

(3) The accounting basis (cash or accrual) selected for costing each type of leave is consistently followed by the non-Federal entity or specified grouping of employees.

(i) When a non-Federal entity uses the cash basis of accounting, the cost of leave is recognized in the period that the leave is taken and paid for. Payments for unused leave when an employee retires or terminates employment are allowable in the year of payment.

(ii) The accrual basis may be only used for those types of leave for which a liability as defined by GAAP exists when the leave is earned. When a non- Federal entity uses the accrual basis of accounting, allowable leave costs are the lesser of the amount accrued or funded.

(c) *Fringe benefits.* The cost of fringe benefits in the form of employer contributions or expenses for social security; employee life, health, unemployment, and worker's compensation insurance (except as indicated in §200.447); pension plan costs (see paragraph (i) of this section); and other similar benefits are allowable, provided such benefits are granted under established written policies. Such benefits, must be allocated to Federal awards and all other activities in a manner consistent with the pattern of benefits attributable to the individuals or group(s) of employees whose salaries and wages are chargeable to such Federal awards and other activities, and charged as direct or indirect costs in accordance with the non-Federal entity's accounting practices.

(d) *Cost objectives.* Fringe benefits may be assigned to cost objectives by identifying specific benefits to specific individual employees or by allocating on the basis of entity-wide salaries and wages of the employees receiving the benefits. When the allocation method is used, separate allocations must be made to selective groupings of employees, unless the non-Federal entity demonstrates that costs in relationship to salaries and wages do not differ significantly for different groups of employees.

(e) *Insurance.* See also §200.447(d)(1) and (2).

(1) Provisions for a reserve under a self-insurance program for unemployment compensation or workers' compensation are allowable to the extent that the provisions represent reasonable estimates of the liabilities for such compensation, and the types of coverage, extent of coverage, and rates and premiums would have been allowable had insurance been purchased to cover the risks. However, provisions for self-insured liabilities which do not become payable for more than one year after the provision is made must not exceed the present value of the liability.

(2) Costs of insurance on the lives of trustees, officers, or other employees holding positions of similar responsibility are allowable only to the extent that the insurance represents additional compensation. The costs of such insurance when the non-Federal entity is named as beneficiary are unallowable.

(3) Actual claims paid to or on behalf of employees or former employees for workers' compensation, unemployment compensation, severance pay, and similar employee benefits (*e.g.*, post- retirement health benefits), are allowable in the year of payment provided that the non-Federal entity follows a consistent costing policy.

(f) *Automobiles.* That portion of automobile costs furnished by the non-Federal entity that relates to personal use by employees (including transportation to and from work) is unallowable as fringe benefit or indirect (F&A) costs regardless of whether the cost is reported as taxable income to the employees.

(g) *Pension plan costs.* Pension plan costs which are incurred in accordance with the established policies of the non- Federal entity are allowable, provided that:

(1) Such policies meet the test of reasonableness.

(2) The methods of cost allocation are not discriminatory.

(3) Except for State and Local Governments, the cost assigned to each fiscal year should be determined in accordance with GAAP.

(4) The costs assigned to a given fiscal year are funded for all plan participants within six months after the end of that year. However, increases to normal and past service pension costs caused by a delay in funding the actuarial liability beyond 30 calendar days after each quarter of the year to which such costs are assignable are unallowable. Non-Federal entity may elect to follow the ''Cost Accounting Standard for Composition and Measurement of Pension Costs'' (48 CFR 9904.412).

(5) Pension plan termination insurance premiums paid pursuant to the Employee Retirement Income Security Act (ERISA) of 1974 (29 U.S.C. 1301–1461) are allowable. Late payment charges on such premiums are unallowable. Excise taxes on accumulated funding deficiencies and other penalties imposed under ERISA are unallowable.

(6) Pension plan costs may be computed using a pay-as-you-go method or an acceptable actuarial cost method in accordance with established written policies of the non-Federal entity.

(i) For pension plans financed on a pay-as-you-go method, allowable costs will be limited to those representing actual payments to retirees or their beneficiaries.

(ii) Pension costs calculated using an actuarial cost-based method recognized by GAAP are allowable for a given fiscal year if they are funded for that year within six months after the end of that year. Costs funded after the six-month period (or a later period agreed to by the cognizant agency for indirect costs) are allowable in the year funded. The cognizant agency for indirect

costs may agree to an extension of the six-month period if an appropriate adjustment is made to compensate for the timing of the charges to the Federal Government and related Federal reimbursement and the non-Federal entity's contribution to the pension fund. Adjustments may be made by cash refund or other equitable procedures to compensate the Federal Government for the time value of Federal reimbursements in excess of contributions to the pension fund.

(iii) Amounts funded by the non-Federal entity in excess of the actuarially determined amount for a fiscal year may be used as the non- Federal entity's contribution in future periods.

(iv) When a non-Federal entity converts to an acceptable actuarial cost method, as defined by GAAP, and funds pension costs in accordance with this method, the unfunded liability at the time of conversion is allowable if amortized over a period of years in accordance with GAAP.

(v) The Federal Government must receive an equitable share of any previously allowed pension costs (including earnings thereon) which revert or inure to the non-Federal entity in the form of a refund, withdrawal, or other credit.

(h) *Post-retirement health.* Post- retirement health plans (PRHP) refers to costs of health insurance or health services not included in a pension plan covered by paragraph (g) of this section for retirees and their spouses, dependents, and survivors. PRHP costs may be computed using a pay-as-you-go method or an acceptable actuarial cost method in accordance with established written policies of the non-Federal entity.

(1) For PRHP financed on a pay-as-you-go method, allowable costs will be limited to those representing actual payments to retirees or their beneficiaries.

(2) PRHP costs calculated using an actuarial cost method recognized by GAAP are allowable if they are funded for that year within six months after the end of that year. Costs funded after the six-month period (or a later period agreed to by the cognizant agency) are allowable in the year funded. The Federal cognizant agency for indirect costs may agree to an extension of the six-month period if an appropriate adjustment is made to compensate for the timing of the charges to the Federal Government and related Federal reimbursements and the non-Federal entity's contributions to the PRHP fund. Adjustments may be made by cash refund, reduction in current year's PRHP costs, or other equitable procedures to compensate the Federal Government for the time value of Federal reimbursements in excess of contributions to the PRHP fund.

(3) Amounts funded in excess of the actuarially determined amount for a fiscal year may be used as the non- Federal entity contribution in a future period.

(4) When a non-Federal entity converts to an acceptable actuarial cost method and funds PRHP costs in accordance with this method, the initial unfunded liability attributable to prior years is allowable if amortized over a period of years in accordance with GAAP, or, if no such GAAP period exists, over a period negotiated with the cognizant agency for indirect costs.

(5) To be allowable in the current year, the PRHP costs must be paid either to:

(i) An insurer or other benefit provider as current year costs or premiums, or

(ii) An insurer or trustee to maintain a trust fund or reserve for the sole purpose of providing post-retirement benefits to retirees and other beneficiaries.

(6) The Federal Government must receive an equitable share of any amounts of previously allowed post- retirement benefit costs (including earnings thereon) which revert or inure to the non-Federal entity in the form of a refund, withdrawal, or other credit.

(i) *Severance pay.* (1) Severance pay, also commonly referred to as dismissal wages, is a payment in addition to regular salaries and wages, by non- Federal entities to workers whose employment is being terminated. Costs of severance pay are allowable only to the extent that in each case, it is required by

(i) Law;

(ii) Employer-employee agreement;

(iii) Established policy that constitutes, in effect, an implied agreement on the non-Federal entity's part; or

(iv) Circumstances of the particular employment.

(2) Costs of severance payments are divided into two categories as follows:

(i) Actual normal turnover severance payments must be allocated to all activities; or, where the non-Federal entity provides for a reserve for normal severances, such method will be acceptable if the charge to current operations is reasonable in light of payments actually made for normal severances over a representative past period, and if amounts charged are allocated to all activities of the non- Federal entity.

(ii) Measurement of costs of abnormal or mass severance pay by means of an accrual will not achieve equity to both parties. Thus, accruals for this purpose are not allowable. However, the Federal Government recognizes its responsibility to participate, to the extent of its fair share, in any specific payment. Prior approval by the Federal awarding agency or cognizant agency for indirect cost, as appropriate, is required. (3) Costs incurred in certain severance pay packages which are in an amount in excess of the normal severance pay paid by the non-Federal entity to an employee upon termination of employment and are paid to the employee contingent upon a change in management control over, or ownership of, the non-Federal entity's assets, are unallowable.

(4) Severance payments to foreign nationals employed by the non-Federal entity outside the United States, to the extent that the amount exceeds the customary or prevailing practices for the non-Federal entity in the United States, are unallowable, unless they are necessary for the performance of Federal programs and approved by the Federal awarding agency.

(5) Severance payments to foreign nationals employed by the non-Federal entity outside the United States due to the termination of the foreign national as a result of the closing of, or curtailment of activities by, the non- Federal entity in that country, are unallowable, unless they are necessary for the performance of Federal programs and approved by the Federal awarding agency.

(j) *For IHEs only.* (1) Fringe benefits in the form of undergraduate and graduate tuition or remission of tuition for individual employees are allowable, provided such benefits are granted in accordance with established non-Federal entity policies, and are distributed to all non-Federal entity activities on an equitable basis. Tuition benefits for family members other than the employee are unallowable.

(2) Fringe benefits in the form of tuition or remission of tuition for individual employees not employed by IHEs are limited to the tax-free amount allowed per section 127 of the Internal Revenue Code as amended.

(3) IHEs may offer employees tuition waivers or tuition reductions, provided that the benefit does not discriminate in favor of highly compensated employees. Employees can exercise these benefits at other institutions according to institutional policy. See §200.466, for treatment of tuition remission provided to students.

(k) *Fringe benefit programs and other benefit costs.* For IHEs whose costs are paid by state or local governments, fringe benefit programs (such as pension costs and FICA) and any other benefits costs specifically incurred on behalf of, and in direct benefit to, the non-Federal entity, are allowable costs of such non- Federal entities whether or not these costs are recorded in the accounting records of the non-Federal entities, subject to the following:

(1) The costs meet the requirements of Basic Considerations in §§200.402 through 200.411;

(2) The costs are properly supported by approved cost allocation plans in accordance with applicable Federal cost accounting principles; and

(3) The costs are not otherwise borne directly or indirectly by the Federal Government. ■ 69. Revise §200.432 to read as follows:

§200.432 Conferences.

A conference is defined as a meeting, retreat, seminar, symposium, workshop or event whose primary purpose is the

dissemination of technical information beyond the non-Federal entity and is necessary and reasonable for successful performance under the Federal award. Allowable conference costs paid by the non-Federal entity as a sponsor or host of the conference may include rental of facilities, speakers' fees, costs of meals and refreshments, local transportation, and other items incidental to such conferences unless further restricted by the terms and conditions of the Federal award. As needed, the costs of identifying, but not providing, locally available dependent-care resources are allowable. Conference hosts/sponsors must exercise discretion and judgment in ensuring that conference costs are appropriate, necessary and managed in a manner that minimizes costs to the Federal award. The Federal awarding agency may authorize exceptions where appropriate for programs including Indian tribes, children, and the elderly. See also §§200.438, 200.456, and 200.475.

■ 70. Amend §200.433 by revising paragraphs (b) and (c) to read as follows:

§200.433 Contingency provisions.

* * * * *

(b) It is permissible for contingency amounts other than those excluded in paragraph (a) of this section to be explicitly included in budget estimates, to the extent they are necessary to improve the precision of those estimates. Amounts must be estimated using broadly-accepted cost estimating methodologies, specified in the budget documentation of the Federal award, and accepted by the Federal awarding agency. As such, contingency amounts are to be included in the Federal award. In order for actual costs incurred to be allowable, they must comply with the cost principles and other requirements in this part (see also §§200.300 and 200.403 of this part); be necessary and reasonable for proper and efficient accomplishment of project or program objectives, and be verifiable from the non-Federal entity's records.

(c) Payments made by the Federal awarding agency to the non-Federal entity's ''contingency reserve'' or any similar payment made for events the occurrence of which cannot be foretold with certainty as to the time or intensity, or with an assurance of their happening, are unallowable, except as noted in §§200.431 and 200.447.

■ 71. Amend §200.434 by revising paragraphs (b), (c), (f), and (g)(2) to read as follows:

§200.434 Contributions and donations.

* * * * *

(b) The value of services and property donated to the non-Federal entity may not be charged to the Federal award either as a direct or indirect (F&A) cost. The value of donated services and property may be used to meet cost sharing or matching requirements (see §200.306). Depreciation on donated assets is permitted in accordance with §200.436, as long as the donated property is not counted towards cost sharing or matching requirements.

(c) Services donated or volunteered to the non-Federal entity may be furnished to a non-Federal entity by professional and technical personnel, consultants, and other skilled and unskilled labor. The value of these services may not be charged to the Federal award either as a direct or indirect cost. However, the value of donated services may be used to meet cost sharing or matching requirements in accordance with the provisions of §200.306.

* * * * *

(f) Fair market value of donated services must be computed as described in §200.306.

* * * * *

(g) * * *

(2) The value of the donations may be used to meet cost sharing or matching share requirements under the conditions described in §200.300 of this part. The value of the donations must be determined in accordance with §200.300. Where donations are treated as indirect costs, indirect cost rates will separate the value of the donations so that reimbursement will not be made.

■ 72. Amend §200.436 by revising paragraphs (c) introductory text, (c)(3) and (4), and (e) to read as follows:

§200.436 Depreciation.

* * * * *

(c) Depreciation is computed applying the following rules. The computation of depreciation must be based on the acquisition cost of the assets involved. For an asset donated to the non-Federal entity by a third party, its fair market value at the time of the donation must be considered as the acquisition cost. Such assets may be depreciated or claimed as matching but not both. For the computation of depreciation, the acquisition cost will exclude:

* * * * *

(3) Any portion of the cost of buildings and equipment contributed by or for the non-Federal entity that are already claimed as matching or where law or agreement prohibits recovery;

(4) Any asset acquired solely for the performance of a non-Federal award; and

* * * * *

(e) Charges for depreciation must be supported by adequate property records, and physical inventories must be taken at least once every two years to ensure that the assets exist and are usable, used, and needed. Statistical sampling techniques may be used in taking these inventories. In addition, adequate depreciation records showing the amount of depreciation must be maintained.

■ 73. Amend §200.439 by revising paragraphs (a) and (b)(3) and (7) to read as follows:

§200.439 Equipment and other capital expenditures.

(a) See §200.1 for the definitions of *capital expenditures, equipment, special purpose equipment, general purpose equipment, acquisition cost,* and *capital assets.*

* * * * *

(b) * * *

(3) Capital expenditures for improvements to land, buildings, or equipment which materially increase their value or useful life are unallowable as a direct cost except with the prior written approval of the Federal awarding agency, or pass-through entity. See §200.436, for rules on the allowability of depreciation on buildings, capital improvements, and equipment. See also §200.465.

* * * * *

(7) Equipment and other capital expenditures are unallowable as indirect costs. See §200.436.

■ 74. Revise §200.441 to read as follows:

§200.441 Fines, penalties, damages and other settlements.

Costs resulting from non-Federal entity violations of, alleged violations of, or failure to comply with, Federal, state, tribal, local or foreign laws and regulations are unallowable, except when incurred as a result of compliance with specific provisions of the Federal award, or with prior written approval of the Federal awarding agency. See also §200.435. ■ 75. Revise §200.442 to read as follows:

§200.442 Fund raising and investment management costs.

(a) Costs of organized fund raising, including financial campaigns, endowment drives, solicitation of gifts and bequests, and similar expenses incurred to raise capital or obtain contributions are unallowable. Fund raising costs for the purposes of meeting the Federal program objectives are allowable with prior written approval from the Federal awarding agency. Proposal costs are covered in §200.460.

(b) Costs of investment counsel and staff and similar expenses incurred to enhance income from investments are unallowable except when associated with investments covering pension, self- insurance, or other funds which include Federal participation allowed by this part.

(c) Costs related to the physical custody and control of monies and securities are allowable.

(d) Both allowable and unallowable fund-raising and investment activities

must be allocated as an appropriate share of indirect costs under the conditions described in §200.413.

■ 76. Amend §200.443 by revising paragraphs (b)(1) and (3) and (d) to read as follows:

§200.443 Gains and losses on disposition of depreciable assets.

* * * * *

(b) * * *

(1) The gain or loss is processed through a depreciation account and is reflected in the depreciation allowable under §§200.436 and 200.439.

* * * * *

(3) A loss results from the failure to maintain permissible insurance, except as otherwise provided in §200.447.

* * * * *

(d) When assets acquired with Federal funds, in part or wholly, are disposed of, the distribution of the proceeds must be made in accordance with §§200.310 through 200.316 of this part.

■ 77. Amend §200.444 by revising paragraphs (a) introductory text, (a)(4), and (b) to read as follows:

§200.444 General costs of government.

(a) For states, local governments, and Indian Tribes, the general costs of government are unallowable (except as provided in §200.475). Unallowable costs include:

* * * * *

(4) Costs of prosecutorial activities unless treated as a direct cost to a specific program if authorized by statute or regulation (however, this does not preclude the allowability of other legal activities of the Attorney General as described in §200.435); and

* * * * *

(b) For Indian tribes and Councils of Governments (COGs) (see definition for *Local government* in §200.1 of this part), up to 50% of salaries and expenses directly attributable to managing and operating Federal programs by the chief executive and his or her staff can be included in the indirect cost calculation without documentation.

■ 78. Amend §200.447 by revising paragraph (a)(4) to read as follows:

§200.447 Insurance and indemnification.

(a) * * *

(4) Costs of insurance on the lives of trustees, officers, or other employees holding positions of similar responsibilities are allowable only to the extent that the insurance represents additional compensation (see §200.431). The cost of such insurance when the non-Federal entity is identified as the beneficiary is unallowable.

* * * * *

■ 79. Amend §200.448 by revising paragraph (a)(1)(iii) to read as follows:

§200.448 Intellectual property.

(a) * * *

(1) * * *

(iii) General counseling services relating to patent and copyright matters, such as advice on patent and copyright laws, regulations, clauses, and employee intellectual property agreements (See also §200.459).

* * * * *

■ 80. Amend §200.449 by revising paragraphs (b)(1) and (c)(4) to read as follows:

§200.449 Interest.

* * * * *

(b) *Capital assets.* (1) Capital assets is defined as noted in §200.1 of this part. An asset cost includes (as applicable) acquisition costs, construction costs, and other costs capitalized in accordance with GAAP.

* * * * *

(c) * * *

(4) The non-Federal entity limits claims for Federal reimbursement of interest costs to the least expensive alternative. For example, a lease contract that transfers ownership by the end of the contract may be determined less costly than purchasing through other types of debt financing, in which case reimbursement must be limited to the amount of interest determined if leasing had been used.

* * * * *

■ 81. Amend §200.450 by revising paragraphs (a), (c)(2)(v) and (vi), (c)(2)(vii)(A) introductory text to read as follows:

§200.450 Lobbying.

(a) The cost of certain influencing activities associated with obtaining grants, contracts, or cooperative agreements, or loans is an unallowable cost. Lobbying with respect to certain grants, contracts, cooperative agreements, and loans is governed by relevant statutes, including among others, the provisions of 31 U.S.C. 1352, as well as the common rule, ''New Restrictions on Lobbying'' published on February 26, 1990, including definitions, and the Office of Management and Budget ''Governmentwide Guidance for New Restrictions on Lobbying'' and notices published on December 20, 1989, June 15, 1990, January 15, 1992, and January 19, 1996.

* * * * *

(c) * * *

(2) * * *

(v) When a non-Federal entity seeks reimbursement for indirect (F&A) costs, total lobbying costs must be separately identified in the indirect (F&A) cost rate proposal, and thereafter treated as other unallowable activity costs in accordance with the procedures of §200.413.

(vi) The non-Federal entity must submit as part of its annual indirect (F&A) cost rate proposal a certification that the requirements and standards of this section have been complied with.

(See also §200.415.)

(vii)(A) Time logs, calendars, or similar records are not required to be created for purposes of complying with the record keeping requirements in §200.302 with respect to lobbying costs during any particular calendar month when:

* * * * *

■ 82. Revise §200.452 to read as follows:

§200.452 Maintenance and repair costs.

Costs incurred for utilities, insurance, security, necessary maintenance, janitorial services, repair, or upkeep of buildings and equipment (including Federal property unless otherwise provided for) which neither add to the permanent value of the property nor appreciably prolong its intended life, but keep it in an efficient operating condition, are allowable. Costs incurred for improvements which add to the permanent value of the buildings and equipment or appreciably prolong their intended life must be treated as capital expenditures (see §200.439). These costs are only allowable to the extent not paid through rental or other agreements. ■ 83. Amend §200.454 by revising paragraph (e) to read as follows:

§200.454 Memberships, subscriptions, and professional activity costs.

* * * * *

(e) Costs of membership in organizations whose primary purpose is lobbying are unallowable. See also §200.450. ■ 84. Revise §200.456 to read as follows:

§200.456 Participant support costs.

Participant support costs as defined in §200.1 are allowable with the prior approval of the Federal awarding agency.

■ 85. Revise §200.457 to read as follows:

§200.457 Plant and security costs.

Necessary and reasonable expenses incurred for protection and security of facilities, personnel, and work products are allowable. Such costs include, but are not limited to, wages and uniforms of personnel engaged in security activities; equipment; barriers; protective (non-military) gear, devices, and equipment; contractual security services; and consultants. Capital expenditures for plant security purposes are subject to §200.439.

■ 86. Revise §200.458 to read as follows:

§200.458 Pre-award costs.

Pre-award costs are those incurred prior to the effective date of the Federal award or subaward directly pursuant to the negotiation and in anticipation of the Federal award where such costs are necessary for efficient and timely performance of the scope of work. Such costs are allowable only to the extent that they would have been allowable if incurred after the date of the Federal award and only with the written approval of the Federal awarding agency. If charged to the award, these costs must be charged to the initial budget period of the award, unless otherwise specified by the Federal awarding agency or pass-through entity.

■ 87. Amend §200.459 by revising paragraph (a) to read as follows:

§200.459 Professional service costs.

(a) Costs of professional and consultant services rendered by persons who are members of a particular profession or possess a special skill, and who are not officers or employees of the non-Federal entity, are allowable, subject to paragraphs (b) and (c) of this section when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Federal Government. In addition, legal and related services are limited under §200.435.

* * * * *

■ 88. Amend §200.461 by revising paragraph (b)(3) to read as follows:

§200.461 Publication and printing costs.

* * * * *

(b) * * *

(3) The non-Federal entity may charge the Federal award during closeout for the costs of publication or sharing of research results if the costs are not incurred during the period of performance of the Federal award. If charged to the award, these costs must be charged to the final budget period of the award, unless otherwise specified by the Federal awarding agency.

■ 89. Amend §200.463 by revising paragraph (c) to read as follows:

§200.463 Recruiting costs.

* * * * *

(c) Where relocation costs incurred incident to recruitment of a new employee have been funded in whole or in part to a Federal award, and the newly hired employee resigns for reasons within the employee's control within 12 months after hire, the non- Federal entity will be required to refund or credit the Federal share of such relocation costs to the Federal Government. See also §200.464.

* * * * *

■ 90. Amend §200.464 by revising paragraph (c) to read as follows:

§200.464 Relocation costs of employees.

* * * * *

(c) Allowable relocation costs for new employees are limited to those described in paragraphs (b)(1) and (2) of this section. When relocation costs incurred incident to the recruitment of new employees have been charged to a Federal award and the employee resigns for reasons within the employee's control within 12 months after hire, the non-Federal entity must refund or credit the Federal Government for its share of the cost. If dependents are not permitted at the location for any reason and the costs do not include costs of transporting household goods, the costs of travel to an overseas location must be considered travel costs in accordance with §200.474 Travel costs, and not this relocations costs of employees (See also §200.464).

* * * * *

■ 91. Amend §200.465 by adding paragraphs (d) through (f) to read as follows:

§200.465 Rental costs of real property and equipment.

* * * * *

(d) Rental costs under leases which are required to be accounted for as a financed purchase under GASB standards or a finance lease under FASB standards under GAAP are allowable only up to the amount (as explained in paragraph (b) of this section) that would be allowed had the non-Federal entity purchased the property on the date the lease agreement was executed. Interest costs related to these leases are allowable to the extent they meet the criteria in §200.449. Unallowable costs include amounts paid for profit, management fees, and taxes that would not have been incurred had the non- Federal entity purchased the property.

(e) Rental or lease payments are allowable under lease contracts where the non-Federal entity is required to recognize an intangible right-to-use lease asset (per GASB) or right of use operating lease asset (per FASB) for purposes of financial reporting in accordance with GAAP.

(f) The rental of any property owned by any individuals or entities affiliated with the non-Federal entity, to include commercial or residential real estate, for purposes such as the home office workspace is unallowable.

■ 92. Amend §200.466 by revising paragraph (b) to read as follows:

§200.466 Scholarships and student aid costs.

* * * * *

(b) Charges for tuition remission and other forms of compensation paid to students as, or in lieu of, salaries and wages must be subject to the reporting requirements in §200.430, and must be treated as direct or indirect cost in accordance with the actual work being performed. Tuition remission may be charged on an average rate basis. See also §200.431.

■ 93. Revise §200.467 to read as follows:

§200.467 Selling and marketing costs.

Costs of selling and marketing any products or services of the non-Federal entity (unless allowed under §200.421) are unallowable, except as direct costs, with prior approval by the Federal awarding agency when necessary for the performance of the Federal award.

■ 94. Amend §200.468 by revising paragraph (a) and (b)(2) to read as follows:

§200.468 Specialized service facilities.

(a) The costs of services provided by highly complex or specialized facilities operated by the non-Federal entity, such as computing facilities, wind tunnels, and reactors are allowable, provided the charges for the services meet the conditions of either paragraph (b) or (c) of this section, and, in addition, take into account any items of income or Federal financing that qualify as applicable credits under §200.406.

* * * * *

(b) * * *

(2) Is designed to recover only the aggregate costs of the services. The costs of each service must consist normally of both its direct costs and its allocable share of all indirect (F&A) costs. Rates must be adjusted at least biennially, and must take into consideration over/ under-applied costs of the previous period(s).

* * * * *

§§200.471 through 200.475 [Redesignated as §§200.472 through 200.476]

■ 95. Redesignate §§200.471 through 200.475 as §§200.472 through 200.476.

■ 96. Add new §200.471 to read as follows:

§200.471 Telecommunication costs and video surveillance costs

(a) Costs incurred for telecommunications and video surveillance services or equipment such as phones, internet, video surveillance, cloud servers are allowable except for the following circumstances:

(b) Obligating or expending covered telecommunications and video surveillance services or equipment or services as described in §200.216 to:

(1) Procure or obtain, extend or renew a contract to procure or obtain;

(2) Enter into a contract (or extend or renew a contract) to procure; or

(3) Obtain the equipment, services, or systems.

■ 97. Amend newly redesignated §200.472 by revising paragraphs (c)(2), (e)(1)(i), and (f) to read as follows:

§200.472 Termination costs.

* * * * *

(c) * * *

(2) The interest of the Federal Government is protected by transfer of title or by other means deemed appropriate by the Federal awarding agency (see also §200.313 (d)), and

* * * * *

(e) * * *

(1) * * *

(i) The preparation and presentation to the Federal awarding agency of settlement claims and supporting data with respect to the terminated portion of the Federal award, unless the termination is for cause (see subpart D, including §§200.339–200.343); and

* * * * *

(f) Claims under subawards, including the allocable portion of claims which are common to the Federal award and to other work of the non-Federal entity, are generally allowable. An appropriate share of the non-Federal entity's indirect costs may be allocated to the amount of settlements with contractors and/or subrecipients, provided that the amount allocated is otherwise consistent with the basic guidelines contained in §200.414. The indirect costs so allocated must exclude the same and similar costs claimed directly or indirectly as settlement expenses.

■ 98. Amend newly redesignated §200.475 by revising paragraphs (a) and (c)(2) to read as follows:

§200.475 Travel costs.

(a) *General.* Travel costs are the expenses for transportation, lodging, subsistence, and related items incurred by employees who are in travel status on official business of the non-Federal entity. Such costs may be charged on an actual cost basis, on a per diem or mileage basis in lieu of actual costs incurred, or on a combination of the two, provided the method used is applied to an entire trip and not to selected days of the trip, and results in charges consistent with those normally allowed in like circumstances in the non-Federal entity's non-federally- funded activities and in accordance with non-Federal entity's written travel reimbursement policies. Notwithstanding the provisions of §200.444, travel costs of officials covered by that section are allowable with the prior written approval of the Federal awarding agency or pass- through entity when they are specifically related to the Federal award.

* * * * *

(c) * * *

(2) Travel costs for dependents are unallowable, except for travel of duration of six months or more with prior approval of the Federal awarding agency. See also §200.432.

* * * * *

■ 99. Revise newly redesignated §200.476 to read as follows:

§200.476 Trustees.

Travel and subsistence costs of trustees (or directors) at IHEs and nonprofit organizations are allowable. See also §200.475.

Subpart F—Audit Requirements

■ 100. Amend §200.501 by revising paragraphs (b), (c), (d), (f), and (h) to read as follows:

§200.501 Audit requirements.

* * * * *

(b) *Single audit.* A non-Federal entity that expends $750,000 or more during the non-Federal entity's fiscal year in Federal awards must have a single audit conducted in accordance with §200.514 except when it elects to have a program- specific audit conducted in accordance with paragraph (c) of this section.

(c) *Program-specific audit election.* When an auditee expends Federal awards under only one Federal program (excluding R&D) and the Federal program's statutes, regulations, or the terms and conditions of the Federal award do not require a financial statement audit of the auditee, the auditee may elect to have a program- specific audit conducted in accordance with §200.507. A program-specific audit may not be elected for R&D unless all of the Federal awards expended were received from the same Federal agency, or the same Federal agency and the same pass-through entity, and that Federal agency, or pass-through entity in the case of a subrecipient, approves in advance a program-specific audit.

(d) *Exemption when Federal awards expended are less than $750,000.* A non-Federal entity that expends less than $750,000 during the non-Federal entity's fiscal year in Federal awards is exempt from Federal audit requirements for that year, except as noted in §200.503, but records must be available for review or audit by appropriate officials of the Federal agency, pass- through entity, and Government Accountability Office (GAO).

* * * * *

(f) *Subrecipients and contractors.* An auditee may simultaneously be a recipient, a subrecipient, and a contractor. Federal awards expended as a recipient or a subrecipient are subject to audit under this part. The payments received for goods or services provided as a contractor are not Federal awards. Section §200.331 sets forth the considerations in determining whether payments constitute a Federal award or a payment for goods or services provided as a contractor.

* * * * *

(h) *For-profit subrecipient.* Since this part does not apply to for-profit subrecipients, the pass-through entity is responsible for establishing requirements, as necessary, to ensure compliance by for-profit subrecipients. The agreement with the for-profit subrecipient must describe applicable compliance requirements and the for- profit subrecipient's compliance responsibility. Methods to ensure compliance for Federal awards made to for-profit subrecipients may include pre-award audits, monitoring during the agreement, and post-award audits. See also §200.332. ■ 101. Amend §200.503 by revising paragraph (e) to read as follows:

§200.503 Relation to other audit requirements.

* * * * *

(e) Request for a program to be audited as a major program. A Federal awarding agency may request that an auditee have a particular Federal program audited as a major program in lieu of the Federal awarding agency conducting or arranging for the additional audits. To allow for planning, such requests should be made at least 180 calendar days prior to the end of the fiscal year to be audited. The auditee, after consultation with its auditor, should promptly respond to such a request by informing the Federal awarding agency whether the program would otherwise be audited as a major program using the risk-based audit approach described in §200.518 and, if not, the estimated incremental cost. The Federal awarding agency must then promptly confirm to the auditee whether it wants the program audited as a major program. If the program is to be audited as a major program based upon this Federal awarding agency request, and the Federal awarding agency agrees to pay the full incremental costs, then the auditee must have the program audited as a major program. A pass- through entity may use the provisions of this paragraph for a subrecipient.

■ 102. Revise §200.505 to read as follows:

§200.505 Sanctions.

In cases of continued inability or unwillingness to have an audit conducted in accordance with this part, Federal agencies and pass-through entities must take appropriate action as provided in §200.339.

■ 103. Revise §200.506 to read as follows:

§200.506 Audit costs. See §200.425.

■ 104. Amend §200.507 by revising paragraphs (a), (b)(2), (b)(3)(ii) through (v), (b)(4)(iv), (c)(2) and (3), and (d)(8) to read as follows:

§200.507 Program-specific audits.

(a) *Program-specific audit guide available.* In some cases, a program- specific audit guide will be available to provide specific guidance to the auditor with respect to internal controls, compliance requirements, suggested audit procedures, and audit reporting requirements. A listing of current program-specific audit

guides can be found in the compliance supplement, Part 8, Appendix VI, Program-Specific Audit Guides, which includes a website where a copy of the guide can be obtained. When a current program- specific audit guide is available, the auditor must follow GAGAS and the guide when performing a program- specific audit.

* * * * *

(b) * * *

(2) The auditee must prepare the financial statement(s) for the Federal program that includes, at a minimum, a schedule of expenditures of Federal awards for the program and notes that describe the significant accounting policies used in preparing the schedule, a summary schedule of prior audit findings consistent with the requirements of §200.511(b), and a corrective action plan consistent with the requirements of §200.511(c).

(3) * * *

(ii) Obtain an understanding of internal controls and perform tests of internal controls over the Federal program consistent with the requirements of §200.514(c) for a major program;

(iii) Perform procedures to determine whether the auditee has complied with Federal statutes, regulations, and the terms and conditions of Federal awards that could have a direct and material effect on the Federal program consistent with the requirements of §200.514(d) for a major program;

(iv) Follow up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with the requirements of §200.511, and report, as a current year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding; and

(v) Report any audit findings consistent with the requirements of §200.516.

(4) * * *

(iv) A schedule of findings and questioned costs for the Federal program that includes a summary of the auditor's results relative to the Federal program in a format consistent with §200.515(d)(1) and findings and questioned costs consistent with the requirements of §200.515(d)(3).

(c) * * *

(2) When a program-specific audit guide is available, the auditee must electronically submit to the FAC the data collection form prepared in accordance with §200.512(b), as applicable to a program-specific audit, and the reporting required by the program-specific audit guide.

(3) When a program-specific audit guide is not available, the reporting package for a program-specific audit must consist of the financial statement(s) of the Federal program, a summary schedule of prior audit findings, and a corrective action plan as described in paragraph (b)(2) of this section, and the auditor's report(s) described in paragraph (b)(4) of this section. The data collection form prepared in accordance with §200.512(b), as applicable to a program-specific audit, and one copy of this reporting package must be electronically submitted to the FAC.

(d) * * *

(8) 200.521 Management decision; and

* * * * *

■ 105. Amend §200.508 by revising paragraphs (a), (b), and (c) to read as follows:

§200.508 Auditee responsibilities.

* * * * *

(a) Procure or otherwise arrange for the audit required by this part in accordance with §200.509, and ensure it is properly performed and submitted when due in accordance with §200.512.

(b) Prepare appropriate financial statements, including the schedule of expenditures of Federal awards in accordance with §200.510.

(c) Promptly follow up and take corrective action on audit findings, including preparation of a summary schedule of prior audit findings and a corrective action plan in accordance with §200.511(b) and (c), respectively.

* * * * *

■ 106. Amend §200.509 by revising paragraph (a) to read as follows:

§200.509 Auditor selection.

(a) *Auditor procurement.* In procuring audit services, the auditee must follow the procurement standards prescribed by the Procurement Standards in §§200.317 through 200.326 of subpart D of this part or the FAR (48 CFR part 42), as applicable. When procuring audit services, the objective is to obtain high- quality audits. In requesting proposals for audit services, the objectives and scope of the audit must be made clear and the non-Federal entity must request a copy of the audit organization's peer review report which the auditor is required to provide under GAGAS. Factors to be considered in evaluating each proposal for audit services include the responsiveness to the request for proposal, relevant experience, availability of staff with professional qualifications and technical abilities, the results of peer and external quality control reviews, and price. Whenever possible, the auditee must make positive efforts to utilize small businesses, minority-owned firms, and women's business enterprises, in procuring audit services as stated in §200.321, or the FAR (48 CFR part 42), as applicable.

* * * * *

■ 107. Amend §200.510 by revising paragraphs (a), (b) introductory text, and (b)(3), (5), and (6) to read as follows:

§200.510 Financial statements.

(a) *Financial statements.* The auditee must prepare financial statements that reflect its financial position, results of operations or changes in net assets, and, where appropriate, cash flows for the fiscal year audited. The financial statements must be for the same organizational unit and fiscal year that is chosen to meet the requirements of this part. However, non-Federal entity-wide financial statements may also include departments, agencies, and other organizational units that have separate audits in accordance with §200.514(a) and prepare separate financial statements.

(b) *Schedule of expenditures of Federal awards.* The auditee must also prepare a schedule of expenditures of Federal awards for the period covered by the auditee's financial statements which must include the total Federal awards expended as determined in accordance with §200.502. While not required, the auditee may choose to provide information requested by Federal awarding agencies and pass- through entities to make the schedule easier to use. For example, when a Federal program has multiple Federal award years, the auditee may list the amount of Federal awards expended for each Federal award year separately. At a minimum, the schedule must:

* * * * *

(3) Provide total Federal awards expended for each individual Federal program and the Assistance Listings Number or other identifying number when the Assistance Listings information is not available. For a cluster of programs also provide the total for the cluster.

* * * * *

(5) For loan or loan guarantee programs described in §200.502(b), identify in the notes to the schedule the balances outstanding at the end of the audit period. This is in addition to including the total Federal awards expended for loan or loan guarantee programs in the schedule.

(6) Include notes that describe that significant accounting policies used in preparing the schedule, and note whether or not the auditee elected to use the 10% de minimis cost rate as covered in §200.414.

■ 108. Amend §200.511 by revising paragraphs (a) and (c) to read as follows:

§200.511 Audit findings follow-up.

(a) *General.* The auditee is responsible for follow-up and corrective action on all audit findings. As part of this responsibility, the auditee must prepare a summary schedule of prior audit findings. The auditee must also prepare a corrective action plan for current year audit findings. The summary schedule

of prior audit findings and the corrective action plan must include the reference numbers the auditor assigns to audit findings under §200.516(c). Since the summary schedule may include audit findings from multiple years, it must include the fiscal year in which the finding initially occurred. The corrective action plan and summary schedule of prior audit findings must include findings relating to the financial statements which are required to be reported in accordance with GAGAS.

* * * * *

(c) *Corrective action plan.* At the completion of the audit, the auditee must prepare, in a document separate from the auditor's findings described in §200.516, a corrective action plan to address each audit finding included in the current year auditor's reports. The corrective action plan must provide the name(s) of the contact person(s) responsible for corrective action, the corrective action planned, and the anticipated completion date. If the auditee does not agree with the audit findings or believes corrective action is not required, then the corrective action plan must include an explanation and specific reasons.

■ 109. Amend §200.512 by revising paragraphs (b) introductory text, (b)(1), (c)(1) through (4), and (g) to read as follows:

§200.512 Report submission.

* * * * *

(b) *Data collection.* The FAC is the repository of record for subpart F of this part reporting packages and the data collection form. All Federal agencies, pass-through entities and others interested in a reporting package and data collection form must obtain it by accessing the FAC.

(1) The auditee must submit required data elements described in Appendix X to Part 200, which state whether the audit was completed in accordance with this part and provides information about the auditee, its Federal programs, and the results of the audit. The data must include information available from the audit required by this part that is necessary for Federal agencies to use the audit to ensure integrity for Federal programs. The data elements and format must be approved by OMB, available from the FAC, and include collections of information from the reporting package described in paragraph (c) of this section. A senior level representative of the auditee (*e.g.,* state controller, director of finance, chief executive officer, or chief financial officer) must sign a statement to be included as part of the data collection that says that the auditee complied with the requirements of this part, the data were prepared in accordance with this part (and the instructions accompanying the form), the reporting package does not include protected personally identifiable information, the information included in its entirety is accurate and complete, and that the FAC is authorized to make the reporting package and the form publicly available on a website.

* * * * *

(c) * * *

(1) Financial statements and schedule of expenditures of Federal awards discussed in §200.510(a) and (b), respectively;

(2) Summary schedule of prior audit findings discussed in §200.511(b);

(3) Auditor's report(s) discussed in §200.515; and

(4) Corrective action plan discussed in §200.511(c).

* * * * *

(g) *FAC responsibilities.* The FAC must make available the reporting packages received in accordance with paragraph (c) of this section and §200.507(c) to the public, except for
Indian tribes exercising the option in (b)(2) of this section, and maintain a data base of completed audits, provide appropriate information to Federal agencies, and follow up with known auditees that have not submitted the required data collection forms and reporting packages.

* * * * *

■ 110. Amend §200.513 by revising paragraphs (a)(1) and (2), (a)(3)(ii) and (vii), (b) introductory text, (c) introductory text, and (c)(3)(i) and (iii) to read as follows:

§200.513 Responsibilities.

(a)(1) *Cognizant agency for audit responsibilities.* A non-Federal entity expending more than $50 million a year in Federal awards must have a cognizant agency for audit. The designated cognizant agency for audit must be the Federal awarding agency that provides the predominant amount of funding directly (direct funding) (as listed on the Schedule of expenditures of Federal awards, see §200.510(b)) to a non-Federal entity unless OMB designates a specific cognizant agency for audit. When the direct funding represents less than 25 percent of the total expenditures (as direct and subawards) by the non-Federal entity, then the Federal agency with the predominant amount of total funding is the designated cognizant agency for audit.

(2) To provide for continuity of cognizance, the determination of the predominant amount of direct funding must be based upon direct Federal awards expended in the non-Federal entity's fiscal years ending in 2019, and every fifth year thereafter.

(3) * * *

(ii) Obtain or conduct quality control reviews on selected audits made by non-Federal auditors, and provide the results to other interested organizations. Cooperate and provide support to the Federal agency designated by OMB to lead a governmentwide project to determine the quality of single audits by providing a reliable estimate of the extent that single audits conform to applicable requirements, standards, and procedures; and to make recommendations to address noted audit quality issues, including recommendations for any changes to applicable requirements, standards and procedures indicated by the results of the project. The governmentwide project can rely on the current and on-going quality control review work performed by the agencies, State auditors, and professional audit associations. This governmentwide audit quality project must be performed once every 6 years (or at such other interval as determined by OMB), and the results must be public.

* * * * *

(vii) Coordinate a management decision for cross-cutting audit findings (see in §200.1 of this part) that affect the Federal programs of more than one agency when requested by any Federal awarding agency whose awards are included in the audit finding of the auditee.

* * * * *

(b) *Oversight agency for audit responsibilities.* An auditee who does not have a designated cognizant agency for audit will be under the general oversight of the Federal agency determined in accordance with §200.1 *oversight agency for audit.* A Federal agency with oversight for an auditee may reassign oversight to another Federal agency that agrees to be the oversight agency for audit. Within 30 calendar days after any reassignment, both the old and the new oversight agency for audit must provide notice of the change to the FAC, the auditee, and, if known, the auditor. The oversight agency for audit:

* * * * *

(c) *Federal awarding agency responsibilities.* The Federal awarding agency must perform the following for the Federal awards it makes (See also the requirements of §200.211):

(3) * * *

(i) Issue a management decision as prescribed in §200.521;

* * * * *

(iii) Use cooperative audit resolution mechanisms (see the definition of *cooperative audit resolution* in §200.1 of this part) to improve Federal program outcomes through better audit resolution, follow-up, and corrective action; and

* * * * *

■ 111. Amend §200.514 by revising paragraphs (d)(4), (e), and (f) to read as follows:

§200.514 Scope of audit.

* * * * *

(d) * * *

(4) When internal control over some or all of the compliance requirements for a major program are likely to be ineffective in preventing or detecting noncompliance, the planning and performing of testing described in paragraph (c)(3) of this section are not required for those compliance requirements. However, the auditor must report a significant deficiency or material weakness in accordance with §200.516, assess the related control risk at the

(e) *Audit follow-up.* The auditor must follow-up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with §200.511(b), and report, as a current year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding. The auditor must perform audit follow-up procedures regardless of whether a prior audit finding relates to a major program in the current year.

(f) *Data collection form.* As required in §200.512(b)(3), the auditor must complete and sign specified sections of the data collection form.

■ 112. Amend §200.515 by revising paragraphs (a), (d)(1)(vi) through (ix), (d)(3), and (e) to read as follows:

§200.515 Audit reporting.

* * * * *

(a) *Financial statements.* The auditor must determine and provide an opinion (or disclaimer of opinion) whether the financial statements of the auditee are presented fairly in all materials respects in accordance with generally accepted accounting principles (or a special purpose framework such as cash, modified cash, or regulatory as required by state law). The auditor must also decide whether the schedule of expenditures of Federal awards is stated fairly in all material respects in relation to the auditee's financial statements as a whole.

* * * * *

(d) * * *

(1) * * *

(vi) A statement as to whether the audit disclosed any audit findings that the auditor is required to report under §200.516(a);

(vii) An identification of major programs by listing each individual major program; however, in the case of a cluster of programs, only the cluster name as shown on the Schedule of Expenditures of Federal Awards is required;

(viii) The dollar threshold used to distinguish between Type A and Type B programs, as described in §200.518(b)(1) or (3) when a recalculation of the Type A threshold is required for large loan or loan guarantees; and

(ix) A statement as to whether the auditee qualified as a low-risk auditee under §200.520.

* * * * *

(3) Findings and questioned costs for Federal awards which must include audit findings as defined in §200.516(a).

* * * * *

(e) Nothing in this part precludes combining of the audit reporting required by this section with the reporting required by §200.512(b) when allowed by GAGAS and appendix X to this part.

■ 113. Amend §200.516 by revising paragraphs (a)(1) and (7), (b)(1) and (6), and (c) to read as follows:

§200.516 Audit findings.

(a) * * *

(1) Significant deficiencies and material weaknesses in internal control over major programs and significant instances of abuse relating to major programs. The auditor's determination of whether a deficiency in internal control is a significant deficiency or a material weakness for the purpose of reporting an audit finding is in relation to a type of compliance requirement for a major program identified in the Compliance Supplement.

* * * * *

(7) Instances where the results of audit follow-up procedures disclosed that the summary schedule of prior audit findings prepared by the auditee in accordance with §200.511(b) materially misrepresents the status of any prior audit finding.

(b) * * *

(1) Federal program and specific Federal award identification including the Assistance Listings title and number, Federal award identification number and year, name of Federal agency, and name of the applicable pass-through entity. When information, such as the Assistance Listings title and number or Federal award identification number, is not available, the auditor must provide the best information available to describe the Federal award.

* * * * *

(6) Identification of questioned costs and how they were computed. Known questioned costs must be identified by applicable Assistance Listings number(s) and applicable Federal award identification number(s).

* * * * *

(c) *Reference numbers.* Each audit finding in the schedule of findings and questioned costs must include a reference number in the format meeting the requirements of the data collection form submission required by §200.512(b) to allow for easy referencing of the audit findings during follow-up. ■ 114. Amend §200.518 by revising paragraphs (b)(3) and (4), (c)(1) introductory text, (c)(1)(i) and (ii), (d)(1), and (f) to read as follows:

§200.518 Major program determination.

* * * * *

(b) * * *

(3) The inclusion of large loan and loan guarantees (loans) must not result in the exclusion of other programs as Type A programs. When a Federal program providing loans exceeds four times the largest non-loan program it is considered a large loan program, and the auditor must consider this Federal program as a Type A program and exclude its values in determining other Type A programs. This recalculation of the Type A program is performed after removing the total of all large loan programs. For the purposes of this paragraph a program is only considered to be a Federal program providing loans if the value of Federal awards expended for loans within the program comprises fifty percent or more of the total Federal awards expended for the program. A cluster of programs is treated as one program and the value of Federal awards expended under a loan program is determined as described in §200.502.

(4) For biennial audits permitted under §200.504, the determination of Type A and Type B programs must be based upon the Federal awards expended during the two-year period.

(c) * * *

(1) The auditor must identify Type A programs which are low-risk. In making this determination, the auditor must consider whether the requirements in §200.519(c), the results of audit follow- up, or any changes in personnel or systems affecting the program indicate significantly increased risk and preclude the program from being low risk. For a Type A program to be considered low-risk, it must have been audited as a major program in at least one of the two most recent audit periods (in the most recent audit period in the case of a biennial audit), and, in the most recent audit period, the program must have not had:

(i) Internal control deficiencies which were identified as material weaknesses in the auditor's report on internal control for major programs as required under §200.515(c);

(ii) A modified opinion on the program in the auditor's report on major programs as required under §200.515(c); or

* * * * *

(d) * * *

(1) The auditor must identify Type B programs which are high-risk using professional judgment and the criteria in §200.519. However, the auditor is not required to identify more high-risk Type B programs than at least one fourth the number of low-risk Type A programs identified as low-risk under Step 2 (paragraph (c) of this section). Except for known material weakness in internal control or compliance problems as

discussed in §200.519(b)(1) and (2) and (c)(1), a single criterion in risk would seldom cause a Type B program to be considered high-risk. When identifying which Type B programs to risk assess, the auditor is encouraged to use an approach which provides an opportunity for different high-risk Type B programs to be audited as major over a period of time.

* * * * *

(f) *Percentage of coverage rule.* If the auditee meets the criteria in §200.520, the auditor need only audit the major programs identified in Step 4 (paragraphs (e)(1) and (2) of this section) and such additional Federal programs with Federal awards expended that, in aggregate, all major programs encompass at least 20 percent (0.20) of total Federal awards expended. Otherwise, the auditor must audit the major programs identified in Step 4 (paragraphs (e)(1) and (2) of this section) and such additional Federal programs with Federal awards expended that, in aggregate, all major programs encompass at least 40 percent (0.40) of total Federal awards expended.

* * * * *

■ 115. Amend §200.519 by revising paragraph (d)(1) to read as follows:

§200.519 Criteria for Federal program risk.

* * * * *

(d) * * *

(1) The nature of a Federal program may indicate risk. Consideration should be given to the complexity of the program and the extent to which the Federal program contracts for goods and services. For example, Federal programs that disburse funds through third-party contracts or have eligibility criteria may be of higher risk. Federal programs primarily involving staff payroll costs may have high risk for noncompliance with requirements of §200.430, but otherwise be at low risk.

* * * * *

■ 116. Amend §200.520 by revising the introductory text and paragraphs (a) and (e)(1) and (2) to read as follows:

§200.520 Criteria for a low-risk auditee.

An auditee that meets all of the following conditions for each of the preceding two audit periods must qualify as a low-risk auditee and be eligible for reduced audit coverage in accordance with §200.518.

(a) Single audits were performed on an annual basis in accordance with the provisions of this Subpart, including submitting the data collection form and the reporting package to the FAC within the timeframe specified in §200.512. A non-Federal entity that has biennial audits does not qualify as a low-risk auditee.

* * * * *

(e) * * *

(1) Internal control deficiencies that were identified as material weaknesses in the auditor's report on internal control for major programs as required under §200.515(c);

(2) A modified opinion on a major program in the auditor's report on major programs as required under §200.515(c); or

* * * * *

■ 117. Amend §200.521 by revising paragraph (b), (c), and (e) to read as follows:

§200.521 Management decision.

* * * * *

(b) *Federal agency.* As provided in §200.513(a)(3)(vii), the cognizant agency for audit must be responsible for coordinating a management decision for audit findings that affect the programs of more than one Federal agency. As provided in §200.513(c)(3)(i), a Federal awarding agency is responsible for issuing a management decision for findings that relate to Federal awards it makes to non-Federal entities.

(c) *Pass-through entity.* As provided in §200.332(d), the pass-through entity must be responsible for issuing a management decision for audit findings that relate to Federal awards it makes to subrecipients.

* * * * *

(e) *Reference numbers.* Management decisions must include the reference numbers the auditor assigned to each audit finding in accordance with §200.516(c).

■ 118. Amend appendix I to part 200 by revising sections A, B, C paragraph 2, D paragraphs 3 through 5, E paragraph 3 introductory text, E paragraph 3.iii, and F paragraphs 1 and 3 to read as follows:

Appendix I to Part 200—Full Text of Notice of Funding Opportunity

* * * * *

A. Program Description—Required

This section contains the full program description of the funding opportunity. It may be as long as needed to adequately communicate to potential applicants the areas in which funding may be provided. It describes the Federal awarding agency's funding priorities or the technical or focus areas in which the Federal awarding agency intends to provide assistance. As appropriate, it may include any program history (*e.g.,* whether this is a new program or a new or changed area of program emphasis). This section must include program goals and objectives, a reference to the relevant Assistance Listings, a description of how the award will contribute to the achievement of the program's goals and objectives, and the expected performance goals, indicators, targets, baseline data, data collection, and other outcomes such Federal awarding agency expects to achieve, and may include examples of successful projects that have been funded previously. This section also may include other information the Federal awarding agency deems necessary, and must at a minimum include citations for authorizing statutes and regulations for the funding opportunity.

B. Federal Award Information—Required

This section provides sufficient information to help an applicant make an informed decision about whether to submit a proposal. Relevant information could include the total amount of funding that the Federal awarding agency expects to award through the announcement; the expected performance indicators, targets, baseline data, and data collection; the anticipated number of Federal awards; the expected amounts of individual Federal awards (which may be a range); the amount of funding per Federal award, on average, experienced in previous years; and the anticipated start dates and periods of performance for new Federal awards. This section also should address whether applications for renewal or supplementation of existing projects are eligible to compete with applications for new Federal awards. This section also must indicate the type(s) of assistance instrument (*e.g.,* grant, cooperative agreement) that may be awarded if applications are successful. If cooperative agreements may be awarded, this section either should describe the ''substantial involvement'' that the Federal awarding agency expects to have or should reference where the potential applicant can find that information (*e.g.,* in the funding opportunity description in Section A. or Federal award administration information in Section D. If procurement contracts also may be awarded, this must be stated.

C. Eligibility Information

* * * * *

2. *Cost Sharing or Matching— Required.* Announcements must state whether there is required cost sharing, matching, or cost participation without which an application would be ineligible (if cost sharing is not required, the announcement must explicitly say so). Required cost sharing may be a certain percentage or amount, or may be in the form of contributions of specified items or activities (*e.g.,* provision of equipment). It is important that the announcement be clear about any restrictions on the types of cost (*e.g.,* in- kind contributions) that are acceptable as cost sharing. Cost sharing as an eligibility criterion includes requirements based in statute or regulation, as described in §200.306 of this Part. This section should refer to the appropriate portion(s) of section D. stating any pre-award requirements for submission of letters or other documentation to verify commitments to meet cost-sharing requirements if a Federal award is made.

* * * * *

D. Application and Submission Information

* * * * *

3. *Unique entity identifier and System for Award Management (SAM)— Required.* This paragraph must state clearly that each applicant (unless the applicant is an individual or Federal awarding agency that is excepted from those requirements under 2 CFR 25.110(b) or (c), or has an exception approved by the Federal awarding agency under 2 CFR 25.110(d)) is required to: (i) Be registered in SAM before submitting its application; (ii) Provide a valid unique entity identifier in its application; and (iii) Continue to maintain an active SAM registration with current information at all times during which it has an active Federal award or an application or plan under consideration by a Federal awarding agency. It also must state that the Federal awarding agency may not make a Federal award to an applicant until the applicant has complied with all applicable unique entity identifier and SAM requirements and, if an applicant has not fully complied with the requirements by the time the Federal awarding agency is ready to make a Federal award, the Federal awarding agency may determine that the applicant is not qualified to receive a Federal award and use that determination as a basis for making a Federal award to another applicant.

4. *Submission Dates and Times—Required.* Announcements must identify due dates and times for all submissions. This includes not only the full applications but also any preliminary submissions (*e.g.*, letters of intent, white papers, or pre- applications). It also includes any other submissions of information before Federal award that are separate from the full application. If the funding opportunity is a general announcement that is open for a period of time with no specific due dates for applications, this section should say so. Note that the information on dates that is included in this section also must appear with other overview information in a location preceding the full text of the announcement (see §200.204 of this part).

5. *Intergovernmental Review—Required, if applicable.* If the funding opportunity is subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' the notice must say so and applicants must contact their state's Single Point of Contact (SPOC) to find out about and comply with the state's process under Executive Order 12372, it may be useful to inform potential applicants that the names and addresses of the SPOCs are listed in the Office of Management and Budget's website.

* * * * *

E. Application Review Information

* * * * *

3. For any Federal award under a notice of funding opportunity, if the Federal awarding agency anticipates that the total Federal share will be greater than the simplified acquisition threshold on any Federal award under a notice of funding opportunity may include, over the period of performance, this section must also inform applicants:

* * * * *

iii. That the Federal awarding agency will consider any comments by the applicant, in addition to the other information in the designated integrity and performance system, in making a judgment about the applicant's integrity, business ethics, and record of performance under Federal awards when completing the review of risk posed by applicants as described in §200.206.

* * * * *

F. Federal Award Administration Information

1. Federal Award Notices—Required. This section must address what a successful applicant can expect to receive following selection. If the Federal awarding agency's practice is to provide a separate notice stating that an application has been selected before it actually makes the Federal award, this section would be the place to indicate that the letter is not an authorization to begin performance (to the extent that it allows charging to Federal awards of pre-award costs at the non-Federal entity's own risk). This section should indicate that the notice of Federal award signed by the grants officer (or equivalent) is the authorizing document, and whether it is provided through postal mail or by electronic means and to whom. It also may address the timing, form, and content of notifications to unsuccessful applicants. See also §200.211.

* * * * *

3. *Reporting—Required.* This section must include general information about the type (*e.g.*, financial or performance), frequency, and means of submission (paper or electronic) of post-Federal award reporting requirements. Highlight any special reporting requirements for Federal awards under this funding opportunity that differ (*e.g.*, by report type, frequency, form/format, or circumstances for use) from what the Federal awarding agency's Federal awards usually require. Federal awarding agencies must also describe in this section all relevant requirements such as those at 2 CFR 180.335 and 180.350.

If the Federal share of any Federal award may include more than $500,000 over the period of performance, this section must inform potential applicants about the post award reporting requirements reflected in appendix XII to this part.

* * * * *

■ 119. Amend appendix II to part 200 by revising paragraphs (A) and (J) and adding paragraphs (K) and (L) to read as follows:

Appendix II to Part 200—Contract Provisions for Non-Federal Entity Contracts Under Federal Awards

* * * * *

(A) Contracts for more than the simplified acquisition threshold, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

* * * * *

(J) See §200.323.

(K) See §200.216. (L) See §200.322.

■ 120. Amend appendix III to part 200:

■ a. Under section A by revising the introductory text and paragraphs 1.d introductory text, 2.b, 2.d(4) introductory text, 2.d.(4)(b), 2.d.(5), and 2.e.(1); and

■ b. Under section B by revising paragraphs 1, 2.a and b introductory text, 3, 4.c.(2)(ii)B, 5.a, 6.a.(2)(a), 6.b.(1), 8.a., and 9.a; ■ c. Under section C by revising paragraphs 1.a.(1) and (3), 2., 7, 8.a., 9.a., 11.a. introductory text, 11.a.(1), 11.a.(2)b;

■ d. By revising section E;

■ e. Under section F by revising paragraph 2.c.

The revisions read as follows:

Appendix III to Part 200—Indirect (F&A) Costs Identification and Assignment, and Rate Determination for Institutions of Higher Education (IHEs)

A. General

This appendix provides criteria for identifying and computing indirect (or indirect (F&A)) rates at IHEs (institutions). Indirect (F&A) costs are those that are incurred for common or joint objectives and therefore cannot be identified readily and specifically with a particular sponsored project, an instructional activity, or any other institutional activity. See subsection B.1 for a discussion of the components of indirect (F&A) costs.

1. Major Functions of an Institution

* * * * *

d. *Other institutional activitie*s means all activities of an institution except for instruction, departmental research, organized research, and other sponsored activities, as defined in this section; indirect (F&A) cost activities identified in this Appendix paragraph B, Identification and assignment of indirect (F&A) costs; and specialized services facilities described in §200.468 of this part.

* * * * *

2. Criteria for Distribution

* * * * *

b. *Need for cost groupings.* The overall objective of the indirect (F&A) cost allocation process is to distribute the indirect (F&A) costs described in Section B, Identification and assignment of indirect (F&A) costs, to the major functions of the institution in proportions reasonably consistent with the nature and extent of their use of the institution's resources. In order to achieve this objective, it may be necessary to provide for selective distribution by establishing separate groupings of cost within one or more of the indirect (F&A) cost categories referred to in subsection B.1. In general, the cost groupings established within a category should constitute, in each case, a pool of those items of expense that are considered to be of like nature in terms of their relative contribution to (or degree of remoteness from) the particular cost objectives to which distribution is appropriate. Cost groupings should be established considering the general guides provided in subsection c of this section. Each such pool or cost grouping should then be distributed individually to the related cost objectives, using the distribution base or method most appropriate in light of the guidelines set forth in subsection d of this section.

* * * * *

d. * * *

(4) If a cost analysis study is not performed, or if the study does not result in an equitable distribution of the costs, the distribution must be made in accordance with the appropriate base cited in Section B, unless one of the following conditions is met:

* * * * *

(b) The institution qualifies for, and elects to use, the simplified method for computing indirect (F&A) cost rates described in Section D.

(5) Notwithstanding subsection (3), effective July 1, 1998, a cost analysis or base other than that in Section B must not be used to distribute utility or

student services costs. Instead, subsection B.4.c, may be used in the recovery of utility costs.

e. * * *

(1) Indirect (F&A) costs are the broad categories of costs discussed in Section B.1.

* * * * *

B. Identification and Assignment of Indirect (F&A) Costs

1. Definition of Facilities and Administration

See §200.414 which provides the basis for these indirect cost requirements.

2. Depreciation

a. The expenses under this heading are the portion of the costs of the institution's buildings, capital improvements to land and buildings, and equipment which are computed in accordance with §200.436.

b. In the absence of the alternatives provided for in Section A.2.d, the expenses included in this category must be allocated in the following manner:

3. Interest

Interest on debt associated with certain buildings, equipment and capital improvements, as defined in §200.449, must be classified as an expenditure under the category Facilities. These costs must be allocated in the same manner as the depreciation on the buildings, equipment and capital improvements to which the interest relates.

4. Operation and Maintenance Expenses

* * * * *

c. * * * (2) *

* *

(ii) * * *

B. In July 2012, values for these two indices (taken respectively from the Lawrence Berkeley Laboratory ''Labs for the 21st Century'' benchmarking tool and the US Department of Energy ''Buildings Energy Databook'' and were 310 kBtu/sq ft-yr. and 155 kBtu/sq ft-yr., so that the adjustment ratio is 2.0 by this methodology. To retain currency, OMB will adjust the EUI numbers from time to time (no more often than annually nor less often than every 5 years), using reliable and publicly disclosed data. Current values of both the EUIs and the REUI will be posted on the OMB website.

5. General Administration and General Expenses

a. The expenses under this heading are those that have been incurred for the general executive and administrative offices of educational institutions and other expenses of a general character which do not relate solely to any major function of the institution; *i.e.,* solely to (1) instruction, (2) organized research, (3) other sponsored activities, or (4) other institutional activities. The general administration and general expense category should also include its allocable share of fringe benefit costs, operation and maintenance expense, depreciation, and interest costs. Examples of general administration and general expenses include: Those expenses incurred by administrative offices that serve the entire university system of which the institution is a part; central offices of the institution such as the President's or Chancellor's office, the offices for institution-wide financial management, business services, budget and planning, personnel management, and safety and risk management; the office of the General Counsel; and the operations of the central administrative management information systems. General administration and general expenses must not include expenses incurred within non-university-wide deans' offices, academic departments, organized research units, or similar organizational units. (See subsection 6.)

* * * * *

6. Departmental Administration Expenses

a. * * * (2) *

* *

(a) Salaries and fringe benefits attributable to the administrative work (including bid and proposal preparation) of faculty (including department heads) and other professional personnel conducting research and/or instruction, must be allowed at a rate of 3.6 percent of modified total direct costs. This category does not include professional business or professional administrative officers. This allowance must be added to the computation of the indirect (F&A) cost rate for major functions in Section C; the expenses covered by the allowance must be excluded from the departmental administration cost pool. No documentation is required to support this allowance.

* * * * *

b. The following guidelines apply to the determination of departmental administrative costs as direct or indirect (F&A) costs.

(1) In developing the departmental administration cost pool, special care should be exercised to ensure that costs incurred for the same purpose in like circumstances are treated consistently as either direct or indirect (F&A) costs.

For example, salaries of technical staff, laboratory supplies (*e.g.,* chemicals), telephone toll charges, animals, animal care costs, computer costs, travel costs, and specialized shop costs must be treated as direct costs wherever identifiable to a particular cost objective. Direct charging of these costs may be accomplished through specific identification of individual costs to benefitting cost objectives, or through recharge centers or specialized service facilities, as appropriate under the circumstances. See §§200.413(c) and 200.468.

* * * * *

8. Library Expenses

a. The expenses under this heading are those that have been incurred for the operation of the library, including the cost of books and library materials purchased for the library, less any items of library income that qualify as applicable credits under §200.406. The library expense category should also include the fringe benefits applicable to the salaries and wages included therein, an appropriate share of general administration and general expense, operation and maintenance expense, and depreciation. Costs

incurred in the purchases of rare books (museum-type books) with no value to Federal awards should not be allocated to them.

* * * * *

9. Student Administration and Services

a. The expenses under this heading are those that have been incurred for the administration of student affairs and for services to students, including expenses of such activities as deans of students, admissions, registrar, counseling and placement services, student advisers, student health and infirmary services, catalogs, and commencements and convocations. The salaries of members of the academic staff whose responsibilities to the institution require administrative work that benefits sponsored projects may also be included to the extent that the portion charged to student administration is determined in accordance with subpart E of this Part. This expense category also includes the fringe benefit costs applicable to the salaries and wages included therein, an appropriate share of general administration and general expenses, operation and maintenance, interest expense, and depreciation.

* * * * *

C. Determination and Application of Indirect (F&A) Cost Rate or Rates

1. Indirect (F&A) Cost Pools

a. (1) Subject to subsection b, the separate categories of indirect (F&A) costs allocated to each major function of the institution as prescribed in Section B, must be aggregated and treated as a common pool for that function. The amount in each pool must be divided by the distribution base described in subsection 2 to arrive at a single indirect (F&A) cost rate for each function.

* * * * *

(3) Each institution's indirect (F&A) cost rate process must be appropriately designed to ensure that Federal sponsors do not in any way subsidize the indirect (F&A) costs of other sponsors, specifically activities sponsored by industry and foreign governments. Accordingly, each allocation method used to identify and allocate the indirect (F&A) cost pools, as described in Sections A.2 and B.2 through B.9, must contain the full amount of the institution's modified total costs or other appropriate units of measurement used to make the computations. In addition, the final rate distribution base (as defined in subsection 2) for each major function (organized research, instruction, etc., as described in Section A.1 functions of an institution) must contain all the programs or activities which utilize the indirect (F&A) costs allocated to that major function. At the time an indirect (F&A) cost proposal is submitted to a cognizant agency for indirect costs, each institution must describe the process it uses to ensure that Federal funds are not used to subsidize industry and foreign government funded programs.

2. The Distribution Basis

Indirect (F&A) costs must be distributed to applicable Federal awards and other benefitting activities within each major function (see section A.1) on the basis of modified total direct costs (MTDC), consisting of all salaries and wages, fringe benefits, materials and supplies, services, travel, and up to the first $25,000 of each subaward (regardless of the period covered by the subaward). MTDC is defined in §200.1. For this purpose, an indirect (F&A) cost rate should be determined for each of the separate indirect (F&A) cost pools developed pursuant to subsection 1. The rate in each case should be stated as the percentage which the amount of the particular indirect (F&A) cost pool is of the modified total direct costs identified with such pool.

* * * * *

7. Fixed Rates for the Life of the Sponsored Agreement

a. Except as provided in paragraph (c)(1) of §200.414, Federal agencies must use the negotiated rates in effect at the time of the initial award throughout the life of the Federal award. Award levels for Federal awards may not be adjusted in future years as a result of changes in negotiated rates. ''Negotiated rates'' per the rate agreement include final, fixed, and predetermined rates and exclude provisional rates. ''Life'' for the purpose of this subsection means each competitive segment of a project. A competitive segment is a period of years approved by the Federal awarding agency at the time of the Federal award. If negotiated rate agreements do not extend through the life of the Federal award at the time of the initial award, then the negotiated rate for the last year of the Federal award must be extended through the end of the life of the Federal award.

b. Except as provided in §200.414, when an educational institution does not have a negotiated rate with the Federal Government at the time of an award (because the educational institution is a new recipient or the parties cannot reach agreement on a rate), the provisional rate used at the time of the award must be adjusted once a rate is negotiated and approved by the cognizant agency for indirect costs.

8. Limitation on Reimbursement of Administrative Costs

a. Notwithstanding the provisions of subsection C.1.a, the administrative costs charged to Federal awards awarded or amended (including continuation and renewal awards) with effective dates beginning on or after the start of the institution's first fiscal year which begins on or after October 1, 1991, must be limited to 26% of modified total direct costs (as defined in subsection 2) for the total of General Administration and General Expenses, Departmental Administration, Sponsored Projects Administration, and Student Administration and Services (including their allocable share of depreciation, interest costs, operation and maintenance expenses, and fringe benefits costs, as provided by Section B, and all other types of expenditures not listed specifically under one of the subcategories of facilities in Section B.

* * * * *

9. Alternative Method for Administrative Costs

a. Notwithstanding the provisions of subsection C.1.a, an institution may elect to claim a fixed allowance for the ''Administration'' portion of indirect (F&A) costs. The allowance could be either 24% of modified total direct costs or a percentage equal to 95% of the most recently negotiated fixed or predetermined rate for the cost pools included under ''Administration'' as defined in Section B.1, whichever is less. Under this alternative, no cost proposal need be prepared for the ''Administration'' portion of the indirect (F&A) cost rate nor is further identification or documentation of these costs required (see subsection c). Where a negotiated indirect (F&A) cost agreement includes this alternative, an institution must make no further charges for the expenditure categories described in Section B.5, Section B.6, Section B.7, and Section B.9.

* * * * *

11. Negotiation and Approval of Indirect (F&A) Rate

a. Cognizant agency for indirect costs is defined in Subpart A.

(1) Cost negotiation cognizance is assigned to the Department of Health and Human Services (HHS) or the Department of Defense's Office of Naval Research (DOD), normally depending on which of the two agencies (HHS or DOD) provides more funds directly to the educational institution for the most recent three years. Information on funding must be derived from relevant data gathered by the National Science Foundation. In cases where neither HHS nor DOD provides Federal funding directly to an educational institution, the cognizant agency for indirect costs assignment must default to HHS. Notwithstanding the method for cognizance determination described in this section, other arrangements for cognizance of a particular educational institution may

also be based in part on the types of research performed at the educational institution and must be decided based on mutual agreement between HHS and DOD. Where a non-Federal entity only receives funds as a subrecipient, see §200.332.

(2) * * *

b. Acceptance of rates. See §200.414.

* * * * *

E. Documentation Requirements

The standard format for documentation requirements for indirect (indirect (F&A)) rate proposals for claiming costs under the regular method is available on the OMB website.

F. Certification

* * * * *

2. * * *

c. *Certificate.* The certificate required by this section must be in the following form:

Certificate of Indirect (F&A) Costs

This is to certify that to the best of my knowledge and belief:

(1) I have reviewed the indirect (F&A) cost proposal submitted herewith;

(2) All costs included in this proposal [identify date] to establish billing or final indirect (F&A) costs rate for [identify period covered by rate] are allowable in accordance with the requirements of the Federal agreement(s) to which they apply and with the cost principles applicable to those agreements.

(3) This proposal does not include any costs which are unallowable under subpart E of this part such as (without limitation): Public relations costs, contributions and donations, entertainment costs, fines and penalties, lobbying costs, and defense of fraud proceedings; and

(4) All costs included in this proposal are properly allocable to Federal agreements on the basis of a beneficial or causal relationship between the expenses incurred and the agreements to which they are allocated in accordance with applicable requirements.

I declare that the foregoing is true and correct. Institution of Higher Education:

Signature: lllllllllllll Name of Official: llllllllll

Title: lllllllllllllll

Date of Execution: llllllllll

■ 121. Amend appendix IV to part 200:

■ a. By revising section A; ■ b. Under section B by revising paragraphs 2.b through e, 3.b(1), (2), and (4), 3.c.(4), 3.f and g, and 4.b and c; ■ c. Under section C by revising paragraphs 2.a through c; and ■ d. Under section D by revising (D)(1), and under the center heading ''Certificate of Indirect (F&A) Costs'', paragraphs (2) and (3).

The revisions read as follows:

Appendix IV to Part 200—Indirect (F&A) Costs Identification and Assignment, and Rate Determination for Nonprofit Organizations

A. General

1. Indirect costs are those that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective. Direct cost of minor amounts may be treated as indirect costs under the conditions described in §200.413(d). After direct costs have been determined and assigned directly to awards or other work as appropriate, indirect costs are those remaining to be allocated to benefitting cost objectives. A cost may not be allocated to a Federal award as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been assigned to a Federal award as a direct cost.

2. ''Major nonprofit organizations'' are defined in paragraph (a) of §200.414. See indirect cost rate reporting requirements in sections B.2.e and B.3.g of this Appendix.

B. Allocation of Indirect Costs and Determination of Indirect Cost Rates

* * * * *

2. Simplified Allocation Method

* * * * *

b. Both the direct costs and the indirect costs must exclude capital expenditures and unallowable costs. However, unallowable costs which represent activities must be included in the direct costs under the conditions described in §200.413(e).

c. The distribution base may be total direct costs (excluding capital expenditures and other distorting items, such as subawards for $25,000 or more), direct salaries and wages, or other base which results in an equitable distribution. The distribution base must exclude participant support costs as defined in §200.1.

d. Except where a special rate(s) is required in accordance with section B.5 of this Appendix, the indirect cost rate developed under the above principles is applicable to all Federal awards of the organization. If a special rate(s) is required, appropriate modifications must be made in order to develop the special rate(s).

e. For an organization that receives more than $10 million in direct Federal funding in a fiscal year, a breakout of the indirect cost component into two broad categories, Facilities and Administration as defined in paragraph (a) of §200.414, is required. The rate in each case must be stated as the percentage which the amount of the particular indirect cost category (*i.e.,* Facilities or Administration) is of the distribution base identified with that category.

3. Multiple Allocation Base Method

* * * * *

(b) * * *

(1) Depreciation. The expenses under this heading are the portion of the costs of the organization's buildings, capital improvements to land and buildings, and equipment which are computed in accordance with §200.436.

(2) Interest. Interest on debt associated with certain buildings, equipment and capital improvements are computed in accordance with §200.449.

* * * * *

(4) General administration and general expenses. The expenses under this heading are those that have been incurred for the overall general executive and administrative offices of the organization and other expenses of a general nature which do not relate solely to any major function of the organization. This category must also include its allocable share of fringe benefit costs, operation and maintenance expense, depreciation, and interest costs. Examples of this category include central offices, such as the director's office, the office of finance, business services, budget and planning, personnel, safety and risk management, general counsel, management information systems, and library costs. In developing this cost pool, special care should be exercised to ensure that costs incurred for the same purpose in like circumstances are treated consistently as either direct or indirect costs. For example, salaries of technical staff, project supplies, project publication, telephone toll charges, computer costs, travel costs, and specialized services costs must be treated as direct costs wherever identifiable to a particular program. The salaries and wages of administrative and pooled clerical staff should normally be treated as indirect costs. Direct charging of these costs may be appropriate as described in §200.413. Items such as office supplies, postage, local telephone costs, periodicals and memberships should normally be treated as indirect costs. (c) * * *

(4) General administration and general expenses. General administration and general expenses must be allocated to benefitting functions based on modified total costs (MTC). The MTC is the modified total direct costs (MTDC), as described in §200.1, plus the allocated indirect cost proportion. The expenses included in this category could be grouped first according to major functions of the organization to which they render services or provide benefits. The aggregate expenses of each group must then be allocated to benefitting functions based on MTC.

* * * * *

f. Distribution basis. Indirect costs

must be distributed to applicable Federal awards and other benefitting activities within each major function on

the basis of MTDC (see definition in §200.1).

g. Individual Rate Components. An indirect cost rate must be determined for each separate indirect cost pool developed. The rate in each case must be stated as the percentage which the amount of the particular indirect cost pool is of the distribution base identified with that pool. Each indirect cost rate negotiation or determination agreement must include development of the rate for each indirect cost pool as well as the overall indirect cost rate. The indirect cost pools must be classified within two broad categories: ''Facilities'' and ''Administration,'' as described in §200.414(a).

4. Direct Allocation Method

* * * * *

b. This method is acceptable, provided each joint cost is prorated using a base which accurately measures the benefits provided to each Federal award or other activity. The bases must be established in accordance with reasonable criteria and be supported by current data. This method is compatible with the Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Organizations issued jointly by the National Health Council, Inc., the National Assembly of Voluntary Health and Social Welfare Organizations, and the United Way of America.

c. Under this method, indirect costs consist exclusively of general administration and general expenses. In all other respects, the organization's indirect cost rates must be computed in the same manner as that described in section B.2 of this Appendix.

* * * * *

C. Negotiation and Approval of Indirect Cost Rates

* * * * *

2. Negotiation and Approval of Rates

a. Unless different arrangements are agreed to by the Federal agencies concerned, the Federal agency with the largest dollar value of Federal awards directly funded to an organization will be designated as the cognizant agency for indirect costs for the negotiation and approval of the indirect cost rates and, where necessary, other rates such as fringe benefit and computer charge-out rates. Once an agency is assigned cognizance for a particular nonprofit organization, the assignment will not be changed unless there is a shift in the dollar volume of the Federal awards directly funded to the organization for at least three years. All concerned Federal agencies must be given the opportunity to participate in the negotiation process but, after a rate has been agreed upon, it will be accepted by all Federal agencies. When a Federal agency has reason to believe that special operating factors affecting its Federal awards necessitate special indirect cost rates in accordance with section B.5 of this Appendix, it will, prior to the time the rates are negotiated, notify the cognizant agency for indirect costs. (See also §200.414.) If the nonprofit does not receive any funding from any Federal agency, the pass-through entity is responsible for the negotiation of the indirect cost rates in accordance with §200.332(a)(4).

b. Except as otherwise provided in §200.414(f), a nonprofit organization which has not previously established an indirect cost rate with a Federal agency must submit its initial indirect cost proposal immediately after the organization is advised that a Federal award will be made and, in no event, later than three months after the effective date of the Federal award.

c. Unless approved by the cognizant agency for indirect costs in accordance with §200.414(g), organizations that have previously established indirect cost rates must submit a new indirect cost proposal to the cognizant agency for indirect costs within six months after the close of each fiscal year.

* * * * *

D. Certification of Indirect (F&A) Costs

(1) Required Certification. No proposal to establish indirect (F&A) cost rates must be acceptable unless such costs have been certified by the nonprofit organization using the Certificate of Indirect (F&A) Costs set forth in section j. of this appendix. The certificate must be signed on behalf of the organization by an individual at a level no lower than vice president or chief financial officer for the organization.

* * * * *

Certificate of Indirect (F&A) Costs

* * * * *

(2) All costs included in this proposal [identify date] to establish billing or final indirect (F&A) costs rate for [identify period covered by rate] are allowable in accordance with the requirements of the Federal awards to which they apply and with subpart E of this part.

(3) This proposal does not include any costs which are unallowable under subpart E of this part such as (without limitation): Public relations costs, contributions and donations, entertainment costs, fines and penalties, lobbying costs, and defense of fraud proceedings; and

* * * * *

■ 122. Amend appendix V to part 200 by revising: ■ a. Section A, paragraph 2; ■ b. Section B, paragraph 4; ■ c. Section C ■ d. Section E, paragraph 3.b.(1); and ■ e. Section G, paragraph 5.

The revisions read as follows:

Appendix V to Part 200—State/Local Governmentwide Central Service Cost Allocation Plans

A. General

* * * * *

2. Guidelines and illustrations of central service cost allocation plans are provided in a brochure published by the Department of Health and Human Services entitled ''*A Guide for State, Local and Indian Tribal Governments: Cost Principles and Procedures for Developing Cost Allocation Plans and Indirect Cost Rates for Agreements with the Federal Government.*'' A copy of this brochure may be obtained from the HHS Cost Allocation Services or at their website.

B. Definitions

* * * * *

4. *Cognizant agency for indirect costs* is defined in §200.1. The determination of cognizant agency for indirect costs for states and local governments is described in section F.1.

* * * * *

C. Scope of the Central Service Cost Allocation Plans

The central service cost allocation plan will include all central service costs that will be claimed (either as a billed or an allocated cost) under Federal awards and will be documented as described in section E. omitted from the plan will not be reimbursed.

E. Documentation Requirements for Submitted Plans

* * * * *

3. Billed Services

* * * * *

b. * * *

(1) For each internal service fund or similar activity with an operating budget of $5 million or more, the plan must include: A brief description of each service; a balance sheet for each fund based on individual accounts contained in the governmental unit's accounting system; a revenue/expenses statement, with revenues broken out by source, *e.g.*, regular billings, interest earned, etc.; a listing of all non-operating transfers (as defined by GAAP) into and out of the fund; a description of the procedures (methodology) used to charge the costs of each service to users, including how billing rates are determined; a schedule of current rates; and, a schedule comparing total

revenues (including imputed revenues) generated by the service to the allowable costs of the service, as determined under this part, with an explanation of how variances will be handled.

* * * * *

G. Other Polices

* * * * *

5. Records Retention

All central service cost allocation plans and related documentation used as a basis for claiming costs under Federal awards must be retained for audit in accordance with the records retention requirements contained in subpart D of this part.

* * * * *

■ 123. Amend appendix VI to part 200 by revising paragraph 2 in section D to read as follows:

Appendix VI to Part 200—Public Assistance Cost Allocation Plans

* * * * *

D. Submission, Documentation, and Approval of Public Assistance Cost Allocation Plans

* * * * *

2. Under the coordination process outlined in section E, affected Federal agencies will review all new plans and plan amendments and provide comments, as appropriate, to HHS. The effective date of the plan or plan amendment will be the first day of the calendar quarter following the event that required the amendment, unless another date is specifically approved by HHS. HHS, as the cognizant agency for indirect costs acting on behalf of all affected Federal agencies, will, as necessary, conduct negotiations with the state public assistance agency and will inform the state agency of the action taken on the plan or plan amendment.

* * * * *

■ 124. Amend appendix VII to part 200 by revising:

■ a. Section A, paragraphs 2, 3, 4, and 5;

■ b. Section B, paragraph 3;

■ c. Section D, paragraph 1a.; and ■ d. Section E, paragraph 4.

The revisions read as follows:

Appendix VII to Part 200—States and Local Government and Indian Tribe Indirect Cost Proposals

A. General

* * * * *

2. Indirect costs include (a) the indirect costs originating in each department or agency of the governmental unit carrying out Federal awards and (b) the costs of central governmental services distributed through the central service cost allocation plan (as described in Appendix V to this part) and not otherwise treated as direct costs.

3. Indirect costs are normally charged to Federal awards by the use of an indirect cost rate. A separate indirect cost rate(s) is usually necessary for each department or agency of the governmental unit claiming indirect costs under Federal awards. Guidelines and illustrations of indirect cost proposals are provided in a brochure published by the Department of Health and Human Services entitled ''*A Guide for States and Local Government Agencies: Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government.*'' A copy of this brochure may be obtained from HHS Cost Allocation Services or at their website.

4. Because of the diverse characteristics and accounting practices of governmental units, the types of costs which may be classified as indirect costs cannot be specified in all situations. However, typical examples of indirect costs may include certain state/ local-wide central service costs, general administration of the non-Federal entity accounting and personnel services performed within the non-Federal entity, depreciation on buildings and equipment, the costs of operating and maintaining facilities.

5. This Appendix does not apply to state public assistance agencies. These agencies should refer instead to Appendix VI to this part.

B. Definitions

* * * * *

3. *Cognizant agency for indirect costs* means the Federal agency responsible for reviewing and approving the governmental unit's indirect cost rate(s) on the behalf of the Federal Government. The cognizant agency for indirect costs assignment is described in Appendix V, section F.

* * * * *

D. Submission and Documentation of Proposals

1. Submission of Indirect Cost Rate Proposals

a. All departments or agencies of the governmental unit desiring to claim indirect costs under Federal awards must prepare an indirect cost rate proposal and related documentation to support those costs. The proposal and related documentation must be retained for audit in accordance with the records retention requirements contained in §200.334.

* * * * *

E. Negotiation and Approval of Rates

* * * * *

4. Refunds must be made if proposals are later found to have included costs that (a) are unallowable (i) as specified by law or regulation, (ii) as identified in §200.420, or (iii) by the terms and conditions of Federal awards, or (b) are unallowable because they are clearly not allocable to Federal awards. These adjustments or refunds will be made regardless of the type of rate negotiated (predetermined, final, fixed, or provisional).

* * * * *

■ 125. Amend appendix VIII to part 200 by revising the heading and paragraphs 32 and 33 to read as follows:

Appendix VIII to Part 200—Nonprofit Organizations Exempted From Subpart E of Part 200

* * * * *

32. Nonprofit insurance companies, such as Blue Cross and Blue Shield Organizations

33. Other nonprofit organizations as negotiated with Federal awarding agencies

■ 126. Appendix XI to part 200 is revised to read as follows:

Appendix XI to Part 200—Compliance Supplement

The compliance supplement is available on the OMB website.

■ 127. Amend appendix XII to part 200 by revising section A, paragraph 2.b to read as follows:

Appendix XII to Part 200—Award Term and Condition for Recipient Integrity and Performance Matters

A. Reporting of Matters Related to Recipient Integrity and Performance

* * * * *

2. Proceedings About Which You Must Report

* * * * *

b. Reached its final disposition during the most recent five-year period; and

* * * * *

[FR Doc. 2020–17468 Filed 8–11–20; 8:45 am]
BILLING CODE 3110–01–P

Presidential Documents

Executive Order 13903 of January 31, 2020

Combating Human Trafficking and Online Child Exploitation in the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Trafficking Victims Protection Act, 22 U.S.C. 7101 *et seq.*, it is hereby ordered as follows:

Section 1. *Policy.* Human trafficking is a form of modern slavery. Throughout the United States and around the world, human trafficking tears apart communities, fuels criminal activity, and threatens the national security of the United States. It is estimated that millions of individuals are trafficked around the world each year—including into and within the United States. As the United States continues to lead the global fight against human trafficking, we must remain relentless in resolving to eradicate it in our cities, suburbs, rural communities, tribal lands, and on our transportation networks. Human trafficking in the United States takes many forms and can involve exploitation of both adults and children for labor and sex.

Twenty-first century technology and the proliferation of the internet and mobile devices have helped facilitate the crime of child sex trafficking and other forms of child exploitation. Consequently, the number of reports to the National Center for Missing and Exploited Children of online photos and videos of children being sexually abused is at record levels.

The Federal Government is committed to preventing human trafficking and the online sexual exploitation of children. Effectively combating these crimes requires a comprehensive and coordinated response to prosecute human traffickers and individuals who sexually exploit children online, to protect and support victims of human trafficking and child exploitation, and to provide prevention education to raise awareness and help lower the incidence of human trafficking and child exploitation into, from, and within the United States.

To this end, it shall be the policy of the executive branch to prioritize its resources to vigorously prosecute offenders, to assist victims, and to provide prevention education to combat human trafficking and online sexual exploitation of children.

Sec. 2. *Strengthening Federal Responsiveness to Human Trafficking.* (a) The Domestic Policy Council shall commit one employee position to work on issues related to combating human trafficking occurring into, from, and within the United States and to coordinate with personnel in other components of the Executive Office of the President, including the Office of Economic Initiatives and the National Security Council, on such efforts. This position shall be filled by an employee of the executive branch detailed from the Department of Justice, the Department of Labor, the Department of Health and Human Services, the Department of Transportation, or the Department of Homeland Security.

(b) The Secretary of State, on behalf of the President's Interagency Task Force to Monitor and Combat Trafficking in Persons, shall make available, online, a list of the Federal Government's resources to combat human trafficking, including resources to identify and report instances of human trafficking, to protect and support the victims of trafficking, and to provide public outreach and training.

(c) The Secretary of State, the Attorney General, the Secretary of Labor, the Secretary of Health and Human Services, and the Secretary of Homeland Security shall, in coordination and consistent with applicable law:

(i) improve methodologies of estimating the prevalence of human trafficking, including in specific sectors or regions, and monitoring the impact of anti-trafficking efforts and publish such methodologies as appropriate; and

(ii) establish estimates of the prevalence of human trafficking in the United States.

Sec. 3. *Prosecuting Human Traffickers and Individuals Who Exploit Children Online.* (a) The Attorney General, through the Federal Enforcement Working Group, in collaboration with the Secretary of Labor and the Secretary of Homeland Security, shall:

(i) improve interagency coordination with respect to targeting traffickers, determining threat assessments, and sharing law enforcement intelligence to build on the Administration's commitment to the continued success of ongoing anti-trafficking enforcement initiatives, such as the Anti-Trafficking Coordination Team and the U.S.-Mexico Bilateral Human Trafficking Enforcement Initiatives; and

(ii) coordinate activities, as appropriate, with the Task Force on Missing and Murdered American Indians and Alaska Natives as established by Executive Order 13898 of November 26, 2019 (Establishing the Task Force on Missing and Murdered American Indians and Alaska Natives).

(b) The Attorney General and the Secretary of Homeland Security, and other heads of executive departments and agencies as appropriate, shall, within 180 days of the date of this order, propose to the President, through the Director of the Domestic Policy Council, legislative and executive actions that would overcome information-sharing challenges and improve law enforcement's capabilities to detect in real-time the sharing of child sexual abuse material on the internet, including material referred to in Federal law as ''child pornography.'' Overcoming these challenges would allow law enforcement officials to more efficiently identify, protect, and rescue victims of online child sexual exploitation; investigate and prosecute alleged offenders; and eliminate the child sexual abuse material online.

Sec. 4. *Protecting Victims of Human Trafficking and Child Exploitation.* (a) The Attorney General, the Secretary of Health and Human Services, and the Secretary of Homeland Security, and other heads of executive departments and agencies as appropriate, shall work together to enhance capabilities to locate children who are missing, including those who have run away from foster care and those previously in Federal custody, and are vulnerable to human trafficking and child exploitation. In doing so, such heads of executive departments and agencies, shall, as appropriate, engage social media companies; the technology industry; State, local, tribal and territorial child welfare agencies; the National Center for Missing and Exploited Children; and law enforcement at all levels.

(b) The Secretary of Health and Human Services, in consultation with the Secretary of Housing and Urban Development, shall establish an internal working group to develop and incorporate practical strategies for State, local, and tribal governments, child welfare agencies, and faith-based and other community organizations to expand housing options for victims of human trafficking.

Sec. 5. *Preventing Human Trafficking and Child Exploitation Through Education Partnerships.* The Attorney General and the Secretary of Homeland Security, in coordination with the Secretary of Education, shall partner with State, local, and tribal law enforcement entities to fund human trafficking and child exploitation prevention programs for our Nation's youth in schools, consistent with applicable law and available appropriations.

Sec. 6. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

THE WHITE HOUSE,
January 31, 2020.

[FR Doc. 2020–02438
Filed 2–4–20; 11:15 am]
Billing code 3295–F0–P

Federal Register
Vol. 85, No. 56
Monday, March 23, 2020

Presidential Documents

Title 3— **Executive Order 13909 of March 18, 2020**

The President **Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID–19**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (50 U.S.C. 4501 *et seq.*) (the ''Act''), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Policy and Findings.* On March 13, 2020, I declared a national emergency recognizing the threat that the novel (new) coronavirus known as SARS–CoV–2 poses to our national security. In recognizing the public health risk, I noted that on March 11, 2020, the World Health Organization announced that the outbreak of COVID–19 (the disease caused by SARS– CoV–2) can be characterized as a pandemic. I also noted that while the Federal Government, along with State and local governments, have taken preventive and proactive measures to slow the spread of the virus and to treat those affected, the spread of COVID–19 within our Nation's communities threatens to strain our Nation's healthcare system. To ensure that our healthcare system is able to surge capacity and capability to respond to the spread of COVID–19, it is critical that all health and medical resources needed to respond to the spread of COVID–19 are properly distributed to the Nation's healthcare system and others that need them most at this time.

Accordingly, I find that health and medical resources needed to respond to the spread of COVID–19, including personal protective equipment and ventilators, meet the criteria specified in section 101(b) of the Act (50 U.S.C. 4511(b)). Under the delegation of authority provided in this order, the Secretary of Health and Human Services may identify additional specific health and medical resources that meet the criteria of section 101(b).

Sec. 2. *Priorities and Allocation of Medical Resources.*

(a) Notwithstanding Executive Order 13603 of March 16, 2012 (National Defense Resource Preparedness), the authority of the President conferred by section 101 of the Act to require performance of contracts or orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense, and to implement the Act in subchapter III of chapter 55 of title 50, United States Code, is delegated to the Secretary of Health and Human Services with respect to all health and medical resources needed to respond to the spread of COVID–19 within the United States.

(b) The Secretary of Health and Human Services may use the authority under section 101 of the Act to determine, in consultation with the Secretary of Commerce and the heads of other executive departments and agencies as appropriate, the proper nationwide priorities and allocation of all health and medical resources, including controlling the distribution of such materials (including applicable services) in the civilian market, for responding to the spread of COVID–19 within the United States.

(c) The Secretary of Health and Human Services shall issue such orders and adopt and revise appropriate rules and regulations as may be necessary to implement this order.

Sec. 3. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

THE WHITE HOUSE, *March 18, 2020.*

[FR Doc. 2020–06161
Filed 3–20–20; 8:45 am]
Billing code 3295–F0–P

Federal Register
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April 1, 2020

Presidential Documents

Title 3— The President

Executive Order 13911 of March 27, 2020

Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources To Respond to the Spread of COVID–19

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (50 U.S.C. 4501 *et seq.*) (the ''Act''), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Policy.* In Proclamation 9994 of March 13, 2020 (Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID– 19) Outbreak), I declared a national emergency recognizing the threat that the novel (new) coronavirus known as SARS–CoV–2 poses to our Nation's healthcare systems. In recognizing the public health risk, I noted that on March 11, 2020, the World Health Organization announced that the outbreak of COVID–19 (the disease caused by SARS–CoV–2) can be characterized as a pandemic. I also noted that while the Federal Government, along with State and local governments, have taken preventive and proactive measures to slow the spread of the virus and to treat those affected, the spread of COVID–19 within our Nation's communities threatens to strain our Nation's healthcare systems.

To deal with this threat, on March 18, 2020, I issued Executive Order 13909 (Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID–19), in which I delegated to the Secretary of Health and Human Services the prioritization and allocation authority under section 101 of the Act with respect to health and medical resources needed to respond to the spread of COVID–19. And on March 23, 2020, I issued Executive Order 13910 (Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID–19), in which I delegated to the Secretary of Health and Human Services the authority under section 102 of the Act to combat hoarding and price gouging with respect to such resources.

To ensure that our healthcare systems are able to surge capacity and capability to respond to the spread of COVID–19, it is the policy of the United States to expand domestic production of health and medical resources needed to respond to the spread of COVID–19, including personal protective equipment and ventilators. Accordingly, I am delegating authority under title III of the Act to guarantee loans by private institutions, make loans, make provision for purchases and commitments to purchase, and take additional actions to create, maintain, protect, expand, and restore domestic industrial base capabilities to produce such resources. To enable greater cooperation among private businesses in expanding production of and distributing such resources, I am also delegating my authority under section 708(c) and (d) of the Act (50 U.S.C. 4558(c), (d)) to provide for the making of voluntary agreements and plans of action by the private sector.

Sec. 2. *Delegation of Authority Under Title III of the Act.* (a) Notwithstanding Executive Order 13603 of March 16, 2012 (National Defense Resources Preparedness), the Secretary of Health and Human Services and the Secretary of Homeland Security are each delegated, with respect to responding to the spread of COVID–19 within the United States, the authority of the President conferred by sections 301, 302, and 303 of the Act (50 U.S.C. 4531, 4532, and 4533), and the authority to implement the Act in subchapter

III of chapter 55 of title 50, United States Code (50 U.S.C. 4554, 4555, 4556, and 4560).

(b) The Secretary of Health and Human Services and the Secretary of Homeland Security may each use the authority under sections 301, 302, and 303 of the Act, in consultation with the Secretary of Defense and the heads of other executive departments and agencies as he deems appropriate, to respond to the spread of COVID–19.

(c) To provide additional authority to respond to the national emergency I declared in Proclamation 9994, the requirements of section 301(a)(2), section 301(d)(1)(A), and section 303(a)(1) through (a)(6) of the Act are waived during the period of that national emergency.

(d) To provide additional authority to respond to the national emergency I declared in Proclamation 9994, the Secretary of Health and Human Services and the Secretary of Homeland Security are each authorized to submit for my approval under section 302(d)(2)(B) of the Act a proposed determination that any specific loan is necessary to avert an industrial resource or critical technology shortfall that would severely impair national defense capability.

(e) Before exercising the authority delegated under this section with respect to health or medical resources, the Secretary of Homeland Security shall consult with the Secretary of Health and Human Services.

Sec. 3. *Delegation of Authority Under Title VII of the Act.* (a) Notwithstanding Executive Order 13603, the Secretary of Health and Human Services and the Secretary of Homeland Security are each delegated, with respect to responding to the spread of COVID–19 within the United States, the authority of the President conferred by section 708(c)(1) and (d) of the Act. The Secretary of Health and Human Services shall provide to the Secretary of Homeland Security notice of any use of such delegated authority.

(b) The delegation made in this section is made upon the condition that the Secretary of Health and Human Services or the Secretary of Homeland Security consult with the Attorney General and with the Federal Trade Commission, and obtain the prior approval of the Attorney General, after consultation by the Attorney General with the Federal Trade Commission, as required by section 708(c)(2) of the Act, except when such consultation is waived under subsection (c) of section 3 of this order and section 708(c)(3) of the Act.

(c) The Secretary of Health and Human Services and the Secretary of Homeland Security are each authorized to submit for my approval under section 708(c)(3) of the Act any proposed determination that any specific voluntary agreement or plan of action is necessary to meet national defense requirements resulting from an event that degrades or destroys critical infrastructure.

(d) Before exercising the authority delegated under this section with respect to health or medical resources, the Secretary of Homeland Security shall consult with the Secretary of Health and Human Services.

Sec. 4. *Additional Delegations.* (a) Notwithstanding Executive Order 13603, the Secretary of Health and Human Services and the Secretary of Homeland Security are each delegated, with respect to responding to the spread of COVID–19 within the United States, the authority of the President conferred by section 107 of the Act (50 U.S.C. 4517).

(b) In addition to the delegations of authority in Executive Order 13909 and Executive Order 13910, the authority of the President conferred by sections 101 and 102 of the Act (50 U.S.C. 4511, 4512) is delegated to the Secretary of Homeland Security with respect to health and medical resources needed to respond to the spread of COVID–19 within the United States.

(c) The Secretary of Homeland Security may use the authority under section 101 of the Act to determine, in consultation with the heads of

other executive departments and agencies as appropriate, the proper nationwide priorities and allocation of health and medical resources, including by controlling the distribution of such materials (including applicable services) in the civilian market, for responding to the spread of COVID–19 within the United States.

(d) Before exercising the authority under section 102 of the Act, the Secretary of Homeland Security shall consult with the Secretary of Health and Human Services.

(e) The Secretary of Homeland Security shall periodically consider whether the designations made by him under section 102 of the Act pursuant to section 4(b) of this order remain necessary. Upon finding that such designation of material is no longer necessary, the Secretary of Homeland Security shall promptly publish a notice of withdrawal of the designation in the *Federal Register*, and in such other manner as he deems appropriate.

Sec. 5. *Implementing Rules and Regulations.* The Secretary of Health and Human Services and the Secretary of Homeland Security shall each adopt and revise appropriate rules and regulations as may be necessary to implement this order.

Sec. 6. *Policy Coordination.* The Assistant to the President for Trade and Manufacturing Policy shall serve as National Defense Production Act Policy Coordinator.

Sec. 7. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

THE WHITE HOUSE, *March 27, 2020.*

[FR Doc. 2020–06969
Filed 3–31–20; 11:15 am]
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Friday, May 1, 2020

Presidential Documents

Title 3— **Executive Order 13917 of April 28, 2020**

The President Delegating Authority Under the Defense Production Act With Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID–19

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (50 U.S.C. 4501 *et seq.*) (the ''Act''), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Policy.* The 2019 novel (new) coronavirus known as SARS–CoV– 2, the virus causing outbreaks of the disease COVID–19, has significantly disrupted the lives of Americans. In Proclamation 9994 of March 13, 2020 (Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak), I declared that the COVID–19 outbreak in the United States constituted a national emergency, beginning March 1, 2020. Since then, the American people have united behind a policy of mitigation strategies, including social distancing, to flatten the curve of infections and reduce the spread of COVID–19. The COVID–19 outbreak and these necessary mitigation measures have taken a dramatic toll on the United States economy and critical infrastructure.

It is important that processors of beef, pork, and poultry (''meat and poultry'') in the food supply chain continue operating and fulfilling orders to ensure a continued supply of protein for Americans. However, outbreaks of COVID– 19 among workers at some processing facilities have led to the reduction in some of those facilities' production capacity. In addition, recent actions in some States have led to the complete closure of some large processing facilities. Such actions may differ from or be inconsistent with interim guidance recently issued by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services and the Occupational Safety and Health Administration (OSHA) of the Department of Labor entitled ''Meat and Poultry Processing Workers and Employers'' providing for the safe operation of such facilities.

Such closures threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the national emergency. Given the high volume of meat and poultry processed by many facilities, any unnecessary closures can quickly have a large effect on the food supply chain. For example, closure of a single large beef processing facility can result in the loss of over 10 million individual servings of beef in a single day. Similarly, under established supply chains, closure of a single meat or poultry processing facility can severely disrupt the supply of protein to an entire grocery store chain.

Accordingly, I find that meat and poultry in the food supply chain meet the criteria specified in section 101(b) of the Act (50 U.S.C. 4511(b)). Under the delegation of authority provided in this order, the Secretary of Agriculture shall take all appropriate action under that section to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA. Under the delegation of authority provided in this order, the Secretary of Agriculture may identify additional specific food supply chain resources that meet the criteria of section 101(b).

Sec. 2. *Ensuring the Continued Supply of Meat and Poultry*. (a) Notwithstanding Executive Order 13603 of March 16, 2012 (National Defense Resources Preparedness), the authority

of the President to require performance of contracts or orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense, and to implement the Act in subchapter III of chapter 55 of title 50, United States Code (50 U.S.C. 4554, 4555, 4556, 4559, 4560), is delegated to the Secretary of Agriculture with respect to food supply chain resources, including meat and poultry, during the national emergency caused by the outbreak of COVID–19 within the United States.

(b) The Secretary of Agriculture shall use the authority under section 101 of the Act, in consultation with the heads of such other executive departments and agencies as he deems appropriate, to determine the proper nationwide priorities and allocation of all the materials, services, and facilities necessary to ensure the continued supply of meat and poultry, consistent with the guidance for the operations of meat and poultry processing facilities jointly issued by the CDC and OSHA.

(c) The Secretary of Agriculture shall issue such orders and adopt and revise appropriate rules and regulations as may be necessary to implement this order.

Sec. 3. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

THE WHITE HOUSE,
April 28, 2020.

[FR Doc. 2020–09536
Filed 4–30–20; 11:15 am]
Billing code 3295–F0–P

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Tuesday, May 19, 2020

Presidential Documents

Title 3— **Executive Order 13922 of May 14, 2020**

The President Delegating Authority Under the Defense Production Act to the Chief Executive Officer of the United States International Development Finance Corporation To Respond to the COVID– 19 Outbreak

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (50 U.S.C. 4501 *et seq.*) (the ''Act''), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Policy.* In Proclamation 9994 of March 13, 2020 (Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID– 19) Outbreak), I declared a national emergency recognizing the threat that the novel (new) coronavirus known as SARS–CoV–2 poses to our Nation's healthcare systems. In recognizing the public health risk, I noted that on March 11, 2020, the World Health Organization announced that the outbreak of COVID–19 (the disease caused by SARS–CoV–2) can be characterized as a pandemic.

To ensure that our country has the capacity, capability, and strong and resilient domestic industrial base necessary to respond to the COVID–19 outbreak, it is the policy of the United States to further expand domestic production of strategic resources needed to respond to the COVID–19 outbreak, including strengthening relevant supply chains within the United States and its territories. It is important to use all resources available to the United States, including executive departments and agencies (agencies) with expertise in loan support for private institutions. Accordingly, I am delegating authority under title III of the Act to make loans, make provision for purchases and commitments to purchase, and take additional actions to create, maintain, protect, expand, and restore the domestic industrial base capabilities, including supply chains within the United States and its territories (''domestic supply chains''), needed to respond to the COVID– 19 outbreak.

Sec. 2. *Delegation of Authority Under Title III of the Act.* (a) Notwithstanding Executive Order 13603 of March 16, 2012 (National Defense Resources Preparedness), and in addition to the delegation of authority in Executive Order 13911 of March 27, 2020 (Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources to Respond to the Spread of COVID–19), the Chief Executive Officer of the United States International Development Finance Corporation (DFC) is delegated the authority of the President conferred by sections 302 and 303 of the Act (50 U.S.C. 4532 and 4533), and the authority to implement the Act in subchapter III of chapter 55 of title 50, United States Code (50 U.S.C. 4554, 4555, 4556, and 4560).

(b) The Chief Executive Officer of the DFC may use the authority under sections 302 and 303 of the Act, in consultation with the Secretary of Defense, the Secretary of Health and Human Services, the Secretary of Homeland Security, and the heads of other agencies as he deems appropriate, for the domestic production of strategic resources needed to respond to the COVID–19 outbreak, or to strengthen any relevant domestic supply chains.

(c) The loan authority delegated by this order is limited to loans that create, maintain, protect, expand, or restore domestic industrial base capabilities supporting:

(i) the national response and recovery to the COVID–19 outbreak; or

(ii) the resiliency of any relevant domestic supply chains.

(d) Loans extended using the authority delegated by this order shall be made in accordance with the principles and guidelines outlined in OMB Circular A–11, OMB Circular A–129, and the Federal Credit Reform Act of 1990, as amended (2 U.S.C. 661 *et seq.*).

(e) The Chief Executive Officer of the DFC shall adopt appropriate rules and regulations as may be necessary to implement this order.

Sec. 3. *Termination.* The delegation of authority in this order shall expire upon termination of the 2-year period during which the requirements described in section 302(c)(1) of the Act (50 U.S.C. 4532(c)(1)) are waived pursuant to title III of division B of the Coronavirus Aid, Relief, and Economic Security Act (Public Law 116–136).

Sec. 4. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

THE WHITE HOUSE, *May 14, 2020.*

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Federal Register
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Thursday, August 6, 2020

Presidential Documents

Title 3—

The President

Executive Order 13940 of August 3, 2020

Aligning Federal Contracting and Hiring Practices With the Interests of American Workers

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* It is the policy of the executive branch to create opportunities for United States workers to compete for jobs, including jobs created through Federal contracts. These opportunities, particularly in regions where the Federal Government remains the largest employer, are especially critical during the economic dislocation caused by the 2019 novel coronavirus (COVID–19) pandemic. When employers trade American jobs for temporary foreign labor, for example, it reduces opportunities for United States workers in a manner inconsistent with the role guest-worker programs are meant to play in the Nation's economy.

Sec. 2. *Review of Contracting and Hiring Practices.* (a) The head of each executive department and agency (agency) that enters into contracts shall review, to the extent practicable, performance of contracts (including subcontracts) awarded by the agency in fiscal years 2018 and 2019 to assess:

(i) whether contractors (including subcontractors) used temporary foreign labor for contracts performed in the United States, and, if so, the nature of the work performed by temporary foreign labor on such contracts; whether opportunities for United States workers were affected by such hiring; and any potential effects on the national security caused by such hiring; and

(ii) whether contractors (including subcontractors) performed in foreign countries services previously performed in the United States, and, if so, whether opportunities for United States workers were affected by such offshoring; whether affected United States workers were eligible for assistance under the Trade Adjustment Assistance program authorized by the Trade Act of 1974; and any potential effects on the national security caused by such offshoring.

(b) The head of each agency that enters into contracts shall assess any negative impact of contractors' and subcontractors' temporary foreign labor hiring practices or offshoring practices on the economy and efficiency of Federal procurement and on the national security, and propose action, if necessary and as appropriate and consistent with applicable law, to improve the economy and efficiency of Federal procurement and protect the national security.

(c) The head of each agency shall, in coordination with the Director of the Office of Personnel Management, review the employment policies of the agency to assess the agency's compliance with Executive Order 11935 of September 2, 1976 (Citizenship Requirements for Federal Employment), and section 704 of the Consolidated Appropriations Act, 2020, Public Law 116–93.

(d) Within 120 days of the date of this order, the head of each agency shall submit a report to the Director of the Office of Management and Budget summarizing the results of the reviews required by subsections (a) through (c) of this section; recommending, if necessary, corrective actions that may be taken by the agency and timeframes to implement such actions; and proposing any Presidential actions that may be appropriate.

Sec. 3. *Measures to Prevent Adverse Effects on United States Workers.* Within 45 days of the date of this order, the Secretaries of Labor and Homeland Security shall take action, as appropriate and consistent with applicable law, to protect United States workers from any adverse effects on wages and working conditions caused by the employment of H–1B visa holders at job sites (including third-party job sites), including measures to ensure that all employers of H–1B visa holders, including secondary employers, adhere to the requirements of section 212(n)(1) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)).

Sec. 4. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

THE WHITE HOUSE,
August 3, 2020.

[FR Doc. 2020–17363
Filed 8–5–20; 11:15 am]
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Federal Register

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August 14, 2020

Presidential Documents

Title 3— The President

Executive Order 13944 of August 6, 2020

Combating Public Health Emergencies and Strengthening National Security by Ensuring Essential Medicines, Medical Countermeasures, and Critical Inputs Are Made in the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* The United States must protect our citizens, critical infrastructure, military forces, and economy against outbreaks of emerging infectious diseases and chemical, biological, radiological, and nuclear (CBRN) threats. To achieve this, the United States must have a strong Public Health Industrial Base with resilient domestic supply chains for Essential Medicines, Medical Countermeasures, and Critical Inputs deemed necessary for the United States. These domestic supply chains must be capable of meeting national security requirements for responding to threats arising from CBRN threats and public health emergencies, including emerging infectious diseases such as COVID–19. It is critical that we reduce our dependence on foreign manufacturers for Essential Medicines, Medical Countermeasures, and Critical Inputs to ensure sufficient and reliable long-term domestic production of these products, to minimize potential shortages, and to mobilize our Nation's Public Health Industrial Base to respond to these threats. It is therefore the policy of the United States to:

(a) accelerate the development of cost-effective and efficient domestic production of Essential Medicines and Medical Countermeasures and have adequate redundancy built into the domestic supply chain for Essential
Medicines, Medical Countermeasures, and Critical Inputs;

(b) ensure long-term demand for Essential Medicines, Medical Countermeasures, and Critical Inputs that are produced in the United States;

(c) create, maintain, and maximize domestic production capabilities for Critical Inputs, Finished Drug Products, and Finished Devices that are essential to protect public safety and human health and to provide for the national defense; and

(d) combat the trafficking of counterfeit Essential Medicines, Medical Countermeasures, and Critical Inputs over e-commerce platforms and from third- party online sellers involved in the government procurement process.

I am therefore directing each executive department and agency involved in the procurement of Essential Medicines, Medical Countermeasures, and Critical Inputs (agency) to consider a variety of actions to increase their domestic procurement of Essential Medicines, Medical Countermeasures, and Critical Inputs, and to identify vulnerabilities in our Nation's supply chains for these products. Under this order, agencies will have the necessary flexibility to increase their domestic procurement in appropriate and responsible ways, while protecting our Nation's service members, veterans, and their families from increases in drug prices and without interfering with our Nation's ability to respond to the spread of COVID–19.

Sec. 2. *Maximizing Domestic Production in Procurement.* (a) Agencies shall, as appropriate, to the maximum extent permitted by applicable law, and in consultation with the Commissioner of Food and Drugs (FDA Commissioner) with respect to Critical Inputs, use their respective authorities under section 2304(c) of title 10, United States Code; section 3304(a) of title 41, United States Code; and subpart 6.3 of the Federal Acquisition Regulation, title 48, Code of Federal Regulations, to conduct the procurement of Essential Medicines, Medical Countermeasures, and Critical Inputs by:

(i) using procedures to limit competition to only those Essential Medicines, Medical Countermeasures, and Critical Inputs that are produced in the United States; and

(ii) dividing procurement requirements among two or more manufacturers located in the United States, as appropriate.

(b) Within 90 days of the date of this order, the Director of the Office of Management and Budget (OMB), in consultation with appropriate agency heads, shall:

(i) review the authority of each agency to limit the online procurement of Essential Medicines and Medical Countermeasures to e-commerce platforms that have:

(A) adopted, and certified their compliance with, the applicable best practices published by the Department of Homeland Security in its Report to the President on ''Combating Trafficking in Counterfeit and Pirated Goods,'' dated January 24, 2020; and

(B) agreed to permit the Department of Homeland Security's National Intellectual Property Rights Coordination Center to evaluate and confirm their compliance with such best practices; and

(ii) report its findings to the President.

(c) Within 90 days of the date of this order, the head of each agency shall, in consultation with the FDA Commissioner, develop and implement procurement strategies, including long-term contracts, consistent with law, to strengthen and mobilize the Public Health Industrial Base in order to increase the manufacture of Essential Medicines, Medical Countermeasures, and Critical Inputs in the United States.

(d) No later than 30 days after the FDA Commissioner has identified, pursuant to section 3(c) of this order, the initial list of Essential Medicines, Medical Countermeasures, and Critical Inputs, the United States Trade Representative shall, to the extent permitted by law, take all appropriate action to modify United States Federal procurement product coverage under all relevant Free Trade Agreements and the World Trade Organization Agreement on Government Procurement to exclude coverage of Essential Medicines, Medical Countermeasures, and Critical Inputs. The United States Trade Representative shall further modify United States Federal procurement product coverage, as appropriate, to reflect updates by the FDA Commissioner. After the modifications to United States Federal procurement coverage take effect, the United States Trade Representative shall make any necessary, corresponding modifications of existing waivers under section 301 of the Trade Agreements Act of 1979. The United States Trade Representative shall notify the President, through the Director of OMB, once it has taken the actions described in this subsection.

(e) No later than 60 days after the FDA Commissioner has identified, pursuant to section 3(c) of this order, the initial list of Essential Medicines, Medical Countermeasures, and Critical Inputs, and notwithstanding the public interest exception in subsection (f)(i)(1) of this section, the Secretary of Defense shall, to the maximum extent permitted by applicable law, use his authority under section 225.872–1(c) of the Defense Federal Acquisition Regulation Supplement to restrict the procurement of Essential Medicines, Medical Countermeasures, and Critical Inputs to domestic sources and to reject otherwise acceptable offers of such products from sources in Qualifying Countries in instances where considered necessary for national defense reasons.

(f) Subsections (a), (d), and (e) of this section shall not apply:

(i) where the head of the agency determines in writing, with respect to a specific contract or order, that (1) their application would be inconsistent with the public interest; (2) the relevant Essential Medicines, Medical Countermeasures, and Critical Inputs are not produced in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality; or (3) their application would cause the cost of the procurement to increase by more than 25 percent, unless applicable law requires a higher percentage, in which case such higher percentage shall apply;

(ii) with respect to the procurement of items that are necessary to respond to any public health emergency declared under section 319 of the Public Health Service Act (42 U.S.C. 247d), any major disaster or emergency declared under the Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*), or any national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*).

(g) To the maximum extent permitted by law, any public interest determination made pursuant to section 2(f)(i)(1) of this order shall be construed to maximize the procurement and use of Essential Medicines and Medical Countermeasures produced in the United States.

(h) The head of an agency who makes any determination pursuant to section 2(f)(i) of this order shall submit an annual report to the President, through the Director of OMB and the Assistant to the President for Trade and Manufacturing Policy, describing the justification for each such determination.

Sec. 3. *Identifying Vulnerabilities in Supply Chains.* (a) Within 180 days of the date of this order, the Secretary of Health and Human Services, through the FDA Commissioner and in consultation with the Director of OMB, shall take all necessary and appropriate action, consistent with law, to identify vulnerabilities in the supply chain for Essential Medicines, Medical Countermeasures, and Critical Inputs and to mitigate those vulnerabilities, including by:

(i) considering proposing regulations or revising guidance on the collection of the following information from manufacturers of Essential Medicines and Medical Countermeasures as part of the application and regulatory approval process:

(A) the sources of Finished Drug Products, Finished Devices, and Critical Inputs;

(B) the use of any scarce Critical Inputs; and

(C) the date of the last FDA inspection of the manufacturer's regulated facilities and the results of such inspection;

(ii) entering into written agreements, pursuant to section 20.85 of title 21, Code of Federal Regulations, with the National Security Council, Department of State, Department of Defense, Department of Veterans Affairs, and other interested agencies, as appropriate, to disclose records regarding the security and vulnerabilities of the supply chains for Essential Medicines, Medical Countermeasures, and Critical Inputs;

(iii) recommending to the President any changes in applicable law that may be necessary to accomplish the objectives of this subsection; and

(iv) reviewing FDA regulations to determine whether any of those regulations may be a barrier to domestic production of Essential Medicines, Medical Countermeasures, and Critical Inputs, and by advising the President whether such regulations should be repealed or amended.

(b) The Secretary of Health and Human Services, through the FDA Commissioner, shall take all appropriate action, consistent with applicable law, to:

(i) accelerate FDA approval or clearance, as appropriate, for domestic producers of Essential Medicines, Medical Countermeasures, and Critical Inputs, including those needed for infectious disease and CBRN threat preparedness and response;

(ii) issue guidance with recommendations regarding the development of Advanced Manufacturing techniques;

(iii) negotiate with countries to increase site inspections and increase the number of unannounced inspections of regulated facilities manufacturing Essential Medicines, Medical Countermeasures, and Critical Inputs; and

(iv) refuse admission, as appropriate, to imports of Essential Medicines, Medical Countermeasures, and Critical Inputs if the facilities in which they are produced refuse or unreasonably delay an inspection.

(c) Within 90 days of the date of this order, and periodically updated as appropriate, the FDA Commissioner, in consultation with the Director of OMB, the Assistant Secretary for Preparedness and Response in the Department of Health and Human Services, the Assistant to the President for Economic Policy, and the Director of the Office of Trade and Manufacturing Policy, shall identify the list of Essential Medicines, Medical Countermeasures, and their Critical Inputs that are medically necessary to have available at all times in an amount adequate to serve patient needs and in the appropriate dosage forms.

(d) Within 180 days of the date of this order, the Secretary of Defense, in consultation with the Director of OMB, shall take all necessary and appropriate action,

consistent with law, to identify vulnerabilities in the supply chain for Essential Medicines, Medical Countermeasures, and Critical Inputs necessary to meet the unique needs of the United States Armed Forces and to mitigate the vulnerabilities identified in subsection (a) of this section. The Secretary of Defense shall provide to the Secretary of Health and Human Services, the FDA Commissioner, the Director of OMB, and the Director of the Office of Trade and Manufacturing Policy a list of defense-specific Essential Medicines, Medical Countermeasures, and Critical Inputs that are medically necessary to have available for defense use in adequate amounts and in appropriate dosage forms. The Secretary of Defense shall, as appropriate, periodically update this list.

Sec. 4. *Streamlining Regulatory Requirements.* Consistent with law, the Administrator of the Environmental Protection Agency shall take all appropriate action to identify relevant requirements and guidance documents that can be streamlined to provide for the development of Advanced Manufacturing facilities and the expeditious domestic production of Critical Inputs, including by accelerating siting and permitting approvals.

Sec. 5. *Priorities and Allocation of Essential Medicines, Medical Countermeasures, and Critical Inputs.* The Secretary of Health and Human Services shall, as appropriate and in accordance with the delegation of authority under Executive Order 13603 of March 16, 2012 (National Defense Resources Preparedness), use the authority under section 101 of the Defense Production Act of 1950, as amended (50 U.S.C. 4511), to prioritize the performance of Federal Government contracts or orders for Essential Medicines, Medical Countermeasures, or Critical Inputs over performance of any other contracts or orders, and to allocate such materials, services, and facilities as the Secretary deems necessary or appropriate to promote the national defense.

Sec. 6. *Reporting.* (a) No later than December 15, 2021, and annually thereafter, the head of each agency shall submit a report to the President, through the Director of OMB and the Assistant to the President for Trade and Manufacturing Policy, detailing, for the preceding three fiscal years: (i) the Essential Medicines, Medical Countermeasures, and Critical Inputs procured by the agency;

(ii) the agency's annual itemized and aggregated expenditures for all Essential Medicines, Medical Countermeasures, and Critical Inputs; (iii) the sources of these products and inputs; and

(iv) the agency's plan to support domestic production of such products and inputs in the next fiscal year.

(b) Within 180 days of the date of this order, the Secretary of Commerce shall submit a report to the Director of OMB, the Assistant to the President for National Security Affairs, the Director of the National Economic Council, and the Director of the Office of Trade and Manufacturing Policy, describing any change in the status of the Public Health Industrial Base and recommending initiatives to strengthen the Public Health Industrial Base.

(c) To the maximum extent permitted by law, and with the redaction of any information protected by law from disclosure, each agency's report shall be published in the *Federal Register* and on each agency's official website.

Sec. 7. *Definitions.* As used in this order:

(a) ''Active Pharmaceutical Ingredient'' has the meaning set forth in section 207.1 of title 21, Code of Federal Regulations.

(b) ''Advanced Manufacturing'' means any new medical product manufacturing technology that can improve drug quality, address shortages of medicines, and speed time to market, including continuous manufacturing and 3D printing.

(c) ''API Starting Material'' means a raw or intermediate material that is used in the manufacturing of an API, that is incorporated as a significant structural fragment into the structure of the API, and that is determined by the FDA Commissioner to be relevant in assessing the safety and effectiveness of Essential Medicines and Medical Countermeasures.

(d) ''Critical Inputs'' means API, API Starting Material, and other ingredients of drugs and components of medical devices that the FDA Commissioner determines to be critical in assessing the safety and effectiveness of Essential Medicines and Medical Countermeasures.

(e) ''Essential Medicines'' are those Essential Medicines deemed necessary for the United States pursuant to section 3(c) of this order.

(f) ''Finished Device'' has the meaning set forth in section 820.3(l) of title 21, Code of Federal Regulations.

(g) ''Finished Drug Product'' has the meaning set forth in section 207.1 of title 21, Code of Federal Regulations.

(h) ''Healthcare and Public Health Sector'' means the critical infrastructure sector identified in Presidential Policy Directive 21 of February 12, 2013 (Critical Infrastructure Security and Resilience), and the National Infrastructure Protection Plan of 2013.

(i) An Essential Medicine or Medical Countermeasure is ''produced in the United States'' if the Critical Inputs used to produce the Essential Medicine or Medical Countermeasures are produced in the United States and if the Finished Drug Product or Finished Device, are manufactured, prepared, propagated, compounded, or processed, as those terms are defined in section 360(a)(1) of title 21, United States Code, in the United States.

(j) ''Medical Countermeasures'' means items that meet the definition of ''qualified countermeasure'' in section 247d–6a(a)(2)(A) of title 42, United States Code; ''qualified pandemic or epidemic product'' in section 247d–6d(i)(7) of title 42, United States Code; ''security countermeasure'' in section 247d–6b(c)(1)(B) of title 42, United States Code; or personal protective equipment described in part 1910 of title 29, Code of Federal Regulations.

(k) ''Public Health Industrial Base'' means the facilities and associated workforces within the United States, including research and development facilities, that help produce Essential Medicines, Medical Countermeasures, and Critical Inputs for the Healthcare and Public Health Sector.

(l) ''Qualifying Countries'' has the meaning set forth in section 225.003, Defense Federal Acquisition Regulation Supplement.

Sec. 8. *Rule of Construction.* Nothing in this order shall be construed to impair or otherwise affect:

(a) the ability of State, local, tribal, or territorial governments to timely procure necessary resources to respond to any public health emergency declared under section 319 of the Public Health Service Act (42 U.S.C. 247d), any major disaster or emergency declared under the Stafford Act (42 U.S.C. 5121 *et seq.*), or any national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*);

(b) the ability or authority of any agency to respond to the spread of COVID–19; or

(c) the authority of the Secretary of Veterans Affairs to take all necessary steps, including those necessary to implement the policy set forth in section 1 of this order, to ensure that service members, veterans, and their families continue to have full access to Essential Medicines at reasonable and affordable prices.

Sec. 9. *Severability.* If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of any of its other provisions to any other persons or circumstances shall not be affected thereby.

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

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

(ii) the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

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

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

THE WHITE HOUSE,
August 6, 2020.

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Title 3— The President

Executive Order 13950 of September 22, 2020

Combating Race and Sex Stereotyping

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq*., and in order to promote economy and efficiency in Federal contracting, to promote unity in the Federal workforce, and to combat offensive and anti-American race and sex stereotyping and scapegoating, it is hereby ordered as follows:

Section 1. *Purpose*. From the battlefield of Gettysburg to the bus boycott in Montgomery and the Selma-to-Montgomery marches, heroic Americans have valiantly risked their lives to ensure that their children would grow up in a Nation living out its creed, expressed in the Declaration of Independence: ''We hold these truths to be self-evident, that all men are created equal.'' It was this belief in the inherent equality of every individual that inspired the Founding generation to risk their lives, their fortunes, and their sacred honor to establish a new Nation, unique among the countries of the world. President Abraham Lincoln understood that this belief is ''the electric cord'' that ''links the hearts of patriotic and liberty-loving'' people, no matter their race or country of origin. It is the belief that inspired the heroic black soldiers of the 54th Massachusetts Infantry Regiment to defend that same Union at great cost in the Civil War. And it is what inspired Dr. Martin Luther King, Jr., to dream that his children would one day ''not be judged by the color of their skin but by the content of their character.''

Thanks to the courage and sacrifice of our forebears, America has made significant progress toward realization of our national creed, particularly in the 57 years since Dr. King shared his dream with the country.

Today, however, many people are pushing a different vision of America that is grounded in hierarchies based on collective social and political identities rather than in the inherent and equal dignity of every person as an individual. This ideology is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans.

This destructive ideology is grounded in misrepresentations of our country's history and its role in the world. Although presented as new and revolutionary, they resurrect the discredited notions of the nineteenth century's apologists for slavery who, like President Lincoln's rival Stephen A. Douglas, maintained that our government ''was made on the white basis'' ''by white men, for the benefit of white men.'' Our Founding documents rejected these racialized views of America, which were soundly defeated on the blood-stained battlefields of the Civil War. Yet they are now being repackaged and sold as cutting-edge insights. They are designed to divide us and to prevent us from uniting as one people in pursuit of one common destiny for our great country.

Unfortunately, this malign ideology is now migrating from the fringes of American society and threatens to infect core institutions of our country. Instructors and materials teaching that men and members of certain races, as well as our most venerable institutions, are inherently sexist and racist are appearing in workplace diversity trainings across the country, even in components of the Federal Government and among Federal contractors. For example, the Department of the Treasury recently held a seminar that promoted arguments that ''virtually all White people, regardless of how 'woke' they are, contribute to racism,'' and that instructed small group leaders to encourage employees to avoid ''narratives'' that Americans should ''be more color-blind'' or ''let people's skills and personalities be what differentiates them.''

Training materials from Argonne National Laboratories, a Federal entity, stated that racism ''is interwoven into every fabric of America'' and described statements like ''color blindness'' and the ''meritocracy'' as ''actions of bias.''

Materials from Sandia National Laboratories, also a Federal entity, for non- minority males stated that an emphasis on ''rationality over emotionality'' was a characteristic of ''white male[s],'' and asked those present to ''acknowledge'' their ''privilege'' to each other.

A Smithsonian Institution museum graphic recently claimed that concepts like ''[o]bjective, rational linear thinking,'' ''[h]ard work'' being ''the key to success,'' the ''nuclear family,'' and belief in a single god are not values that unite Americans of all races

but are instead ''aspects and assumptions of whiteness.'' The museum also stated that ''[f]acing your whiteness is hard and can result in feelings of guilt, sadness, confusion, defensiveness, or fear.''

All of this is contrary to the fundamental premises underpinning our Republic: that all individuals are created equal and should be allowed an equal opportunity under the law to pursue happiness and prosper based on individual merit.

Executive departments and agencies (agencies), our Uniformed Services, Federal contractors, and Federal grant recipients should, of course, continue to foster environments devoid of hostility grounded in race, sex, and other federally protected characteristics. Training employees to create an inclusive workplace is appropriate and beneficial. The Federal Government is, and must always be, committed to the fair and equal treatment of all individuals before the law.

But training like that discussed above perpetuates racial stereotypes and division and can use subtle coercive pressure to ensure conformity of viewpoint. Such ideas may be fashionable in the academy, but they have no place in programs and activities supported by Federal taxpayer dollars. Research also suggests that blame-focused diversity training reinforces biases and decreases opportunities for minorities.

Our Federal civil service system is based on merit principles. These principles, codified at 5 U.S.C. 2301, call for all employees to ''receive fair and equitable treatment in all aspects of personnel management without regard to'' race or sex ''and with proper regard for their . . . constitutional rights.'' Instructing Federal employees that treating individuals on the basis of individual merit is racist or sexist directly undermines our Merit System Principles and impairs the efficiency of the Federal service. Similarly, our Uniformed Services should not teach our heroic men and women in uniform the lie that the country for which they are willing to die is fundamentally racist. Such teachings could directly threaten the cohesion and effectiveness of our Uniformed Services.

Such activities also promote division and inefficiency when carried out by Federal contractors. The Federal Government has long prohibited Federal contractors from engaging in race or sex discrimination and required contractors to take affirmative action to ensure that such discrimination does not occur. The participation of contractors' employees in training that promotes race or sex stereotyping or scapegoating similarly undermines efficiency in Federal contracting. Such requirements promote divisiveness in the workplace and distract from the pursuit of excellence and collaborative achievements in public administration.

Therefore, it shall be the policy of the United States not to promote race or sex stereotyping or scapegoating in the Federal workforce or in the Uniformed Services, and not to allow grant funds to be used for these purposes. In addition, Federal contractors will not be permitted to inculcate such views in their employees.

Sec. 2. *Definitions*. For the purposes of this order, the phrase:

(a) ''Divisive concepts'' means the concepts that (1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term ''divisive concepts'' also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.

(b) ''Race or sex stereotyping'' means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.

(c) ''Race or sex scapegoating'' means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.

(d) ''Senior political appointee'' means an individual appointed by the President, or a non-career member of the Senior Executive Service (or agency- equivalent system).

Sec. 3. *Requirements for the United States Uniformed Services*. The United States Uniformed Services, including the United States Armed Forces, shall not teach, instruct, or train any member of the United States Uniformed Services, whether serving on active duty, serving on reserve duty, attending a military service academy, or attending courses conducted by a military department pursuant to a Reserve Officer Corps Training program, to believe any of the divisive concepts set forth in section 2(a) of this order. No member of the United States Uniformed Services shall face any penalty or discrimination on account of his or her refusal to support, believe, endorse, embrace, confess, act upon, or otherwise assent to these concepts.

Sec. 4. *Requirements for Government Contractors*. (a) Except in contracts exempted in the manner provided by section 204 of Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity), as amended, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

''During the performance of this contract, the contractor agrees as follows:

1. The contractor shall not use any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating, including the concepts that (a) one race or sex is inherently superior to another race or sex; (b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (c) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (d) members of one race or sex cannot and should not attempt

to treat others without respect to race or sex; (e) an individual's moral character is necessarily determined by his or her race or sex; (f) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (h) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term ''race or sex stereotyping'' means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex, and the term ''race or sex scapegoating'' means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex.

2. The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under the Executive Order of September 22, 2020, entitled Combating Race and Sex Stereotyping, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

3. In the event of the contractor's noncompliance with the requirements of paragraphs (1), (2), and (4), or with any rules, regulations, or orders that may be promulgated in accordance with the Executive Order of September 22, 2020, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive

Order 11246, and such other sanctions may be imposed and remedies invoked as provided by any rules, regulations, or orders the Secretary of Labor has issued or adopted pursuant to Executive Order 11246, including subpart D of that order.

4. The contractor will include the provisions of paragraphs (1) through (4) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.''

(b) The Department of Labor is directed, through the Office of Federal Contract Compliance Programs (OFCCP), to establish a hotline and investigate complaints received under both this order as well as Executive Order 11246 alleging that a Federal contractor is utilizing such training programs in violation of the contractor's obligations under those orders. The Department shall take appropriate enforcement action and provide remedial relief, as appropriate.

(c) Within 30 days of the date of this order, the Director of OFCCP shall publish in the *Federal Register* a request for information seeking information from Federal contractors, Federal subcontractors, and employees of Federal contractors and subcontractors regarding the training, workshops, or similar programming provided to employees. The request for information should request copies of any training, workshop, or similar programing having to do with diversity and inclusion as well as information about the duration, frequency, and expense of such activities.

Sec. 5. *Requirements for Federal Grants*. The heads of all agencies shall review their respective grant programs and identify programs for which the agency may, as a condition of receiving such a grant, require the recipient to certify that it will not use Federal funds to promote the concepts that

(a) one race or sex is inherently superior to another race or sex; (b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (c) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (d) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (e) an individual's moral character is necessarily determined by his or her race or sex; (f) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (h) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. Within 60 days of the date of this order, the heads of agencies shall each submit a report to the Director of the Office of Management and Budget (OMB) that lists all grant programs so identified.

Sec. 6. *Requirements for Agencies*. (a) The fair and equal treatment of individuals is an inviolable principle that must be maintained in the Federal workplace. Agencies should continue all training that will foster a workplace that is respectful of all employees. Accordingly:

(i) The head of each agency shall use his or her authority under 5 U.S.C. 301, 302, and 4103 to ensure that the agency, agency employees while on duty status, and any contractors hired by the agency to provide training, workshops, forums, or similar programming (for purposes of this section, ''training'') to agency employees do not teach, advocate, act upon, or promote in any training to agency employees any of the divisive concepts listed in section 2(a) of this order. Agencies may consult with the Office of Personnel Management (OPM), pursuant to 5 U.S.C. 4116, in carrying out this provision; and

(ii) Agency diversity and inclusion efforts shall, first and foremost, encourage agency employees not to judge each other by their color, race, ethnicity, sex, or any other characteristic protected by Federal law.

(b) The Director of OPM shall propose regulations providing that agency officials with supervisory authority over a supervisor or an employee with responsibility for promoting diversity and inclusion, if such supervisor or employee either authorizes or approves training that promotes the divisive concepts set forth in section 2(a) of this order, shall take appropriate steps to pursue a performance-based adverse action proceeding against such supervisor or employee under chapter 43 or 75 of title 5, United States Code.

(c) Each agency head shall:

(i) issue an order incorporating the requirements of this order into agency operations, including by making compliance with this order a provision in all agency contracts for diversity training;

(ii) request that the agency inspector general thoroughly review and assess by the end of the calendar year, and not less than annually thereafter, agency compliance with the requirements of this order in the form of a report submitted to OMB; and

(iii) assign at least one senior political appointee responsibility for ensuring compliance with the requirements of this order.

Sec. 7. *OMB and OPM Review of Agency Training*. (a) Consistent with OPM's authority under 5 U.S.C. 4115–4118, all training programs for agency employees relating to diversity or inclusion shall, before being used, be reviewed by OPM for compliance with the requirements of section 6 of this order.

(b) If a contractor provides a training for agency employees relating to diversity or inclusion that teaches, advocates, or promotes the divisive concepts set forth in section 2(a) of this order, and such action is in violation of the applicable contract, the agency that contracted for such training shall evaluate whether to pursue debarment of that contractor, consistent with

applicable law and regulations, and in consultation with the Interagency Suspension and Debarment Committee.

(c) Within 90 days of the date of this order, each agency shall report to OMB all spending in Fiscal Year 2020 on Federal employee training programs relating to diversity or inclusion, whether conducted internally or by contractors. Such report shall, in addition to providing aggregate totals, delineate awards to each individual contractor.

(d) The Directors of OMB and OPM may jointly issue guidance and directives pertaining to agency obligations under, and ensuring compliance with, this order.

Sec. 8. *Title VII Guidance*. The Attorney General should continue to assess the extent to which workplace training that teaches the divisive concepts set forth in section 2(a) of this order may contribute to a hostile work environment and give rise to potential liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. If appropriate, the Attorney General and the Equal Employment Opportunity Commission shall issue publicly available guidance to assist employers in better promoting diversity and inclusive workplaces consistent with Title VII.

Sec. 9. *Effective Date*. This order is effective immediately, except that the requirements of section 4 of this order shall apply to contracts entered into 60 days after the date of this order.

Sec. 10. *General Provisions*. (a) This order does not prevent agencies, the United States Uniformed Services, or contractors from promoting racial, cultural, or ethnic diversity or inclusiveness, provided such efforts are consistent with the requirements of this order.

(b) Nothing in this order shall be construed to prohibit discussing, as part of a larger course of academic instruction, the divisive concepts listed in section 2(a) of this order in an objective manner and without endorsement.

(c) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its provisions to any other persons or circumstances shall not be affected thereby.

(d) Nothing in this order shall be construed to impair or otherwise affect: (i) the authority granted by law to an executive department, agency, or the head thereof; or

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

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

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

THE WHITE HOUSE, *September 22, 2020.*

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