INTERNAL REVENUE
BULLETIN

IRS

Bulletin No. 2020–49
November 30, 2020

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

EMPLOYEE PLANS

NOTICE 2020-81, page 1454.

This notice sets forth updates on the corporate bond monthly yield curve, the corresponding spot segment rates for November 2020 used under § 417(e)(3)(D), the 24-month average segment rates applicable for November 2020, and the 30-year Treasury rates, as reflected by the application of § 430(h)(2)(C)(iv).

NOTICE 2020-82, page 1458.

This notice provides that the IRS will treat a contribution to a single-employer defined benefit pension plan with an extended due date of January 1, 2021 pursuant to § 3608(a)(1) of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, as timely if it is made no later than January 4, 2021 (which is the first business day after January 1, 2021).

T.D. 9929, page 1220.

These final regulations respond to Executive Order 13877, "Executive Order on Improving Price and Quality Transparency in American Healthcare to Put Patients First" and are intended to increase consumer access to price information for health costs when third-party payers are involved. The final regulations set forth requirements for non-grandfathered group health plans and health insurance issuers of non-grandfathered coverage offering group health insurance coverage to disclose to a participant, beneficiary, or authorized representative for such individual, their cost-sharing liability for covered items or services from a particular provider. Under the final regulations, group health plans and health insurance issuers are required to make such information available for covered items and services through an internet website and through non-internet means. The final regulations also require plans and issuers to disclose provider negotiated rates and out-of-network provider allowed amounts through three machine-readable files posted on an internet website.

T.D. 9930, page 1400.

This document sets forth final regulations providing guidance relating to the life expectancy and distribution period tables that are used to calculate required minimum distributions from qualified retirement plans, individual retirement accounts and annuities, and certain other tax-favored employer-provided retirement arrangements. These regulations affect participants, beneficiaries, and plan administrators of these qualified retirement plans and other tax-favored employer-provided retirement arrangements, as well as owners, beneficiaries, trustees and custodians of individual retirement accounts and annuities.

INCOME TAX

REG-101657-20, page 1466.

This document contains proposed regulations relating to the foreign tax credit, including guidance on the disallowance of a credit or deduction for foreign income taxes with respect to dividends eligible for a dividends-received deduction; the allocation and apportionment of interest expense, foreign income tax expense, and certain deductions of life insurance companies; the definition of a foreign income tax and a tax in lieu of an income tax; transition rules relating to the impact on loss accounts of net operating loss carrybacks allowed by reason of the Coronavirus Aid, Relief, and Economic Security Act; the definition of foreign branch category and financial services income; and the time at which foreign taxes accrue and can be claimed as a credit. This document also contains proposed regulations clarifying rules relating to foreign-derived intangible income

REV. PROC. 2020-48, page 1459.

This revenue procedure prescribes discount factors for the 2020 accident year for insurance companies to compute discounted unpaid losses under § 846 of the Internal Revenue Code and discounted estimated salvage recoverable under § 832.

Finding Lists begin on page ii.

T.D. 9922, page 1139.
This document contains final regulations that modify the foreign tax credit provisions following the Tax Cuts and Jobs Act. This document contains additional changes to the existing regulations regarding the allocation and apportionment of expenses. Additionally, this document contains guidance on the allocation and apportionment of foreign income taxes to categories of income for purposes of the foreign tax credit. This document also contains final regulations addressing hybrid deduction accounts, certain hybrid instruments, and certain payments under section 951A. Finally, this document also contains numerous other conforming changes to the existing foreign tax credit rules.

NOTICE 2020-75, page 1453.
This notice announces that the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to issue proposed regulations to clarify that State and local income taxes imposed on and paid by a partnership or an S corporation on its income are allowed as a deduction by the partnership or S corporation in computing its non-separately stated taxable income or loss for the taxable year of payment.

The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

Part I

245A, 861, 904, 905, 965, 1502T.D. 9922

T.D. 9922

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Parts 1 and 301

Guidance Related to the Allocation and Apportionment of Deductions and Foreign Taxes, Foreign Tax Redeterminations, Foreign Tax Credit Disallowance Under Section 965(g), Consolidated Groups, Hybrid Arrangements and Certain Payments under Section 951A

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations that provide guidance relating to the allocation and apportionment of deductions and creditable foreign taxes, the definition of financial services income, foreign tax redeterminations, availability of foreign tax credits under the transition tax, the application of the foreign tax credit limitation to consolidated groups, adjustments to hybrid deduction accounts to take into account certain inclusions in income by a United States shareholder, conduit financing arrangements involving hybrid instruments, and the treatment of certain payments under the global intangible low-taxed income provisions.

DATES: *Effective Date*: These regulations are effective on January 11, 2021.

Applicability Dates: For dates of applicability, see §§1.245A(e)-1(h)(2), 1.704-1(b)(1)(ii)(*b*)(*1*), 1.861-8(h), 1.861-9(k), 1.861-12(k), 1.861-14(k), 1.861-17(h), 1.861-20(i), 1.881-3(f), 1.904-4(q), 1.904-6(g), 1.904(b)-3(f), 1.904(g)-3(l), 1.905-3(d), 1.905-4(f), 1.905-5(f), 1.951A-7(d), 1.954-1(h), 1.954-2(i), 1.960-7, 1.965-9, 1.1502-4(f), and 301.6689-1(e).

FOR FURTHER INFORMATION CONTACT: Concerning §1.245A(e)-1, Andrew L. Wigmore, (202) 317-5443; concerning §§1.861-8, 1.861-9(b), 1.861-12, 1.861-14, 1.861-17, and 1.954-2(h), Jeffrey P. Cowan, (202) 317-4924; concerning §§1.704-1, 1.861-9(e), 1.904-4(e), 1.904(b)-3, 1.904(g)-3, 1.1502-4, and 1.1502-21, Jeffrey L. Parry, (202) 317-4916; concerning §§1.861-20, 1.904-4(c), 1.904-6, 1.960-1, and 1.960-7, Suzanne M. Walsh, (202) 317-4908; concerning §1.881-3, Richard F. Owens, (202) 317-6501; concerning §§1.965-5 and 1.965-9, Karen J. Cate, (202) 317-4667; concerning §§1.905-3, 1.905-4, 1.905-5, 1.954-1, 301.6227-1, and 301.6689-1, Corina Braun, (202) 317-5004; concerning §1.951A-2, Jorge M. Oben, at (202) 317-6934 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

I. *Rules Relating to Foreign Tax Credits*

On December 7, 2018, the Department of the Treasury (the "Treasury Department") and the IRS published proposed regulations (REG-105600-18) relating to foreign tax credits in the **Federal Register** (83 FR 63200) (the "2018 FTC proposed regulations"). The 2018 FTC proposed regulations addressed several significant changes that the Tax Cuts and Jobs Act (Pub. L. 115-97, 131 Stat. 2054, 2208 (2017)) (the "TCJA") made with respect to the foreign tax credit rules and related rules for allocating and apportioning deductions in determining the foreign tax credit limitation. Certain provisions of the 2018 FTC proposed regulations relating to §§1.78-1, 1.861-12(c)(2), and 1.965-7 were finalized as part of TD 9866, published in the **Federal Register** (84 FR 29288) on June 21, 2019.

The remainder of the 2018 FTC proposed regulations were finalized on December 17, 2019 in TD 9882, published in the **Federal Register** (84 FR 69022) (the "2019 FTC final regulations"). On the same date, the Treasury Department and the IRS published proposed regulations (REG-105495-19) relating to foreign tax credits in the **Federal Register** (84 FR 69124) (the "2019 FTC proposed regulations"). The 2019 FTC proposed regulations related to changes made by the TCJA and other foreign tax credit issues. Correcting amendments to the 2019 FTC final regulations and the 2019 FTC proposed regulations were published in the **Federal Register** on May 15, 2020, see 85 FR 29323 (2019 FTC final regulations) and 85 FR 29368 (2019 FTC proposed regulations). A public hearing on the proposed regulations was held on May 20, 2020.

On November 7, 2007, the **Federal Register** published temporary regulations (TD 9362) at 72 FR 62771 and a notice of proposed rulemaking by cross-reference to the temporary regulations at 72 FR 62805 relating to sections 905(c), 986(a), and 6689 of the Internal Revenue Code ("Code"). Portions of these temporary regulations were finalized in the 2019 FTC final regulations, while certain portions were reproposed in the 2019 FTC proposed regulations.

This document contains final regulations (the "final regulations") addressing the following issues: (1) the allocation and apportionment of deductions under sections 861 through 865, including rules on the allocation and apportionment of expenditures for research and experimentation ("R&E"), stewardship, legal damages, and certain deductions of life insurance companies; (2) the allocation and apportionment of foreign income taxes; (3) the interaction of the branch loss and dual consolidated loss recapture rules with section 904(f) and (g); (4) the effect of foreign tax redeterminations of foreign corporations, including for purposes of the application of the high-tax exception described in section 954(b)(4) (and for purposes of determining tested income under section 951A(c)(2)(A)(i)(III)), and required notifications under section 905(c) to the IRS of foreign tax redeterminations

and related penalty provisions; (5) the definition of foreign personal holding company income under section 954; (6) the application of the foreign tax credit disallowance under section 965(g); and (7) the application of the foreign tax credit limitation to consolidated groups.

II. *Rules Relating to Hybrid Deduction Accounts, Hybrid Instruments Used in Conduit Financing Arrangements, and Certain Payments under Section 951A*

On December 28, 2018, the Treasury Department and the IRS published proposed regulations (REG-104352-18) relating to hybrid arrangements, including hybrid arrangements to which section 245A(e) applies, in the **Federal Register** (83 FR 67612) (the "2018 hybrids proposed regulations"). Those regulations were finalized as part of TD 9896, published in the **Federal Register** (85 FR 19802) on April 8, 2020 (the "2020 hybrids final regulations"). On the same date, the Treasury Department and the IRS published proposed regulations (REG-106013-19) in the **Federal Register** (85 FR 19858) (the "2020 hybrids proposed regulations"). Correcting amendments to the 2020 hybrids final regulations and the 2020 hybrids proposed regulations were published in the **Federal Register** on August 4, 2020, August 11, 2020, and August 12, 2020. See 85 FR 47027 (2020 hybrids final regulations), 85 FR 48485 (2020 hybrids proposed regulations), and 85 FR 48651 (2020 hybrids final regulations).

The 2020 hybrids proposed regulations address hybrid deduction accounts under section 245A(e), hybrid instruments used in conduit financing arrangements under section 881, and certain payments under section 951A (relating to global intangible low-taxed income). The Treasury Department and the IRS received written comments with respect to the 2020 hybrids proposed regulations. All written comments received in response to the 2020 hybrids proposed regulations are available at www.regulations.gov or upon request. A public hearing on the 2020 hybrids proposed regulations was not held because there were no requests to speak.

This document contains final regulations addressing the following issues: (1) the reduction to a hybrid deduction account under section 245A(e) by reason of an amount included in the gross income of a domestic corporation under section 951(a) or 951A(a) with respect to a controlled foreign corporation ("CFC"); (2) the treatment of a hybrid instrument as a financing transaction for purposes of the conduit financing rules under section 881; and (3) the treatment under section 951A of certain prepayments made to a related CFC after December 31, 2017, and before the CFC's first taxable year beginning after December 31, 2017.

III. *Scope of Provisions and Comments Discussed in this Preamble*

This rulemaking finalizes, without substantive change, certain provisions in the 2019 FTC proposed regulations and the 2020 hybrids proposed regulations with respect to which the Treasury Department and IRS did not receive any comments. See, for example, §1.904(b)-3, §1.904(g)-3, §1.951A-2(c)(6), §1.951A-7(d), §1.1502-4, or §301.6689-1. These provisions are generally not discussed in this preamble.

Comments received that do not pertain to the 2019 FTC proposed regulations or the 2020 hybrids proposed regulations, or that are otherwise outside the scope of this rulemaking, are generally not addressed in this preamble but may be considered in connection with future guidance projects.

Summary of Comments and Explanation of Revisions

I. *Rules Under Section 245A(e) to Reduce Hybrid Deduction Accounts*

A. *Overview*

Section 245A(e) was added to the Code by the TCJA. Section 245A(e) and the 2020 hybrids final regulations neutralize the double non-taxation effects of a hybrid dividend or tiered hybrid dividend by either denying the section 245A(a) dividends received deduction with respect to the dividend or requiring an inclusion under section 951(a)(1)(A) with respect to the dividend, depending on whether the dividend is received by a domestic corporation or a CFC. The 2020 hybrids final regulations require that certain shareholders of a CFC maintain a hybrid deduction account with respect to each share of stock of the CFC that the shareholder owns, and provide that a dividend received by the shareholder from the CFC is a hybrid dividend or tiered hybrid dividend to the extent of the sum of those accounts. A hybrid deduction account with respect to a share of stock of a CFC reflects the amount of hybrid deductions of the CFC that have been allocated to the share, reduced by the amount of hybrid deductions that gave rise to a hybrid dividend or tiered hybrid dividend.

The 2020 hybrids proposed regulations generally reduced a hybrid deduction account with respect to a share of stock of a CFC by three categories of amounts included in the gross income of a domestic corporation with respect to the share, including an "adjusted subpart F inclusion" or an "adjusted GILTI inclusion" with respect to the share. See proposed §1.245A(e)-1(d)(4)(i)(B)(*1*) and (*2*). An adjusted subpart F inclusion or an adjusted GILTI inclusion with respect to a share is intended to measure, in an administrable manner, the extent to which a domestic corporation's inclusion under section 951(a)(1)(A) ("subpart F inclusion") or inclusion under section 951A ("GILTI inclusion amount") attributable to the share is likely "included in income" in the United States — that is, taken into account in income and not offset by, for example, foreign tax credits associated with the inclusion and, in the case of a GILTI inclusion amount, the deduction under section 250(a)(1)(B).

The final regulations retain the basic approach and structure of the 2020 hybrids proposed regulations that reduced hybrid deduction accounts, with certain revisions. Part I.B of this Summary of Comments and Explanation of Revisions discusses the revisions as well as comments received that relate to these rules.

B. *Computation of adjusted subpart F income inclusion and adjusted GILTI inclusion*

1. In General

Comments suggested several refinements or clarifications to the computation of an adjusted subpart F inclusion or ad-

justed GILTI inclusion with respect to a share of stock of a CFC, generally so that the adjusted subpart F inclusion or adjusted GILTI inclusion more closely reflects the extent that the subpart F inclusion or GILTI inclusion amount is in fact included in income in the United States.

2. Section 904 Limitation

Under the 2020 hybrids proposed regulations, an adjusted subpart F inclusion or adjusted GILTI inclusion with respect to a share of stock is computed by taking into account foreign income taxes that, as a result of the application of section 960(a) or (d), are likely to give rise to deemed paid credits eligible to be claimed by the domestic corporation with respect to the subpart F inclusion or adjusted GILTI inclusion. See proposed §1.245A(e)-1(d)(4)(ii)(A) and (B). To minimize complexity, the 2020 hybrids proposed regulations did not take into account any limitations on foreign tax credits when computing foreign income taxes that are likely to give rise to deemed paid credits. See proposed §1.245A(e)-1(d)(4)(ii)(D). A comment suggested that the final regulations take into account the limitation under section 904.

The Treasury Department and the IRS agree with the comment for computing an adjusted GILTI inclusion. Foreign income taxes that by reason of section 904 do not currently give rise to deemed paid credits eligible to be claimed with respect to the GILTI inclusion amount are not creditable in another year through a carryback or carryover. See section 904(c). Thus, there is generally no ability for such excess foreign income taxes to reduce the extent that an amount taken into account in income by the domestic corporation is included in income in the United States. The final regulations therefore provide that such foreign income taxes are not taken into account when computing an adjusted GILTI inclusion. See §1.245A(e)-1(d)(4)(ii)(D)(*2*)(*iii*) and (G). If the application of this rule results in circularity or ordering rule issues, a taxpayer may, solely for purposes of computing the adjusted GILTI inclusion, apply any reasonable method to compute the amount of foreign income taxes the creditability of which is limited by section 904.[1]

The final regulations do not adopt a similar rule for computing an adjusted subpart F inclusion. This is because foreign income taxes that by reason of section 904 do not currently give rise to deemed paid credits eligible to be claimed with respect to the subpart F inclusion may become creditable in another year under section 904(c). Consequently, for example, the foreign income taxes could in a later year reduce the extent that an amount is included in income in the United States, and could thus inappropriately result in an outcome similar to the one that would have occurred had the foreign income taxes given rise to deemed paid credits in the year of the subpart F inclusion and thereby reduced the extent that the subpart F inclusion was subject to tax in the United States at the full statutory rate. The Treasury Department and the IRS have determined that special rules to prevent such results would be complex or burdensome as they would require, for instance, tracking the creditability of the foreign income taxes over prior or later years (potentially through a 10-year period), and then adjusting the hybrid deduction account as the foreign income taxes become creditable.

3. Section 250 Deduction

Under the 2020 hybrids proposed regulations, an adjusted GILTI inclusion is computed by taking into account the portion of the deduction allowed under section 250 by reason of section 250(a)(1)(B) that the domestic corporation is likely to claim with respect to the GILTI inclusion amount. See proposed §1.245A(e)-1(d)(4)(ii)(B). The 2020 hybrids proposed regulations did not take into account any limitations on the deduction under section 250(a)(2)(B). See id. A comment suggested that the final regulations take into account the taxable income limitation under section 250(a)(2).

The Treasury Department and the IRS agree with the comment, because taking into account the taxable income limitation results in an adjusted GILTI inclusion that more closely reflects the extent to which the GILTI inclusion amount is included in income in the United States. The final regulations thus provide a rule to this effect. See §1.245A(e)-1(d)(4)(ii)(B) and (H). Similar to the rule discussed in Part I.B.2 of this Summary of Comments and Explanation of Revisions (related to the section 904 limitation), a taxpayer may, solely for purposes of computing an adjusted GILTI inclusion, apply any reasonable method to compute the extent to which the portion of a deduction allowed under section 250 by reason of section 250(a)(1)(B) is limited under section 250(a)(2)(B).

4. Limit on Reduction of a Hybrid Deduction Account

The 2020 hybrids proposed regulations provided a limit to ensure that an adjusted subpart F inclusion or adjusted GILTI inclusion with respect to a share of stock of a CFC does not reduce the hybrid deduction account by an amount greater than the hybrid deductions allocated to the share for the taxable year multiplied by a fraction, the numerator of which is the subpart F income or tested income, as applicable, of the CFC for the taxable year and the denominator of which is the CFC's taxable income. See proposed §1.245A(e)-1(d)(4)(i)(B)(*1*)(*ii*) and (d)(4)(i)(B)(*2*)(*ii*). In cases in which the CFC's taxable income is zero or negative, the 2020 hybrids proposed regulations prevented distortions to the fraction – which would otherwise occur because the fraction would involve dividing by zero or a negative number – by providing that the fraction is considered to be zero. See proposed §1.245A(e)-1(d)(4)(i)(B)(*1*)(*ii*) and (d)(4)(i)(B)(*2*)(*ii*).

[1] For example, in certain cases the section 904 limitation may be affected by the extent to which section 245A(e) applies to a dividend paid by the CFC (in particular, in connection with allocating and apportioning deductions under §§1.861-8 through 1.861-20); the application of section 245A(e) to the dividend may depend on the extent to which a hybrid deduction account is reduced by reason of an adjusted GILTI inclusion; and the adjusted GILTI inclusion may in turn depend on the section 904 limitation. In such a case, to avoid circularity issues, a taxpayer may compute the section 904 limitation for purposes of determining the adjusted GILTI inclusion by, for instance, using simultaneous equations, or applying an ordering rule pursuant to which, solely for purposes of determining the adjusted GILTI inclusion, the section 904 limitation is determined without regard to the application of section 245A(e) (as well as any other provision the application of which depends on the extent to which section 245A(e) applies).

Distortions to the fraction could also occur if the CFC's taxable income is greater than zero but less than its subpart F income or tested income (due to losses in one category of income) because, absent a rule to address, the fraction would be greater than one. The final regulations eliminate these distortions by modifying the fraction so that the numerator and denominator only reflect items of gross income. See §1.245A(e)-1(d)(4)(i)(B)(*1*)(*ii*) and (d)(4)(i)(B)(*2*)(*ii*).

5. Clarifications

Comments recommended that the final regulations clarify whether an adjusted subpart F inclusion or adjusted GILTI inclusion can be negative and result in an increase to the hybrid deduction account (that is, whether the hybrid deduction account can be reduced by a negative amount). The final regulations clarify that an adjusted subpart F inclusion or adjusted GILTI inclusion cannot be negative and thus cannot result in an increase to the hybrid deduction account. See §1.245A(e)-1(d)(4)(ii)(A) and (B).

A comment also recommended that the final regulations clarify whether the computation of an adjusted subpart F inclusion takes into account an amount that the domestic corporation includes in gross income by reason of section 964(e)(4). As noted in the comment, an amount that the domestic corporation includes in gross income by reason of section 964(e)(4) is in many cases offset by a 100 percent dividends received deduction under section 245A(a), and thus no portion of the amount is included in income in the United States (that is, taken into account in income and not offset by a deduction or credit particular to the inclusion). The final regulations clarify that the computation of an adjusted subpart F inclusion does not take into account an amount that a domestic corporation includes in gross income by reason of section 964(e)(4), to the extent that a deduction under section 245A(a) is allowed for the amount. See §1.245A(e)-1(d)(4)(ii)(A).

6. Comments Outside the Scope of the 2020 Hybrids Proposed Regulations

In response to a comment, the 2020 hybrids final regulations clarified that a deduction or other tax benefit may be a hybrid deduction regardless of whether it is used currently under the foreign tax law. See §1.245A(e)-1(d)(2). The preamble to the 2020 hybrids final regulations explained that even though a deduction or other tax benefit may not be used currently, it could be used in another taxable period and thus could produce double non-taxation. The preamble also noted that it could be complex or burdensome to determine whether a deduction or other tax benefit is used currently and, to the extent not used currently, to track the deduction or other tax benefit and add it to the hybrid deduction account if it is in fact used.

Comments submitted with respect to the 2020 hybrids proposed regulations raised additional issues involving the extent to which a hybrid deduction account should be adjusted based on the availability-for-use of a deduction or other tax benefit under the foreign tax law. These issues include the extent to which (or the mechanism by which) a hybrid deduction account should be adjusted when a deduction or other tax benefit reflected in the account is subsequently disallowed under the foreign tax law (for example, by reason of a foreign audit) or an economically equivalent adjustment is made under the foreign tax law, or the deduction or other tax benefit expires or otherwise cannot be used under the foreign tax law. The Treasury Department and the IRS are studying these comments, which are outside the scope of the 2020 hybrids proposed regulations, and may address these issues in a future guidance project.

II. *Allocation and Apportionment of Deductions and the Calculation of Taxable Income for Purposes of Section 904(a)*

A. *Stewardship expenses, litigation damages awards and settlement payments, net operating losses, interest expense, and other expenses*

1. Stewardship Expenses

The 2019 FTC proposed regulations made several changes to the rules for allocating and apportioning stewardship expenses, which are generally expenses incurred to oversee a related corporation. Although the 2019 FTC proposed regulations did not change the definition of stewardship expenses, the regulations did provide that expenses incurred with respect to partnerships are treated as stewardship expenses. The 2019 FTC proposed regulations also expanded the types of income to which stewardship expenses are allocated to include not only dividends but also other inclusions received with respect to stock. The 2019 FTC proposed regulations further provided that stewardship expenses are to be apportioned based on the relative values of stock held by a taxpayer, as computed for purposes of allocating and apportioning the taxpayer's interest expense. Additionally, the preamble to the 2019 FTC proposed regulations requested comments regarding how to distinguish stewardship expenses from supportive expenses.

Several comments addressed the definition of stewardship expenses. Some comments recommended that the current regulations' definition be retained without changes. One comment recommended that, because stewardship is among those activities that are not treated as providing a benefit to a related party under the section 482 regulations, such expenses should be treated as supportive expenses. Another recommended that the definition of stewardship expenses be narrowed to apply solely to expenses that result from oversight with respect to foreign subsidiaries or non-affiliated domestic entities. Comments also requested clarification on how to identify and distinguish between stewardship and supportive expenses and sought greater flexibility in identifying stewardship expenses. One comment recommended that further guidance be left to a separate project.

The final regulations generally retain the existing definition of stewardship expenses as either duplicative or shareholder activities as described in §1.482-9(l)(3)(iii) or (iv). Therefore, stewardship expenses either duplicate an expense incurred by the related entity without providing an additional benefit to that entity or are incurred primarily to protect the taxpayer's investment in another entity or to facilitate the taxpayer's compliance with its own reporting, legal or regulatory requirements. In contrast, supportive expenses are typically incurred in order

to enhance the income-producing capabilities of the taxpayer itself, and so are definitely related and allocable to all, or broad classes, of the taxpayer's gross income. See §1.861-8(b)(3). The fact that expenses attributable to stewardship activities do not provide a benefit to the related party does not mean that the expenses are supportive of all of the taxpayer's income-producing activity. Instead, expenses categorized under §§1.861-8(e)(4)(ii) and 1.482-9(l)(3)(iii) and (iv) as stewardship expenses are properly allocated to income generated by the related party (and included in income of the taxpayer as a dividend or other inclusion), rather than to income earned directly by the taxpayer.

Comments recommended that the definition of stewardship expenses be expanded to include expenses incurred with respect to branches and disregarded entities, in addition to corporations and partnerships. The Treasury Department and the IRS agree that stewardship expenses can also be incurred with respect to all business entities (whether foreign or domestic) as described in §301.7701-2(a) and not only those business entities that are classified as corporations or partnerships for Federal income tax purposes. Therefore, the final regulations at §1.861-8(e)(4)(ii)(A) provide that stewardship expenses incurred with respect to oversight of disregarded entities are also subject to allocation and apportionment under the rules of §1.861-8(e)(4). However, the Treasury Department and the IRS have determined that it is inappropriate to extend the definition of stewardship expense to include oversight expenses incurred with respect to an unincorporated branch of the taxpayer, since the branch's income is income of the taxpayer itself, not income of a separate entity in which the taxpayer is protecting its investment, and any reporting, legal or regulatory requirements that apply to an unincorporated branch of the taxpayer apply to the taxpayer itself.

Comments also requested that the final regulations make clear that stewardship expenses can be allocated and apportioned to income and assets of all affiliated and consolidated group members, noting that a portion of the dividends and stock with respect to domestic affiliates may be treated as exempt income or assets under section 864(e)(3) and §1.861-8(d)(2)(ii) and excluded from the apportionment formula, which could reduce apportionment of expenses to U.S. source income. In response to the comments, the final regulations at §1.861-8(e)(4)(ii)(A) provide that the affiliated group rules in §1.861-14 do not apply for purposes of allocating and apportioning stewardship expenses. As a result, stewardship expenses incurred by one member of an affiliated group in order to oversee the activities of another member of the group are allocated and apportioned by the investor taxpayer on a separate entity basis, with reference to the investor's stock in the affiliated member. See §1.861-8(e)(4)(ii)(A). Furthermore, in response to comments, the final regulations at §1.861-8(e)(4)(ii)(C) provide that the exempt income and asset rules in section 864(e)(3) and §1.861-8(d)(2) do not apply for purposes of apportioning stewardship expenses.

Comments were also received regarding the rules for allocating stewardship expenses solely to income arising from the entity for which the stewardship expenses are being incurred in order to protect that investment. One comment argued that the rule in the prior final regulations for allocating stewardship expenses solely to dividend income should be retained and should not be expanded to include inclusions such as those under the GILTI rules. In contrast, another comment agreed with the approach to expand allocation to include shareholder-level inclusions such as GILTI inclusions in light of the changes made by the TCJA.

The Treasury Department and the IRS have determined that allocating stewardship expenses to all types of income derived from ownership of the entity, rather than solely dividend income, is appropriate because dividends do not fully capture all of the statutory and residual groupings to which income from stock is assigned. Limiting the allocation of stewardship expenses only to dividends would preclude allocation to stock in a CFC or passive foreign investment company ("PFIC") whose income gave rise only to subpart F, GILTI, or PFIC inclusions, even if the expense clearly relates to overseeing activities that generate income in the CFC or PFIC that give rise to such inclusions. Therefore, the Treasury Department and IRS agree with the comment supporting the expansion of stewardship expense allocation in proposed §1.861-8(e)(4)(ii)(B) to include shareholder-level inclusions.

One comment recommended adding dividends eligible for a section 245A deduction to the list of income inclusions to which stewardship expenses are allocable. The existing regulations are already clear, however, that stewardship expenses are allocable to dividends. This allocation is not affected by the fact that dividends may qualify for the deduction under section 245A, which does not convert the dividends into exempt or excluded income for purposes of allocating and apportioning deductions. See §1.861-8(d)(2)(iii)(C). To the extent that stewardship expense is allocated and apportioned to dividend income in the section 245A subgroup, section 904(b)(4) requires certain adjustments to the taxpayer's foreign source taxable income and entire taxable income for purposes of computing the applicable foreign tax credit limitation. Accordingly, the final regulations are not modified in response to the comment.

In response to a request for comments in the 2019 FTC proposed regulations on possible exceptions to the general rule for the allocation and apportionment of stewardship expenses, several comments recommended allowing taxpayers to show that stewardship expense factually relates only to the relevant income of a specific income-producing entity or entities. The Treasury Department and the IRS agree that stewardship expenses may be factually related to the taxpayer's ownership of a specific entity (or entities) and should not be allocated and apportioned to the income derived from all entities in a group without taking into account the factual connection between the stewardship expense and the entity being overseen. Accordingly, the final regulations at §1.861-8(e)(4)(ii)(B) clarify that at the allocation step (but before applying the apportionment rules), only the gross income derived from entities to which the taxpayer's stewardship expense has a factual connection are included and, in such cases, the apportionment rule applies based on the tax book value of the taxpayer's investment in those particular entities. This approach recognizes that stewardship activities are not fungible in the same manner as interest expense.

With respect to the apportionment of stewardship expenses, several comments recommended retaining the flexibility of the prior final regulations, which provide for several permissible methods of apportionment, or alternatively apportioning stewardship expenses on the basis of gross income, rather than assets. One comment questioned the appropriateness of applying the apportionment rule used for interest expense in the context of stewardship expenses.

The Treasury Department and the IRS have determined that it is appropriate to provide a single, clear rule for the apportionment of stewardship expenses and that the asset-based rule for interest expense apportionment is the most appropriate method. The Treasury Department and the IRS have also determined that an explicit rule provides certainty for both taxpayers and the IRS and will minimize disputes. By definition, stewardship expenses typically relate to protecting the value of the taxpayer's ownership interest in another entity. Therefore, such expenses should be apportioned on the basis of the tax book value (or alternative tax book value) of the taxpayer's interest in the entity (or entities) in question, since that value more closely approximates the income generated by the entity over time, while income distributed from an entity (or entities) and taxed to the owner can vary from year to year and may not properly reflect all the income-generating activity of the entity. Although stewardship activities may be definitely related to indirectly-owned entities, the Treasury Department and the IRS have determined that apportioning stewardship expenses based on the value of an indirectly-owned entity would lead to unnecessary complexity for taxpayers and administrative burdens for the IRS; instead, such expenses are apportioned based on the values of the entities that are owned directly by the taxpayer. See §1.861-8(e)(4)(ii)(C).

For purposes of determining the value of an entity, the final regulations at §1.861-8(e)(4)(ii)(C) provide that the value of the stock in an affiliated corporation is characterized as if the corporation were not affiliated and the stock is characterized by the taxpayer in the same ratios in which the affiliate's assets are characterized for purposes of allocating and apportioning the group's interest expense. The final regulations also provide that the tax book value of a taxpayer's investment in a disregarded entity is determined and characterized under the rules that would apply if the entity's stock basis were regarded for purposes of allocating and apportioning the investor taxpayer's interest expense.

2. Litigation Damages Awards, Prejudgment Interest, and Settlement Payments

The 2019 FTC proposed regulations included special rules for the allocation and apportionment of damages awards, prejudgment interest, and settlement payments incurred in settlement of, or in anticipation of, claims for damages arising from product liability, events incident to the production or sale of goods or provision of services, and investor suits. Damages or settlement awards related to product liability, or events incident to the production or sale of goods or provision of services, are allocated to the class of gross income produced by the specific sales of products or services that gave rise to the claims for damages or injury, or to the class of gross income produced by the assets involved in the production or sales activity, respectively. Damages awards related to shareholder suits are allocated to all income of the corporation and apportioned based on the relative values of all of the corporation's assets that produce income in the statutory and residual groupings.

One comment suggested that the proposed rules lacked clearly articulated rationales, in contrast to, for example, the rules for R&E expenditures. The Treasury Department and the IRS have determined that the rules included in the 2019 FTC proposed regulations for specific types of litigation-related expenses are consistent with the general principles of the allocation and apportionment rules, which are based on the factual connection between deductions and the class of gross income to which they relate. See §1.861-8(b)(1). Accordingly, no change is made in the final regulations in response to this comment. However, the final regulations at §1.861-8(e)(5)(ii) include a new paragraph heading and a sentence to clarify that the damages rule is not limited to product liability claims.

One comment stated that the 2019 FTC proposed regulations could be interpreted to require a double allocation of deductions to royalty income, for example, if a taxpayer incurs damages from a patent infringement lawsuit and also indemnifies its CFC for damages paid in a separate lawsuit filed against the CFC. The Treasury Department and the IRS have determined that indemnification payments, to the extent deductible, are governed by the generally-applicable rules for allocating and apportioning expenses based on the factual relationship between the deduction and the class of gross income to which the deduction relates. The allocation of separate deductions that are both related to the same class of gross income does not constitute a double allocation. Accordingly, no changes are made in the final regulations in response to this comment.

The 2019 FTC proposed regulations contained an explicit apportionment rule for damages awards in response to industrial accidents and investor lawsuits, but not for product liability and similar claims. The final regulations add a sentence at §1.861-8(e)(5)(ii) to clarify that deductions relating to product liability and similar claims are apportioned among the statutory and residual groupings based on the relative amounts of gross income in the relevant class in the groupings in the year the deductions are allowed.

Finally, several comments disagreed with the approach in the 2019 FTC proposed regulations regarding lawsuits filed by investors against a corporation. These comments argued that it is inappropriate to allocate deductions for such payments to income produced by all of the taxpayer's assets, because these expenses can have a closer factual connection to the jurisdiction where the litigation occurs or where the events (for example, any negligence, fraud, or malfeasance) at issue in the lawsuit occurred. Some comments advocated for a more flexible rule, noting that certain shareholder claims may have a very narrow geographic scope, whereas other claims may relate to a broader range of activities.

The Treasury Department and the IRS have determined that it is inappropriate to allocate deductions for payments with

respect to investor lawsuits on the basis of the situs of the underlying events or the location of the lawsuit. The purpose of direct investor lawsuits against a company is generally to compensate investors for damages to their investment in the entire company. Even where the underlying misconduct directly relates to only a portion of the taxpayer's business activities, the harm to the investor is generally attributable to the taxpayer's business more generally and, therefore, any damages payment is related to all of the taxpayer's income-producing activities. Moreover, any rule that attempted to quantify the portion of damages or settlements that relate to specific business activities and the portion that relates to more general reputational loss would by its nature be difficult for taxpayers to comply with and for the IRS to administer. Furthermore, the Treasury Department and the IRS disagree with the comments suggesting that award payments should be allocated based on the geographic location in which the lawsuit is filed, which could be governed by contractual terms or choice-of-law rules that have little to no factual relationship to the underlying activities to which the lawsuit relates. Accordingly, the comments are not adopted.

3. Net Operating Loss Deductions

The 2019 FTC proposed regulations clarified the treatment of net operating losses (NOLs) by specifying how the statutory and residual grouping components of an NOL are determined in the taxable year of the loss and by clarifying the manner in which the net operating loss deduction allowed under section 172 is allocated and apportioned in the taxable year in which the deduction is allowed. Comments requested that for purposes of applying §1.861-8(e)(8) to section 250 as the operative section, NOLs arising in taxable years before the TCJA's enactment of section 250 should not be allocated and apportioned to gross FDDEI. On July 15, 2020, the Treasury Department and the IRS finalized regulations under section 250, which provide that the deduction under section 172(a) is not taken into account in computing FDDEI. See §1.250(b)-1(d)(2)(ii). Therefore, the comment is moot. However, a sentence is added to the final regulations at §1.861-8(e)(8)(i) to clarify that in determining the component parts of an NOL, deductions that are considered absorbed in the year the loss arose for purposes of an operative section may differ from the deductions that are considered absorbed for purposes of another provision of the Code that requires determining the components of an NOL. Therefore, for example, a taxpayer's NOL may comprise excess deductions allocated to foreign source general category income for purposes of section 904, even though for purposes of section 172(b)(1)(B)(ii) the NOL is a farming loss comprising excess deductions allocated to U.S. source income from farming.

4. Application of the Exempt Income/Asset Rule to Insurance Companies in Connection with Certain Dividends and Tax-exempt Interest

The 2019 FTC proposed regulations clarified in proposed §1.861-8(d)(2)(ii)(B), (d)(2)(v), and (e)(16) the effect of certain deduction limitations on the treatment of income and assets generating dividends-received deductions and tax-exempt interest held by insurance companies for purposes of allocating and apportioning deductions to such income and assets. Specifically, the 2019 FTC proposed regulations provided that in the case of insurance companies, exempt income includes dividends for which a deduction is provided by sections 243(a)(1) and (2) and 245, without regard to the proration rules under section 805(a)(4)(A)(ii) disallowing a portion of the deduction attributable to the policyholder's share of the dividends or any similar disallowance under section 805(a)(4)(D). Similarly, the regulations provided that the term exempt income includes tax-exempt interest without regard to the proration rules.

One comment requested that the final regulations modify §1.861-8T(d)(2) to permit insurance companies to adjust the amount of income and assets that are exempted in apportioning deductions. The comment asserted that such adjustment is required in order to reflect the addition of section 864(e)(7)(E) and relied on legislative history to a provision in proposed technical corrections legislation (Technical Corrections Act of 1987, H.R. 2636, 100th Cong., section 112(g)(6)(A)) (June 10, 1987)) (the "1987 bill") to suggest that Congress intended to create a different result for insurance companies than for other companies.

The 1987 bill, however, was not enacted, and the language in section 864(e)(7)(E) is not the same as the language proposed in the bill. Section 864(e)(7)(E) provides regulatory authority for the Secretary to issue regulations regarding any adjustments that may be appropriate in applying section 864(e)(3) to insurance companies. The legislative history to section 864(e)(7)(E) (which was enacted in 1988) does not contain the same language as did the committee reports from the 1987 bill, and the rule that was proposed in the 1987 bill is contrary to subsequent case law. See *Travelers Insurance Company v. United States*, 303 F.3d 1373 (2002). Therefore, the Treasury Department and the IRS have concluded that although section 864(e)(7)(E) provides regulatory authority for a rule applying section 864(e)(3) to insurance companies, there is no indication that Congress intended for Treasury to adopt a rule mirroring the rule in the 1987 bill (which Congress did not enact).

Section 864(e)(3) is clear that exempt income includes income for which a deduction is allowed under sections 243 and 245, and no exception is provided in the statute for insurance companies. Furthermore, as explained in Part I.A.4 of the Explanation of Provisions in the 2019 FTC proposed regulations, a special rule for either tax-exempt interest of a life insurance company or dividends-received deductions and tax-exempt interest of a nonlife insurance company is not appropriate because when a policyholder's share or applicable percentage is accounted for as either a reserve adjustment or a reduction to losses incurred, no further modification to the generally applicable rules is required to ensure that the appropriate amount of expenses are apportioned to U.S. source income. Instead, the rule suggested by the comment would inappropriately distort the allocation and apportionment of deductions to U.S. source income. Therefore, the comment is not adopted.

5. Treatment of the Section 250 Deduction

One comment requested clarification on the allocation and apportionment of the deduction allowed under section 250 ("section 250 deduction") with respect to members of a consolidated group. In general, under §1.1502-50(b), a consolidated group member's section 250 deduction is determined based on the member's share of the sum of all members' positive FDDEI or GILTI. Separate from this determination under §1.1502-50(b), a taxpayer must also allocate and apportion the section 250 deduction to gross income for purposes of determining its foreign tax credit limitation. For this purpose, in allocating and apportioning the section 250 deduction to statutory and residual groupings, under §1.861-8(e)(13) the portion of the section 250 deduction attributable to FDII is treated as definitely related and allocable to the specific class of gross income that is included in the taxpayer's FDDEI and then apportioned between the statutory and residual groupings based on the relative amounts of FDDEI in each grouping. In the context of an affiliated group, under §1.861-14T(c)(1) expenses are generally allocated and apportioned by treating all members of an affiliated group as if they were a single corporation.

In response to the comment requesting clarity on the allocation and apportionment of the section 250 deduction with respect to members of a consolidated group, the final regulations provide that the section 250 deduction is allocated and apportioned as if all members of the consolidated group are treated as a single corporation. See §1.861-14(e)(4). However, in the case of an affiliated group that is not a consolidated group, the section 250 deduction of a member of an affiliated group is allocated and apportioned on a separate entity basis under the rules of §1.861-8(e)(13) and (14).

6. Other Requests for Comments on Expense Allocation

The preamble to the 2019 FTC proposed regulations requested comments on whether future regulations should allow taxpayers to capitalize and amortize certain expenses solely for purposes of the rules in §1.861-9 for allocating and apportioning interest expense in order to better reflect asset values under the tax book value method. One comment was received recommending that such a rule be included with respect to R&E and advertising expenditures. The Treasury Department and the IRS agree with this comment and, accordingly, this rule is included in a notice of proposed rulemaking in the Proposed Rules section of this issue of the **Federal Register** (the "the 2020 FTC proposed regulations"). See Part V.A of the Explanation of Provisions in the 2020 FTC proposed regulations.

One comment requested that a special rule be adopted in §1.861-10T to directly allocate certain interest expense related to regulated utility companies. The Treasury Department and the IRS agree that a special rule is warranted, and have included a rule in the 2020 FTC proposed regulations. See Part V.B. of the Explanation of Provisions in the 2020 FTC proposed regulations.

Finally, the preamble to the 2019 FTC proposed regulations requested comments on whether the rules in §1.861-8(e)(6) for allocating and apportioning state income taxes should be revised in light of changes made by the TCJA and changes to state rules for taxing foreign income. One comment was received requesting that the existing rules, which rely on state law to determine the income to which state taxes relate, be retained. The Treasury Department and the IRS agree that no changes to the rules in §1.861-8(e)(6) are required at this time.

7. Examples Illustrating Allocation and Apportionment of Certain Expenses of an Affiliated Group of Corporations

Examples 1 through 6 in §1.861-14T(j) apply the temporary regulations to fact patterns involving affiliated groups of corporations. However, Examples 1 and 4 of §1.861-14T(j) are no longer consistent with current law, and therefore the final regulations append an informational footnote to §1.861-14T(j) to reflect this fact. The Treasury Department and the IRS are also studying whether the remaining examples should be modified and whether new examples should be included in future guidance.

B. *Partnership transactions*

The 2019 FTC proposed regulations revised §§1.861-9(b) and 1.954-2(h)(2)(i) to provide that guaranteed payments for the use of capital described in section 707(c) are treated similarly to interest deductions for purposes of allocating and apportioning deductions under §§1.861-8 through 1.861-14, and are treated as income equivalent to interest under section 954(c)(1)(E). These rules were intended to prevent the use of guaranteed payments to avoid the rules under §§1.861-9(e)(8) and 1.954-2(h) that apply to partnership debt.

One comment stated that while guaranteed payments for capital are economically similar to interest payments in some respects, guaranteed payments are, for Federal income tax purposes, payments with respect to equity, not debt, and regulations issued under section 707 narrowly circumscribe the situations in which a guaranteed payment is treated as something other than a distributive share of partnership income. The comment recommended that guaranteed payments for capital be treated as interest only in cases when the taxpayer harbors an abusive motive to circumvent the relevant rule.

The Treasury Department and the IRS have determined that guaranteed payments for the use of capital share many of the characteristics of interest payments that a partnership would make to a lender and, therefore, should be treated as interest equivalents for purposes of allocating and apportioning deductions under §§1.861-8 through 1.861-14 and as income equivalent to interest under section 954(c)(1)(E). This treatment is consistent with other sections of the Code in which guaranteed payments for the use of capital are treated similarly to interest. See, for example, §§1.469-2(e)(2)(ii) and 1.263A-9(c)(2)(iii). In addition, the fact that a guaranteed payment for the use of capital may be treated as a payment attributable to equity under section 707(c), or that a guaranteed payment for the use of capital is not explicitly included in the definition of interest in §1.163(j)-1(b)(22), does not preclude applying the same allocation and apportionment rules that apply to interest expense attributable to debt, nor does it preclude treating such payments as "equivalent" to interest under section

954(c)(1)(E). Instead, the relevant statutory provisions under sections 861 and 864, and section 954(c)(1)(E), are clear that the rules can apply to amounts that are similar to interest.

Finally, a rule that would require determining whether the transaction had an abusive motive would be difficult to administer. Therefore, the comment is not adopted.

C. *Treatment of section 818(f) expenses for consolidated groups*

Section 818(f)(1) provides that a life insurance company's deduction for life insurance reserves and certain other deductions ("section 818(f) expenses") are treated as items which cannot definitely be allocated to an item or class of gross income. When the life insurance company is a member of an affiliated group of corporations, proposed §1.861-14(h)(1) provided that section 818(f) expenses are allocated and apportioned on a separate company basis.

One comment argued that the separate company approach was inconsistent with the general rule in section 864(e)(6) that expenses other than interest that are not directly allocable or apportioned to any specific income-producing activity are allocated and apportioned as if all members of the affiliated group were a single corporation. The comment also argued that the separate company approach would encourage consolidated groups to use intercompany transactions, such as related party reinsurance arrangements, to shift their section 818(f) expenses and achieve a more desirable foreign tax credit result. The comment advocated that the regulations instead adopt a single entity approach for life insurance companies that operate businesses and manage assets and liabilities on a group basis (a "life subgroup" approach).

In contrast, another comment argued that the separate company approach adopted in the proposed regulations was consistent with the fact that life insurance companies are regulated with respect to their reserves, investable assets, and capital. The comment, however, acknowledged that a life subgroup approach may be appropriate in certain cases, such as when an affiliated group of life insurance companies manages similar products on a cross-entity, product-line basis, rather than on an entity-by-entity basis. The comment recommended that final regulations provide a one-time election for taxpayers to choose either the separate company or life subgroup approach for allocating and apportioning section 818(f) expenses.

The Treasury Department and the IRS agree that there are merits and drawbacks to both the separate company and the life subgroup approaches and that a one-time election, as suggested by the comments, should be considered. Therefore, the final regulations at §1.861-14(h) do not include the separate company rule for section 818(f) expenses. The 2020 FTC proposed regulations instead propose a life subgroup approach as well as a one-time election for taxpayers to choose the separate company approach.

D. *Allocation and apportionment of R&E expenditures*

The 2019 FTC proposed regulations proposed several changes to §1.861-17, including eliminating the gross income method of apportionment, eliminating the legally-mandated R&E rule, and limiting the class of income to which R&E expenditures could be allocated to gross intangible income reasonably connected with a relevant Standard Industrial Code (SIC) category. In addition, the rule for exclusive apportionment of R&E expenditures was modified by eliminating the possibility of increased exclusive apportionment based on taxpayer-specific facts and circumstances, and by providing that exclusive apportionment applies solely for purposes of section 904.

1. Scope of Gross Intangible Income

Before being revised, §1.861-17(a) provided that R&E expenditures are related to all income reasonably connected to a broad line of business or SIC code category. The 2019 FTC proposed regulations narrowed and clarified the class of gross income to which R&E expenditures are considered to relate. The 2019 FTC proposed regulations defined the relevant class of gross income as gross intangible income ("GII"), which is defined as all income attributable, in whole or in part, to intangible property, including sales or leases of products or services derived, in whole or in part, from intangible property, income from sales of intangible property, income from platform contribution transactions, royalty income, and amounts taken into account under section 367(d) by reason of a transfer of intangible property. GII does not include dividends or any amounts included in income under section 951, 951A, or 1293.

One comment disagreed with the exclusion from GII of section 951A inclusions. According to this comment, R&E expenditures ultimately benefit foreign subsidiaries such that allocation to income described in section 904(d)(1)(A) (the "section 951A category") is appropriate and should not be treated differently from other taxpayer expenses that reduce income in the section 951A category. Other comments generally supported the exclusion of GILTI and other income inclusions from GII on the grounds that a taxpayer incurring R&E expenditures to develop intangible property should be fully compensated for the value of that intellectual property and, conversely, the earnings of CFCs should not reflect returns on intellectual property owned by another person.

The Treasury Department and the IRS have determined that GII should continue to exclude GILTI or other inclusions attributable to ownership of stock in a CFC. As described in §1.861-17(b), R&E expenditures, whether or not ultimately successful, are incurred to produce intangible property. Under the rules of sections 367(d) and 482, the person incurring the R&E expenditures must be compensated at arm's length when such intangible property is licensed, sold, or otherwise gives rise to income of controlled parties, and it is this income that gives rise to GII. In transactions not involving the direct transfer of intangible property to a related party, the section 482 regulations require compensation for the intangible property embedded in the underlying transaction. See generally §1.482-1(d)(3)(v). For example, §1.482-3(f) requires that intangible property embedded in tangible property be accounted for when determining the arm's length price for the transaction. Similarly, §1.482-9(m) requires that intangible property used in a controlled services transac-

tion be accounted for in determining the arm's length price for the transaction.

In contrast to R&E expenditures giving rise to income required by sections 367(d) and 482, subpart F or GILTI inclusions reflect income earned by a CFC and not the taxpayer incurring the R&E expenditures; the fact that such taxpayer is deemed under section 951 or 951A to have income through an inclusion from a CFC licensee does not mean that such income is a result of the R&E expenditures incurred by the taxpayer, assuming that the CFC pays the taxpayer an arm's length price for the transfer of the intangible property or, in the case of an exchange described in sections 351 or 361, the taxpayer reports the required annual income inclusion.[2] Therefore, including income in the section 951A category in GII would result in a mismatch between the R&E expenditures and the income generated by such expenditures. Although (as noted in a comment) R&E expenditures that are ultimately unsuccessful could be viewed as intended to benefit a taxpayer's foreign subsidiaries more broadly, the Treasury Department and the IRS have determined that the GII earned by the taxpayer provides a reasonable proxy for how the taxpayer expects to recover its R&E costs, and providing separate rules for identifying and attributing unsuccessful R&E expenditures to a broader class of income would be unduly burdensome for taxpayers and difficult for the IRS to administer.

Several comments noted that while income in the section 951A category is excluded from GII, income giving rise to foreign-derived intangible income ("FDII") is included in GII. These comments generally argued that the exclusion from GII of income in the section 951A category and inclusion of amounts included in FDII created a lack of parity between the two provisions even though the methodology and calculations of both are meant to be similar.

The Treasury Department and the IRS disagree with these comments. The allocation and apportionment of R&E expenditures to separate categories for purposes of section 904 as the operative section and the allocation and apportionment of R&E expenditures to FDDEI for purposes of section 250 as the operative section both require identifying the class of income to which the R&E expenditures are attributable. R&E expenditures incurred by a United States shareholder ("U.S. shareholder") are not allocated and apportioned to income in the section 951A category because such income, which relates to an inclusion of income earned by the CFC, is not a return on the U.S. shareholder's R&E expenditures and, thus, is not included in gross intangible income. In contrast, income giving rise to FDII is earned directly by the same taxpayer that incurs R&E expenditures and may include a return on those R&E expenditures. Income that gives rise to FDII is reduced by "the deductions (including taxes) properly allocable to such gross income." See section 250(b)(3)(A)(ii) and §1.250(b)-1(d)(2). There is no indication that Congress intended to exclude R&E expenditures from that calculation. Furthermore, because expenses incurred by a CFC are allocated and apportioned to income of the CFC for purposes of computing tested income under section 951A(c)(2)(A)(ii), contrary to the suggestion in the comments, R&E expenditures of the CFC are in fact allocated and apportioned to tested income under §1.861-17 and reduce the ultimate amount of the taxpayer's GILTI inclusion. Accordingly, the comment is not adopted.

One comment requested modifications to the definition of GII to exclude both acquired intangible property and income from certain platform contribution transactions described in §1.482-7(b)(1)(ii). According to the comment, income from these items should be excluded from GII because a taxpayer's R&E expenditures could not relate to gross income from intangible property acquired from a different taxpayer (as opposed to developed by the taxpayer), or to gross income from certain platform contributions.

The Treasury Department and the IRS have determined that the comment does not accurately describe the premise on which the R&E allocation and apportionment rules are based. R&E expenditures are not reasonably expected to produce any current income in the taxable year in which the expenditures are incurred, and as the regulations explicitly recognize, the results of R&E expenditures are speculative. Accordingly, R&E expenditures are allocated to a class of currently recognized gross income only because it generally will be the best available proxy for the income that the current expense is reasonably expected to produce in the future. Specifically, although current R&E expense of a taxpayer likely does not directly contribute to gross intangible income currently recognized, it is reasonable to expect that R&E will contribute to GII earned by the taxpayer group in the future. The definition of GII is not intended to require a strict factual connection between the R&E expenditure and GII earned in the taxable year, but merely that the expenditures be "reasonably connected" with a class of income. The Treasury Department and the IRS have also determined that requiring the comment's suggested level of explicit factual connection between R&E expenditures and GII would outweigh the administrative benefit and ease of broadly defining GII. Moreover, in cases in which a taxpayer has a valid cost sharing agreement, even though R&E expenditures may be allocated to PCT payments, those expenses are generally apportioned based on sales by the taxpayer or other entities reasonably expected to benefit from current research and experimentation. This ensures that R&E expenditures offset the categories of income included in GII that are expected to benefit from those expenditures. Accordingly, the comment is not adopted.

One comment requested clarification of the definition of GII and specifically that the final regulations provide that the services income included in GII does not include gross income allocated to or from a foreign branch under §1.904-4(f)(2)(vi) by reason of a disregarded payment for services performed by or for the foreign branch that contribute to earning GII of the taxpayer.

Under §1.904-4(f)(2)(vi)(B), a disregarded payment from a foreign branch

[2] To assist in determining an arm's length price in related party transactions, section 14221 of the TCJA and related technical corrections in the 2018 Consolidated Appropriations Act amended sections 482 and 367(d) to clarify the methods that may be applied to determine the value of intangible property and that the definition of intangible property includes workforce, goodwill and going concern value, or other items the value or potential value of which is not attributable to tangible property or the services of any individual. To the extent the comment reflects a concern that arm's length compensation for intangible property has not always been paid under sections 367(d) and 482, the comment raises issues beyond the scope of this rulemaking.

owner to its foreign branch to compensate the foreign branch for the provision of contract R&E services that, if regarded, would be allocable to general category gross intangible income attributable to the foreign branch owner under the principles of §§1.861-8 through 1.861-17, would cause the general category GII attributable to the foreign branch owner to be adjusted downward and the GII attributable to the foreign branch and included in foreign branch category income to be adjusted upward. Although a disregarded payment for R&E services does not give rise to gross income for Federal income tax purposes and so does not in and of itself constitute GII, to the extent the disregarded payment results in the reattribution of regarded gross income that is GII from the general category to the foreign branch category (or vice versa), that income is treated as GII in the foreign branch category (or the general category). The final regulations at §1.861-17(b)(2) clarify that although GII does not include disregarded payments, certain disregarded payments that would be allocable to GII if regarded may result in the reassignment of GII from the general category to the foreign branch category or vice versa. Part II.D.6 of this Summary of Comments and Explanation of Revisions further describes comments regarding R&E expenditures and foreign branches.

One comment sought clarification regarding the portion of product sales derived from intangible property that would be considered GII. The final regulations at §1.861-17(b)(2) clarify that GII includes the full amount of gross income from sales or leases of products or services, if the income is derived in whole or in part from intangible property. Under the definition of GII, there is no bifurcation or splitting of sales income between a portion attributable to intangible property and other amounts such as distribution or marketing functions. Additionally, the definition of GII has been modified to more clearly delineate between amounts from sales or leases of products derived from intangible property versus sales or licenses of intangible property itself.

2. Allocation of R&E Expenditures

One comment requested modifications to the general rule that allocates R&E expenditures to GII that is reasonably connected with one or more relevant SIC code categories. The comment noted that in some cases, taxpayers are restricted by law or contract from exploiting research, with the result that the research would only generate income in a particular statutory grouping after several years from the date of the contract. Accordingly, the comment requested that such R&E expenditures be allocated to the statutory or residual grouping of income within GII that corresponds to the market restrictions on the use of the R&E. Alternatively, the comment requested that taxpayers be provided with the option to allocate R&E expenditures in a manner consistent with the taxpayer's books and records to the extent there is a clear factual relationship between the expenditures and a particular category of income.

The Treasury Department and the IRS have determined that it is inappropriate to provide exceptions to the general rule that R&E expenditures are allocated to GII reasonably connected with one or more relevant SIC code categories. The two approaches suggested by the comment are premised on a goal of seeking to "trace" R&E expenditures to the actual income that they are expected to produce in the future. However, as discussed in Part II.D.1 of this Summary of Comments and Explanation of Revisions, R&E expenditures are not reasonably expected to produce any current income in the taxable year in which the expenditures are incurred, and the regulations recognize that the results of R&E expenditures are speculative. Instead, §1.861-17 relies on the use of current year sales as a proxy for the income that the expenses are reasonably expected to produce in the future, in recognition of the fact that it is difficult to ascertain the composition of future income that would be generated from R&E expenditures. This approach generally already takes into account the types of market or legal restrictions described by the comment — to the extent that a taxpayer's sales of products in the same SIC code category are generally restricted to a particular market, these restrictions will be reflected in its sales and therefore are already taken into account under the sales method provided in proposed §1.861-17. Moreover, rules that specially allocate particular R&E expenditures based on the reasonableness of speculative expectations about sales that may or may not actually arise several years in the future would be very difficult for taxpayers to comply with and for the IRS to administer.

Finally, allowing taxpayers to elect the use of a books-and-records method to allocate R&E expenditures to less than all of a taxpayer's GII would lead to inappropriate results, as taxpayers would only elect such option if the additional information reflected in the taxpayer's books and records improved the tax result; in contrast, the IRS would not have any such information available to it if the taxpayer chose not to make the election. Since this information would generally be in the form of predictions about future income streams, an elective books-and-records rule would create administrability concerns for the IRS, which would have substantial difficulty verifying whether the predictions were reasonable. Accordingly, the comments are not adopted.

One comment recommended that the Treasury Department and the IRS reconsider the elimination of the "legally mandated R&E" rule from the 2019 FTC proposed regulations, noting that the rule seemed to be required by section 864(g)(1)(A). As explained in the preamble to the 2019 FTC proposed regulations, the legally mandated R&E rule was eliminated in light of changes to the international business environment and to simplify the regulations, and the comment does not argue the change is inappropriate. Additionally, the comment misstates the application of section 864(g)(1)(A), which is not applicable to the taxable years to which the final regulations apply. See section 864(g)(6). Accordingly, the comment is not adopted.

One comment sought clarification on the allocation of R&E expenditures where research is conducted with respect to more than one SIC code category. The comment noted that the current final regulations at §1.861-17(a)(2)(iii) mention two digit SIC code categories, or Major Groups in the terminology of the SIC Manual, yet the 2019 FTC proposed regulations omitted references to two digit SIC codes.

The Treasury Department and the IRS have determined that it is appropriate to aggregate some or all three digit SIC cat-

egories within the same Major Group, but it is inappropriate to aggregate any three digit SIC categories within different Major Groups. While R&E expenditures are speculative, it is not reasonable to expect R&E conducted for one broad line of business to benefit an unrelated line of business and, therefore, the allocation and apportionment of expenses should not be determined by aggregating different Major Groups. For example, if a taxpayer engages in both the manufacturing and assembling of cars and trucks (SIC code 371) it may aggregate that category with another three digit category in Major Group 37, which includes six other three digit categories (for example, aircraft and parts (SIC code 372) or railroad equipment (SIC code 374)), but taxpayers may not aggregate a three digit SIC code from a Major Group with another three digit SIC code from a different Major Group, except as provided in §1.861-17(b)(3)(iv) (requiring aggregation of R&E expenditures related to sales-related activities with the most closely related three digit SIC code, other than those within the wholesale and retail trade divisions, if the taxpayer conducts material non-sales-related activities with respect to a particular SIC code). The final regulations are modified accordingly.

3. Exclusive Apportionment of R&E Expenditures

i. Computation of FDII

Several comments argued that if the Treasury Department and the IRS determine that GII should include amounts giving rise to FDII, then the rule in the 2019 FTC proposed regulations in §1.861-17(c), which limits exclusive apportionment of R&E expenditures solely for purposes of applying section 904 as the operative section, should be revised to also allow for exclusive apportionment for purposes of calculating a taxpayer's FDII deduction. The comments generally argued that the exclusive apportionment provision be applied such that 50 percent of a taxpayer's R&E expenditures should be apportioned to income that is not foreign derived deduction eligible income ("FDDEI") provided that at least 50 percent of the taxpayer's research activities are conducted in the United States. Comments argued that such an exclusive apportionment rule would encourage R&E activity in the United States, consistent with the general intent of the TCJA to eliminate tax incentives for shifting activity and intellectual property overseas. Additionally, comments asserted that R&E expenditures provide greater value to the location where R&E is performed and that there is a technology "lag" before successful products are exported to foreign markets.

The Treasury Department and the IRS have determined that it is not appropriate to apply an exclusive apportionment rule for purposes of computing FDII. As discussed in Part II.D.1 of this Summary of Comments and Explanation of Revisions, R&E expenditures are not reasonably expected to produce any current income in the taxable year in which the expenditures are incurred, and the regulations explicitly recognize that the results of R&E expenditures are speculative. Furthermore, to the extent there is consistently a "lag" before a taxpayer's successful products are exported to foreign markets, then such lag should generally be reflected in current year sales of newly successful products (which relate to R&E incurred in prior taxable years) being weighted towards domestic markets. Therefore, the rules' use of current year sales as a proxy for the income that the expense is reasonably expected to produce in the future already takes into account to some extent the potential for a "lag" between exploiting intangible property in the domestic market versus foreign markets.

In addition, the Treasury Department and the IRS have determined that nothing in the text of the TCJA or its legislative history suggests that Congress intended that existing rules on allocation and apportionment of R&E expenditures be modified in a way to create particular incentives. Section 250(b)(3) requires determining the deductions that are "properly allocable" to deduction eligible income, and §1.250(b)-1(d)(2) confirms that the general rules under §1.861-17 apply for purposes of allocating and apportioning R&E expenditures to deduction eligible income and FDDEI. Nothing in the statute or legislative history suggests that any alternative allocation and apportionment rule should apply. Furthermore, adopting an R&E allocation and apportionment rule solely for purposes of increasing the amount of the FDII deduction to incentivize R&E activity (whether or not such expenditures were "properly" allocable to non-FDDEI income) would be inconsistent with the United States' position, including as stated in forums such as the OECD's Forum on Harmful Tax Practices, that the FDII regime is not intended to provide a tax inducement to shifting activities or income, but is intended to neutralize the effect of providing a lower U.S. effective tax rate with respect to the active earnings of a CFC of a domestic corporation (through a deduction for GILTI) by also providing a lower effective U.S. tax rate with respect to FDII earned directly by the domestic corporation. Such parity is generally furthered by ensuring that R&E expenditures incurred by a domestic corporation are allocated and apportioned to FDII in the same manner as R&E expenditures incurred by a CFC are allocated and apportioned to tested income that gives rise to GILTI.

Therefore, the final regulations provide that the exclusive apportionment rule is limited to section 904 as the operative section.

ii. Increased exclusive apportionment

Two comments recommended reinstating the rule allowing for an increased exclusive apportionment of R&E expenditures. Under the increased exclusive apportionment rule, a taxpayer may establish to the satisfaction of the Commissioner that an even greater amount of R&E expenditures should be exclusively apportioned. One comment indicated that there may be circumstances where an even greater amount of R&E expenditures should be apportioned, such as following the termination of a cost sharing arrangement ("CSA"). Another comment pointed out that the 2019 FTC proposed regulations reduce taxpayer options by eliminating both increased exclusive apportionment and the gross income method.

The Treasury Department and the IRS have determined that a rule allowing for increased exclusive apportionment is not warranted. The facts and circumstances nature of the determination that would be required and the potential for disputes

outweigh the benefits of affording taxpayers additional flexibility in rare or unusual cases. Additionally, to the extent that there is a tendency to exploit intellectual property in the same market where the taxpayer conducts R&E, this will already be reflected in current sales, as those in part reflect the results of recently-developed intellectual property. Accordingly, this comment is not adopted.

iii. Mandatory application of exclusive apportionment

Two comments generally objected to the required application of exclusive apportionment for purposes of section 904. According to the comments, in certain situations where a taxpayer has insufficient domestic source gross income to absorb the apportioned R&E expenditures, the resulting overall domestic loss ("ODL") would reduce foreign source income in each separate category described in §1.904-5(a)(4)(v), including the section 951A and foreign branch categories, reducing the taxpayer's ability to claim foreign tax credits. The comments recommended that taxpayers either be allowed to elect out of exclusive apportionment or alternatively that it be applied in an amount less than 50 percent of the taxpayer's R&E expenditures. One comment alternatively recommended a modification to the ODL and R&E expenditure rules such that the majority of the amounts otherwise subjected to exclusive apportionment would instead be allocated to income in the general category rather than the section 951A or foreign branch categories.

The TCJA did not modify the operation of section 904(f) or (g) with respect to the section 951A or foreign branch categories, nor is there any indication in the TCJA or legislative history that Congress intended the rules under section 904(f) and (g), or the allocation and apportionment rules under section 861, to apply differently in connection with section 951A or foreign branch category income. To the extent an ODL account is created as the result of a domestic loss offsetting foreign source income in the section 951A or foreign branch category under section 904(f)(5)(D), this reduction is reversed in later years through the recapture provisions in section 904(g)(3), when U.S. source income is recharacterized as foreign source income in the separate categories that were offset by the ODL. Additionally, the Treasury Department and the IRS have determined that the consistent application of the exclusive apportionment rule for purposes of section 904 promotes simplicity and certainty, whereas an optional rule would be more difficult to administer. Accordingly, these comments are not adopted.

4. Elimination of the Gross Income Method

Several comments requested that the gross income method for apportioning R&E expenditures be retained. In general, these comments recommended allowing taxpayers to choose either the gross income method or the sales method rather than being required to utilize only the sales method, including by allowing taxpayers to choose one method for certain operative sections and another method for other operative sections. Some comments asserted that the mandatory use of the sales method would inappropriately allocate and apportion more R&E expenditures to FDDEI than under the gross income method in cases where U.S. taxpayers license their intellectual property for foreign use but sell products directly to U.S. customers. One comment argued that the sales method could be distortive in certain situations where a taxpayer licenses its intellectual property to entities whose sales are at least partially attributable to self-developed intellectual property. Another comment argued that where a taxpayer's primary type of GII is royalty income, it will be difficult to apportion R&E based on sales numbers and that therefore the gross income method should be maintained.

The Treasury Department and the IRS have determined that, on balance, the sales method results in substantially fewer distortions than the gross income method. Before being modified by these final regulations, taxpayers were permitted to apportion R&E expenditures under either a gross income or sales method. The Explanation of Provisions in the 2019 FTC proposed regulations explained that the gross income method could produce inappropriate, distortive results in certain cases. In particular, distortions could arise because the gross income method looks only to gross income earned directly by the taxpayer. Gross income that is earned by the taxpayer and that is attributable to one grouping (such as U.S. source income) may reflect value unrelated to intangible property, for example gross income from sales that reflect value from marketing or distribution activities of the taxpayer, whereas gross income of such taxpayer that is attributable to another grouping (such as foreign source income) may exclude such non-IP related value due, for example, to the fact that such gross income is earned solely from licensing intangible property to a related party without the performance of any marketing or distribution activities. The distortions arise both because gross income reflects a reduction of gross receipts for cost of goods sold but not for related deductible expenses, and also because the gross income method does not distinguish between gross income earned from customers (for which the gross income generally captures all of the value related to the product or service arising from the IP) versus from related parties (for which gross income generally only captures an intermediate portion of the value of the relevant product or service, which will generally be enhanced by the related party).

In contrast, the sales method provides a consistent, reliable method with fewer distortions than the gross income method. In particular, the sales method focuses on the gross receipts from sales of a product to final customers. This approach is more likely to achieve consistent results in the case of the same or similar final products, and thereby allows for a consistent comparison of value derived from intangible property with respect to each grouping. That is the case regardless of whether the taxpayer chooses to license its intangible property to other persons (including related parties) for purposes of manufacturing final products, or the taxpayer manufactures products itself, and regardless of whether other persons enhance the product with additional value attributable to other intangible property. Therefore, the sales method ensures that differences in supply chain structures do not alter the nature of how R&E expenditures are allocated and apportioned.

Alternatively, some comments recommended modifying the gross income method. One comment recommended modifying the gross income method to more accurately match income to related R&E expenditures by using only gross income that is attributable to the intangible property owned by the taxpayer. However, the Treasury Department and the IRS have determined that it would lead to complexity for taxpayers and administrative burdens for the IRS to seek to accurately determine the share of gross income that is attributable to intangible property when the intangible property is embedded in a final product. In addition, such a rule would be unlikely to result in significantly different results than under the sales method, because the ratio of gross income among groupings that is attributable solely to intangible property is likely to be broadly similar to the ratio of gross receipts from sales within those groupings, since the intangible component of gross income from sales is likely to be determined as a fraction of gross receipts, and such fraction would generally be the same for each grouping.

One comment argued that the gross income method must be included in the final regulations because it is statutorily required under section 864(g)(1). However, section 864(g) is not applicable to the taxable years covered by the final regulations. See section 864(g)(6). Therefore, the comment is not adopted.

Finally, one comment recommended allowing taxpayers to use the gross income method if using the sales method would otherwise cause the taxpayer to have an ODL. The Treasury Department and the IRS have determined that it would be inappropriate to allow for the targeted application of a method solely for the purpose of avoiding the ODL rules, which are statutorily mandated. The regulations under section 861, including §1.861-17, are premised on associating deductions in as accurate and reasonable a manner as possible with the income to which such deductions relate. It is inconsistent with this overall policy of relating deductions to the relevant income to revise the regulations under section 861 simply to achieve a specific result under an operative section. Accordingly, the final regulations eliminate the gross income method.

5. Application of Sales Method

The 2019 FTC proposed regulations retained the rule in the prior final regulations which provides that for apportionment purposes, the sales method includes certain gross receipts of related and unrelated entities that are reasonably expected to benefit from the taxpayer's R&E expenditures, but does not include the receipts of entities that have entered into a valid CSA with the taxpayer. The 2019 FTC proposed regulations made limited changes to the sales method as it existed under the prior final regulations.

One comment requested guidance on the application of the sales method in the context of foreign branch category income; this comment is discussed in Part II.D.6 of this Summary of Comments and Explanation of Revisions.

Two comments asked for a modification to the treatment of controlled entities that terminate an existing CSA with a taxpayer. Under the sales method, gross receipts from sales of products or the provision of services within a relevant SIC code category by controlled parties of the taxpayer are taken into account when apportioning the taxpayer's R&E expenditures if the controlled party is reasonably expected to benefit from the taxpayer's research and experimentation. Under proposed §1.861-17(d)(4)(iv), the sales of controlled parties that enter into a valid CSA with a taxpayer are generally excluded from the apportionment formula because the controlled party is not expected to benefit from the taxpayer's R&E expenditures. The comments argued that when a CSA is terminated and a taxpayer licenses newly-developed intangibles to a controlled party, all gross receipts from the controlled party are included in the apportionment formula, even though for some post-termination period the controlled party may benefit more from intangibles created by its own R&E expenditures incurred under the previously-existing CSA rather than from the newly-developed and licensed intangibles. The comments recommended varying adjustments, including rules specific to CSA terminations or alternatively more generalized adjustments such as the retention of the increased exclusive apportionment rule or the gross income method.

The Treasury Department and the IRS disagree with the comments' characterization of §1.861-17 as seeking directly to match R&E expenditures with the income that such expenditures generate. According to the comments, following a CSA termination with a controlled party, a taxpayer's current R&E expenditures should not offset the controlled party's royalty payment to the taxpayer because the controlled party's gross receipts would be attributable to the intangibles funded by the controlled party during the period the CSA existed. This assertion assumes that current sales are used to apportion R&E expenditures because they result from a taxpayer's current or recent research and, therefore, it is inappropriate to include gross receipts attributable to the research of a different taxpayer. The regulations, however, are based in part on the acknowledgement that R&E is a speculative, forward-looking activity that often does not result in income or sales in the current year, or even in future years. As discussed in Part II.D.2 of this Summary of Comments and Explanation of Revisions, current sales are nevertheless used because they generally will be the best available proxy for the income R&E expenditures are expected to produce in future years. Accordingly, once a CSA is terminated, it is appropriate to include the sales of a controlled party that previously participated in a CSA if that controlled party is reasonably expected to benefit from the taxpayer's current R&E expenditures to generate future sales. Additionally, the Treasury Department and the IRS have determined that attempting to distinguish between the sales attributable to the controlled party's intangible property and those attributable to intangible property licensed from the taxpayer is generally difficult and uncertain and may often lead to disputes, making such a rule difficult for taxpayers to comply with and burdensome for the IRS to administer. Because those concerns also exist when a taxpayer and a controlled party enter into a CSA, the final regulations also do not adopt comments requesting such a rule in that context. Furthermore, the Treasury Department and the IRS have determined that the tax consequences of terminating a CSA may vary depending on the facts and circumstances and are considering whether it would be

appropriate to provide special rules for these transactions, and thus it would not be appropriate to provide special rules in connection with §1.861-17 until these transactions have undergone further study. Therefore, the comments are not adopted.

Finally, several comments requested a modification to the rule in proposed §1.861-17(d)(3) and (4) providing that if a taxpayer has previously licensed, sold, or transferred intangible property related to a SIC code category to a controlled or uncontrolled party, then the taxpayer is presumed to expect to do so with respect to all future intangible property related to the same SIC code category. The comments argued that the 2019 FTC proposed regulations' use of the term "presumption" suggested that taxpayers would be unable to rebut the presumption in appropriate cases. In response to the comments, the final regulations clarify that taxpayers may rebut the presumption by demonstrating that prior exploitation of the taxpayer's intangible property is inconsistent with reasonable future expectations.

In addition, the final regulations make other revisions to the sales method. First, the final regulations specify under what circumstances the sales or services of uncontrolled or controlled parties are taken into account. In particular, the final regulations specify that the gross receipts are taken into account if the uncontrolled or controlled party is expected to acquire (through license, sale, or transfer) intangible property arising from the taxpayer's current R&E expenditures, products in which such intangible property is embedded or used in connection with the manufacture or sale of such products, or services that incorporate or benefit from such intangible property. Second, the final regulations revise §1.861-17(d)(4) to refer to sales by controlled parties (which is defined as any person that is related to the taxpayer)), rather than controlled corporations, to clarify that, for example, sales made by a controlled partnership that is reasonably expected to license intangible property from the taxpayer are fully taken into account under the sales method. Finally, the final regulations revise §1.861-17(f)(3) to provide that if a partnership incurs R&E expenditures (and is not also an uncontrolled party or controlled party described in §1.861-17(d)(3) or (4)) and makes related sales, then those sales are considered made by the partners in proportion to their distributive shares of gross income attributable to the sales.

6. Foreign Branch Category Income and R&E Expenditures

Two comments addressed the interaction of §1.861-17 and foreign branch category income. One comment requested that a portion of sales earned by a foreign branch should be attributed to the general category for purposes of apportioning R&E expenditures in circumstances where a foreign branch utilizes intellectual property of the foreign branch owner to earn GII and pays a disregarded royalty to its U.S. owner. Under §1.904-4(f)(2)(vi)(A), the amount of foreign branch category income would be adjusted downward and the foreign branch owner's general category income would be adjusted upward by the amount of the disregarded royalty. According to the comment, after exclusive apportionment (as applicable), the 2019 FTC proposed regulations would apportion entirely to foreign branch category income the remaining R&E expense, which should instead be apportioned to the general category income originally attributable to the GII of the foreign branch that was reassigned by reason of the disregarded royalty.

The Treasury Department and the IRS have determined that the 2019 FTC proposed regulations, in combination with §1.904-4(f)(2)(vi), already operate in the manner requested by the comment. Under proposed §1.861-17(d)(1)(iii), gross receipts are assigned to the statutory grouping (or groupings) or residual grouping to which the GII related to the sale, lease, or service is assigned. Adjustments to the amounts of gross income attributable to a foreign branch by reason of disregarded payments change the separate category grouping to which the gross income is assigned, but do not change the total amount, character, or source of a United States person's gross income. See §1.904-4(f)(2)(vi)(A). After application of §1.904-4(f)(2)(vi), GII related to the foreign branch's sales is assigned to the general category in the amount of the disregarded royalty payment, and only the balance of the GII is assigned to the foreign branch category. Accordingly, a proportionate amount of the gross receipts from sales made by the foreign branch to which a disregarded royalty payment would be allocable is assigned to the general and foreign branch categories in the same ratio as the disregarded royalty payment bears to the gross income attributable to the sales. The final regulations in §1.861-17(d)(1)(iii) clarify that the assignment of gross receipts occurs after gross income in the separate categories is adjusted under §1.904-4(f)(2)(vi) and clarify through an example the formula used to reassign gross receipts as a result of a disregarded reallocation transaction. See §1.861-17(g)(6) (*Example 6*).

The second comment requested changes to the treatment of foreign branches that provide contract R&E services for the benefit of the foreign branch owner. According to the comment, when disregarded payments made by the foreign branch owner in respect of the provision of contract R&E services by a foreign branch cause GII to be reallocated to the foreign branch, R&E expenditures incurred by the foreign branch owner may be apportioned to foreign branch category income in a manner inconsistent with the economics of the branch's activities as a services provider, creating disparate tax results compared to those that would obtain if the services were performed by a CFC. The comment suggested that the foreign branch's regarded costs of providing the research services that give rise to the disregarded payment from the foreign branch owner should reduce the amount of GII that was assigned to the foreign branch category, or more generally that GII should not be assigned to the foreign branch category by reason of disregarded payments for research services.

The Treasury Department and the IRS agree that R&E expenditures, including deductible expenses for the foreign branch's costs in providing research services to the foreign branch owner, may be apportioned to foreign branch category income that is GII, including GII that is treated as attributable to the foreign branch category under §1.904-4(f)(2)(vi) by reason of disregarded payments from the foreign branch owner compensating the foreign branch for its research services that will generate GII for the foreign branch owner, and that the apportionment

is based upon gross receipts assigned to the statutory groupings. However, as noted in §1.904-4(f)(2)(vi)(A), the reattribution of gross income between the general and foreign branch categories by reason of disregarded payments cannot change the character of a taxpayer's realized gross income. The Treasury Department and the IRS have determined that the different characterization of services income earned by a CFC, which may not be GII, and sales income reflecting GII that is attributed to a foreign branch by reason of disregarded payments for services, results from the Federal income tax treatment of disregarded payments, which do not give rise to gross income, and that it is not appropriate effectively to override the characterization of gross income by modifying the rules for allocating and apportioning recognized R&E expenditures. Accordingly, the comment is not adopted.

7. Contract Research Arrangements

In the Explanation of Provisions in the 2019 FTC proposed regulations, the Treasury Department and the IRS requested comments on whether contract research arrangements involving expenditures that are reimbursed by a foreign affiliate are generally paid or incurred by a U.S. taxpayer such that a deduction under section 174 would be allowable for such expenditures, and whether any special rules for such arrangements should be considered. Generally, the comments received stated that where contract research is performed in the United States and is connected with a U.S.-based multinational's trade or business, a deduction under section 174, rather than section 162, may be appropriate.

The Treasury Department and the IRS have determined that it is beyond the scope of the final regulations to determine whether contract research expenses are, or are not, eligible to be deducted under either section 162 or 174.

8. Amended Returns and Applicability Dates

One comment requested clarification of the applicability date provisions of the §1.861-17 portion of the 2019 FTC proposed regulations. The comment noted that it was unclear whether a taxpayer that originally elected to apply the gross income method on its 2018 tax return would be eligible to amend its 2018 tax return to apply the sales method. The 2019 FTC final regulations included a provision addressing the binding election contained in former §1.861-17(e)(1). Under this provision, as modified in the 2019 FTC final regulations at §1.861-17(e)(3), taxpayers otherwise subject to the binding election were permitted to change their election. On May 15, 2020, correcting amendments to the 2019 FTC final regulations were issued in 85 FR 29323. These amendments make clear that the change in method can occur on an original or an amended return. See also Part VII of this Summary of Comments and Explanation of Revisions for a discussion of the ability for taxpayers to rely on the proposed or final versions of §1.861-17 for taxable years before the years in which the final regulations are applicable. Accordingly, changes to the applicability date provisions are not necessary in response to this comment.

Finally, one comment requested that the applicability of the regulations under section 250 be deferred until after §1.861-17 is finalized. Because the applicability of the regulations under section 250 has been deferred until taxable years beginning on or after January 1, 2021, which is consistent with the applicability date of §1.861-17, the comment is moot. See §1.250-1(b).

E. *Application of section 904(b) to net operating losses*

Proposed §1.904(b)-3(d)(2) contained a coordination rule providing that for purposes of determining the source and separate category of a net operating loss, the separate limitation loss and overall foreign loss rules of section 904(f) and the overall domestic loss rules of section 904(g) are applied without taking into account the adjustments required under section 904(b). No comments were received on this provision, which is finalized without change.

One comment requested that the final regulations include a rule switching off the application of section 904(b)(4) with respect to pre-2018 U.S. source NOLs that offset foreign source income and created ODL accounts in pre-2018 taxable years, because in certain cases the increase in the denominator of the foreign tax credit limitation fraction required by section 904(b)(4) could limit the utilization of foreign tax credits that would otherwise be allowed by reason of the recapture of the ODL.

Nothing in section 904(b)(4) allows for the rule to be applied differently in cases when a taxpayer recaptures a pre-2018 ODL versus a post-2017 ODL or has no ODL recapture at all. Instead, the adjustments required by section 904(b)(4) apply in all taxable years beginning after 2017. Therefore, the comment is not adopted.

III. *Conduit Financing Rules Under §1.881-3 to Address Hybrid Instruments*

A. *Overview*

The conduit financing regulations in §1.881-3 allow the IRS to disregard the participation of one or more intermediate entities in a "financing arrangement" where such entities are acting as conduit entities, and to recharacterize the financing arrangement as a transaction directly between the remaining parties for purposes of imposing tax under sections 871, 881, 1441 and 1442. In general, a financing arrangement exists when through a series of transactions one person advances money or other property (the financing entity), another person receives money or other property (the financed entity), the advance and receipt are effected through one or more other persons (intermediate entities), and there are "financing transactions" linking each of those parties. See §1.881-3(a)(2)(i). An instrument that for U.S. tax purposes is stock (or a similar interest, such as an interest in a partnership) is not a financing transaction under the existing conduit financing regulations, unless it is "redeemable equity" or is otherwise described in §1.881-3(a)(2)(ii)(B)(*1*).

The 2020 hybrids proposed regulations expanded the definition of a financing transaction, such that an instrument that for U.S. tax purposes is stock or a similar interest is a financing transaction if: (i) under the tax law of a foreign country where the issuer is a tax resident or has a taxable presence, such as a permanent establishment, the issuer is allowed a de-

duction or another tax benefit, including a deduction with respect to equity, for an amount paid, accrued, or distributed with respect to the instrument; or (ii) under the issuer's tax laws, a person related to the issuer is entitled to a refund, including a credit, or similar tax benefit for taxes paid by the issuer upon a payment, accrual, or distribution with respect to the equity interest and without regard to the related person's tax liability in the issuer's jurisdiction. See proposed §1.881-3(a)(2)(ii)(B)(*1*)(*iv*) and (*v*). The 2020 hybrids proposed regulations relating to conduit financing arrangements were proposed to apply to payments made on or after the date that final regulations are published in the **Federal Register**.

B. *Scope of instruments treated as financing transactions*

A comment agreed that a financing transaction should include an instrument that is stock or a similar interest for U.S. tax purposes but debt under the tax law of the issuer's country because, according to the comment, cases of potential conduit abuse are likely to involve "classic" hybrid instruments not covered by the types of equity described in §1.881-3(a)(2)(ii)(B)(*1*). However, the comment recommended that an instrument that is equity for purposes of both U.S. tax law and the issuer's tax law not be treated as a financing transaction, except in limited circumstances, such as if the instrument is issued by a special purpose company formed to facilitate the avoidance of tax under section 881 and the instrument gives rise to a notional deduction or a refund or credit to a related person. According to the comment, the proposed rule that treated an instrument that is equity for both U.S. and foreign tax purposes as a financing transaction was overbroad – as it could deem an operating company to have entered into a financing transaction simply because foreign tax law provides for notional interest deductions or a similar regime of general applicability – or was unclear or vague in certain cases.

If the final regulations were to retain the proposed rules treating other types of equity instruments as financing transactions, the comment requested several clarifications, modifications, and limitations with respect to the rules. These included: (i) treating an instrument that is equity in a partnership for U.S. tax purposes and under the issuer's tax law as a financing transaction only if the partnership is a hybrid entity that claims treaty benefits; (ii) either eliminating or clarifying the rule providing that an instrument can be a financing transaction by reason of generating tax benefits in a jurisdiction where the issuer has a permanent establishment; and (iii) modifying the applicability date for payments under existing financing arrangements.

Consistent with the comment, the final regulations adopt without substantive change the rule that included as a financing transaction an instrument that is stock or a similar interest (including an interest in a partnership) for U.S. tax purposes but debt under the tax law of the country of which the issuer is a tax resident. See §1.881-3(a)(2)(ii)(B)(*1*)(*iv*). In addition, the final regulations provide that if the issuer is not a tax resident of any country, such as an entity treated as a partnership under foreign tax law, the instrument is a financing transaction if the instrument is debt under the tax law of the country where the issuer is created, organized, or otherwise established. See id.

The final regulations do not include the rules under the 2020 hybrids proposed regulations that treated as a financing transaction an instrument that is stock or a similar interest for U.S. tax purposes but gives rise to notional interest deductions or other tax benefits (such as a deduction or credit allowed to a related person) under foreign tax law. The Treasury Department and the IRS plan to finalize those rules separately, in order to allow additional time to consider the comments received. In addition, the Treasury Department and the IRS are continuing to study instruments that generate tax benefits in the jurisdiction where the issuer has a permanent establishment and may address these instruments in future guidance.

IV. *Foreign Tax Credit Limitation Under Section 904*

A. *Definition of financial services entity*

In order to promote simplification and greater consistency with other Code provisions that have complementary policy objectives, §1.904-4(e)(2) of the 2019 FTC proposed regulations proposed to define a financial services entity as an individual or a corporation "predominantly engaged in the active conduct of a banking, insurance, financing, or similar business," and proposed to define financial services income as "income derived in the active conduct of a banking, insurance, financing, or similar business." These modified definitions are generally consistent with sections 954(h), 1297(b)(2)(B), and 953(e); the 2019 FTC proposed regulations also included conforming changes to the rules for affiliated groups in proposed §1.904-4(e)(2)(ii) and partnerships in proposed §1.904-4(e)(2)(i)(C).

Comments stated that the 2019 FTC proposed regulations increased uncertainty and resulted in the disqualification of certain banks or insurance companies that would qualify as financial services entities under the existing final regulations. Comments also suggested that it was inappropriate to seek to align the relevant definitions in section 904 with those in section 954 because of the differing policies and scope of the two rules. Comments suggested various modifications to more closely align the revisions with the existing approach under §1.904-4(e), or in the alternative, withdrawing the proposed rules entirely.

The Treasury Department and the IRS have determined that revisions to the financial services entity rules in §1.904-4(e) continue to be necessary in light of statutory changes made in 2004 (under the American Jobs Creation Act of 2004, Pub. L. 108-357) and the changes to the look-through rules in §1.904-5 in the 2019 FTC final regulations, which were precipitated by the revisions to section 904(d) under the TCJA. However, the Treasury Department and the IRS have determined the changes to §1.904-4(e) should be reproposed to allow further opportunity for comment. Therefore, the 2020 FTC proposed regulations contain new proposed regulations under §1.904-4(e), as well as a delayed applicability date. See Part IX.B. of the Explanation of Provisions in the 2020 FTC proposed regulations.

B. *Allocation and apportionment of foreign income taxes*

Proposed §1.861-20 provided detailed guidance on how to match foreign income

taxes with income, particularly in the case of differences in how U.S. and foreign law compute taxable income with respect to the same transactions. Proposed §1.861-20(c) provided that foreign tax expense is allocated and apportioned among the statutory and residual groupings by first assigning the items of gross income under foreign law ("foreign gross income") on which a foreign tax is imposed to a grouping, then allocating and apportioning deductions under foreign law to that income, and finally allocating and apportioning the foreign tax among the groupings. See proposed §1.861-20(c).

Proposed §1.861-20(d)(2)(ii)(B) provided that if a taxpayer recognizes an item of foreign gross income that is attributable to a base difference, then the item of foreign gross income is assigned to the residual grouping, with the result that no credit is allowed if the tax on that item is paid by a CFC. The proposed regulations provided an exclusive list of items that are excluded from U.S. gross income and that, if taxable under foreign law, are treated as base differences.

Several comments requested that distributions described in sections 301(c)(2) and 733, representing nontaxable returns of capital, be removed from the list of base differences on the grounds that foreign tax on such distributions is more likely to result from timing differences. Some comments argued that the foreign law characterization of the distribution should govern the determination of the income group to which the foreign tax is allocated. Other comments suggested that foreign tax on return of capital distributions should be associated with passive category capital gains, because by reducing basis such distributions may increase the amount of capital gain recognized for U.S. tax purposes in the future.

The purpose of the rules in §1.861-20, as well as §1.904-6, is to allocate and apportion foreign income taxes to groupings of income determined under Federal income tax law, and the final regulations at §1.861-20(d)(1), consistent with the approach in former §1.904-6, provide that Federal income tax law applies to characterize foreign gross income and assign it to a grouping. Characterizing items solely based on foreign law, with no comparison to the U.S. tax base, would altogether eliminate base differences, which are expressly referenced in section 904(d)(2)(H)(i).

However, the Treasury Department and the IRS have determined that in most cases, a foreign tax imposed on distributions described in sections 301(c)(2) and 733 is likely to represent tax on earnings and profits of the distributing entity that are accounted for at different times under U.S. and foreign tax law, such as earnings of a hybrid partnership, earnings that are accelerated and subsequently eliminated for U.S. tax purposes by reason of a section 338 election, or earnings and profits of lower-tier entities, rather than tax on amounts that are permanently excluded from the U.S. tax base. Although in some cases involving net basis foreign income taxes imposed at the shareholder level, distributions described in sections 301(c)(2) and 733 may reflect a timing difference in the recognition of unrealized gain with respect to the equity of the distributing entity, the Treasury Department and the IRS have determined that these situations are less likely to occur than timing differences in the recognition of earnings subject to withholding taxes because of the prevalence of foreign participation exemption regimes. Moreover, treating the foreign tax on distributions as representing a timing difference on earnings and profits of the distributing entity is more consistent with the general approach in the Code and regulations to the treatment of distributions as representing a tax on the earnings (see, for example, sections 904(d)(3) and (4), and 960(b)) and with treating gain on stock sales as related in part to earnings and profits (see section 1248(a)).

Therefore, these distributions are removed from the list of base differences, and the final regulations at §1.861-20(d)(3)(ii)(B)(*2*) generally associate a foreign law dividend that gives rise to a return of capital distribution under section 301(c)(2) with hypothetical earnings of the distributing corporation, measured based on the groupings to which the tax book value of the corporation's stock is assigned under the asset method in §1.861-9. Similar rules are included in the 2020 FTC proposed regulations for partnership distributions described in section 733.

The Treasury Department and the IRS have determined that similar rules should apply in appropriate cases to associate a portion of foreign tax imposed on an item of foreign gross income constituting gain recognized on the sale or other disposition of stock in a corporation or a partnership interest with amounts that constitute nontaxable basis recovery for U.S. tax purposes. Such similar treatment is appropriate to minimize differences in the foreign tax credit consequences of a sale or a distribution in redemption of the taxpayer's interest. Proposed rules on the allocation of foreign income tax on such dispositions are included in the 2020 FTC proposed regulations.

Proposed §1.861-20 addressed the assignment to statutory and residual groupings of foreign gross income arising from disregarded payments between a foreign branch (as defined in §1.904-4(f)(3)) and its owner. If the foreign gross income item arises from a payment made by a foreign branch to its owner, proposed §1.861-20(d)(3)(ii)(A) generally assigned the item by deeming the payment to be made ratably out of the foreign branch's accumulated after-tax income, calculated based on the tax book value of the branch's assets in each grouping. If the item of foreign gross income arises from a disregarded payment to a foreign branch from its owner, proposed §1.861-20(d)(3)(ii)(B) generally assigned the item to the residual grouping, with the result that any taxes imposed on the disregarded payment would be allocated and apportioned to the residual grouping as well. In addition, proposed §1.904-6(b)(2) included special rules assigning foreign gross income items arising from certain disregarded payments for purposes of applying section 904 as the operative section.

Several comments asserted that foreign tax on disregarded payments from a foreign branch owner to a foreign branch should not be allocated and apportioned to the residual grouping, which results in an effective denial of foreign tax credits in the case of a branch of a CFC, because items of foreign gross income that arise from disregarded payments of items such as interest or royalties should give rise to creditable foreign income taxes despite being nontaxable for Federal income tax purposes. Some comments recommended adopting a tracing regime similar to the rules in §1.904-4(f) to trace foreign gross

income that a taxpayer includes by reason of a disregarded payment to current year income of the payor for purposes of determining the grouping to which tax on the disregarded payment is allocated and apportioned. Comments also requested that the final regulations clarify whether the rule for remittances or contributions applies in the case of payments between two foreign branches.

The Treasury Department and the IRS generally agree with the comments that rules similar to the rules in §1.904-4(f) should apply under §1.861-20 to trace foreign gross income that a taxpayer includes by reason of a disregarded payment to the current year income of the payor to which the disregarded payment would be allocable if regarded for U.S. tax purposes. However, in order to provide taxpayers additional opportunity to comment, the final regulations reserve on the allocation and apportionment of foreign tax on disregarded payments, and new proposed rules are contained in the 2020 FTC proposed regulations. See Part V.F.4 of the Explanation of Provisions in the 2020 FTC proposed regulations. Similarly, the special rules in proposed §1.904-6(b)(2) for assigning foreign gross income items arising from certain disregarded payments for purposes of applying section 904 as the operative section are reproposed in the 2020 FTC proposed regulations. The other special rules in proposed §1.861-20(d)(3) for allocating foreign tax in connection with a taxpayer's investment in a corporation or a disregarded entity are reorganized, and some of the definitions in proposed §1.861-20(b) are correspondingly revised, in the final regulations to group the rules on the basis of how the entity is classified, and whether the transaction giving rise to the item of foreign gross income results in the recognition of gross income or loss, for U.S. tax purposes. The rule in proposed §1.904-6(b)(3) relating to dispositions of property resulting in certain disregarded reallocation transactions is removed and reproposed as part of proposed §1.861-20 as contained in the 2020 FTC proposed regulations.

Finally, one comment requested that §§1.904-1 and 1.904-6 clarify that the tax allocation rules apply to taxes paid to United States territories, which are generally treated as foreign countries for purposes of the foreign tax credit. The final regulations clarify this point by including a cross reference to §1.901-2(g), which defines a foreign country to include the territories. See §1.861-20(b)(6).

V. *Foreign Tax Redeterminations Under Section 905(c) and Penalty Provisions Under Section 6689*

Portions of the temporary regulations relating to sections 905(c), 986(a), and 6689 (TD 9362) (the ''2007 temporary regulations'') were reproposed in order to provide taxpayers an additional opportunity to comment on those rules in light of the changes made by the TCJA. In particular, the rules in the 2007 temporary regulations that were reproposed in the 2019 FTC proposed regulations were: (1) proposed §1.905-3(b)(2), which addressed foreign taxes deemed paid under section 960, (2) proposed §1.905-4, which in general provided the procedural rules for how to notify the IRS of a foreign tax redetermination, and (3) proposed §301.6689-1, which provided rules for the penalty for failure to notify the IRS of a foreign tax redetermination. In addition, the 2019 FTC proposed regulations contained a transition rule in proposed §§1.905-3(b)(2)(iv) and 1.905-5 to address foreign tax redeterminations of foreign corporations that relate to taxable years that predated the amendments made by the TCJA.

A. *Adjustments to foreign taxes paid by foreign corporations*

One comment requested clarification on whether multiple payments to foreign tax authorities under a single assessment (for example, payments to stop the running of interest and penalties) each result in a foreign tax redetermination under section 905(c).

Under §1.905-3(a) of the 2019 FTC final regulations, each payment of tax that has accrued in a later year in excess of the amount originally accrued results in a separate foreign tax redetermination. However, the 2019 FTC proposed regulations at §1.905-4(b)(1)(iv), which is finalized without change, only required one amended return for each affected prior year to reflect all foreign tax redeterminations that occur in the same taxable year. In the case of payments that are made across multiple taxable years, §1.905-4(b)(1)(iv) of the final regulations also provides that, if more than one foreign tax redetermination requires a redetermination of U.S. tax liability for the same affected year and those redeterminations occur within the same taxable year or within two consecutive taxable years, the taxpayer may file for the affected year one amended return and one statement under §1.905-4(c) with respect to all of the redeterminations. Otherwise, separate amended returns for each affected year are required to reflect each foreign tax redetermination. Accordingly, no changes are made in response to this comment.

The comment also requested that the Treasury Department and the IRS clarify whether contested taxes that are paid before the contest is resolved are considered to accrue for foreign tax credit purposes when paid or whether they represent an advance payment against a future liability that does not accrue until the final liability is determined. Proposed rules addressing this issue are included in the 2020 FTC proposed regulations. See Part X.D.3 of the Explanation of Provisions in the 2020 FTC proposed regulations.

B. *Deductions for foreign income taxes*

One comment requested clarification on whether the general rules under section 905(c) apply to taxpayers who elect to take a deduction, rather than a credit, for creditable foreign taxes in the prior year to which the adjusted taxes relate. Additionally, the comment requested that the Treasury Department and the IRS clarify whether the ten-year statute of limitations under section 6511(d)(3)(A) applies to refund claims based on such deductions.

In the case of a U.S. taxpayer that directly pays or accrues foreign income taxes, no U.S. tax redetermination is required in the case of a foreign tax redetermination of such taxes if the taxpayer did not claim a foreign tax credit in the taxable year to which such taxes relate. See §1.905-3(b)(1) (a redetermination of U.S. tax liability is required with respect to foreign income tax claimed as a credit under section 901). However, in the case of a U.S. shareholder of a CFC that pays or accrues foreign income tax, proposed

§1.905-3(b)(2)(i) and (ii), which are finalized without substantive change, provided that a redetermination of U.S. tax liability is required to account for the effect of a foreign tax redetermination even in situations in which the foreign tax credit is not changed, such as for purposes of computing earnings and profits or applying the high-tax exception described in section 954(b)(4), including in the case of a U.S. shareholder that chooses to deduct foreign income taxes rather than to claim a foreign tax credit. Additional guidance addressing the accrual rules for creditable foreign taxes that are deducted or claimed as a credit is included in §1.461-4(g)(6)(B)(iii) and in the 2020 FTC proposed regulations.

The question of whether section 6511(d)(3)(A) applies to refunds relating to foreign taxes that are deducted, instead of taken as a foreign tax credit, is beyond the scope of this rulemaking. See, however, *Trusted Media Brands, Inc. v. United States*, 899 F.3d 175 (2d. Cir. 2018) (holding that section 6511(d)(3)(A) only applies to refund claims based on foreign tax credits). In addition, the 2020 FTC proposed regulations include proposed amendments to the regulations under section 901(a), which provides that an election to claim foreign income taxes as a credit for a particular taxable year may be made or changed at any time before the expiration of the period prescribed for claiming a refund of U.S. tax for that year. See Part X.B.2 of the Explanation of Provisions in the 2020 FTC proposed regulations.

C. *Application to GILTI high-tax exclusion*

Proposed §1.905-3(b)(2)(ii) provided that the required adjustments to U.S. tax liability by reason of a foreign tax redetermination of a foreign corporation include not only adjustments to the amount of foreign taxes deemed paid and related section 78 dividend, but also adjustments to the foreign corporation's income and earnings and profits and the amount of the U.S. shareholder's inclusions under sections 951 and 951A in the year to which the redetermined foreign tax relates.

One comment requested that final regulations clarify whether a U.S. tax redetermination is required when the foreign tax redetermination affects whether the taxpayer is eligible for the GILTI high-tax exclusion. Specifically, the comment stated that because a redetermination of U.S. tax liability is required when the foreign tax redetermination affects whether a taxpayer is eligible for the subpart F high-tax election under section 954(b)(4), a similar result should apply for taxpayers that make (or seek to make) the GILTI high-tax exclusion election, and that taxpayers should be allowed to make the election on an annual basis. Further, the comment suggested that if taxpayers are allowed to make an annual election under the final GILTI high-tax exclusion regulations, then taxpayers should be permitted to make or revoke the election on an amended return following a foreign tax redetermination.

Proposed §1.905-3(b)(2)(ii) provided that the required U.S. tax redetermination applies for purposes of determining amounts excluded from a CFC's gross tested income under section 951A(c)(2)(A)(i)(III), and this provision is retained in the final regulations with minor modifications. Furthermore, under final regulations issued on July 23, 2020 (TD 9902, 85 FR 44620), taxpayers may make the GILTI high-tax exclusion election on an annual basis and may do so on an amended return filed within 24 months of the unextended due date of the original income tax return. See §1.951A-2(c)(7)(viii)(A)(*1*)(*i*).

D. *Foreign tax redeterminations of successor entities*

Proposed §1.905-3(b)(3) provided that if at the time of a foreign tax redetermination the person with legal liability for the tax (the ''successor'') is a different person than the person that had legal liability for the tax in the year to which the redetermined tax relates (the ''original taxpayer''), the required redetermination of U.S. tax liability is made as if the foreign tax redetermination occurred in the hands of the original taxpayer. The proposed regulations further provided that Federal income tax principles apply to determine the tax consequences if the successor remits, or receives a refund of, a tax that in the year to which the redetermined tax relates was the legal liability of, and thus considered paid by, the original taxpayer.

One comment suggested that proposed §1.905-3(b)(3), as drafted, did not clearly address cases where the ownership of a disregarded entity changes. The comment recommended clarifying that in the case of a disregarded entity, the owner of the disregarded entity is treated as the person with legal liability for the tax or the person with the legal right to a refund, as applicable.

The Treasury Department and the IRS have determined that no clarification is necessary. Existing regulations make clear that the owner of a disregarded entity is considered to be legally liable for the tax. See §1.901-2(f)(4)(ii) (legal liability for income taxes imposed on a disregarded entity).

The same comment stated that the preamble to the proposed regulations incorrectly suggested that under U.S. tax principles the payment of tax by a successor entity owned by the original taxpayer (for example, by a CFC that was formerly a disregarded entity) is treated as a distribution. The comment further recommended addressing the issue of contingent liabilities in future guidance. The Treasury Department and the IRS agree that there may be multiple ways to characterize the tax consequences of tax paid by a successor in the example described in the preamble to the proposed regulations. Furthermore, the Treasury Department and the IRS have determined that the issue of contingent foreign tax liabilities in connection with foreign tax redeterminations under section 905(c) requires further study and may be considered as part of future guidance.

E. *Notification to the IRS of foreign tax redeterminations and related penalty provisions*

1. Notification Through Amended Returns

In general, proposed §1.905-4(b)(1)(i) provided that any taxpayer for which a redetermination of U.S. tax liability is required must notify the IRS of the foreign tax redetermination by filing an amended return.

Several comments suggested that taxpayers should be allowed to report adjustments to U.S. tax liability in prior years by reason of foreign tax redeterminations on

an attachment to their Federal income tax return for the taxable year in which the redetermination occurs, instead of requiring taxpayers to file amended tax returns for the taxable year in which the adjusted foreign tax was claimed as a credit and any intervening years in which the foreign tax redetermination affected U.S. tax liability. Specifically, comments suggested that taxpayers could be allowed to file a statement with their return for the taxable year in which the foreign tax redetermination occurs notifying the IRS of overpayments or underpayments of U.S. tax and applicable interest due for prior taxable years that resulted from the foreign tax redetermination. One comment suggested that taxpayers could be required to maintain books and records reflecting all the adjustments that would normally accompany an amended return, without actually being required to prepare and file such a return. Another comment suggested that the IRS could amend Schedule E on Form 5471 to include this type of information about the changes to prior year U.S. tax liabilities that result from foreign tax redeterminations. Comments noted that providing an alternative to filing amended Federal income tax returns would relieve taxpayers from having to file amended state tax returns.

The Treasury Department and the IRS have determined that, based on existing processes, the only manner in which taxpayers can properly notify the IRS of a change in U.S. tax liability for a prior taxable year that results from a foreign tax redetermination is by filing an amended return reflecting all the necessary U.S. tax adjustments. In addition, the Treasury Department and the IRS have determined that the type of statement suggested by the comments, reflecting a recomputation of Federal income tax liability for a prior year, could be viewed by state tax authorities as the functional equivalent of an amended Federal income tax return that may not necessarily operate to relieve taxpayers of their obligations to file amended state tax returns. In any event, taxpayer requests for relief from state tax filing obligations are properly directed to state tax authorities, rather than to the Treasury Department and the IRS. Therefore, the comments are not adopted. However, the Treasury Department and the IRS continue to study whether new processes or forms can be developed to streamline the filing requirements while ensuring that the IRS receives the necessary information to verify that taxpayers have made the required adjustments to their U.S. tax liability. Under §1.905-4(b)(3) of the final regulations, the IRS may prescribe alternative notification requirements through forms, instructions, publications, or other guidance.

Comments also suggested that the notification due date should be extended (for example, to up to three years from the due date of the original return for the taxable year in which the foreign tax redetermination occurred).

The Treasury Department and the IRS have determined that deferring the due date of the required amended returns beyond the due date (with extensions) of the return for the year in which the foreign tax redetermination occurs would not substantially reduce compliance burdens and could be more difficult for the IRS to administer, because the same filing obligations would be required, though with respect to foreign tax redeterminations that occurred three years earlier rather than in the current taxable year. In addition, taxpayers have an economic incentive to promptly file amended returns claiming a refund of U.S. tax in cases where a foreign tax redetermination reduces, rather than increases, U.S. tax liability; the Treasury Department and the IRS have determined that it is appropriate to require comparable promptness when a foreign tax redetermination increases U.S. tax due in order to permit timely verification of the required U.S. tax adjustments when the relevant documentation and personnel are more readily available. Accordingly, the comments are not adopted. However, a transition rule is added at §1.905-4(b)(6) to give taxpayers an additional year to file required notifications with respect to foreign tax redeterminations occurring in taxable years ending on or after December 16, 2019, and before November 12, 2020.

Comments also requested that the final regulations provide that for foreign tax redeterminations below a certain de minimis threshold (for example, 10 percent of foreign taxes as originally accrued, or $5 million), taxpayers should be allowed to account for the foreign tax redeterminations by making adjustments to current year taxes and foreign tax credits claimed in the taxable year in which the foreign tax redetermination occurs, rather than by adjusting U.S. tax liability in the prior year or years in which the adjusted foreign taxes were claimed as a credit. Alternatively, some comments requested that for foreign tax redeterminations below a de minimis or materiality threshold, taxpayers should be completely relieved of adjusting U.S. tax liability and from all notification and amended return requirements.

The Treasury Department and the IRS have determined that, as amended by the TCJA, section 905(c) mandates retroactive adjustments to U.S. tax liability when foreign taxes claimed as credits are redetermined. The TCJA repealed section 902 and the regulatory authority at the end of section 905(c)(1) to prescribe alternative adjustments to multi-year pools of earnings and taxes of foreign corporations in lieu of the required adjustments to U.S. tax liability for the affected years. Recharacterizing prior year taxes as current year taxes would have substantive effects on the amounts of a taxpayer's GILTI and subpart F inclusions, the applicable carryover periods for excess credits, the applicable currency translation conventions, the amounts of interest owed by or due to the taxpayer, and the applicable statutes of limitation for refund or assessment. Therefore, the comments are not adopted.

Finally, a comment requested that §1.905-4(b)(1)(ii) be amended to allow a taxpayer that avails itself of special procedures under Revenue Procedure 94-69 to notify the IRS of a foreign tax redetermination when the taxpayer makes a Revenue Procedure 94-69 disclosure during an audit for the taxable year for which U.S. tax liability is increased by reason of the foreign tax redetermination.

In relevant part, Revenue Procedure 94-69 provides special procedures for a taxpayer in the Large Corporate Compliance program (formerly the Coordinated Examination Program or Coordinated Industry Case program) to avoid the potential application of the accuracy-related penalty currently described in section 6662. Under Revenue Procedure 94-69, a taxpayer may file a written statement that is treated as a qualified amended return within 15 days after the IRS requests it. However, Revenue Procedure 94-69 does

not provide any protection for penalties under section 6689 for failure to file a notice of a foreign tax redetermination, and it requires a statement that is less detailed than the notification statement required under §1.905-4(b)(1)(ii). Further, section 905(c) contemplates that the burden is on the taxpayer to notify the IRS of a foreign tax redetermination, whereas Revenue Procedure 94-69 places the burden on the IRS to request information. Finally, the notification requirement under §1.905-4(b)(1)(ii) affords a taxpayer more time to satisfy its reporting obligation as opposed to the 15-day notification requirement in Revenue Procedure 94-69. Therefore, the comment is not adopted.

2. Foreign Tax Redeterminations of Pass-through Entities

Proposed §1.905-4(b)(2) generally provided that a pass-through entity that reports creditable foreign income tax to its partners, shareholders, or beneficiaries is required to notify the IRS and its partners, shareholders, or beneficiaries if there is a foreign tax redetermination with respect to such foreign income tax. See proposed §1.905-4(c) for the information required to be provided with the notification. Additionally, proposed §1.905-4(b)(2)(ii) provided that if a redetermination of U.S. tax liability would require a partnership adjustment as defined in §301.6241-1(a)(6), the partnership must file an administrative adjustment request ("AAR") under section 6227 without regard to the time restrictions on filing an AAR in section 6227(c). See also §1.6227-1(g).

One comment suggested that S corporations should be allowed to follow similar notification procedures as partnerships that are subject to sections 6221 through 6241 (enacted in §1101 of the Bipartisan Budget Act of 2015, Pub. L. 114-74 ("BBA") and as amended by the Protecting Americans from Tax Hikes Act of 2015, Pub. L. 114-113, div Q, and by sections 201 through 207 of the Tax Technical Corrections Act of 2018, contained in Title II of Division U of the Consolidated Appropriations Act of 2018, Pub. L. 115-141).

By their terms, the BBA rules only apply to partnerships and not S corporations, except in the limited circumstance in which an S corporation is a partner in a partnership subject to the BBA rules. See sections 6226(b)(4) and 6227(b). But in cases where the S corporation is not a partner in a BBA partnership that made the election, there is no provision under BBA or any other provision of the Code to allow the S corporation to pay the imputed underpayment on behalf of its shareholders. Because the statute does not generally allow for S corporations to pay imputed underpayments on behalf of its shareholders, the approach suggested by the comment is not viable and therefore the comment is not adopted. However, as described in Part V.E.1 of this Summary of Comments and Explanation of Revisions, the Treasury Department and the IRS continue to study whether new processes or forms can be developed to streamline the amended return requirements, including in the case of S corporations that report foreign tax redeterminations to their shareholders.

3. Foreign Tax Redeterminations of LB&I Taxpayers

Proposed §1.905-4(b)(4) provided a limited alternative notification requirement for U.S. taxpayers that are under the jurisdiction of the IRS's Large Business & International ("LB&I") Division. Under proposed §1.905-4(b)(4)(i)(B), the alternative notification requirement is available only if certain conditions are met, including that an amended return reflecting a foreign tax redetermination would otherwise be due while the return for the affected taxable year is under examination, and that the foreign tax redetermination results in a downward adjustment to the amount of foreign tax paid or accrued, or included in the computation of foreign taxes deemed paid.

Several comments suggested broadening the scope of proposed §1.905-4(b)(4) to include upward adjustments to foreign taxes paid or accrued. The comments also recommended that the special notification rules apply when multiple foreign tax redeterminations involving different foreign jurisdictions occur in the same taxable year and result in offsetting adjustments, for example, if there is an additional payment of foreign tax in one jurisdiction and a refund of a comparable amount in another jurisdiction.

The proposed regulations limited the alternative notification requirement to cases where the foreign tax redetermination results in a downward adjustment to the amount of foreign taxes paid or accrued because failure to comply with the notification requirements exposes taxpayers to penalties under section 6689 only if the foreign tax redetermination results in an underpayment of U.S. tax. As provided in §1.905-4(b)(1)(iii), if a foreign tax redetermination results in an overpayment of U.S. tax, in order to claim a refund of U.S. tax the taxpayer must file an amended return within the period specified in section 6511. See section 6511(d)(3)(A), providing a special 10-year period of limitations for refund claims based on foreign tax credits. However, in unusual circumstances, an increase in foreign tax liability for a prior year may result in an underpayment (rather than an overpayment) of U.S. tax (for example, if an increase in foreign income tax liability causes a CFC to have a tested loss or to qualify for the high-tax exclusion of section 954(b)(4), reducing the amount of foreign taxes deemed paid). In addition, in some cases the complexity of the required computations may make it difficult for taxpayers to identify easily which particular foreign tax redeterminations will ultimately result in an underpayment of U.S. tax. Accordingly, the final regulations extend the alternative notification procedures to cover the case of any adjustment (whether upward or downward) of foreign taxes by reason of a foreign tax redetermination that increases U.S. tax liability, and so would otherwise require the filing of an amended return while the affected year of the LB&I taxpayer is under examination. In addition, the final regulations provide that an LB&I taxpayer that has a foreign tax redetermination that decreases U.S. tax liability for an affected year that is under examination may (but is not required to) notify the examiner of the adjustment in lieu of filing an amended return to claim a refund (within the time period provided in section 6511). However, because section 6511(d)(3) generally allows taxpayers 10 years to seek a U.S. tax refund attributable to foreign tax credits and the regulations do not preclude taxpayers from filing such an amended return before the audit of an affected year is completed, the IRS may

either accept the alternative notification or require the taxpayer to file an amended return. The additional flexibility added to the final regulations will assure timely notification of, and penalty protection for taxpayers with respect to, all foreign tax redeterminations that may increase or decrease U.S. tax liability for an affected taxable year, including in the case of offsetting foreign tax redeterminations that occur in the same taxable year.

Finally, comments recommended that examiners should be granted authority to accept notifications of foreign tax redeterminations outside the periods specified in §1.905-4(b)(4)(ii)(A) through (C) and for affected taxable years that are not currently under examination. For example, the comments suggested that the notification deadline for an LB&I taxpayer should be extended upon the taxpayer's request and at the examiner's discretion.

The Treasury Department and the IRS have determined that amended returns reflecting additional U.S. tax due should be timely filed in order to ensure examiners have sufficient time to take into account any redetermination of U.S. tax liability without prolonging the audit. In addition, the special notification rules are not extended to taxpayers that are not currently under examination. The alternative notification rules in §1.905-4(b)(4) are predicated on the fact that the examiner is in the process of determining whether to propose adjustments to the items included on the taxpayer's return for the taxable year under examination, and it is appropriate to defer the requirement to file an amended return reflecting the effect of a foreign tax redetermination on the taxpayer's U.S. tax liability for that taxable year until the examination has concluded. These considerations do not apply to affected taxable years that are not currently under examination when an amended return would otherwise be due. Accordingly, these comments are not adopted.

F. *Transition rule relating to the TCJA*

Proposed §§1.905-3(b)(2)(iv) and 1.905-5 provided a transition rule providing that post-2017 redeterminations of pre-2018 foreign income taxes of foreign corporations must be accounted for by adjusting the foreign corporation's taxable income and earnings and profits, post-1986 undistributed earnings, and post-1986 foreign income taxes (or pre-1987 accumulated profits and pre-1987 foreign income taxes, as applicable) in the pre-2018 year to which the redetermined foreign taxes relate.

The preamble to the 2019 FTC proposed regulations requested comments on whether an alternative adjustment to account for post-2017 foreign tax redeterminations with respect to pre-2018 taxable years of foreign corporations, such as an adjustment to the foreign corporation's taxable income and earnings and profits, post-1986 undistributed earnings, and post-1986 foreign income taxes as of the foreign corporation's last taxable year beginning before January 1, 2018, may provide for a simplified and reasonably accurate alternative.

Several comments supported this suggestion. A comment further noted that certain taxpayers should be excluded from any alternative rule where it would be distortive. For example, the comment suggested excluding taxpayers that distributed material amounts of earnings and profits, as well as taxpayers who took advantage of the subpart F high-tax exception in the foreign corporation's final pre-TCJA taxable year. Another comment noted that taxpayers should be allowed to adjust the foreign corporation's final pre-2018 year only if the adjustments would not cause a deficit in the foreign corporation's tax pool in that final year. A comment also suggested that the alternative rule should provide that in case of foreign corporations that ceased to be subject to the pooling regime before 2018 (for example, due to a liquidation or sale to a foreign acquiror), the required adjustments should be made in the foreign corporation's last year in which the pooling rules are relevant). Additionally, several comments suggested that foreign tax redeterminations of foreign corporations below a certain threshold should not require a redetermination or adjustment of a taxpayer's section 965(a) inclusion or the amount of foreign taxes deemed paid with respect to such section 965(a) inclusion. Instead, some comments suggested that the redetermination be taken into account in the post-2017 year of the redetermination.

In response to comments, the final regulations under §1.905-5(e) provide an irrevocable election for a foreign corporation's controlling domestic shareholders to account for all foreign tax redeterminations that occur in taxable years ending on or after November 2, 2020, with respect to pre-2018 taxable years of foreign corporations as if they occurred in the foreign corporation's last taxable year beginning before January 1, 2018 (the "last pooling year"). The rules in §§1.905-3T and 1.905-5T (as contained in 26 CFR part 1 revised as of April 1, 2019) will apply for purposes of determining whether a particular foreign tax redetermination must instead be accounted for in the year to which the redetermined foreign tax relates, instead of in the last pooling year. The election is made by the foreign corporation's controlling domestic shareholders, and is binding on all persons who are, or were in a prior year to which the election applies, U.S. shareholders of the foreign corporation with respect to which the election is made for all of its subsequent foreign tax redeterminations, as well as foreign tax redeterminations of other members of the same CFC group as the foreign corporation for which the election is made. For this purpose, the definition of a CFC group in §1.905-5(e)(2)(iv)(B) is modeled off the definition contained in §1.951A-2(c)(7)(viii)(E)(*2*).

No exception is provided that would allow taxpayers to avoid redetermination or adjustment of the amount of a taxpayer's section 965(a) inclusion or foreign income taxes deemed paid with respect to such section 965(a) inclusion if under section 905(c) a foreign tax redetermination with respect to a foreign corporation's pre-2018 year requires such an adjustment to the taxpayer's U.S. tax liability. As discussed in Part V.E.1 of this Summary of Comments and Explanation of Revisions, section 905(c) mandates retroactive adjustments to U.S. tax liability when foreign taxes claimed as credits are redetermined, and there is no technical or policy basis on which to exclude such adjustments when the U.S. tax liability arises as a result of section 965 as opposed to another section of the Code.

G. *Protective claims*

One comment requested guidance on how to file protective refund claims to account for contested foreign taxes that may

result in foreign tax redeterminations after the expiration of the applicable statute of limitations. Providing guidance on the procedures for filing protective claims is beyond the scope of this rulemaking.

VI. *Foreign Income Taxes Taken into Account Under Section 954(b)(4)*

The 2019 FTC proposed regulations included a clarification relating to schemes involving jurisdictions that do not impose corporate income tax on a CFC until its earnings are distributed. The proposed regulations clarified that foreign income taxes that have not accrued because they are contingent on a future distribution are not taken into account for purposes of determining the amount of foreign income taxes paid or accrued with respect to an item of income.

No comments were received with respect to this provision, and the rules are finalized without change. In addition, proposed §1.905-1(d)(1) in the 2020 FTC proposed regulations further clarifies that taxes contingent on a future distribution are not treated as accrued.

VII. *Applicability Dates*

A. *Regulations relating to foreign tax credits*

The 2019 FTC proposed regulations provided that the rules in proposed §§1.861-8, 1.861-9, 1.861-12, 1.861-14, 1.904-4(c)(7) and (8), 1.904(b)-3, 1.905-3, 1.905-4, 1.905-5, 1.954-1, 1.954-2, 1.965-5(b)(2), and 301.6689-1 are applicable to taxable years that end on or after December 16, 2019. Certain provisions, such as §§1.704-1(b)(4)(viii)(*d*)(*1*), 1.861-17, 1.861-20, 1.904-6, and 1.960-1, were proposed to be applicable to taxable years beginning after December 31, 2019, while proposed §§1.904-4(e) and 1.904(g)-3 were proposed to be applicable to taxable years ending on or after the date the final regulations are filed. Proposed §1.1502-4 was proposed to be applicable to taxable years for which the original consolidated Federal income tax return is due (without extensions) after December 17, 2019.

Several comments requested that the applicability dates to the 2019 FTC proposed regulations generally be delayed to taxable years beginning on or after the final regulations are published to allow more time for taxpayers to adapt to the new rules, and also requested that the regulations allow taxpayers the flexibility to rely on either the 2019 FTC proposed regulations or the final regulations for any preceding taxable years.

The Treasury Department and the IRS agree that the applicability date of the expense allocation rules in §§1.861-8 and 1.861-14, which particularly in the case of stewardship expenses contain significant changes relative to the 2019 FTC proposed regulations, should be delayed to allow taxpayers more time to comply with the revisions made in the final regulations. Therefore, the applicability dates of §§1.861-8 and 1.861-14 are revised to apply to taxable years beginning after December 31, 2019 (consistent with the later applicability date provided for §§1.861-17, 1.861-20, 1.904-6, and 1.960-1). In addition, although the applicability date of the notification requirements for foreign tax redeterminations in §1.905-4 is adopted as proposed to apply to foreign tax redeterminations occurring in taxable years ending on or after December 16, 2019, a transition rule is added to the final regulations to provide taxpayers an additional year to file required notifications with respect to foreign tax redeterminations occurring in taxable years ending before November 12, 2020. Also, because section 1503(a) provides that regulations under section 1502 only apply to consolidated tax returns if they are prescribed before the last day prescribed by law for the filing of such return, the applicability date of §1.1502-4 is revised to apply to taxable years for which the original consolidated Federal income tax return is due (without extensions) after January 11, 2021. However, the other provisions in the 2019 FTC proposed regulations which were proposed to apply to taxable years ending on or after December 16, 2019 (§§1.861-9, 1.861-12, 1.904-4(c)(7) and (8), 1.904(b)-3, 1.905-3, 1.905-5, 1.954-1, 1.954-2, 1.965-5(b)(2), and 301.6689-1), generally received minimal or no comments and have been adopted with no or minimal changes. Therefore, the Treasury Department and the IRS have determined that taxpayers with 2019 calendar years have been sufficiently on notice of these rules and little benefit would be afforded by providing a delayed applicability date or an election to apply either the proposed or final regulations to preceding years, given that these rules have not significantly changed between the proposed and final regulations.

The 2019 FTC proposed regulations provided that, with respect to §1.861-17, taxpayers that use the sales method for taxable years beginning after December 31, 2017, and before January 1, 2020 (or taxpayers that use the sales method only for their last taxable year that begins before January 1, 2020), may rely on proposed §1.861-17 if they apply it consistently with respect to such taxable year and any subsequent year. Therefore, a taxpayer using the sales method for its taxable year beginning in 2018 may rely on proposed §1.861-17 but must also apply the sales method (relying on proposed §1.861-17) for its taxable year beginning in 2019.

These final regulations provide that a taxpayer may choose to apply §1.861-17 (as contained in these final regulations) to taxable years beginning before January 1, 2020, provided that it applies the final regulations in their entirety, and provided that if a taxpayer applies the final regulations to the taxable year beginning in 2018, the taxpayer must also apply the final regulations for the subsequent taxable year beginning in 2019. Alternatively, and consistent with the 2019 FTC proposed regulations, a taxpayer may rely on proposed §1.861-17 in its entirety for taxable years beginning after December 31, 2017, and beginning before January 1, 2020. A taxpayer that applies either the proposed or final version of §1.861-17 to a taxable year beginning on or after January 1, 2018, and beginning before January 1, 2020, must apply it with respect to all operative sections (including both section 250 and 904). See §1.861-8(f).

B. *Rules relating to hybrid arrangements and section 951A*

Under the 2020 hybrids proposed regulations, the rules under section 245A(e) relating to hybrid deduction accounts were proposed to be applicable to taxable years ending on or after the date that final regulations are published in the **Federal Register**, although a taxpayer could choose to consistently apply those final regulations to earlier taxable years. See proposed §1.245A(e)-1(h)(2). In addition, the 2020 hybrids pro-

posed regulations provided that a taxpayer could consistently rely on the proposed rules with respect to earlier taxable years.

Further, under the 2020 hybrids proposed regulations, the rules under section 881 relating to conduit financing arrangements were proposed to be applicable to payments made on or after the date that final regulations are published in the **Federal Register**. See proposed §1.881-3(f). Finally, the rules under section 951A relating to disqualified payments were proposed to be applicable to taxable years of foreign corporations ending on or after April 7, 2020, and to taxable years of United States shareholders in which or with which such taxable years end. See proposed §1.951A-7(d).

As discussed in Part III.B of this Summary of Comments and Explanation of Revisions, a comment recommended modifying the applicability date for the rules under section 881 if the final regulations were to include some of the proposed rules, such as the rule that treated as a financing transaction an instrument that is equity for both U.S. and foreign tax purposes and that gives rise to notional interest deductions. The final regulations do not include those rules. In addition, no comments suggested a modification to the applicability dates for the other rules under the 2020 hybrids proposed regulations. Therefore, the final regulations adopt applicability dates consistent with the proposed applicability dates under the 2020 hybrids proposed regulations. See §§1.245A(e)-1(h)(2); 1.881-3(f); and 1.951A-7(d). The final regulations also clarify that for a taxpayer to apply the final rules under section 245A(e) to a taxable year ending before November 12, 2020, the taxpayer must consistently apply those rules to that taxable year and any subsequent taxable year ending before November 12, 2020. See §1.245A(e)-1(h)(2).

Special Analyses

I. *Regulatory Planning and Review*

Executive Orders 13771, 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. For purposes of Executive Order 13771, this final rule is regulatory.

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

A. *Background and need for the final regulations*

1. Regulations Relating to Foreign Tax Credits

Before the Tax Cuts and Jobs Act (TCJA), the United States taxed its citizens, residents, and domestic corporations on their worldwide income. However, to the extent that a foreign jurisdiction and the United States taxed the same income, this framework could have resulted in double taxation. The U.S. foreign tax credit (FTC) regime alleviated potential double taxation by allowing a non-refundable credit for foreign income taxes paid or accrued that could be applied to reduce the U.S. tax on foreign source income. Although TCJA eliminated the U.S. tax on some foreign source income, the United States continues to tax other foreign source income, and to provide foreign tax credits against this U.S. tax. The changes made by TCJA to international taxation necessitate certain changes in this FTC regime.

The FTC calculation operates by defining different categories of foreign source income (a "separate category") based on the type of income.[3] Foreign taxes paid or accrued as well as deductions for expenses borne by U.S. parents and domestic affiliates that support foreign operations are also allocated to the separate categories under similar principles. The taxpayer can then use foreign tax credits allocated to each category against the U.S. tax owed on income in that category. This approach means that taxpayers who pay foreign taxes on income in one category cannot claim a credit against U.S. taxes owed on income in a different category, an important feature of the FTC regime. For example, suppose a domestic corporate taxpayer has $100 of active foreign source income in the "general category" and $100 of passive foreign source income, such as interest income, in the "passive category." It also has $50 of foreign taxes associated with the "general category" income and $0 of foreign taxes associated with the "passive category" income. The allowable FTC is determined separately for the two categories. Therefore, none of the $50 of "general category" FTCs can be used to offset U.S. tax on the "passive category" income. This taxpayer has a pre-FTC U.S. tax liability of $42 (21 percent of $200) but can claim an FTC for only $21 (21 percent of $100) of this liability, which is the U.S. tax owed with respect to active foreign source income in the general category. The $21 represents what is known as the taxpayer's foreign tax credit limitation. The taxpayer may carry the remaining $29 of foreign taxes ($50 minus $21) back to the prior taxable year and then forward for up to 10 years (until used), and is allowed a credit against U.S. tax on general category foreign source income in the carryover year, subject to certain restrictions.

The final regulations are needed to address changes introduced by the TCJA and to respond to outstanding issues raised in comments to foreign tax credit regulations issued in 2018. In particular, the comments highlighted the following areas of concern: (a) uncertainty concerning ap-

[3] Prior to the TCJA, these categories were primarily the passive income and general income categories. The TCJA added new separate categories for global intangible low-taxed income (the section 951A category) and foreign branch income

propriate allocation of R&E expenditures across FTC categories, and (b) the need to treat loans from partnerships to partners the same as loans from partners to partnerships with respect to aligning interest income to interest expense. In addition, the final regulations are needed to expand the application of section 905(c) to cases where a foreign tax redetermination changes a taxpayer's eligibility for the high-taxed exception under subpart F and GILTI.

In addition to the 2018 FTC final regulations, the Treasury Department and the IRS also issued final regulations in 2019 (84 FR 69022) (2019 FTC final regulations) and proposed regulations (84 FR 69124) (2019 FTC proposed regulations), which are being finalized in this document, and are issuing additional proposed regulations simultaneously with these final regulations.

2. Regulations Relating to Hybrid Arrangements and to Section 951A

The TCJA introduced two new provisions, sections 245A(e) and 267A, that affect the treatment of hybrid arrangements, and a new section 951A, which imposes tax on United States shareholders with respect to certain earnings of their CFCs.[4] The Treasury Department and the IRS previously issued final regulations under sections 245A(e) and 267A (2020 hybrids final regulations) as well as proposed regulations under sections 245A(e), 881, and 951A (2020 hybrids proposed regulations). See TD 9896, 85 FR 19802; REG-106013-19, 85 FR 19858. The Treasury Department and the IRS are issuing additional final regulations relating to finalize the 2020 hybrids proposed regulations.

Section 245A(e) disallows the dividends received deduction (DRD) for any dividend received by a U.S. shareholder from a CFC if the dividend is a hybrid dividend. In addition, section 245A(e) treats hybrid dividends between CFCs with a common U.S. shareholder as subpart F income. The statute defines a hybrid dividend as an amount received from a CFC for which a deduction would be allowed under section 245A(a) and for which the CFC received a deduction or other tax benefit in a foreign country. This disallowance of the DRD for hybrid dividends and the treatment of hybrid dividends as subpart F income neutralizes the double non-taxation that might otherwise be produced by these dividends.[5] The 2020 hybrids final regulations require that taxpayers maintain "hybrid deduction accounts" to track a CFC's (or a person related to a CFC's) hybrid deductions allowed in foreign jurisdictions across sources and years. The 2020 hybrids final regulations then provide that a dividend received by a U.S. shareholder from the CFC is a hybrid dividend to the extent of the sum of those accounts.

These final regulations also include rules regarding conduit financing arrangements.[6] Under the regulations in §1.881-3 (the "conduit financing regulations"), a "financing arrangement" means a series of transactions by which one entity (the financing entity) advances money or other property to another entity (the financed entity) through one or more intermediaries, and there are "financing transactions" linking each of those parties. If the IRS determines that a principal purpose of such an arrangement is to avoid U.S. tax, the IRS may disregard the participation of intermediate entities. As a result, U.S.-source payments from the financed entity are, for U.S. withholding tax purposes, treated as being made directly to the financing entity.

For example, consider a foreign entity that is seeking to finance its U.S. subsidiary but is not entitled to U.S. tax treaty benefits; thus, U.S.-source payments made to this entity are not entitled to reduced withholding tax rates. Instead of lending money directly to the U.S. subsidiary, the foreign entity might loan money to an affiliate residing in a treaty jurisdiction and have the affiliate lend on to the U.S. subsidiary in order to access U.S. tax treaty benefits.

Under the conduit financing regulations, if the IRS determines that a principal purpose of such an arrangement is to avoid U.S. tax, the IRS may disregard the participation of the affiliate. As a result, U.S.-source interest payments from the U.S. subsidiary are, for U.S. withholding tax purposes, treated as being made directly to the foreign entity.

In general, the conduit financing regulations apply only if "financing transactions," as defined under the regulations, link the financing entity, the intermediate entities, and the financed entity. Under the prior conduit financing regulations, before the finalization of these regulations, an instrument that is equity for U.S. tax purposes generally will not be treated as a "financing transaction" unless it provides the holder significant redemption rights or the issuer has a right to redeem that likely will be exercised. This is the case even if the instrument is treated as debt under the laws of the foreign jurisdiction (for example, perpetual debt). As a result, the prior conduit financing regulations would not apply to an equity instrument in the absence of such attributes, and the U.S.-source payment might be entitled to a lower rate of U.S. withholding tax.

These final regulations also implement items in section 951A of the TCJA. Section 951A provides for the taxation of global intangible low-taxed income (GILTI), effective beginning with the first taxable year of a CFC that begins after December 31. 2017. The existing final regulations under section 951A address the treatment of a deduction or loss attributable to ba-

[4] Hybrid arrangements are tax-avoidance tools used by certain multinational corporations (MNCs) that have operations both in the U.S. and a foreign country. These hybrid arrangements use differences in tax treatment by the U.S. and a foreign country to reduce taxes in one or both jurisdictions. Hybrid arrangements can be "hybrid entities," in which a taxpayer is treated as a flow-through or disregarded entity in one country but as a corporation in another, or "hybrid instruments," which are financial transactions that are treated as debt in one country and as equity in another.

[5] The tax treatment under which certain payments are deductible in one jurisdiction and not included in income in a second jurisdiction is referred to as a deduction/no-inclusion outcome ("D/NI outcome").

[6] On December 22, 2008, the Treasury Department and the IRS published a notice of proposed rulemaking (REG-113462-08) that proposed adding §1.881-3(a)(2)(i)(C) to the conduit financing regulations. The preamble to the proposed regulations provides that the Treasury Department and the IRS are also studying transactions where a financing entity advances cash or other property to an intermediate entity in exchange for a hybrid instrument (that is, an instrument treated as debt under the tax laws of the foreign country in which the intermediary is resident and equity for U.S. tax purposes), and states that they may issue separate guidance to address the treatment under §1.881-3 of certain hybrid instruments.

sis created by certain transfers of property from one CFC to a related CFC after December 31, 2017, but before the date on which section 951A first applies to the transferring CFC's income. Those regulations state that such a deduction or loss is allocated to residual CFC gross income; that is, income that is not attributable to tested income, subpart F income, or income effectively connected with a trade or business in the United States.

B. *Overview of the final regulations*

1. Regulations Relating to Foreign Tax Credits

These final regulations address the following issues: (1) the allocation and apportionment of deductions under sections 861 through 865, including new rules on the allocation and apportionment of research and experimentation (R&E) expenditures; (2) the allocation of foreign income taxes to the foreign income to which such taxes relate; (3) the interaction of the branch loss and dual consolidated loss recapture rules with sections 904(f) and (g); (4) the effect of foreign tax redeterminations of foreign corporations on the application of the high-tax exception described in section 954(b)(4) (including for purposes of determining tested income under section 951A(c)(2)(A)(i)(III)), and required notifications under section 905(c) to the IRS of foreign tax redeterminations and related penalty provisions; (5) the definition of foreign personal holding company income under section 954; (6) the application of the foreign tax credit disallowance under section 965(g); and (7) the application of the foreign tax credit limitation to consolidated groups.

2. Regulations Relating to Hybrid Arrangements and to Section 951A

These final regulations address three main issues. First, these final regulations address adjustments to hybrid deduction accounts under section 245A(e) and the 2020 hybrids final regulations. The 2020 hybrids final regulations stipulate that hybrid deduction accounts should generally be reduced to the extent that earnings and profits of the CFC that have not been subject to foreign tax as a result of certain hybrid arrangements are included in income in the United States by some provision other than section 245A(e). These final regulations provide new rules for reducing hybrid deduction accounts by reason of income inclusions attributable to subpart F, GILTI, and sections 951(a)(1)(B) and 956. An inclusion due to subpart F or GILTI reduces a hybrid deduction account only to the extent that the inclusion is not offset by a deduction or credit, such as a foreign tax credit, that likely will be afforded to the inclusion. Because deductions and credits are not available to offset income inclusions under section 951(a)(1)(B) and 956, these inclusions reduce a hybrid deduction account dollar-for-dollar.

Second, these final regulations address conduit financing arrangements under §1.881-3 by expanding the types of transactions classified as financing transactions. These final regulations state that if a financial instrument is debt under the tax law of the foreign jurisdiction where the issuer is a resident, or, if the issuer is not a tax resident of any country, where it is created, organized, or otherwise established, then it may now be characterized as a financing transaction even though the instrument is equity for U.S. tax purposes. Accordingly, the conduit financing regulations would apply to multiple-party financing arrangements using these types of instruments. This change is consistent with the policy of §1.881-3 and also helps to align the conduit regulations with the policy of section 267A by discouraging the exploitation of differences in treatment of financial instruments across jurisdictions. While section 267A and the 2020 hybrids final regulations apply only if the D/NI outcome is a result of the use of a hybrid entity or instrument, the conduit financing regulations apply regardless of causation and instead look to whether there is a tax avoidance plan. Thus, this new rule, to a limited extent, will address economically similar transactions that section 267A and the 2020 hybrids final regulations do not cover.

Finally, these final regulations address certain payments made after December 31, 2017, but before the date of the start of the first fiscal year for the transferor CFC for which 951A applies (the "disqualified period") in which payments, such as pre-payments of royalties, create income during the disqualified period and a corresponding deduction or loss claimed in taxable years after the disqualified period. Absent these final regulations, those deductions or losses could have been used to reduce tested income or increase tested losses, among other benefits. However, under these final regulations, these deductions will no longer provide such a tax benefit, and will instead be allocated to residual CFC income, similar to deductions or losses from certain property transfers in the disqualified period under the existing final regulations under section 951A.

C. *Economic analysis*

1. Baseline

In this analysis, the Treasury Department and the IRS assess the benefits and costs of these final regulations relative to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these regulations.

2. Summary of Economic Effects

i. Regulations relating to foreign tax credits

The final regulations provide certainty and clarity to taxpayers regarding the allocation of income, expenses, and foreign income taxes to the separate categories. In the absence of the enhanced specificity provided by these provisions of the regulations, similarly-situated taxpayers might interpret the foreign tax credit provisions of the Code differently, potentially resulting in inefficient patterns of economic activity. For example, in the absence of the final regulations, one taxpayer might have chosen not to undertake research (that is, incur R&E expenses) in a particular location, based on that taxpayer's interpretation of the tax consequences of such expenditures, that another taxpayer, making a different interpretation of the tax treatment of R&E, might have chosen to pursue. If this difference in interpretations confers a competitive advantage on the less productive enterprise, U.S. economic performance may suffer. Thus, the guidance provided in these regulations helps to ensure that taxpayers face more uniform incentives when making economic deci-

sions. In general, economic performance is enhanced when businesses face more uniform signals about tax treatment.

To the extent that taxpayers would generally, in the absence of this final guidance, have interpreted the foreign tax credit rules as being less favorable to the taxpayer than the final regulations provide, the final regulations may result in additional international activity by these taxpayers relative to the no-action baseline. This additional activity may include both activities that are beneficial to the U.S. economy (perhaps because they represent enhanced international opportunities for businesses with U.S. owners) and activities that are not beneficial (perhaps because they are accompanied by reduced activity in the United States). The Treasury Department and the IRS recognize that additional foreign economic activity by U.S. taxpayers may be a complement or substitute to activity within the United States and that to the extent these regulations change this activity, relative to the no-action baseline or alternative regulatory approaches, a mix of results may occur.

The Treasury Department and the IRS have not undertaken quantitative estimates of the economic effects of the foreign tax credit provisions of the regulations. The Treasury Department and the IRS do not have readily available data or models to estimate with reasonable precision (i) the tax stances that taxpayers would likely take in the absence of the final regulations or under alternative regulatory approaches; (ii) the difference in business decisions that taxpayers might make between the final regulations and the no-action baseline or alternative regulatory approaches as a result of these tax stances; or (iii) how this difference in those business decisions would affect measures of U.S. economic performance.

In the absence of such quantitative estimates, the Treasury Department and the IRS have undertaken a qualitative analysis of the economic effects of the final regulations relative to the no-action baseline and relative to alternative regulatory approaches. This analysis is presented in Parts I.C.3.i through iii of this Special Analyses.

ii. Regulations relating to hybrid arrangements and section 951A

These provisions of the final regulations provide certainty and clarity to taxpayers regarding (i) adjustments to hybrid deduction accounts under section 245A(e) and the 2020 hybrids final regulations; (ii) the determination of withholding taxes on payments made pursuant to conduit financing arrangements under §1.881-3; and (iii) the allocation of deductions for certain payments between related CFCs for purposes of section 951A and the final regulations under section 951A.

In the absence of this clarity, the likelihood that different taxpayers would interpret the rules regarding hybrid arrangements and certain deductible payments under the final regulations under section 951A differently would be exacerbated. In general, overall economic performance is enhanced when businesses face more uniform signals about tax treatment. Certainty and clarity over tax treatment generally also reduce compliance costs for taxpayers.

For those statutory provisions for which similar taxpayers would generally adopt similar interpretations of the statute even in the absence of guidance, the final regulations provide value by helping to ensure that those interpretations are consistent with the intent and purpose of the statute. Because the tax treatment in these final regulations advances the intent and purpose of the statute, this guidance enhances U.S. economic performance, relative to the no-action baseline or alternative regulatory approaches, within the context of Congressional intent.

These provisions of the final regulations will further enhance U.S. economic performance by helping to ensure that similar economic arrangements face similar tax treatments. Disparate tax treatment of similar economic transactions may create economic inefficiencies by leading taxpayers to undertake less productive economic activities.

The Treasury Department and the IRS have not undertaken quantitative estimates of the economic effects of these provisions of the final regulations because they do not have readily available data or models to estimate with reasonable precision (i) the types or volume of hybrid arrangements or certain disqualified payments between related CFCs that would likely be covered under these regulations, under the no-action baseline, or under alternative regulatory approaches; or (ii) the effects of those hybrid arrangements or disqualified payments on businesses' overall economic performance, including possible differences in compliance costs.

In the absence of such quantitative estimates, the Treasury Department and the IRS have undertaken a qualitative analysis of the economic effects of the final regulations relative to the no-action baseline and relative to alternative regulatory approaches. This analysis is presented in Parts I.C.3.iv through vi of this Special Analyses.

iii. Summary of economic effects of all provisions

The Treasury Department and the IRS project that the final regulations will have economic effects greater than $100 million per year ($2020) relative to the no-action baseline. This determination is based on the substantial size of many of the businesses potentially affected by these regulations and the general responsiveness of business activity to effective tax rates,[7] one component of which is the creditability of foreign taxes. Based on these two magnitudes, even modest changes in the treatment of foreign taxes or the allocation of deductions between related CFCs provided by the final regulations, relative to the no-action baseline, can be expected to have annual effects greater than $100 million ($2020).

3. Economic Effects of Specific Provisions

i. Rules for allocating R&E expenditures under the sales method

a. Background

Under long-standing foreign tax credit rules, taxpayers must allocate expendi-

[7] See E. Zwick and J. Mahon, "Tax Policy and Heterogeneous Investment Behavior," at *American Economic Review* 2017, 107(1): 217-48 and articles cited therein.

tures to income categories. In the case of research and experimentation (R&E) expenditures, taxpayers can elect between a "sales method" and a "gross income method" to allocate the R&E expenses.[8]

The TCJA created some uncertainty regarding the application of the sales method because of the introduction of the section 951A category. In particular, comments raised issues regarding whether any R&E expenditures should be allocated to the section 951A category. The fact that sales by CFCs generate tested income and tested income is generally assigned to the section 951A category might imply that R&E expenditures should be allocated to the section 951A category. But the fact that royalty payments from the CFC to the U.S. taxpayer (e.g., in remuneration for IP held by the parent that is licensed to the CFC to create the products that are sold) are in the general category implies that R&E expenditures should be allocated to the general category.

The gross income method is based on a different apportionment factor (gross income) as compared to the sales method (gross receipts). However, the gross income method is subject to certain conditions that require the result to be within a certain band around the result under the sales method, because historically the Treasury Department and the IRS have considered that the gross income method could lead to anomalous results and could be more easily manipulated than the sales method.[9] The uncertainty with respect to R&E expense allocation under the sales method needed resolution, and because the gross income method is tied to the sales method, any changes to the sales method required consideration of the gross income method.

b. Options considered for the final regulations

The Treasury Department and the IRS considered three options with respect to the allocation of R&E expenditures to the section 951A category for purposes of calculating the FTC limitation. The first option was to confirm that R&E expenditures are allocated to the section 951A category under the sales method and to otherwise leave their treatment under the gross income method unchanged. The second option was to revise the sales method to provide that R&E expenditures are only allocated to the income that represents the taxpayer's return on intellectual property (thus, R&E expenditures could not be allocated to income from the taxpayer's CFC sales) and otherwise leave their treatment under the gross income method unchanged. The third option was to revise the sales method as considered in the second option and eliminate the gross income method for purposes of allocating R&E expenditures.

The final regulations adopt the third option. This option allows for the provision of an allocation and apportionment method for R&E expenditures that generally matches the expense reasonably with the income it generates. The matching of income and expenses generally produces a more efficient tax system contingent on the overall Code relative to the alternative options. Additionally, because this option results in no R&E expense being allocated to section 951A category income, it does not incentivize taxpayers with excess credits (which cannot be carried over to prior or future taxable years and therefore become unusable) in the section 951A category to perform R&E through foreign subsidiaries; instead, the chosen option generally incentivizes choosing the location of R&E based on economic considerations rather than tax-related reasons, contingent on the overall Code. Finally, because the final regulations adopt the principle of allocating and apportioning R&E expenditures to IP-related income of the U.S. taxpayer, the gross income method is no longer relevant, because it allocates and apportions R&E expenditures to the section 951A category, and section 951A category gross income is not IP income to the U.S. taxpayer.

c. Number of affected taxpayers

The Treasury Department and the IRS have determined that the population of affected taxpayers consists of any U.S. taxpayer with R&E expenditures and foreign operations. There are around 2,500 such taxpayers in currently available tax filings from tax year 2018. Based on Statistics of Income data, approximately $40 billion of R&E expenses of such taxpayers were allocated to foreign source income, out of a total of $190 billion in qualified research expenses reported by such taxpayers.[10]

ii. Application of section 905(c) to changes affecting the high-tax exception

a. Background

Section 905(c) provides special rules for a foreign tax redetermination (FTR), which is when the amount of foreign tax paid in an earlier year (origin year) is changed in a later year (FTR year). This redetermination may be necessary, for example, because the taxpayer gets a refund or because a foreign audit determines that the taxpayer owes additional foreign tax. Since these additional taxes (or refunds) relate to the origin year, an FTR affects a taxpayer's origin year tax position (as well as FTC carryovers from that year). Before the TCJA, FTRs of foreign corporations generally resulted in prospective "pooling adjustments" to foreign tax credits. Under this approach, taxpayers simply added to or reduced the amount of foreign taxes in their foreign subsidiary's FTC "pool" going forward rather than amend the deemed paid taxes claimed on their origin year return. TCJA eliminated the pooling mechanism for taxes (because the adoption of a participation exemption system along with the elimination of de-

[8] If the taxpayer chooses the gross income method, 25 percent of the R&E expenditures are exclusively apportioned to the source where more than 50 percent of the taxpayer's R&E activities occur (generally the United States), and the other 75 percent is apportioned ratably. If a taxpayer chooses the sales method then 50 percent of the R&E expenditures are exclusively apportioned on the same basis, and the other 50 percent is apportioned ratably.

[9] The gross income method is more susceptible to manipulation because taxpayers can manage the type and amount of their foreign gross income by, for example, not paying a dividend and because presuming a factual relationship between the R&E expenditure and the related class of income based on the relative amounts of a taxpayer's gross income was more attenuated than a factual relationship based on sales.

[10] Note, however, that these taxpayers might have additional R&E expenses which are not qualified R&E expenses. The tax data do not separately identify such expenses.

ferral made it unnecessary) and replaced it with a system where taxes are deemed paid each year with an inclusion or distribution of previously taxed earnings and profits ("PTEP").

The 2019 FTC final regulations make clear that an FTR of a United States taxpayer must always be accounted for in the origin year, and that the taxpayer must file an amended return reflecting any resulting change in the taxpayer's U.S. tax liability.

Section 905(c) provides tools to enforce this amended return requirement. It suspends the statute of limitations with respect to the assessment of any additional U.S. tax liability that results from an FTR, and imposes a civil penalty on taxpayers who fail to notify the IRS (through an amended return) of an FTR. To reflect the repeal of the pooling mechanism, the final regulations generally require taxpayers to account for FTRs of foreign subsidiaries on an amended return that reflects revised foreign taxes deemed paid under section 960 and any resulting change in the taxpayer's U.S. tax liability. However, the 2019 FTC final regulations require U.S. tax redeterminations only by reason of FTRs that affect the amount of foreign tax credit taxpayers claimed in the origin year. The rules do not apply to other tax effects, such as when the FTR changes the amount of earnings and profits the taxpayer's CFC had in the origin year, or affects whether or not the CFC's income qualifies for the high-tax exception under GILTI or subpart F.

The interaction of FTRs and the high-tax exception under GILTI and subpart F increases the importance of filing an origin year amended return. In particular, FTRs can give rise to inaccurate origin year U.S. liability calculations in the absence of an amended return precisely because they can change taxpayers' eligibility for the high-tax exception. Therefore, the final regulations provide that the section 905(c) rules cover situations in which the FTR affects not only the amount of FTCs taxpayers claimed in the origin year, but also whether or not their CFC's income qualified for the high-tax exception.

b. Options considered for the final regulations

The Treasury Department and the IRS considered two options in applying section 905(c) in connection with the high-tax exception. The first option was to limit section 905(c) to changes in the amount of FTCs. The second option was to provide that section 905(c) applies in connection with the high-tax exceptions under GILTI and subpart F.

The final regulations adopt the second option. The first option would lead to frequent occurrences of inaccurate results with respect to the GILTI and subpart F high- tax exceptions because it is common for foreign audits to change the amount of tax paid in a prior year. Furthermore, taxpayers would have an incentive to overpay their CFC's foreign tax in the origin year, claim the high-tax exception to avoid subpart F or GILTI inclusions, wait for the 3 year statute of limitations to pass, and then claim a foreign tax refund with the foreign authorities. Without section 905(c) applying, taxpayers would have no obligation or threat of penalty for not amending the origin year return. Although there are FTC regulations that deny a credit if taxpayers make a noncompulsory payment of tax (i.e., taxpayers paid more foreign tax than is necessary under foreign law), those rules are challenging to administer. While taxpayers have the burden to prove that they were legally required to pay the tax, the IRS may need to engage foreign tax law experts to establish that the taxpayer could have successfully fought paying it.

The second option provides a more accurate tax calculation than the first option, and it is instrumental in avoiding abuse. The increased number of amended returns relative to the alternative regulatory approach will increase compliance costs for taxpayers, but the Treasury Department and the IRS consider that, in light of the high-tax exception, accurate origin year tax liability calculations necessitate these increased costs.

c. Number of affected taxpayers

The Treasury Department and the IRS determined that the final regulations potentially affect those U.S. taxpayers that pay foreign taxes and have a redetermination of that tax. Although data reporting the number of taxpayers subject to an FTR in a given year are not readily available, some taxpayers currently subject to FTRs will file amended returns. The Treasury Department and the IRS estimate that there were between 8,900 and 13,500 taxpayers with foreign affiliates that filed amended returns in 2018. However, the elimination of the pooling mechanism and the expanded incidence of deemed paid taxes in connection with the GILTI regime may significantly increase the number of taxpayers filing amended returns, and the expansion of the section 905(c) requirement to file an amended return to instances where a FTR changes eligibility for the high-tax exception under GILTI or subpart F (but does not affect the taxpayer's foreign tax credit) has the potential to modestly increase that number. The Treasury Department and the IRS have determined that a high upper bound for the number of taxpayers subject to a FTR that will be required to file amended returns (that is, taxpayers affected by this provision) can be derived by estimating the number of taxpayers with a potential GILTI or subpart F inclusion. Based on currently available tax filings for taxable year 2018, there were about 16,500 C corporations with CFCs that filed at least one Form 5471 with their Form 1120 return. In addition, for the same year, there were about 41,000 individuals with CFCs that e-filed at least one Form 5471 with their Form 1040 return.

In 2018, there were about 3,250 S corporations with CFCs that filed at least one Form 5471 with their 1120S return. The identified S corporations had an estimated 23,000 shareholders. Finally, the Treasury Department and the IRS estimate that there were approximately 7,500 U.S. partnerships with CFCs that e-filed at least one Form 5471 as Category 4 or 5 filers in 2018. The identified partnerships had approximately 1.7 million partners, as indicated by the number of Schedules K-1 filed by the partnerships. This number includes both domestic and foreign partners, so it substantially overstates the number of partners that would actually be affected by the final regulations because it includes foreign partners.

iii. Extension of the partnership loan rule to loans from the partnership to a U.S. partner

a. Background

The 2019 FTC final regulations provide a rule that aligns interest income

and expense when a U.S. partner makes a loan to the partnership. Under this matching rule, the partner's gross interest income is apportioned between U.S. and foreign sources in each separate category based on the partner's interest expense apportionment ratios. This rule minimizes the artificial increase in foreign source taxable income based solely on offsetting amounts of interest income and expense from a related party loan to a partnership. Comments in response to the 2018 FTC proposed regulations requested an equivalent rule when the partnership makes a loan to a U.S. partner.

b. Options considered for the final regulations

The Treasury Department and the IRS considered two options with respect to this rule. The first option was to not provide a rule, because the abuse the Treasury Department and the IRS were concerned about was not relevant with respect to loans from the partnership to the partner. In the absence of a matching rule, the U.S. partner's U.S. source taxable income would be artificially increased but this income is not eligible to be sheltered by FTCs. The second option was to provide an identical rule for loans from the partnership to the partner as was provided in the 2019 FTC final regulations for loans from the partner to the partnership. The final regulations adopt the second option. This symmetry helps to ensure that similar economic transactions are treated similarly.

c. Number of affected taxpayers

The Treasury Department and the IRS consider the population of affected taxpayers to consist of any U.S. partner in a partnership which has a loan from the partnership to the partner or certain other parties related to the partner. The Treasury Department and the IRS estimate that there are approximately 450 partnerships and 5,000 partners that would be affected by this regulation.

iv. Section 245A(e) – Adjustment of hybrid deduction account

a. Background

Under the 2020 hybrids final regulations, taxpayers must maintain hybrid deduction accounts to track income of a CFC that was sheltered from foreign tax due to hybrid arrangements, so that it may be included in U.S. income under section 245A(e) when paid as a dividend. The final regulations address how hybrid deduction accounts should be adjusted to account for earnings and profits of a CFC included in U.S. income due to certain provisions other than section 245A(e). The final regulations provide rules reducing a hybrid deduction account for three categories of inclusions: subpart F inclusions, GILTI inclusions, and inclusions under sections 951(a)(1)(B) and 956.

b. Options considered for the final regulations

One option for addressing the treatment of earnings and profits included in U.S. income due to provisions other than section 245A(e) would be to not issue additional guidance beyond current tax rules and thus not to adjust hybrid deduction accounts to account for such inclusions. This would be the simplest approach among those considered, but under this approach, some income could be subject to double taxation in the United States. For example, if no adjustment is made, to the extent that a CFC's earnings and profits were sheltered from foreign tax as a result of certain hybrid arrangements, the section 245A DRD would be disallowed for an amount of dividends equal to the amount of the sheltered earnings and profits, even if some of the sheltered earnings and profits were included in the income of a U.S. shareholder under the subpart F rules. The U.S. shareholder would be subject to tax on both the dividends and on the subpart F inclusion. Owing to this double taxation, the final regulations do not adopt this approach.

A second option would be to reduce hybrid deduction accounts by amounts included in gross income under the three categories; that is, without regard to deductions or credits that may offset the inclusion. While this option is also relatively simple, it could lead to double non-taxation and thus would give rise to results not intended by the statute. Subpart F and GILTI inclusions may be offset by – and thus may not be fully taxed in the United States as a result of – foreign tax credits and, in the case of GILTI, the section 250 deduction.[11] Therefore, this option for reducing hybrid deduction accounts may result in some income that was sheltered from foreign tax due to hybrid arrangements also escaping full U.S. taxation. This double non-taxation is economically inefficient because otherwise similar activities are taxed differently, potentially leading to inefficient business decisions.

A third option, which is the option finalized by the Treasury Department and the IRS, is to reduce hybrid deduction accounts by the amount of the inclusions from the three categories, but only to the extent that the inclusions are likely not offset by foreign tax credits or, in the case of GILTI, the section 250 deduction. For subpart F and GILTI inclusions, the final regulations stipulate adjustments to be made to account for the foreign tax credits and the section 250 deduction available for GILTI inclusions. These adjustments are intended to provide a precise, administrable manner for measuring the extent to which a subpart F or GILTI inclusion is included in U.S. income and not shielded by foreign tax credits or deductions. This option results in an outcome aligned with statutory intent, as it generally ensures that the section 245A DRD is disallowed (and thus a dividend is included in U.S. income without any regard for foreign tax credits) only for amounts that were sheltered from foreign tax by reason of a hybrid arrangement but that have not yet been subject to U.S. tax.

Relative to a no-action baseline, these final regulations provide taxpayers with new instructions regarding how to adjust hybrid deduction accounts to account for

[11] Deductions or credits are not available to offset income inclusions under sections 951(a)(1)(B) and 956, the third category of income inclusions that reduce hybrid deduction accounts addressed by these final regulations.

earnings and profits that are included in U.S. income by reason of certain provisions other than section 245A(e). This new instruction avoids possible double taxation. Double taxation is inconsistent with the intent and purpose of the statute and is economically inefficient because it may result in otherwise similar income streams facing different tax treatment, incentivizing taxpayers to finance operations with specific income streams and activities that may not be the most economically productive.

The Treasury Department and the IRS have not estimated the difference in compliance costs under each of the three options for the treatment of earnings and profits included in U.S. income due to provisions other than section 245A(e) because they do not have readily available data or models that can provide such estimates.

c. Number of affected taxpayers

The Treasury Department and IRS estimate that this provision will impact an upper bound of approximately 2,000 taxpayers. This estimate is based on the top 10 percent of taxpayers (by gross receipts) that filed a domestic corporate income tax return for tax year 2017 with a Form 5471 attached, because only domestic corporations that are U.S. shareholders of CFCs are potentially affected by section 245A(e).[12]

This estimate is an upper bound on the number of large corporations affected because it is based on all transactions, even though only a portion of such transactions involve hybrid arrangements. The tax data do not report whether these reported dividends were part of a hybrid arrangement because such information was not relevant for calculating tax before the TCJA. In addition, this estimate is an upper bound because the Treasury Department and the IRS anticipate that fewer taxpayers would engage in hybrid arrangements going forward as the statute and §1.245A(e)-1 would make such arrangements less beneficial to taxpayers. Further, it is anticipated that the final regulations will result in only a small increase in compliance costs for those taxpayers who do engage in hybrid arrangements (relative to the baseline) because a reduction to hybrid deduction accounts under these final regulations generally uses information required to be computed under other provisions of the Code.

v. Conduit financing regulations to address hybrid instruments

a. Background

The conduit financing regulations allow the IRS to disregard intermediate entities in a multiple-party financing arrangement for the purposes of determining withholding tax rates if the instruments used in the arrangement are considered "financing transactions." Financing transactions generally exclude instruments that are treated as equity for U.S. tax purposes unless they have significant redemption-type features. Thus, in the absence of further guidance, the conduit financing regulations would not apply to an equity instrument in the absence of such features. This would allow payments made under these arrangements to continue to be eligible for reduced withholding tax rates through a conduit structure.

b. Options considered for the final regulations

One option for addressing the current disparate treatment would be to not change the conduit financing regulations, which currently treat equity as a financing transaction only if it has specific redemption-type features; this is the no-action baseline. This option is not adopted by the Treasury Department and the IRS, since it is inconsistent with the Treasury Department's and the IRS's ongoing efforts to address financing transactions that use hybrid instruments, as discussed in the 2008 proposed regulations.

A second option, which is adopted in the final regulations, is to treat as a financing transaction an instrument that is equity for U.S. tax purposes but debt under the tax law of the issuer's jurisdiction of residence or, if the issuer is not a tax resident of any country, the tax law of the country in which the issuer is created, organized or otherwise established. This approach will prevent taxpayers from using this type of hybrid instrument to engage in treaty shopping through a conduit jurisdiction. However, this approach does not cover certain cases, such as if a jurisdiction offers a tax benefit to non-debt instruments (for example, a notional interest deduction with respect to equity). The Treasury Department and the IRS adopt this second option in these final regulations because it will, in a manner that is clear and administrable, prevent a basic form of inappropriate avoidance of the conduit financing regulations.

A third option considered, which was proposed in the 2020 hybrids proposed regulations, would be to treat as a financing transaction any instrument that is equity for U.S. tax purposes and which entitles its issuer or its shareholder a deduction or similar tax benefit in the issuer's resident jurisdiction or in the jurisdiction where the resident has a permanent establishment. This rule would be broader than the second option. It would cover all instruments that give rise to deductions or similar tax benefits, such as credits, rather than only those instruments that are treated as debt under foreign law. This rule would also cover instruments where a financing payment is attributable to a permanent establishment of the issuer, and the tax law of the permanent establishment's jurisdiction allows a deduction or similar treatment for the instrument. This approach would prevent issuers from routing transactions through their permanent establishments to avoid the anti-conduit rules. The Treasury Department and the IRS did not adopt this third option in these final regulations. As discussed in Part III.B of the Summary of Comments and Explanation of Revisions, the Treasury Department and the IRS plan to finalize this rule separately to allow additional time to consider the comments received.

Relative to a no-action baseline, the final regulations are likely to incentivize some taxpayers to shift away from conduit financing arrangements and hybrid arrangements, a shift that is likely to re-

[12] Because of the complexities involved, primarily only large taxpayers engage in hybrid arrangements. The estimate that the top 10 percent of otherwise-relevant taxpayers (by gross receipts) are likely to engage in hybrid arrangements is based on the judgment of the Treasury Department and IRS.

sult in little to no overall economic loss, or even an economic gain, because conduit arrangements are generally not economically productive arrangements and are typically pursued only for tax-related reasons. The Treasury Department and the IRS recognize, however, that as a result of these provisions, some taxpayers may face a higher effective tax rate, which may lower their economic activity.

The Treasury Department and the IRS have not undertaken more precise quantitative estimates of either of these economic effects because they do not have readily available data or models to estimate with reasonable precision: (i) the types or volume of conduit arrangements that taxpayers would likely use under the final regulations or under the no-action baseline; or (ii) the effects of those arrangements on businesses' overall economic performance, including possible differences in compliance costs.

c. Number of affected taxpayers

The Treasury Department and the IRS estimate that the number of taxpayers potentially affected by the final conduit financing regulations will be an upper bound of approximately 7,000 taxpayers. This estimate is based on the top 10 percent of taxpayers (by gross receipts) that filed a domestic corporate income tax return with a Form 5472, "Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business," attached because primarily foreign entities that advance money or other property to a related U.S. entity through one or more foreign intermediaries are potentially affected by the conduit financing regulations.[13]

This estimate is an upper bound on the number of large corporations affected because it is based on all domestic corporate arrangements involving foreign related parties, even though only a portion of such arrangements are conduit financing arrangements that use hybrid instruments. The tax data do not report whether these arrangements were part of a conduit financing arrangement because such information is not provided on tax forms. In addition, this estimate is an upper bound because the Treasury Department and the IRS anticipate that fewer taxpayers would engage in conduit financing arrangements that use hybrid instruments going forward as the proposed conduit financing regulations would make such arrangements less beneficial to taxpayers.

vi. Rules under section 951A to address certain disqualified payments made during the disqualified period

a. Background

The final section 951A regulations include a rule that addresses certain transactions involving disqualified transfers of property between related CFCs during the disqualified period that may have the effect of reducing GILTI inclusions due to timing differences between when income is included and when resulting deductions, such as depreciation expenses, are claimed. The disqualified period of a CFC is the period between December 31, 2017, which is the last earnings and profits measurement date under section 965, and the beginning of the CFC's first taxable year that begins after December 31, 2017, which is the first taxable year with respect to which section 951A is effective. The final regulations refine this rule to extend its applicability to other transactions for which similar timing differences can arise.

b. Options considered for the final regulations

The Treasury Department and the IRS considered two options with respect to providing a rule that would apply to certain transactions during the disqualified period in addition to disqualified transfers. The first option was to not provide a rule that would apply to additional transactions. This option was not adopted in the final regulations, since it would result in certain transactions involving payments during the disqualified period giving rise to reduced GILTI inclusions simply due to timing differences. In addition, this option would not provide a similar tax treatment for transactions involving payments as for disqualified transfers of property occurring during the disqualified period.

The second option, which is the option adopted in the final regulations, is to provide an identical rule for disqualified payments between related CFCs as was provided in the section 951A final regulations for disqualified transfers of property between related CFCs during the disqualified period. This symmetry helps to ensure that similar economic transactions are treated similarly.

In the absence of such a rule, certain payments between related CFCs made during the disqualified period may give rise to lower income inclusions for their U.S. shareholders. For example, suppose that a CFC licensed property to a related CFC for ten years and received pre-payments of royalties during the disqualified period from the related CFC. Since these prepayments were received by the licensor CFC during the disqualified period, they would not have affected amounts included under section 965 nor given rise to GILTI tested income. However, the licensee CFC that made the payments would not have claimed the total of the corresponding deductions during the disqualified period, since the timing of deductions are generally tied to economic performance over the period of use. The licensee CFC would claim deductions over the ten years of the contract, and since these deductions would be claimed during taxable years when section 951A is in effect, these deductions would reduce GILTI tested income or increase GILTI tested loss. Thus, this type of transaction could lower overall income inclusions for the U.S. shareholder of these CFCs in a manner that does not accurately reflect the earnings of the CFCs over time.

Under the final regulations, all deductions attributable to disqualified payments to a related CFC during the disqualified period are allocated and apportioned to residual CFC gross income. These deductions will not thereby reduce tested, subpart F or effectively connected income. This rule provides similar treatment to transactions involving payments as the rule in the section 951A final regulations provides to property transfers between related CFCs during the disqualified period.

[13] Because of the complexities involved, primarily only large taxpayers engage in conduit financing arrangements. The estimate that the top 10 percent of otherwise-relevant taxpayers (by gross receipts) are likely to engage in conduit financing arrangements is based on the judgment of the Treasury Department and IRS.

Relative to a no-action baseline, the final regulations harmonize the treatment of similar transactions. Since this rule applies to deductions resulting from transactions that occurred during the disqualified period and not to any new transactions, the Treasury Department and the IRS do not expect changes in taxpayer behavior under the final regulations, relative to the no-action baseline.

c. Number of affected taxpayers

The Treasury Department and the IRS estimate that the number of taxpayers potentially affected by this rule will be an upper bound of approximately 25,000 to 35,000 taxpayers. This estimate is based on filers of income tax returns with a Form 5471 attached because only filers that are U.S. shareholders of CFCs or that have at least a 10 percent ownership in a foreign corporation would be subject to section 951A. This estimate is an upper bound because it is based on all filers subject to section 951A, even though only a portion of such taxpayers may have engaged in the pre-payment transactions during the disqualified period described in the proposed regulations. Therefore, the Treasury Department and the IRS estimate that the number of taxpayers potentially affected by this rule will be substantially less than 25,000 to 35,000 taxpayers.

II. *Paperwork Reduction Act*

A. *Regulations relating to foreign tax credits*

For purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) ("PRA"), there is a collection of information in §§1.905-4 and 1.905-5(b) and (e).

When a redetermination of U.S. tax liability is required by reason of a foreign tax redetermination (FTR), the final regulations generally require the taxpayer to notify the IRS of the FTR and provide certain information necessary to redetermine the U.S. tax due for the year or years affected by the FTR. If there is no change in the U.S. tax liability as a result of the FTR or if the FTR is caused by certain de minimis fluctuations in foreign currency rates, the taxpayer may simply attach the notification to their next filed tax return and make any appropriate adjustments in that year. However, taxpayers are generally required to file an amended return (or an administrative adjustment request in the case of certain partnerships) for the year or years affected by the FTR along with an updated Form 1116 Foreign Tax Credit (Individual, Estate, or Trust) (covered under OMB Control Number 1545-0074 individual, or 1545-0121 and 1545-0092 estate and trust) or Form 1118 Foreign Tax Credit-Corporations (OMB Control Number 1545-0123), and a written statement providing specific information relating to the FTR (covered under OMB Control Number 1545-1056). Since the burden for filing amended income tax returns and the Forms 1116 and 1118 is covered under the OMB Control Numbers listed in the prior sentence, the burden estimates for OMB Control Number 1545-1056 only cover the burden for the written statements. Sections 1.905-5(b) and 1.905-5(e) only apply to foreign tax redeterminations of foreign corporations that relate to a taxable year of the foreign corporation beginning before January 1, 2018. Section 1.905-4 applies to all other foreign tax redeterminations. Section 1.905-5(b) and (e) reference the same notification and information requirements as §1.905-4, subject to certain modifications.

For purposes of the PRA, the reporting burden associated with §§1.905-4 and 1.905-5(b) and (e) will be reflected in the PRA submission associated with OMB control number 1545-1056, which is set to expire on December 31, 2020. The number of respondents to this collection was estimated to be in a range from 8,900 to 13,500 and the total estimated burden time was estimated to be 56,000 hours and total estimated monetized costs of $2,583,840 ($2017). The IRS will be requesting a revision of the paperwork burden under OMB control number 1545-1056 prior to its expiration date.

For taxpayers who are required to file an amended return (along with related Form 1116 or Form 1118) in order to report an FTR, and for purposes of the PRA, the reporting burden for filing the amended return will be reflected in OMB control numbers 1545-0123 (relating to business filers, which represents a total estimated burden time, including all related forms and schedules, of 3.344 billion hours and total estimated monetized costs of $61.558 billion ($2019)), 1545-0074 (relating to individual filers, which represents a total estimated burden time, including all related forms and schedules, of 1.717 billion hours and total estimated monetized costs of $33.267 billion ($2019)), 1545-0092 (relating to estate and trust filers with respect to all related forms and schedules except Form 1116, which represents a total estimated burden time, including all related forms and schedules except Form 1116, of 307,844,800 hours and total estimated monetized costs of $14.077 billion ($2018)), and 1545-0121 (relating to estate and trust filers but solely with respect to Form 1116, which represents a total estimated burden time related solely to Form 1116 of 25,066,693 hours and total estimated monetized costs of $1.744 billion ($2018)). In general, burden estimates for OMB control numbers 1545-0123 and 1545-0074 include, and therefore do not isolate, the estimated burden of the foreign tax credit-related forms. These reported burdens are therefore insufficient for future calculations of the burden imposed by the final regulations. However, with respect to estate and trust filers (OMB control numbers 1545-0121 and 1545-0092) the burdens with respect to foreign tax credit-related forms are isolated in OMB control number 1545-0121 which relates solely to Form 1116, and, therefore may be sufficient to determine future burdens imposed by the final regulations. These particular burden estimates, except OMB control number 1545-0121, have also been reported for other regulations related to the taxation of cross-border income and the Treasury Department and the IRS urge readers to recognize that these numbers are duplicates and to guard against overcounting the burden that international tax provisions imposed prior to the TCJA.

As a result of the changes made in the TCJA to the foreign tax credit rules generally, and to section 905(c) specifically, the Treasury Department and the IRS anticipate that the number of respondents may increase among taxpayers who file Form 1120 series returns. The possible increase in the number of respondents is due to the increase in foreign tax credits

claimed by taxpayers in connection with the new GILTI regime and the elimination of adjustments to pools of post-1986 earnings and profits and post-1986 foreign income taxes as an alternative to filing an amended return following the changes made in the TCJA. These changes to the burden estimate will be reflected in the PRA submission for the renewal of OMB control number 1545-1056 as well as in the OMB control numbers 1545-0074 (for individuals) and 1545-0123 (for business taxpayers).

The estimates for the number of impacted filers with respect to the collections of information described in this Part II of the Special Analyses are based on filers of income tax returns that file a Form 1065, Form 1040, or Form 1120 series for years 2015 through 2017 because only filers of these forms are generally subject to the collection of information requirement. The IRS estimates the number of impacted filers to be the following:

Tax Forms Impacted		
Collection of Information	Number of respondents (estimated)	Forms to which the information may be attached
§1.905-4	8,900 - 13,500	Form 1065 series, Form 1040 series, and Form 1120 series
§1.905-5(b)	8,900 - 13,500	Form 1065 series, Form 1040 series, and Form 1120 series
§1.905-5(e)	8,900 - 13,500	Form 1065 series, Form 1040 series, and Form 1120 series

Source: IRS data (MeF, DCS, and Compliance Data Warehouse)

No burden estimates specific to the final regulations are currently available. The Treasury Department and the IRS have not estimated the burden, including that of any new information collections, related to the requirements under the final regulations. Those estimates would capture both changes made by the TCJA and those that arise out of discretionary authority exercised in the final regulations.

The Treasury Department and the IRS request comments on all aspects of the forms that reflect the information collection burdens related to the final regulations, including estimates for how much time it would take to comply with the paperwork burdens related to the forms described and ways for the IRS to minimize the paperwork burden. Proposed revisions (if any) to these forms that reflect the information collections related to the final regulations will be made available for public comment at https://apps.irs.gov/app/picklist/list/draftTaxForms.html and will not be finalized until after these forms have been approved by OMB under the PRA.

B. *Regulations relating to hybrid arrangements and section 951A*

Pursuant to §1.6038-2(f)(14), certain U.S. shareholders of a CFC must provide information relating to the CFC and the rules of section 245A(e) on Form 5471, "Information Return of U.S. Persons With Respect to Certain Foreign Corporations," (OMB control number 1545-0123), as the form or other guidance may prescribe. The final regulations do not impose any additional information collection requirements relating to section 245A(e). However, the final regulations provide guidance regarding certain computations required under section 245A(e), and such could affect the information required to be reported on Form 5471. For purposes of the PRA, the reporting burden associated with §1.6038-2(f)(14) is reflected in the PRA submission for Form 5471. See the chart at the end of this Part II.B of this Special Analyses section for the status of the PRA submission for Form 5471. As described in the Special Analyses section in the 2020 hybrids final regulations, and as set forth in the chart below, the Treasury Department and the IRS estimate the number of affected filers to be 2,000.

Pursuant to §1.6038-5, certain U.S. shareholders of a CFC must provide information relating to the CFC and the U.S. shareholder's GILTI inclusion under section 951A on new Form 8992, "U.S. Shareholder Calculation of Global Intangible Low-Taxed Income (GILTI)," (OMB control number 1545-0123), as the form or other guidance may prescribe. The final regulations do not impose any additional information collection requirements relating to section 951A. However, the final regulations provide guidance regarding computations required under section 951A for taxpayers who engaged in certain transactions during the disqualified period, and such guidance could affect the information required to be reported by these taxpayers on Form 8992. For purposes of the PRA, the reporting burden associated with the collection of information under §1.6038-5 is reflected in the PRA submission for Form 8992. See the chart at the end of this Part II.B of the Special Analyses for the status of the PRA submission for Form 8992. As discussed in the Special Analyses of the preamble to the proposed regulations under section 951A (REG-104390-18, 83 FR 51072), and as set forth in the chart below, the Treasury Department and the IRS estimate the number of filers subject to §1.6038-5 to be 25,000 to 35,000. Since the final regulations only apply to taxpayers who engaged in certain transactions during the disqualified period, the Treasury Department and the IRS estimate that the number of filers affected by the final regulations and subject to the collection of information in §1.6038-5 will be significantly less than 25,000 to 35,000.

There is no existing collection of information relating to conduit financing arrangements, and the final regulations do not impose any new information collection requirements relating to conduit financing arrangements. Therefore, a PRA analysis is not required with respect to the final regulations relating to conduit financing arrangements.

As a result, the Treasury Department and the IRS estimate the number of filers affected by the final regulations for hybrid arrangements and section 951A to be the following.

Tax Forms Impacted		
Collection of information	**Number of respondents (estimated, rounded to nearest 1,000)**	**Forms in which information may be collected**
§1.6038-2(f)(14)	2,000	Form 5471 (Schedule I)
§1.6038-5	25,000 – 35,000	Form 8992

Source: IRS data (MeF, DCS, and Compliance Data Warehouse)

The current status of the PRA submissions related to the tax forms associated with the information collections in §§1.6038-2(f)(14) and 1.6038-5 is provided in the accompanying table. The reporting burdens associated with the information collections in §§1.6038-2(f)(14) and 1.6038-5 are included in the aggregated burden estimates for OMB control number 1545-0123, which represents a total estimated burden time for all forms and schedules for corporations of 3.157 billion hours and total estimated monetized costs of $58.148 billion ($2017). The overall burden estimates provided in 1545-0123 are aggregate amounts that relate to the entire package of forms associated with the OMB control number, and are therefore not suitable for future calculations needed to assess the burden specific to certain regulations, such as the information collections under §1.6038-2(f)(14) or §1.6038-5.

No burden estimates specific to the final regulations are currently available. The Treasury Department and the IRS have not identified any burden estimates, including those for new information collections, related to the requirements under the final regulations. The Treasury Department and the IRS estimate PRA burdens on a taxpayer-type basis rather than a provision-specific basis. Changes in those estimates from the estimates reported here will capture both changes made by the TCJA and those that arise out of discretionary authority exercised in the final regulations.

The Treasury Department and the IRS request comments on the forms that reflect the information collection burdens related to the final regulations, including estimates for how much time it would take to comply with the paperwork burdens related to the forms described and ways for the IRS to minimize the paperwork burden. Proposed revisions (if any) to these forms that reflect the information collections related to the final regulations will be made available for public comment at https://apps.irs.gov/app/picklist/list/draftTaxForms.html and will not be finalized until after these forms have been approved by OMB under the PRA.

Form	**Type of Filer**	**OMB Number(s)**	**Status**
Form 5471	Business (NEW Model)	1545-0123	Approved by OIRA 1/30/2020 until 1/31/2021.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201907-1545-001*		
	Individual (NEW Model)	1545-0074	Approved by OIRA 1/30/2020 until 1/31/2021.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201909-1545-021*		
Form 8992	Business (NEW Model)	1545-0123	Approved by OIRA 1/30/2020 until 1/31/2021.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201907-1545-001*		

III. *Regulatory Flexibility Act*

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these final regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act.

A. *Regulations relating to foreign tax credits*

These final regulations provide guidance needed to comply with statutory changes and affect individuals and corporations claiming foreign tax credits. The domestic small business entities that are subject to the foreign tax credit rules in the Code and in these final regulations are generally those domestic small business entities that are at least 10 percent corporate shareholders of foreign corporations, and so are eligible to claim dividends-received deductions or compute foreign taxes deemed paid under section 960 with respect to inclusions under subpart F and section 951A from CFCs. Other aspects of these final regulations also affect domestic small business entities that operate in foreign jurisdictions or that have income from sources outside of the United States. Based on 2017 Statistics of Income data, the Treasury Department and the IRS computed the fraction of taxpayers owning a CFC by gross receipts size class. The smaller size classes have a relatively small fraction of taxpayers that own CFCs, which suggests that many domestic small business entities would be unaffected by these regulations.

Many of the important aspects of these final regulations, including all of the rules in §§1.861-8(d)(2)(ii)(B), 1.904-4(c)(7), 1.904-6(f), 1.905-3(b)(2), 1.905-5, 1.954-1, 1.954-2, and 1.965-5(b)(2) apply only to U.S. persons that operate a foreign business in corporate

form, and, in most cases, only if the foreign corporation is a CFC. Other provisions in these final regulations, including the rules in §§1.861-8(d)(2)(v) and (e)(16), 1.861-14, 1.1502-4, and 1.1502-21, generally apply only to members of a consolidated group and insurance companies or other members of the financial services industry earning income from sources outside of the United States. It is infrequent for domestic small entities to operate as part of an affiliated group, to be taxed as an insurance company, or to constitute a financial services entity, and also earn income from sources outside of the United States. Consequently, the Treasury Department and the IRS expect that these final regulations are unlikely to affect a substantial number of domestic small business entities; however, adequate data are not available at this time to certify that a substantial number of small entities would be unaffected.

The Treasury Department and the IRS have determined that these final regulations will not have a significant economic impact on domestic small business entities. Based on published information from 2017, foreign tax credits as a percentage of three different tax-related measures of annual receipts (see Table for variables) by corporations are substantially less than the 3 to 5 percent threshold for significant economic impact for businesses in all categories of business receipts. The amount of foreign tax credits in 2017 is an upper bound on the change in foreign tax credits resulting from these final regulations.

Size (by Business Receipts)	under $500,000	$500,000 under $1,000,000	$1,000,000 under $5,000,000	$5,000,000 under $10,000,000	$10,000,000 under $50,000,000	$50,000,000 under $100,000,000	$100,000,000 under $250,000,000	$250,000,000 or more
FTC/Total Receipts	0.12%	0.00%	0.00%	0.01%	0.01%	0.01%	0.02%	0.28%
FTC/(Total Receipts-Total Deductions)	0.61%	0.03%	0.09%	0.05%	0.35%	0.71%	1.38%	9.89%
FTC/ Business Receipts	0.84%	0.00%	0.00%	0.00%	0.01%	0.01%	0.02%	0.05%

Source: RAAS: KDA: (Tax Year 2017 SOI Data)

Although §1.905-4 contains a collection of information requirement, the small businesses that are subject to the requirements of §1.905-4 are domestic small entities with significant foreign operations. The data to assess precise counts of small entities affected by §1.905-4 are not readily available. However, as demonstrated in the accompanying Table in this Part III, foreign tax credits do not have a significant economic impact for any gross-receipts class of business entities. Accordingly, it is hereby certified that the requirements of §1.905-4 will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f), the proposed regulations preceding these final regulations (REG-105495-19) were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses and no comments were received.

B. *Regulations relating to hybrid arrangements and section 951A*

The final regulations amend certain computations required under section 245A(e) or section 951A. As discussed in the Special Analyses accompanying the preambles to the 2020 hybrids final regulations and the proposed regulations under section 951A (REG-104390-18, 83 FR 51072), as well as in Part II.B of the Special Analyses, the Treasury Department and the IRS project that a substantial number of domestic small business entities will not be subject to sections 245A(e) and 951A, and therefore, the existing requirements in §§1.6038-2(f)(14) and 1.6038-5 will not have a significant economic impact on a substantial number of small entities.

The small entities that are subject to section 245A(e) and §1.6038-2(f)(14) are controlling U.S. shareholders of a CFC that engage in a hybrid arrangement, and the small entities that are subject to section 951A and §1.6038-5 are U.S. shareholders of a CFC. A CFC is a foreign corporation in which more than 50 percent of its stock is owned by U.S. shareholders, measured either by value or voting power. A U.S. shareholder is any U.S. person that owns 10 percent or more of a foreign corporation's stock, measured either by value or voting power, and a controlling U.S. shareholder of a CFC is a U.S. person that owns more than 50 percent of the CFC's stock.

The Treasury Department and the IRS estimate that there are only a small number of taxpayers having gross receipts below either $25 million (or $41.5 million for financial entities) who would potentially be affected by these regulations.[14] The Treasury Department and the IRS's estimate of those entities who could potentially be affected is based on their review of those

[14] This estimate is limited to those taxpayers who report gross receipts above $0.

taxpayers who filed a domestic corporate income tax return in 2016 with gross receipts below either $25 million (or $41.5 million for financial institutions) who also reported dividends on a Form 5471. The Treasury Department and the IRS estimate that this number is between 1 and 6 percent of all affected entities regardless of size.

The Treasury Department and the IRS cannot readily identify from these data amounts that are received pursuant to hybrid arrangements because those amounts are not separately reported on tax forms. Thus, dividends received as reported on Form 5471 are an upper bound on the amount of hybrid arrangements by these taxpayers.

The Treasury Department and the IRS estimated the upper bound of the relative cost of the statutory and regulatory hybrids provisions, as a percentage of revenue, for these taxpayers as (i) the statutory tax rate of 21 percent multiplied by dividends received as reported on Form 5471, divided by (ii) the taxpayer's gross receipts. Based on this calculation, the Treasury Department and the IRS estimate that the upper bound of the relative cost of these statutory and regulatory provisions is above 3 percent for more than half of the small entities described in the preceding paragraph. Because this estimate is an upper bound, a smaller subset of these taxpayers (including potentially zero taxpayers) is likely to have a cost above three percent of gross receipts.

Pursuant to section 7805(f), the proposed regulations preceding these final regulations (REG-106013-19) were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses and no comments were received.

IV. *Unfunded Mandates Reform Act*

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

V. *Executive Order 13132: Federalism*

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

VI. *Congressional Review Act*

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

Drafting Information

The principal authors of the final regulations are Corina Braun, Karen J. Cate, Jeffrey P. Cowan, Jorge M. Oben, Richard F. Owens, Jeffrey L. Parry, Tracy M. Villecco, Suzanne M. Walsh, and Andrew L. Wigmore of the Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Income taxes, Penalties, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by revising the entry for §1.861-14 and adding an entry for §1.905-4 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 1.861-14 also issued under 26 U.S.C. 864(e)(7).

* * * * *

Section 1.905-4 also issued under 26 U.S.C. 989(c)(4), 26 U.S.C. 6227(d), 26 U.S.C. 6241(11), and 26 U.S.C. 6689(a).

* * * * *

Par. 2. Section 1.245A(e)-1 is amended by:

1. Adding paragraphs (d)(4)(i)(B) and (d)(4)(ii).

2. Adding a sentence at the end of the introductory text of paragraph (g).

3. Adding paragraphs (g)(1)(v) and (h)(2).

The additions read as follows:

§1.245A(e)-1 Special rules for hybrid dividends.

* * * * *

(d) * * *

(4) * * *

(i) * * *

(B) Second, the account is decreased (but not below zero) pursuant to the rules of paragraphs (d)(4)(i)(B)(*1*) through (*3*) of this section, in the order set forth in this paragraph (d)(4)(i)(B).

(*1*) *Adjusted subpart F inclusions*—(*i*) *In general*. Subject to the limitation in paragraph (d)(4)(i)(B)(*1*)(*ii*) of this section, the account is reduced by an adjusted subpart F inclusion with respect to the share for the taxable year, as determined pursuant to the rules of paragraph (d)(4)(ii) of this section.

(*ii*) *Limitation*. The reduction pursuant to paragraph (d)(4)(i)(B)(*1*)(*i*) of this sec-

tion cannot exceed the hybrid deductions of the CFC allocated to the share for the taxable year multiplied by a fraction, the numerator of which is the sum of the items of gross income of the CFC that give rise to subpart F income (determined without regard to an amount treated as subpart F income by reason of section 964(e)(4)(A)(i), to the extent that a deduction under section 245A(a) is allowed for a portion of the amount included under section 964(e)(4)(A)(ii) in the gross income of a domestic corporation) of the CFC for the taxable year and the denominator of which is the sum of all the items of gross income of the CFC for the taxable year.

(*iii*) *Special rule allocating otherwise unused adjusted subpart F inclusions across accounts in certain cases*. This paragraph (d)(4)(i)(B)(*1*)(*iii*) applies after each of the specified owner's hybrid deduction accounts with respect to its shares of stock of the CFC are adjusted pursuant to paragraph (d)(4)(i)(B)(*1*)(*i*) of this section but before the accounts are adjusted pursuant to paragraph (d)(4)(i)(B)(*2*) of this section, to the extent that one or more of the hybrid deduction accounts would have been reduced by an amount pursuant to paragraph (d)(4)(i)(B)(*1*)(*i*) of this section but for the limitation in paragraph (d)(4)(i)(B)(*1*)(*ii*) of this section (the aggregate of the amounts that would have been reduced but for the limitation, the *unused reduction amount*, and the accounts that would have been reduced by the unused reduction amount, the *unused reduction amount accounts*). When this paragraph (d)(4)(i)(B)(*1*)(*iii*) applies, the specified owner's hybrid deduction accounts other than the unused reduction amount accounts (if any) are ratably reduced by the lesser of the unused reduction amount and the difference of the following two amounts: the hybrid deductions of the CFC allocated to the specified owner's shares of stock of the CFC for the taxable year multiplied by the fraction described in paragraph (d)(4)(i)(B)(*1*)(*ii*) of this section; and the reductions pursuant to paragraph (d)(4)(i)(B)(*1*)(*i*) of this section with respect to the specified owner's shares of stock of the CFC.

(*2*) *Adjusted GILTI inclusions*—(*i*) *In general*. Subject to the limitation in paragraph (d)(4)(i)(B)(*2*)(*ii*) of this section, the account is reduced by an adjusted GILTI inclusion with respect to the share for the taxable year, as determined pursuant to the rules of paragraph (d)(4)(ii) of this section.

(*ii*) *Limitation*. The reduction pursuant to paragraph (d)(4)(i)(B)(*2*)(*i*) of this section cannot exceed the hybrid deductions of the CFC allocated to the share for the taxable year multiplied by a fraction, the numerator of which is the sum of the items of gross tested income of the CFC for the taxable year and the denominator of which is the sum of all the items of gross income of the CFC for the taxable year.

(*iii*) *Special rule allocating otherwise unused adjusted GILTI inclusions across accounts in certain cases*. This paragraph (d)(4)(i)(B)(*2*)(*iii*) applies after each of the specified owner's hybrid deduction accounts with respect to its shares of stock of the CFC are adjusted pursuant to paragraph (d)(4)(i)(B)(*2*)(*i*) of this section but before the accounts are adjusted pursuant to paragraph (d)(4)(i)(B)(*3*) of this section, to the extent that one or more of the hybrid deduction accounts would have been reduced by an amount pursuant to paragraph (d)(4)(i)(B)(*2*)(*i*) of this section but for the limitation in paragraph (d)(4)(i)(B)(*2*)(*ii*) of this section (the aggregate of the amounts that would have been reduced but for the limitation, the *unused reduction amount*, and the accounts that would have been reduced by the unused reduction amount, the *unused reduction amount accounts*). When this paragraph (d)(4)(i)(B)(*2*)(*iii*) applies, the specified owner's hybrid deduction accounts other than the unused reduction amount accounts (if any) are ratably reduced by the lesser of the unused reduction amount and the difference of the following two amounts: the hybrid deductions of the CFC allocated to the specified owner's shares of stock of the CFC for the taxable year multiplied by the fraction described in paragraph (d)(4)(i)(B)(*2*)(*ii*) of this section; and the reductions pursuant to paragraph (d)(4)(i)(B)(*2*)(*i*) of this section with respect to the specified owner's shares of stock of the CFC. *See* paragraph (g)(1)(v)(C) of this section for an illustration of the application of this paragraph (d)(4)(i)(B)(*2*)(*iii*).

(*3*) *Certain section 956 inclusions*. The account is reduced by an amount included in the gross income of a domestic corporation under sections 951(a)(1)(B) and 956 with respect to the share for the taxable year of the domestic corporation in which or with which the CFC's taxable year ends, to the extent so included by reason of the application of section 245A(e) and this section to the hypothetical distribution described in §1.956-1(a)(2).

* * * * *

(ii) *Rules regarding adjusted subpart F and GILTI inclusions*. (A) The term *adjusted subpart F inclusion* means, with respect to a share of stock of a CFC for a taxable year of the CFC, a domestic corporation's pro rata share of the CFC's subpart F income included in gross income under section 951(a)(1)(A) (determined without regard to an amount included in gross income by the domestic corporation by reason of section 964(e)(4)(A)(ii), to the extent a deduction under section 245A(a) is allowed for the amount) for the taxable year of the domestic corporation in which or with which the CFC's taxable year ends, to the extent attributable to the share (as determined under the principles of section 951(a)(2) and §1.951-1(b) and (e)), adjusted (but not below zero) by—

(*1*) Adding to the amount the associated foreign income taxes with respect to the amount; and

(*2*) Subtracting from such sum the quotient of the associated foreign income taxes divided by the percentage described in section 11(b).

(B) The term *adjusted GILTI inclusion* means, with respect to a share of stock of a CFC for a taxable year of the CFC, a domestic corporation's GILTI inclusion amount (within the meaning of §1.951A-1(c)(1)) for the U.S. shareholder inclusion year (within the meaning of §1.951A-1(f)(7)), to the extent attributable to the share (as determined under paragraph (d)(4)(ii)(C) of this section), adjusted (but not below zero) by—

(*1*) Adding to the amount the associated foreign income taxes with respect to the amount;

(*2*) Multiplying such sum by the difference of 100 percent and the section 250(a)(1)(B)(i) deduction percentage; and

(*3*) Subtracting from such product the quotient of 80 percent of the associated foreign income taxes divided by the percentage described in section 11(b).

(C) A domestic corporation's GILTI inclusion amount for a U.S. shareholder

inclusion year is attributable to a share of stock of the CFC based on a fraction—

(*1*) The numerator of which is the domestic corporation's pro rata share of the tested income of the CFC for the U.S. shareholder inclusion year, to the extent attributable to the share (as determined under the principles of §1.951A-1(d)(2)); and

(*2*) The denominator of which is the aggregate of the domestic corporation's pro rata share of the tested income of each tested income CFC (as defined in §1.951A-2(b)(1)) for the U.S. shareholder inclusion year.

(D) The term *associated foreign income taxes* means—

(*1*) With respect to a domestic corporation's pro rata share of the subpart F income of the CFC included in gross income under section 951(a)(1)(A) and attributable to a share of stock of a CFC for a taxable year of the CFC, current year tax (as described in §1.960-1(b)(4)) allocated and apportioned under §1.960-1(d)(3)(ii) to the subpart F income groups (as described in §1.960-1(b)(30)) of the CFC for the taxable year, to the extent allocated to the share under paragraph (d)(4)(ii)(E) of this section; and

(*2*) With respect to a domestic corporation's GILTI inclusion amount under section 951A attributable to a share of stock of a CFC for a taxable year of the CFC, the product of—

(*i*) Current year tax (as described in §1.960-1(b)(4)) allocated and apportioned under §1.960-1(d)(3)(ii) to the tested income groups (as described in §1.960-1(b)(33)) of the CFC for the taxable year, to the extent allocated to the share under paragraph (d)(4)(ii)(F) of this section;

(*ii*) The domestic corporation's inclusion percentage (as described in §1.960-2(c)(2)); and

(*iii*) The section 904 limitation fraction with respect to the domestic corporation for the U.S. shareholder inclusion year.

(E) Current year tax allocated and apportioned to a subpart F income group of a CFC for a taxable year is allocated to a share of stock of the CFC by multiplying the foreign income tax by a fraction—

(*1*) The numerator of which is the domestic corporation's pro rata share of the subpart F income of the CFC for the taxable year, to the extent attributable to the share (as determined under the principles of section 951(a)(2) and §1.951-1(b) and (e)); and

(*2*) The denominator of which is the subpart F income of the CFC for the taxable year.

(F) Current year tax allocated and apportioned to a tested income group of a CFC for a taxable year is allocated to a share of stock of the CFC by multiplying the foreign income tax by a fraction—

(*1*) The numerator of which is the domestic corporation's pro rata share of tested income of the CFC for the taxable year, to the extent attributable to the share (as determined under the principles §1.951A-1(d)(2)); and

(*2*) The denominator of which is the tested income of the CFC for the taxable year.

(G) The term *section 904 limitation fraction* means, with respect to a domestic corporation for a U.S. shareholder inclusion year, a fraction—

(*1*) The numerator of which is the amount of foreign tax credits for the U.S. shareholder inclusion year that, by reason of sections 901 and 960(d) and taking into account section 904, the domestic corporation is allowed for the separate category set forth in section 904(d)(1)(A) (amounts includible in gross income under section 951A); and

(*2*) The denominator of which is the amount of foreign tax credits for the U.S. shareholder inclusion year that, by reason of sections 901 and 960(d) and without regard to section 904, the domestic corporation would be allowed for the separate category set forth in section 904(d)(1)(A) (amounts includible in gross income under section 951A).

(H) The term *section 250(a)(1)(B)(i) deduction percentage* means, with respect to a domestic corporation for a U.S. shareholder inclusion year, a fraction—

(*1*) The numerator of which is the amount of the deduction under section 250 allowed to the domestic corporation for the U.S. shareholder inclusion year by reason of section 250(a)(1)(B)(i) (taking into account section 250(a)(2)(B)); and

(*2*) The denominator of which is the domestic corporation's GILTI inclusion amount for the U.S. shareholder inclusion year.

* * * * *

(g) * * * No amounts are included in the gross income of US1 under section 951(a)(1)(A), 951A(a), or 951(a)(1)(B) and section 956.

(1) * * *

(v) *Alternative facts – account reduced by adjusted GILTI inclusion*. The facts are the same as in paragraph (g)(1)(i) of this section, except that for taxable year 1 FX has $130x of gross tested income and $10.5x of current year tax (as described in §1.960-1(b)(4)) that is allocated and apportioned under §1.960-1(d)(3)(ii) to the tested income groups of FX. US1's ability to credit the $10.5x of current year tax is not limited under section 904(a). In addition, FX has $119.5x of tested income ($130x of gross tested income, less the $10.5x of current year tax deductions properly allocable to the gross tested income). Further, of US1's pro rata share of the tested income ($119.5x), $80x is attributable to Share A and $39.5x is attributable to Share B (as determined under the principles of §1.951A-1(d)(2)). Moreover, US1's net deemed tangible income return (as defined in §1.951A-1(c)(3)) for taxable year 1 is $71.7x, and US1 does not own any stock of a CFC other than its stock of FX. Thus, US1's GILTI inclusion amount (within the meaning of §1.951A-1(c)(1)) for taxable year 1, the U.S. shareholder inclusion year, is $47.8x (net CFC tested income of $119.5x, less net deemed tangible income return of $71.7x) and US1's inclusion percentage (as described in §1.960-2(c)(2)) is 40 ($47.8x/$119.5x). The deduction allowed to US1 under section 250 by reason of section 250(a)(1)(B)(i) is not limited as a result of section 250(a)(2)(B). At the end of year 1, US1's hybrid deduction account with respect to Share A is: first, increased by $80x (the amount of hybrid deductions allocated to Share A); and second, decreased by $10x (the sum of the adjusted GILTI inclusion with respect to Share A, and the adjusted GILTI inclusion with respect to Share B that is allocated to the hybrid deduction account with respect to Share A) to $70x. *See* paragraphs (d)(4)(i)(A) and (B) of this section. In year 2, the entire $30x of each dividend received by US1 from FX during year 2 is a hybrid dividend, because the sum of US1's hybrid deduction accounts with respect to each of its shares of FX stock at the end of year 2 ($70x) is at least equal to

the amount of the dividends ($60x). *See* paragraph (b)(2) of this section. At the end of year 2, US1's hybrid deduction account with respect to Share A is decreased by $60x (the amount of the hybrid deductions in the account that give rise to a hybrid dividend or tiered hybrid dividend during year 2) to $10x. *See* paragraph (d)(4)(i)(C) of this section. Paragraphs (g)(1)(v)(A) through (C) of this section describe the computations pursuant to paragraph (d)(4)(i)(B)(*2*) of this section.

(A) To determine the adjusted GILTI inclusion with respect to Share A for taxable year 1, it must be determined to what extent US1's $47.8x GILTI inclusion amount is attributable to Share A. *See* paragraph (d)(4)(ii)(B) of this section. Here, $32x of the inclusion is attributable to Share A, calculated as $47.8x multiplied by a fraction, the numerator of which is $80x (US1's pro rata share of the tested income of FX attributable to Share A) and denominator of which is $119.5x (US1's pro rata share of the tested income of FX, its only CFC). *See* paragraph (d)(4)(ii)(C) of this section. Next, the associated foreign income taxes with respect to the $32x GILTI inclusion amount attributable to Share A must be determined. *See* paragraphs (d)(4)(ii)(B) and (D) of this section. Such associated foreign income taxes are $2.8x, calculated as $10.5x (the current year tax allocated and apportioned to the tested income groups of FX) multiplied by a fraction, the numerator of which is $80x (US1's pro rata share of the tested income of FX attributable to Share A) and the denominator of which is $119.5x (the tested income of FX), multiplied by 40% (US1's inclusion percentage), multiplied by 1 (the section 904 limitation fraction with respect to US1's GILTI inclusion amount). *See* paragraphs (d)(4)(ii)(D), (F), and (G) of this section. Thus, pursuant to paragraph (d)(4)(ii)(B) of this section, the adjusted GILTI inclusion with respect to Share A is $6.7x, computed by—

(*1*) Adding $2.8x (the associated foreign income taxes with respect to the $32x GILTI inclusion attributable to Share A) to $32x, which is $34.8x;

(*2*) Multiplying $34.8x (the sum of the amounts in paragraph (g)(1)(v)(A)(*1*) of this section) by 50% (the difference of 100 percent and the section 250(a)(1)(B)(i) deduction percentage), which is $17.4x; and

(*3*) Subtracting $10.7x (calculated as $2.24x (80% of the $2.8x of associated foreign income taxes) divided by .21 (the percentage described in section 11(b)) from $17.4x (the product of the amounts in paragraph (g)(1)(v)(A)(*2*) of this section), which is $6.7x.

(B) Pursuant to computations similar to those discussed in paragraph (g)(1)(v)(A) of this section, the adjusted GILTI inclusion with respect to Share B is $3.3x. However, the hybrid deduction account with respect to Share B is not reduced by such $3.3x, because of the limitation in paragraph (d)(4)(i)(B)(*2*)(*ii*) of this section, which, with respect to Share B, limits the reduction pursuant to paragraph (d)(4)(i)(B)(*2*)(*i*) of this section to $0 (calculated as $0, the hybrid deductions allocated to the share for the taxable year, multiplied by 1, the fraction described in paragraph (d)(4)(i)(B)(*2*)(*ii*) of this section (computed as $130x, the sole item of gross tested income, divided by $130x, the sole item of gross income)). *See* paragraphs (d)(4)(i)(B)(*2*)(*i*) and (*ii*) of this section.

(C) US1's hybrid deduction account with respect to Share A is reduced by the entire $6.7x adjusted GILTI inclusion with respect to the share, as such $6.7x does not exceed the limit in paragraph (d)(4)(i)(B)(*2*)(*ii*) of this section ($80x, calculated as $80x, the hybrid deductions allocated to the share for the taxable year, multiplied by 1, the fraction described in paragraph (d)(4)(i)(B)(*2*)(*ii*) of this section). *See* paragraphs (d)(4)(i)(B)(*2*)(*i*) and (*ii*) of this section. In addition, the hybrid deduction account is reduced by another $3.3x, the amount of the adjusted GILTI inclusion with respect to Share B that is allocated to the hybrid deduction account with respect to Share A. *See* paragraph (d)(4)(i)(B)(*2*)(*iii*) of this section. As a result, pursuant to paragraph (d)(4)(i)(B)(*2*) of this section, US1's hybrid deduction account with respect to Share A is reduced by $10x ($6.7x plus $3.3x).

* * * * *

(h) * * *

(2) *Special rules*. Paragraphs (d)(4)(i)(B) and (d)(4)(ii) of this section (decrease of hybrid deduction accounts; rules regarding adjusted subpart F and GILTI inclusions) apply to taxable years ending on or after November 12, 2020. However, a taxpayer may choose to apply paragraphs (d)(4)(i)(B) and (d)(4)(ii) of this section to a taxable year ending before November 12, 2020, so long as the taxpayer consistently applies paragraphs (d)(4)(i)(B) and (d)(4)(ii) of this section to that taxable year and any subsequent taxable year ending before November 12, 2020.

Par. 3. Section 1.704-1 is amended by:

1. In paragraph (b)(1)(ii)(*b*)(*1*), revising the fourth sentence and adding a new fifth sentence.

2. Revising paragraph (b)(4)(viii)(*d*)(*1*).

The revisions and addition read as follows:

§1.704-1 Partner's distributive share.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(*b*) * * *

(*1*) * * * Except as provided in the next sentence, the provisions of paragraphs (b)(4)(viii)(*a*)(*1*), (b)(4)(viii)(*c*)(*1*), (b)(4)(viii)(*c*)(*2*)(*ii*) and (*iii*), (b)(4)(viii)(*c*)(*3*) and (*4*), and (b)(4)(viii)(*d*)(*1*) (as in effect on July 24, 2019) and in paragraphs (b)(6)(i), (ii), and (iii) of this section (*Examples 1*, *2*, and *3*) apply for partnership taxable years that both begin on or after January 1, 2016, and end after February 4, 2016. For partnership taxable years beginning after December 31, 2019, paragraph (b)(4)(viii)(*d*)(*1*) of this section applies. * * *

* * * * *

(4) * * *

(viii) * * *

(*d*) * * * (*1*) *In general*. CFTEs are allocated and apportioned to CFTE categories in accordance with §1.861-20 by treating each CFTE category as a statutory grouping (with no residual grouping). See paragraphs (b)(6)(ii) and (iii) of this section (*Examples 2* and *3*), which illustrate the application of this paragraph (b)(4)(viii)(*d*)(*1*) in the case of serial disregarded payments subject to withholding tax. In addition, if as described in §1.861-20(e), foreign law does not provide for the direct allocation or apportionment of expenses, losses or other deductions allowed under foreign law to a CFTE category of income, then such expenses, losses or other deductions must be allocated and apportioned to gross income as determined un-

der foreign law in a manner that is consistent with the allocation and apportionment of such items for purposes of determining the net income in the CFTE categories for Federal income tax purposes pursuant to paragraph (b)(4)(viii)(*c*)(*3*) of this section.
* * * * *

Par. 4. Section 1.861-8 is amended by:

1. Adding a sentence to the end of paragraph (a)(1).

2. In paragraph (d)(1), removing the language "§1.1502-4(d)(1) and the last sentence of" in the fifth sentence and removing the last sentence.

3. Revising paragraph (d)(2)(ii)(B).

4. Adding paragraph (d)(2)(v).

5. Revising paragraph (e)(4)(ii).

6. Redesignating paragraph (e)(5) as paragraph (e)(5)(i).

7. Adding a heading for paragraph (e)(5) and paragraphs (e)(5)(ii) and (iii).

8. Revising the first sentence of paragraph (e)(6)(i) and paragraphs (e)(7) and (8).

9. Adding paragraphs (e)(16) and (g)(15) through (18).

10. Revising paragraph (h).

The additions and revisions read as follows:

§1.861-8 Computation of taxable income from sources within the United States and from other sources and activities.

(a) * * *

(1) * * * The term *section 861 regulations* means this section and §§1.861-8T, 1.861-9, 1.861-9T, 1.861-10, 1.861-10T, 1.861-11, 1.861-11T, 1.861-12, 1.861-12T, 1.861-13, 1.861-14, 1.861-14T, 1.861-17, and 1.861-20.

* * * * *

(d) * * *

(2) * * *

(ii) * * *

(B) *Certain stock and dividends*. The term *exempt income* includes the portion of the dividends that are deductible under section 243(a)(1) or (2) (relating to the dividends received deduction) or section 245(a) (relating to the dividends received deduction for dividends from certain foreign corporations). Thus, for purposes of apportioning deductions using a gross income method, gross income does not include a dividend to the extent that it gives rise to a dividends-received deduction under either section 243(a)(1), section 243(a)(2), or section 245(a). In addition, for purposes of apportioning deductions using an asset method, assets do not include that portion of the value of the stock (determined in accordance with §1.861-9(g), and, as relevant, §§1.861-12 and 1.861-13) equal to the portion of dividends that would be offset by a deduction under either section 243(a)(1), section 243(a)(2), or section 245(a), to the extent the stock generates, has generated, or can reasonably be expected to generate such dividends. For example, in the case of stock for which all dividends would be allowed a deduction of 50 percent under section 243(a)(1), 50 percent of the value of the stock is treated as an exempt asset. In the case of stock which generates, has generated, or can reasonably be expected to generate qualifying dividends deductible under section 243(a)(3), such stock does not constitute an exempt asset. However, such stock and the qualifying dividends thereon are eliminated from consideration in the apportionment of interest expense under the affiliated group rule set forth in §1.861-11T(c), and in the apportionment of other expenses under the affiliated group rules set forth in §1.861-14T.
* * * * *

(v) *Dividends-received deduction and tax-exempt interest of insurance companies*—(A) *In general*. For purposes of characterizing gross income or assets as exempt or not exempt under this section, the following rules apply on a company wide basis pursuant to the rules in paragraphs (d)(2)(v)(A)(*1*) and (*2*) of this section.

(*1*) In the case of an insurance company taxable under section 801, the term *exempt income* includes the portion of dividends received that satisfy the requirements of deductibility under sections 243(a)(1) and (2) and 245(a) but without regard to any disallowance under section 805(a)(4)(A)(ii) of the policyholder's share of the dividends or any similar disallowance under section 805(a)(4)(D), and also includes tax-exempt interest but without reduction for the policyholder's share of tax-exempt interest that reduces the closing balance of items described in section 807(c), as provided under section 807(a)(2)(B) and 807(b)(1)(B). The term *exempt assets* includes the corresponding portion of assets that generates, has generated, or can reasonably be expected to generate exempt income described in the preceding sentence. See §1.861-8(e)(16) for a special rule concerning the allocation of reserve expenses to dividends received by a life insurance company.

(*2*) In the case of an insurance company taxable under section 831, the term *exempt income* includes the portion of interest and dividends deductible under sections 832(c)(7) and (12) or sections 834(c)(1) and (7). Exempt income also includes the amounts reducing the losses incurred under section 832(b)(5) to the extent such amounts are not already taken into account in the preceding sentence. The term *exempt assets* includes the corresponding portion of assets that give rise to exempt income described in the preceding two sentences.

(B) *Examples*. The following examples illustrate the application of paragraph (d)(2)(v)(A) of this section.

(*1*) *Example 1*—(*i*) *Facts*. USC is a domestic life insurance company that has $300x of gross income, consisting of $100x of foreign source general category income and $200x of U.S. source passive category interest income, $100x of the latter of which is tax-exempt interest income from municipal bonds under section 103. USC's opening balance of its section 807(c) reserves is $50,000x and USP's closing balance of its section 807(c) reserves is $50,130x. Under section 807(b)(1)(B), USP's closing balance of its section 807(c) reserves, $50,130x, is reduced by the amount of the policyholder's share of tax-exempt interest. The policyholder's share of tax-exempt interest under section 812(b) is equal to 30 percent of the $100x of tax-exempt interest ($30x). Therefore, under sections 803(a)(2) and 807(b), USP's reserve deduction is $100x ($50,130x of reserve deduction minus $30x (30 percent of $100x of tax-exempt interest), minus $50,000x). USC has no other income or deductions.

(*ii*) *Analysis — allocation*. Under section 818(f)(1), USC's reserve deduction is treated as an item that cannot be definitely allocated to an item or class of gross income. Accordingly, under paragraph (b)(5) of this section, USC's reserve deduction is allocable to all of USC's gross income as a class.

(*iii*) *Analysis — apportionment*. Under paragraph (c)(3) of this section, the reserve deduction is ratably apportioned between the statutory grouping (foreign source general category income) and the residual grouping (U.S. source income) on the basis of the relative amounts of gross income in each grouping. For purposes of apportioning deductions under §1.861-8T(d)(2)(i)(B), exempt income is not taken into account. Under paragraph (d)(2)(v)(A)(*1*) of this section, in the case of an insurance company taxable under section 801, exempt income includes tax-exempt interest without regard to any reduction for the policyholder's share. USC has U.S. source income of $200x of which $100x is tax-exempt without re-

gard to the reduction for the policyholder's share of tax-exempt interest that reduces the closing balance of items described in section 807(c). Thus, the gross income taken into account in apportioning USC's reserve deduction is $100x of foreign source general category gross income and $100x of U.S. source gross income. Of USC's $100x reserve deduction, $50x ($100x x $100x/$200x) is apportioned to foreign source general category gross income and $50x ($100x x $100x/$200x) is apportioned to U.S. source gross income.

(*2*) *Example 2*—(*i*) *Facts*. USC is a domestic life insurance company that has $300x of gross income consisting of $100x of foreign source general category income and $200x of U.S. source general category dividend income eligible for the 50% dividends received deduction (DRD) under section 243(a)(1). Under section 805(a)(4)(A)(ii), USC is allowed a 50% DRD on the company's share of the dividend received. Under section 812(a), the company's share of the dividend is equal to 70% of the dividend income eligible for the DRD under section 243(a)(1), which results in a DRD of $70x (50% x 70% x $200x), and under section 812(b), the policyholder's share of the dividend is equal to 30% of the dividend income eligible for the DRD under section 243(a)(1), which would result in a DRD of $30x (50% x 30% x $200x). USC is entitled to a $130x deduction for an increase in its life insurance reserves under sections 803(a)(2) and 807(b). Unlike for tax-exempt interest income, there is no adjustment under section 807(b)(1)(B) to the reserve deduction for the policyholder's share of dividends that would be offset by the DRD under section 243(a)(1). USC has no other income or deductions.

(*ii*) *Analysis — allocation*. Under section 818(f)(1), USC's reserve deduction is treated as an item that cannot be definitely allocated to an item or class of gross income except that, under §1.861-8(e)(16), an amount of reserve expenses of a life insurance company equal to the DRD that is disallowed because it is attributable to the policyholder's share of dividends is treated as definitely related to such dividends. Thus, USC has a life insurance reserve deduction of $130x, of which $30x (equal to the policyholder's share of the DRD that would have been allowed under section 243(a)(1)) is directly allocated and apportioned to U.S. source dividend income. Under paragraph (b)(5) of this section, the remaining portion of USC's reserve deduction ($100x) is allocable to all of USC's gross income as a class.

(*iii*) *Analysis — apportionment*. Under paragraph (c)(3) of this section, the deduction is ratably apportioned between the statutory grouping (foreign source general category income) and the residual grouping (U.S. source income) on the basis of the relative amounts of gross income in each grouping. For purposes of apportioning deductions under §1.861-8T(d)(2)(i)(B), exempt income is not taken into account. Under paragraph (d)(2)(v)(A)(*1*) of this section, in the case of an insurance company taxable under section 801, exempt income includes dividends deductible under section 805(a)(4) without regard to any reduction to the DRD for the policyholder's share in section 804(a)(4)(A)(ii). Thus, the gross income taken into account in apportioning $100x of USC's remaining reserve deduction is $100x of foreign source general category gross income and $100x of U.S. source gross income. Of USC's $100x remaining reserve deduction, $50x ($100x x $100x/$200x) is apportioned to foreign source general category gross income and $50x ($100x x $100x/$200x) is apportioned to U.S. source gross income.

* * * * *

(e) * * *

(4) * * *

(ii) *Stewardship expenses*—(A) *In general*. Stewardship expenses are those expenses resulting from "duplicative activities" (as defined in §1.482-9(l)(3)(iii)) or "shareholder activities" (as defined in §1.482-9(l)(3)(iv)) that are undertaken for a person's own benefit as an investor in a related entity, which for purposes of this paragraph (e)(4)(ii) includes a business entity as described in §301.7701-2(a) of this chapter that is classified for Federal income tax purposes as either a corporation or a partnership, or is disregarded as an entity separate from its owner ("disregarded entity"). Thus, for example, stewardship expenses include expenses of an activity the sole effect of which is to protect the investor's capital investment in the entity or to facilitate compliance by the investor with reporting, legal, or regulatory requirements applicable specifically to the investor. If an investor has a foreign or international department which exercises oversight functions with respect to related entities and, in addition, the department performs other functions that generate other foreign-source income (such as fees for services rendered outside of the United States for the benefit of foreign related corporations or foreign-source royalties), some part of the deductions with respect to that department are considered definitely related to the other foreign-source income. In some instances, the operations of a foreign or international department will also generate U.S. source income (such as fees for services performed in the United States). Stewardship expenses are allocated and apportioned on a separate entity basis without regard to the affiliated group rules in §1.861-14. See §1.861-14(e)(1)(i).

(B) *Allocation*. In the case of stewardship expenses incurred to oversee a corporation, the expenses are considered definitely related and allocable to dividends received or amounts included, or to be received or included, under sections 78, 301, 951, 951A, 1291, 1293, and 1296, from the corporation. In the case of stewardship expenses incurred to oversee a partnership, the expenses are considered definitely related and allocable to a partner's distributive share of partnership income. In the case of stewardship expenses incurred to oversee a disregarded entity, the expenses are considered definitely related and allocable to all gross income attributable to the disregarded entity. Stewardship expenses are allocated to income from a particular entity (or entities) related to the taxpayer if the expense is definitely related to the oversight of that entity or entities as provided in §1.861-8(b)(1) under all the facts and circumstances.

(C) *Apportionment*. Stewardship expenses must be apportioned between the statutory and residual groupings based on the relative values of the entity or entities in each grouping that are owned by the investor taxpayer, and without regard to the relative amounts of gross income in the statutory and residual groupings to which the stewardship expense is allocated. In the case of stewardship expenses incurred to oversee a lower-tier entity owned indirectly by the taxpayer, the stewardship expenses must be apportioned based on the relative values of the owner or owners of the lower-tier entity that are owned directly by the taxpayer. In the case of stewardship expenses incurred to oversee a corporation, the corporation's value is the value of its stock as determined and characterized under the asset method in §1.861-9 (and, as relevant, §§1.861-12 and 1.861-13) for purposes of allocating and apportioning the taxpayer's interest expense. For purposes of the preceding sentence, if the corporation is a member of the same affiliated group as the investor, the value of the corporation's stock is determined under the asset method in §1.861-9 and is characterized by the investor in proportion to how the corporation's assets are characterized for purposes of apportioning the group's interest expense. In the case of stewardship expenses incurred to oversee a partnership, the partnership's value is determined and characterized under the asset method in §1.861-9 (taking into account any adjustments under sections 734(b) and 743(b)). In the case of stewardship expenses incurred to oversee a disregarded entity, the disregarded entity's character and value is determined us-

ing the principles of the asset method in §1.861-9 as if the disregarded entity were treated as a corporation for Federal income tax purposes. For purposes of determining the tax book value of assets under this paragraph (e)(4)(ii)(C), section 864(e)(3) and §1.861-8(d)(2) do not apply.

(5) *Legal and accounting fees and expenses; damages awards, prejudgment interest, and settlement payments*—* * *

(ii) *Product liability and other claims for damages*. Except as otherwise provided in this paragraph (e)(5), awards for litigation or arbitral damages, prejudgment interest, and payments in settlement of or in anticipation of claims for damages, including punitive damages, arising from claims relating to sales, licenses, or leases of products or the provision of services, are definitely related and allocable to the class of gross income of the type produced by the specific sales or leases of the products or provision of services that gave rise to the claims for damage or injury. Such damages and payments may include, but are not limited to, product liability or patent infringement claims. The deductions are apportioned among the statutory and residual groupings on the basis of the relative amounts of gross income in the relevant class in each grouping in the year in which the deductions are allowed. If the claims arise from an event incident to the production or sale of products or provision of services (such as an industrial accident), the payments are definitely related and allocable to the class of gross income ordinarily produced by the assets that are involved in the event. The deductions are apportioned among the statutory and residual groupings on the basis of the relative values (as determined under the asset method in §1.861-9 for purposes of allocating and apportioning the taxpayer's interest expense) of the assets that were involved in the event or that were used to produce or sell products or services in the relevant class in each grouping; such values are determined in the year the deductions are allowed.

(iii) *Investor lawsuits*. If the claims are made by investors in a corporation and arise from negligence, fraud, or other malfeasance of the corporation (or its representatives), then the damages, prejudgment interest, and settlement payments paid by the corporation are definitely related and allocable to all income of the corporation and are apportioned among the statutory and residual groupings based on the relative value of the corporation's assets in each grouping (as determined under the asset method in §1.861-9 for purposes of allocating and apportioning the taxpayer's interest expense) in the year the deductions are allowed.

(6) * * *

(i) * * * The deduction for foreign income, war profits, and excess profits taxes allowed by section 164 is allocated and apportioned among the applicable statutory and residual groupings under §1.861-20. * * *

* * * * *

(7) *Losses on the sale, exchange, or other disposition of property*. See §§1.865-1 and 1.865-2 for rules regarding the allocation and apportionment of certain losses.

(8) *Net operating loss deduction*—(i) *Components of net operating loss*. A net operating loss is separated into components that are assigned to statutory or residual groupings by reference to the losses in each such statutory or residual grouping that are not allocated to reduce income in other groupings in the taxable year of the loss. For example, for purposes of applying this paragraph (e)(8)(i) with respect to section 904 as the operative section, the source and separate category components of a net operating loss are determined by reference to the amounts of separate limitation loss and U.S. source loss (determined without regard to adjustments required under section 904(b)) that are not allocated to reduce U.S. source income or income in other separate categories under the rules of sections 904(f) and 904(g) for the taxable year in which the net operating loss arose. See §1.904(g)-3(d)(2). See §1.1502-4 for rules applicable in computing the foreign tax credit limitation and determining the source and separate category of a net operating loss of a consolidated group. Similarly, for purposes of applying this paragraph (e)(8)(i) with respect to another operative section (as described in §1.861-8(f)(1)), a net operating loss is divided into component parts based on the amounts of the deductions that are assigned to the relevant statutory and residual groupings and that are not absorbed in the taxable year in which the loss is incurred under the rules of that operative section. Deductions that are considered absorbed for purposes of an operative section may differ from the deductions that are considered absorbed for purposes of another provision of the Code that requires determining the components of a net operating loss.

(ii) *Allocation and apportionment of section 172 deduction*. A net operating loss deduction allowed under section 172 is allocated and apportioned to statutory and residual groupings by reference to the statutory and residual groupings of the components of the net operating loss (as determined under paragraph (e)(8)(i) of this section) that is deducted in the taxable year. Except as provided under the rules for an operative section, a partial net operating loss deduction is treated as ratably comprising the components of a net operating loss. See, for example, §1.904(g)-3, which is an exception to the general rule described in the previous sentence and provides rules for determining the source and separate category of a partial net operating loss deduction for purposes of section 904 as the operative section.

* * * * *

(16) *Special rule for the allocation and apportionment of reserve expenses of a life insurance company*. An amount of reserve expenses of a life insurance company equal to the dividends received deduction that is disallowed because it is attributable to the policyholders' share of dividends received is treated as definitely related to such dividends. See paragraph (d)(2)(v)(B)(*2*) of this section (*Example 2*).

* * * * *

(g) * * *

(15) *Example 15: Payment in settlement of claim for damages allocated to specific class of gross income*—(i) *Facts*. USP, a domestic corporation, sells Product A in the United States. USP also owns and operates a disregarded entity (FDE) in Country X. FDE, which constitutes a foreign branch of USP within the meaning of §1.904-4(f)(3)(vii), sells Product A inventory in Country X. FDE's functional currency is the U.S. dollar. In each of its taxable years from 2018 through 2020, USP earns $2,000x of U.S. source gross income from sales of Product A to customers in the United States. USP also sells Product A to FDE for an arm's length price and FDE sells Product A to customers in Country X. After the application of section 862(a)(6), §1.861-7(c), and the disregarded payment rules of §1.904-4(f)(2)(vi), the sales of Product A in Country X result in $1,500x of general category foreign source gross income and $500x of foreign branch category foreign source

gross income in each of 2018 and 2019 and $2,500x of general category foreign source gross income and $500x of foreign branch category foreign source gross income in 2020. FDE is sued for damages in 2019 after Product A harms a customer in Country X in 2018. In 2020, FDE makes a deductible payment of $60x to the Country X customer in settlement of the legal claims for damages.

(ii) *Analysis*. Under paragraph (e)(5)(ii) of this section, the deductible settlement payment is definitely related and allocable to the class of gross income of the type produced by the specific sales of property that gave rise to the damages claims, that is USP's gross income from sales of Product A in Country X. Claims that might arise from damages caused by Product A to customers in the United States are irrelevant in allocating the deduction for the settlement payments made to the customer in Country X. For purposes of determining USP's foreign tax credit limitation under section 904(d), because in 2020 that class of gross income consists of both foreign source foreign branch category income and foreign source general category income, the settlement payment of $60x is apportioned between gross income in the two categories in proportion to the relative amounts of gross income in each category in 2020, the year the deduction is allowed. Therefore, $10x ($60x x $500x / $3,000x) is apportioned to foreign source foreign branch category income, and the remaining $50x ($60x x $2,500x / $3,000x) is apportioned to foreign source general category income.

(16) *Example 16: Legal damages payment arising from event incident to production and sale*—(i) *Facts*—The facts are the same as in paragraph (g)(15) of this section (the facts in *Example 15*) except that instead of a product liability lawsuit relating to a 2018 event, in 2019 there is a disaster at a warehouse owned by USP in the United States arising from the negligence of an employee. The warehouse is used to store Product A inventory intended for sale both by USP in the United States and by FDE in Country X. In 2020, the warehouse asset is characterized under §1.861-9T(g)(3)(ii) as a multiple category asset that is assigned 10% to the foreign source foreign branch category, 50% to the foreign source general category, and 40% to the residual grouping of U.S. source income. The inventory of Product A in the warehouse is destroyed and USP employees as well as residents in the vicinity of the warehouse are injured. USP's reputation in the United States suffers such that USP expects to subsequently lose market share in the United States. In 2020, USP makes deductible damages payments totaling $50x to injured employees and the nearby residents, all of whom are in the United States.

(ii) *Analysis*. USP's warehouse in the United States is used in connection with sales of Product A to customers in both the United States and Country X. Thus, under paragraph (e)(5)(ii) of this section, the $50x damages payment arises from an event incident to the sales of Product A and is therefore definitely related and allocable to the class of gross income ordinarily produced by the asset (the warehouse) that is involved in the event — that is, the gross income from sales of Product A by USP in the United States and by FDE in Country X. Under paragraph (e)(5)(ii) of this section, the $50x deduction for the damages payment is apportioned for purposes of applying section 904(d) on the basis of the relative value in each grouping (as determined under §1.861-9(g) for purposes of allocating and apportioning USP's interest expense) of USP's warehouse, the asset involved in the event, in 2020, the year the deduction is allowed. USP's warehouse is a multiple category asset as described in §1.861-9T(g)(3)(ii) and 10% of the value of USP's warehouse is properly characterized as an asset generating foreign source foreign branch category in 2020. Accordingly, $5x (10% x $50x) of the deduction is apportioned to foreign source foreign branch category income. Additionally, 50% of the value of USP's warehouse is properly characterized as an asset generating foreign source general category income in 2020 and, accordingly, $25x (50% x $50x) is apportioned to such grouping. The remaining $20x (40% x $50x) is apportioned to U.S. source income.

(17) *Example 17: Payment following a change in law*—(i) *Facts*. The facts are the same as in paragraph (g)(16) of this section (the facts in *Example 16*), except that the disaster at USP's warehouse occurred not in 2019 but in 2016 and thus before the enactment of the section 904(d) separate category for foreign branch category income. The deductible damages payments are made in 2020.

(ii) *Analysis*. USP's U.S. warehouse was used in connection with making sales of Product A in both the United States and Country X. Under paragraph (e)(5)(ii) of this section, the 2020 damages payment arises from an event incident to the sales of Product A and is therefore definitely related and allocable to the class of gross income ordinarily produced by the asset (the warehouse) that is involved in the event, that is the gross income from sales of Product A by USP in the United States and by FDE in Country X. Under the law in effect in 2016, the income earned from the Product A sales in Country X was solely general category income. Under paragraph (e)(5)(ii) of this section, the damages payment is definitely related and allocable to the class of gross income consisting of sales of Product A by USP in the United States and by FDE in Country X, and apportioned to the statutory and residual groupings based on the relative value in each grouping (as determined under §1.861-9(g) for purposes of allocating and apportioning USP's interest expense) of USP's warehouse, the asset involved in the event, in 2020, the year in which the deduction is allowed. Accordingly, for purposes of determining USP's foreign tax credit limitation under section 904(d), the 2020 deductible damages payment of $50x is allocated and apportioned in the same manner as in paragraph (g)(16)(ii) of this section (the analysis in *Example 16*).

(18) *Example 18: Stewardship and supportive expenses*—(i) *Facts*—(A) *Overview*. USP, a domestic corporation, manufactures and sells Product A in the United States. USP directly owns 100% of the stock of USSub, a domestic corporation, and each of CFC1, CFC2, and CFC3, which are all controlled foreign corporations. USP and USSub file separate returns for U.S. Federal income tax purposes but are members of the same affiliated group as defined in section 243(b)(2). USSub, CFC1, CFC2, and CFC3 perform similar functions in the United States and in the foreign countries T, U, and V, respectively. USP's tax book value in the stock of USSub is $15,000x. USP's tax book value in the stock of each of CFC1, CFC2, and CFC3 is, respectively, $5,000x, $10,000x, and $15,000x.

(B) *USP Department expenses*. USP's supervision department (the Department) incurs expenses of $1,500x. The Department is responsible for the supervision of its four subsidiaries and for rendering certain services to the subsidiaries, and the Department provides all the supportive functions necessary for USP's foreign activities. The Department performs three types of activities. First, the Department performs services that cost $900x outside the United States for the direct benefit of CFC2 for which a marked-up fee is paid by CFC2 to USP. Second, the Department provides services at a cost of $60x related to license agreements that USP maintains with subsidiaries CFC1 and CFC2 and which give rise to foreign source general category income to USP. Third, the Department performs activities described in §1.482-9(l)(3)(iii) that are in the nature of shareholder oversight, that duplicate functions performed by all four of the subsidiaries' own employees, and that do not provide an additional benefit to the subsidiaries. For example, a team of auditors from USP's accounting department periodically audits the subsidiaries' books and prepares internal reports for use by USP's management. Similarly, USP's treasurer periodically reviews the subsidiaries' financial policies for the board of directors of USP. These activities do not provide an additional benefit to the related corporations. The Department's oversight activities are related to all the subsidiaries. The cost of the duplicative activities is $540x.

(C) *USP's income*. USP earns the following items of income: first, under section 951(a), USP has $2,000x of subpart F income that is passive category income. Second, USP has a GILTI inclusion amount of $2,000x. Third, USP earns $1,000x of royalties, paid by CFC1 and CFC2, that are foreign source general category income. Finally, USP receives a fee of $1,000x from CFC2 that is foreign source general category income.

(ii) *Analysis*—(A) *Character of USP Department services*. The first and second activities (the services rendered for the benefit of CFC2, and the provision of services related to license agreements with CFC1 and CFC2) are not properly characterized as stewardship expenses because they are not incurred solely to protect the corporation's capital investment in the related corporation or to facilitate compliance by the corporation with reporting, legal, or regulatory requirements applicable specifically to the corporation. The third activity described is in the nature of shareholder oversight and is characterized as stewardship as described in paragraph (e)(4)(ii)(A) of this section because the expense is related to duplicative activities.

(B) *Allocation*. First, the deduction of $900x for expenses related to services rendered for the benefit of CFC2 is definitely related (and therefore allocable) to the fees for services that USP receives from CFC2. Second, the $60x of deductions attributable to USP's license agreements with CFC1 and CFC2 are definitely related (and therefore allocable) solely to royalties received from CFC1 and CFC2. Third, based on the relevant facts and circumstances and the Department's oversight activities, the stewardship deduction of $540x is related to the oversight of all of USP's subsidiaries and therefore is definitely

related (and therefore allocable) to dividends and inclusions received or included from all the subsidiaries.

(C) *Apportionment*. (*1*) No apportionment of USP's deduction of $900x for expenses related to the services performed for CFC2 is necessary because the class of gross income to which the deduction is allocated consists entirely of a single statutory grouping, foreign source general category income.

(*2*) No apportionment of USP's deduction of $60x attributable to the services related to license agreements is necessary because the class of gross income to which the deduction is allocated consists entirely of a single statutory grouping, foreign source general category income.

(*3*) For purposes of apportioning USP's $540x stewardship expenses in determining the foreign tax credit limitation, the statutory groupings are foreign source general category income, foreign source passive category income, and foreign source section 951A category income. The residual grouping is U.S. source income.

(*4*) USP's deduction of $540x for the Department's stewardship expenses which are allocable to dividends and amounts included from the subsidiaries are apportioned using the same value of USP's stock in USSub, CFC1, CFC2, and CFC3 that is used for purposes of allocating and apportioning USP's interest expense. Pursuant to paragraph (e)(4)(ii)(A) of this section and §1.861-14(e)(1)(i), the value of USP's stock in USSub is included for purposes of apportioning USP's stewardship expense. The value of USSub's stock is $15,000x, and USSub only owns assets that generate income in the residual grouping of gross income from U.S. sources. Therefore, for purposes of apportioning USP's stewardship expense, all of the $15,000x value of the USSub stock is characterized as an asset generating U.S. source income. Although USSub stock would be eliminated from consideration as an asset under paragraph (d)(2)(ii)(B) of this section, for purposes of apportioning USP's stewardship expense section 864(e)(3) and paragraph (d)(2) of this section do not apply. USP uses the asset method described in §1.861-12T(c)(3)(ii) to characterize the stock in its CFCs. After application of §1.861-13(a), USP determines that with respect to its three CFCs in the aggregate it has $15,000x of section 951A category stock in the non-section 245A subgroup, $6,000x of general category stock in the section 245A subgroup, and $9,000x of passive category stock in the non-section 245A subgroup. Although under paragraph (d)(2)(ii)(C)(*2*) of this section $7,500x of the stock that is section 951A category stock is an exempt asset, for purposes of apportioning USP's stewardship expense section 864(e)(3) and paragraph (d)(2) of this section do not apply. Finally, even though USP may be allowed a section 245A deduction with respect to dividends from the CFCs, no portion of the value of the stock of the CFCs is eliminated, because the section 245A deduction does not create exempt income or result in the stock being treated as an exempt asset. See section 864(e)(3) and paragraph (d)(2)(iii)(C) of this section.

(*5*) Taking into account the characterization of USP's stock in USSub, CFC1, CFC2, and CFC3 with a total value of $45,000x ($15,000x + $6,000x + $9,000x + $15,000x), the $540x of Department expenses is apportioned as follows: $180x ($540x x $15,000x / $45,000x) to section 951A category income, $72x ($540x x $6,000x / $45,000x) to general category income, $108x ($540x x $9,000x / $45,000x) to passive category income, and $180x ($540x x $15,000x / $45,000x) to the residual grouping of U.S. source income. Section 904(b)(4)(B)(i) and §1.904(b)-3 apply to $72x of the stewardship expense apportioned to the CFCs' stock that is characterized as being in the section 245A subgroup in the general category.

* * * * *

(h) *Applicability date*. (1) Except as provided in this paragraph (h), this section applies to taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

(2) Paragraphs (d)(2)(ii)(B), (d)(2)(v), (e)(4) and (5), (e)(6)(i), (e)(8) and (16), and (g)(15) through (18) of this section apply to taxable years that begin after December 31, 2019. For taxable years that both begin after December 31, 2017, and end on or after December 4, 2018, and also begin on or before December 31, 2019, see §1.861-8(d)(2)(ii)(B), (e)(4) and (5), (e)(6)(i), and (e)(8) as in effect on December 17, 2019.

(3) The last sentence of paragraph (d)(2)(ii)(C)(*1*) of this section and paragraph (f)(1)(vi)(N) of this section apply to taxable years beginning on or after January 1, 2021.

Par. 5. Section 1.861-8T is amended by revising paragraph (d)(2)(ii)(B) to read as follows:

§1.861-8T Computation of taxable income from sources within the United States and from other sources and activities (temporary).

* * * * *

(d) * * *

(2) * * *

(ii) * * *

(B) *Certain stock and dividends*. For further guidance, see §1.861-8(d)(2)(ii)(B).

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Par. 6. Section 1.861-9 is amended by:

1. Revising paragraph (a).

2. Adding paragraph (b).

3. Revising paragraphs (e)(8)(vi)(C) and (D).

4. Adding paragraph (e)(9).

5. Revising paragraph (k).

The revisions and additions read as follows:

§1.861-9 Allocation and apportionment of interest expense and rules for asset-based apportionment.

(a) *In general*. For further guidance, see §1.861-9T(a).

(b) *Interest equivalent*—(1) *Certain expenses and losses*—(i) *General rule*. Any expense or loss (to the extent deductible) incurred in a transaction or series of integrated or related transactions in which the taxpayer secures the use of funds for a period of time is subject to allocation and apportionment under the rules of this section and §1.861-9T(b) if such expense or loss is substantially incurred in consideration of the time value of money. However, the allocation and apportionment of a loss under this paragraph (b) and §1.861-9T(b) does not affect the characterization of such loss as capital or ordinary for any purpose other than for purposes of the section 861 regulations (as defined in §1.861-8(a)(1)).

(ii) *Examples*. For further guidance, see §1.861-9T(b)(1)(ii).

(2) *Certain foreign currency borrowings*. For further guidance, see §1.861-9T(b)(2) through (7).

(3) through (7) [Reserved]

(8) *Guaranteed payments*. Any deductions for guaranteed payments for the use of capital under section 707(c) are allocated and apportioned in the same manner as interest expense.

* * * * *

(e) * * *

(8) * * *

(vi) * * *

(C) *Downstream partnership loan*. The term *downstream partnership loan* means a loan to a partnership for which the loan receivable is held, directly or indirectly through one or more other partnerships or other pass-through entities (as defined in §1.904-5(a)(4)), by a person (or any person in the same affiliated group as such person) that owns an interest, directly or indirectly through one or more other partnerships or other pass-through entities, in the partnership.

(D) *Downstream partnership loan interest expense (DPL interest expense)*. The term *downstream partnership loan interest expense*, or *DPL interest expense*, means an item of interest expense paid or accrued with respect to a downstream partnership loan, without regard to wheth-

er the expense was currently deductible (for example, by reason of section 163(j) or the election to waive deductions pursuant to §1.59A-3(c)(6)).

* * * * *

(9) *Special rule for upstream partnership loans*—(i) *In general*. For purposes of apportioning interest expense that is not directly allocable under paragraph (e)(4) of this section or §1.861-10T, an upstream partnership loan debtor's (UPL debtor) pro rata share of the value of the upstream partnership loan (as determined under paragraph (h)(4)(i) of this section) is not considered an asset of the UPL debtor taken into account as described in paragraphs (e)(2) and (3) of this section.

(ii) *Treatment of interest expense and interest income attributable to an upstream partnership loan*. If a UPL debtor (or any other person in the same affiliated group as the UPL debtor) takes into account a distributive share of upstream partnership loan interest income (UPL interest income), the UPL debtor (or any other person in the same affiliated group as the UPL debtor) assigns an amount of its distributive share of the UPL interest income equal to the matching expense amount for the taxable year that is attributable to the same loan to the same statutory and residual groupings using the same ratios as the statutory and residual groupings of gross income from which the upstream partnership loan interest expense (UPL interest expense) is deducted by the UPL debtor (or any other person in the same affiliated group as the UPL debtor). Therefore, the amount of the distributive share of UPL interest income that is assigned to each statutory and residual grouping is the amount that bears the same proportion to the matching expense amount as the UPL interest expense in that statutory or residual grouping bears to the total UPL interest expense of the UPL debtor (or any other person in the same affiliated group as the UPL debtor).

(iii) *Anti-avoidance rule for third party back-to-back loans*. If, with a principal purpose of avoiding the rules in this paragraph (e)(9), a partnership makes a loan to a person that is not related (within the meaning of section 267(b) or 707) to the lender, the unrelated person makes a loan to a direct or indirect partner in the partnership (or any person in the same affiliated group as a direct or indirect partner), and the first loan would constitute an upstream partnership loan if made directly to the direct or indirect partner (or person in the same affiliated group as a direct or indirect partner), then the rules of this paragraph (e)(9) apply as if the first loan was made directly by the partnership to the partner (or affiliate of the partner), and the interest expense paid by the partner is treated as made with respect to the first loan. Such a series of loans will be subject to the recharacterization rule in this paragraph (e)(9)(iii) without regard to whether there was a principal purpose of avoiding the rules in this paragraph (e)(9) if the loan to the unrelated person would not have been made or maintained on substantially the same terms but for the loan of funds by the unrelated person to the direct or indirect partner (or affiliate of the partner). The principles of this paragraph (e)(9)(iii) also apply to similar transactions that involve more than two loans and regardless of the order in which the loans are made.

(iv) *Interest equivalents*. The principles of this paragraph (e)(9) apply in the case of a partner, or any person in the same affiliated group as the partner, that takes into account a distributive share of income and has a matching expense amount (treating any interest equivalent described in paragraph (b) of this section and §1.861-9T(b) as interest income or expense for purposes of paragraph (e)(9)(v)(B) of this section) that is allocated and apportioned in the same manner as interest expense under paragraph (b) of this section and §1.861-9T(b).

(v) *Definitions*. For purposes of this paragraph (e)(9), the following definitions apply.

(A) *Affiliated group*. The term *affiliated group* has the meaning provided in §1.861-11(d)(1).

(B) *Matching expense amount*. The term *matching expense amount* means the lesser of the total amount of the UPL interest expense taken into account directly or indirectly by the UPL debtor for the taxable year with respect to an upstream partnership loan or the total amount of the distributive shares of the UPL interest income of the UPL debtor (or any other person in the same affiliated group as the UPL debtor) with respect to the loan.

(C) *Upstream partnership loan*. The term *upstream partnership loan* means a loan by a partnership to a person (or any person in the same affiliated group as such person) that owns an interest, directly or indirectly through one or more other partnerships or other pass-through entities (as defined in §1.904-5(a)(4)(iv)), in the partnership.

(D) *Upstream partnership loan debtor (UPL debtor)*. The term *upstream partnership loan debtor*, or *UPL debtor*, means the person that has the payable with respect to an upstream partnership loan. If a partnership has the payable, then any partner in the partnership (other than a partner described in paragraph (e)(4)(i) of this section) is also considered a UPL debtor.

(E) *Upstream partnership loan interest expense (UPL interest expense)*. The term *upstream partnership loan interest expense*, or *UPL interest expense*, means an item of interest expense paid or accrued with respect to an upstream partnership loan, without regard to whether the expense was currently deductible (for example, by reason of section 163(j) or the election to waive deductions pursuant to §1.59A-3(c)(6)).

(F) *Upstream partnership loan interest income (UPL interest income)*. The term *upstream partnership loan interest income*, or *UPL interest income*, means an item of gross interest income received or accrued with respect to an upstream partnership loan.

(vi) *Examples*. The following examples illustrate the application of this paragraph (e)(9).

(A) *Example 1*—(*1*) *Facts*. US1, a domestic corporation, directly owns 60% of PRS, a foreign partnership that is not engaged in a U.S. trade or business. The remaining 40% of PRS is directly owned by US2, a domestic corporation that is unrelated to US1. US1, US2, and PRS all use the calendar year as their taxable year. In Year 1, PRS loans $1,000x to US1. For Year 1, US1 has $100x of interest expense with respect to the loan and PRS has $100x of interest income with respect to the loan. US1's distributive share of the interest income is $60x. Under paragraph (e)(2) of this section, $75x of US1's interest expense with respect to the loan is allocated and apportioned to U.S. source income and $25x is allocated and apportioned to foreign source foreign branch category income. Under paragraph (h)(4)(i) of this section, US1's share of the total value of the loan between US1 and PRS is $600x.

(*2*) *Analysis*. The loan by PRS to US1 is an upstream partnership loan and US1 is an UPL debtor. Under paragraph (e)(9)(iv)(B) of this section, the matching expense amount is $60x, the lesser of the

UPL interest expense taken into account by US1 with respect to the loan for the taxable year ($100x) and US1's distributive share of the UPL interest income ($60x). Under paragraph (e)(9)(ii) of this section, US1 assigns $45x of the UPL interest income to U.S. source income ($60x x $75x / $100x) and $15x of the UPL interest income to foreign source foreign branch category income ($60x x $25x / $100x). Under paragraph (e)(9)(i) of this section, the disregarded portion of the upstream partnership loan is $600x, and is not taken into account as described in paragraphs (e)(2) and (3) of this section.

(B) *Example 2—(1) Facts*. The facts are the same as in paragraph (e)(9)(vi)(A)(*1*) of this section (the facts in *Example 1*), except that US1 and US2 are part of the same affiliated group with the same ratio of U.S. and foreign assets that US1 had in paragraph (e)(9)(vi)(A)(*1*), US2's distributive share of the interest income is $40x, and under paragraph (h)(4)(i) of this section US2's share of the total value of the loan between US1 and PRS is $400x.

(*2*) *Analysis*. The loan by PRS to US1 is an upstream partnership loan and US1 is an UPL debtor. Under paragraph (e)(9)(iv)(B) of this section, the matching expense amount is $100x, the lesser of the UPL interest expense taken into account by US1 with respect to the loan for the taxable year ($100x) and the total amount of US1 and US2's distributive shares of the UPL interest income ($100x). Under paragraph (e)(9)(ii) of this section, US1 and US2 assign $75x of their total UPL interest income to U.S. source income ($100x x $75x / $100x) and $25x of their total UPL interest income to foreign source foreign branch category income ($100x x $25x / $100x). Under paragraph (e)(9)(i) of this section, the disregarded portion of the upstream partnership loan is $1,000x, the total amount of US1 and US2's share of the loan between US1 and PRS, and is not taken into account as described in paragraphs (e)(2) and (3) of this section.

* * * * *

(k) *Applicability date*. (1) Except as provided in paragraph (k)(2) of this section, this section applies to taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

(2) Paragraphs (b)(1)(i), (b)(8), and (e)(9) of this section apply to taxable years that end on or after December 16, 2019. For taxable years that both begin after December 31, 2017, and end on or after December 4, 2018, and also end before December 16, 2019, see §1.861-9T(b)(1)(i) as contained in 26 CFR part 1 revised as of April 1, 2019.

Par. 7. Section 1.861-9T is amended by revising paragraph (b)(1)(i) and adding paragraph (b)(8) to read as follows:

§1.861-9T Allocation and apportionment of interest expense (temporary).

* * * * *

(b) * * *

(1) * * *

(i) *General rule*. For further guidance, see §1.861-9(b)(1)(i).

* * * * *

(8) *Guaranteed payments*. For further guidance, see §1.861-9(b)(8).

* * * * *

Par. 8. Section 1.861-12 is amended by revising paragraph (e), adding paragraphs (f) and (g), and revising paragraph (k) to read as follows:

§1.861-12 Characterization rules and adjustments for certain assets.

* * * * *

(e) *Portfolio securities that constitute inventory or generate primarily gains*. For further guidance, see §1.861-12T(e).

(f) *Assets connected with capitalized, deferred, or disallowed interest—*(1) *In general*. In the case of any asset in connection with which interest expense accruing during a taxable year is capitalized, deferred, or disallowed under any provision of the Code, the value of the asset for allocation and apportionment purposes is reduced by the principal amount of indebtedness the interes t on which is so capitalized, deferred, or disallowed. Assets are connected with debt (the interest on which is capitalized, deferred, or disallowed) only if using the debt proceeds to acquire or produce the asset causes the interest to be capitalized, deferred, or disallowed.

(2) *Examples*. The following examples illustrate the application of paragraph (f)(1) of this section.

(i) *Example 1: Capitalized interest under section 263A—*(A) *Facts*. X is a domestic corporation that uses the tax book value method of apportionment. X has $1,000x of indebtedness and incurs $100x of interest expense. Using $800x of the $1,000x debt proceeds to produce tangible property, X capitalizes $80x of interest expense under the rules of section 263A. X deducts the remaining $20x of interest expense.

(B) *Analysis*. Because interest on $800x of debt is capitalized under section 263A by reason of the use of debt proceeds to produce the tangible property, $800x of the principal amount of X's debt is connected to the tangible property under paragraph (f)(1) of this section. Therefore, for purposes of apportioning the remaining $20x of X's interest expense, the adjusted basis of the tangible property is reduced by $800x.

(ii) *Example 2: Disallowed interest under section 163(l)—*(A) *Facts*. X, a domestic corporation, owns 100% of the stock of Y, a domestic corporation. X and Y file a consolidated return and use the tax book value method of apportionment. In Year 1, X makes a loan of $1,000x to Y (Loan A) and Y then uses the Loan A proceeds to acquire in a cash purchase all the stock of a foreign corporation, Z. Interest on Loan A is payable in U.S. dollars or, at the option of Y, in stock of Z.

(B) *Analysis*. Under section 163(l), Loan A is a disqualified debt instrument because interest on Loan A is payable at the option of Y in stock of a related party to Y. Because Loan A is a disqualified debt instrument, section 163(l)(1) disallows Y's interest deduction for interest payable on Loan A. However, the value of the Z stock is not reduced under paragraph (f)(1) of this section because the use of the Loan A proceeds to acquire the stock of Z is not the cause of Y's interest deduction being disallowed. Rather, the Loan A terms allowing interest to be paid in stock of Z is the cause of Y's interest deduction being disallowed under section 163(l). Therefore, no adjustment is made to Y's adjusted basis in the stock of Z for purposes of allocating the interest expense of X and Y.

(g) *Special rules for FSCs*. For further guidance, see §1.861-12T(g) through (j).

* * * * *

(k) *Applicability date*. (1) Except as provided in paragraph (k)(2) of this section, this section applies to taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

(2) Paragraph (f) of this section applies to taxable years that end on or after December 16, 2019. For taxable years that both begin after December 31, 2017, and end on or after December 4, 2018, and before December 16, 2019, see §1.861-12T(f) as contained in 26 CFR part 1 revised as of April 1, 2019.

Par. 9. Section 1.861-12T is amended by revising paragraph (f) to read as follows:

§1.861-12T Characterization rules and adjustments or certain assets (temporary).

* * * * *

(f) *Assets connected with capitalized, deferred, or disallowed interest*. For further guidance, see §1.861-12(f).

* * * * *

§1.861-13T [REMOVED]

Par. 10. Section 1.861-13T is removed.

Par. 11. Section 1.861-14 is amended by:

1. Removing the last sentence in paragraph (d)(1) and paragraphs (d)(3) through (e)(5).

2. Adding paragraph (d)(3), reserved paragraph (d)(4), paragraph (e) heading, and paragraphs (e)(1) through (5).

3. Removing the heading for paragraph (e)(6).

4. Redesignating paragraph (e)(6)(i) as paragraph (e)(6).

5. Revising the heading for newly redesignated paragraph (e)(6).

6. Removing paragraphs (e)(6)(ii) and (f) through (j).

7. Adding paragraph (f), reserved paragraph (g), paragraph (h), reserved paragraphs (i) and (j), and paragraph (k).

The additions and revisions read as follows:

§1.861-14 Special rules for allocating and apportioning certain expenses (other than interest expense) of an affiliated group of corporations.

* * * * *

(d) * * *

(3) *Inclusion of financial corporations*. For further guidance, see §1.861-14T(d)(3) through (4).

(4) [Reserved]

(e) *Expenses to be allocated and apportioned under this section*—(1) *Expenses not directly allocable to specific income-producing activities or property*. (i) The expenses that are required to be allocated and apportioned under the rules of this section are expenses that are not directly allocable to specific income-producing activities or property solely of the member of the affiliated group that incurred the expense, including (but not limited to) certain expenses related to research and experimental expenses, supportive functions, deductions under section 250, legal and accounting expenses, and litigation damages awards, prejudgment interest, and settlement payments. Interest expense of members of an affiliated group of corporations is allocated and apportioned under §1.861-11T and not under the rules of this section. Expenses that are included in inventory costs or that are capitalized are not subject to allocation and apportionment under the rules of this section. In addition, stewardship expenses are not subject to allocation and apportionment under the rules of this section; instead, stewardship expenses of a taxpayer are allocated and apportioned on a separate entity basis without treating members of the affiliated group as a single taxpayer. See §1.861-8(e)(4)(ii)(A).

(ii) For further guidance, see §1.861-14T(e)(1)(ii).

(2) *Research and experimental expenditures*. R&E expenditures (as defined in §1.861-17(a)) in the case of an affiliated group are allocated and apportioned under the rules of §1.861-17 as if all members of the affiliated group were a single taxpayer. Thus, R&E expenditures are allocated to all gross intangible income of all members of the affiliated group reasonably connected with the relevant broad SIC code category. If fewer than all members of the affiliated group derive gross intangible income reasonably connected with that relevant broad SIC code category, then such expenditures are apportioned under the rules of this paragraph (e)(2) only among those members, as if those members were a single taxpayer.

(3) *Expenses related to supportive functions*. For further guidance, see §1.861-14T(e)(3).

(4) *Section 250 deduction*. Except as provided in this paragraph (e)(4), the deduction allowed under section 250(a) (the section 250 deduction) to a member of an affiliated group is allocated and apportioned on a separate entity basis under the rules of §1.861-8(e)(13) and (14). However, the section 250 deduction of a member of a consolidated group is not directly allocable to specific income-producing activities or property solely of the member of the affiliated group that is allowed the deduction. See §1.1502-50 for rules on applying section 250 and §§1.250-1 through 1.250(b)-6 to a member of a consolidated group. In such case, the section 250 deduction is allocated and apportioned as if all members of the consolidated group are treated as a single corporation.

(5) *Legal and accounting fees and expenses; damages awards, prejudgment interest, and settlement payments*. Legal and accounting fees and expenses, as well as litigation or arbitral damages awards, prejudgment interest, and settlement payments, are allocated and apportioned under the rules of §1.861-8(e)(5). To the extent that under §1.861-14T(c)(2) and (e)(1)(ii) such expenses are not directly allocable to specific income-producing activities or property of one or more members of the affiliated group, such expenses must be allocated and apportioned as if all members of the affiliated group were a single corporation. Specifically, such expenses must be allocated to a class of gross income that takes into account the gross income which is generated, has been generated, or is reasonably expected to be generated by the other members of the affiliated group. If the expenses relate to the gross income of fewer than all members of the affiliated group as determined under §1.861-14T(c)(2), then those expenses must be apportioned under the rules of §1.861-14T(c)(2), as if those fewer members were a single corporation. Such expenses must be apportioned taking into account the apportionment factors contributed by the members of the group that are treated as a single corporation.

(6) *Charitable contribution expenses*. * * *

(f) *Computation of FSC or DISC combined taxable income.* For further guidance, see §1.861-14T(f) and (g).

(g) [Reserved]

(h) *Special rule for the allocation and apportionment of reserve expenses of a life insurance company*. Section 1.861-8(e)(16) applies for purposes of allocating and apportioning reserve expenses with respect to dividends received by a life insurance company. The remaining reserve expenses of such company are allocated and apportioned under the rules of §1.861-8 and this section.

(i) through (j) [Reserved]

(k) *Applicability date*. This section applies to taxable years beginning after December 31, 2019.

Par. 12. Section 1.861-14T is amended by:

1. Revising paragraphs (e)(1)(i) and (e)(2)(i).

2. Removing and reserving paragraph (e)(2)(ii).

3. Revising paragraphs (e)(4) and (5) and (h).

4. Adding footnote 1 at the end of paragraph (j) introductory text.

The revisions and additions read as follows:

§1.861-14T Special rules for allocating and apportioning certain expenses (other than interest expense) of an affiliated group of corporations (temporary).

* * * * *

(e) * * *

(1) * * *

(i) For further guidance, see §1.861-14(e)(1)(i).

* * * * *

(2) * * *

(i) For further guidance, see §1.861-14(e)(2)(i) and (ii).

* * * * *

(4) *Section 250 deduction*. For further guidance, see §1.861-14(e)(4).

(5) *Legal and accounting fees and expenses; damages awards, prejudgment interest, and settlement payments*. For further guidance, see §1.861-14(e)(5).

* * * * *

(h) *Special rule for allocation of reserve expenses of life insurance companies*. For further guidance, see §1.861-14(h).

* * * * *

(j) * * *

[1] Examples 1 and 4 of this paragraph (j) apply to taxable years beginning before January 1, 2018.

* * * * *

Par. 13. Section 1.861-17 is revised to read as follows:

§1.861-17 Allocation and apportionment of research and experimental expenditures.

(a) *Scope*. This section provides rules for the allocation and apportionment of research and experimental expenditures that a taxpayer deducts, or amortizes and deducts, in a taxable year under section 174 or section 59(e) (applicable to expenditures that are allowable as a deduction under section 174(a)) (*R&E expenditures*). R&E expenditures do not include any expenditures that are not deductible expenses by reason of the second sentence under §1.482-7(j)(3)(i) (relating to CST Payments (as defined in §1.482-7(b)(1)) owed to a controlled participant in a cost sharing arrangement).

(b) *Allocation*—(1) *In general*. The method of allocation and apportionment of R&E expenditures set forth in this section recognizes that research and experimentation is an inherently speculative activity, that findings may contribute unexpected benefits, and that the gross income derived from successful research and experimentation must bear the cost of unsuccessful research and experimentation. In addition, the method set forth in this section recognizes that successful R&E expenditures ultimately result in the creation of intangible property that will be used to generate income. Therefore, R&E expenditures ordinarily are considered deductions that are definitely related to gross intangible income (as defined in paragraph (b)(2) of this section) reasonably connected with the relevant SIC code category (or categories) of the taxpayer and therefore allocable to gross intangible income as a class related to the SIC code category (or categories) and apportioned under the rules in this section. For purposes of the allocation under this paragraph (b)(1), a taxpayer's SIC code category (or categories) are determined in accordance with the provisions of paragraph (b)(3) of this section. For purposes of this section, the term *intangible property* means intangible property (as defined in section 367(d)(4)), including intangible property either created or acquired by the taxpayer, that is derived from R&E expenditures.

(2) *Definition of gross intangible income*. The term *gross intangible income* means all gross income earned by a taxpayer that is attributable to a sale or license of intangible property (including income from platform contribution transactions described in §1.482-7(b)(1)(ii), royalty income from the licensing of intangible property, or amounts taken into account under section 367(d) by reason of a transfer of intangible property), and the full amount of gross income from sales or leases of products or services if the income is derived directly or indirectly (in whole or in part) from intangible property. Gross intangible income also includes a distributive share of any amounts described in the previous sentence, but does not include dividends or any amounts included in income under section 951, 951A, or 1293. See §1.904-4(f)(2)(vi) for rules addressing the assignment of gross income, including gross intangible income, to a separate category by reason of certain disregarded payments to or from a taxpayer's foreign branch.

(3) *SIC code categories*—(i) *Allocation based on SIC code categories*. Ordinarily, a taxpayer's R&E expenditures are incurred to produce gross intangible income that is reasonably connected with one or more relevant SIC code categories. Except as provided in paragraph (b)(3)(iv) of this section, where research and experimentation is conducted with respect to more than one SIC code category, the taxpayer may aggregate the categories for purposes of allocation and apportionment, provided the categories are in the same Major Group. However, the taxpayer may not subdivide any categories. Where research and experimentation is not clearly related to any SIC code category (or categories), it will be considered conducted with respect to all of the taxpayer's SIC code categories.

(ii) *Use of three digit standard industrial classification codes*. A taxpayer determines the relevant Major Groups and SIC code categories by reference to the two digit and three digit classification, respectively, of the Standard Industrial Classification Manual (SIC code). The SIC Manual is available at https://www.osha.gov/pls/imis/sic_manual.html.

(iii) *Consistency*. Once a taxpayer selects a SIC code category or Major Group for the first taxable year for which this section applies to the taxpayer, it must continue to use that category in following years unless the taxpayer establishes to the satisfaction of the Commissioner that, due to changes in the relevant facts, a change in the category is appropriate. Therefore, once a taxpayer elects a permissible aggregation of three digit SIC code categories into a two digit Major Group, it must continue to use that two digit category in following years unless the taxpayer establishes to the satisfaction of the Commissioner that, due to changes in the relevant facts, a change is appropriate.

(iv) *Wholesale trade and retail trade categories*. A taxpayer must use a SIC code category within the divisions of "wholesale trade" or "retail trade" if it is engaged solely in sales-related activities with respect to a particular category of products. In the case of a taxpayer that conducts material non-sales-related activities with respect to a particular category of products, all R&E expenditures related to sales of the products must be allocated and apportioned as if the expenditures were reasonably connected to the most closely related three digit SIC code category other than those within the wholesale and retail trade divisions. For example, if a taxpayer engages in both

the manufacturing and assembling of cars and trucks (SIC code 371) and in a wholesaling activity related to motor vehicles and motor vehicle parts and supplies (SIC code 501), the taxpayer must allocate and apportion all R&E expenditures related to both activities as if they relate solely to the manufacturing SIC code 371. By contrast, if the taxpayer engages only in the wholesaling activity related to motor vehicles and motor vehicle parts and supplies, the taxpayer must allocate and apportion all R&E expenditures to the wholesaling SIC code 501.

(c) *Exclusive apportionment*. Solely for purposes of applying this section to section 904 as the operative section, an amount equal to fifty percent of a taxpayer's R&E expenditures in a SIC code category (or categories) is apportioned exclusively to the residual grouping of U.S. source gross intangible income if research and experimentation that accounts for at least fifty percent of such R&E expenditures was performed in the United States. Similarly, an amount equal to fifty percent of a taxpayer's R&E expenditures in a SIC code category (or categories) is apportioned exclusively to the statutory grouping (or groupings) of foreign source gross intangible income in that SIC code category if research and experimentation that accounts for more than fifty percent of such R&E expenditures was performed outside the United States. If there are multiple separate categories with foreign source gross intangible income in the SIC code category, the fifty percent of R&E expenditures apportioned under the previous sentence is apportioned ratably to foreign source gross intangible income based on the relative amounts of gross receipts from gross intangible income in the SIC code category in each separate category, as determined under paragraph (d) of this section. Solely for purposes of determining whether fifty percent or more of R&E expenditures in a year are performed within or without the United States under this paragraph (c), a taxpayer's R&E expenditures with respect to a taxable year are determined by taking into account only the R&E expenditures incurred in such taxable year (without regard to whether such expenditures are capitalized under section 59(e) or any other provision in the Code), and do not include amounts that were capitalized in a prior taxable year and are deducted in such taxable year.

(d) *Apportionment based on gross receipts from sales of products or services*—(1) *In general*. A taxpayer's R&E expenditures not apportioned under paragraph (c) of this section are apportioned between the statutory grouping (or among the statutory groupings) within the class of gross intangible income and the residual grouping within such class according to the rules in paragraphs (d)(1)(i) through (iv) of this section. See paragraph (b) of this section for defining the class of gross intangible income in relation to SIC code categories.

(i) A taxpayer's R&E expenditures not apportioned under paragraph (c) of this section are apportioned in the same proportions that:

(A) The amounts of the taxpayer's gross receipts from sales and leases of products (as measured by gross receipts without regard to cost of goods sold) or services that are related to gross intangible income within the statutory grouping (or statutory groupings) and in the residual grouping bear, respectively; to

(B) The total amount of such gross receipts in the class.

(ii) For purposes of this paragraph (d), gross receipts from sales and leases of products are related to gross intangible income if intangible property is embedded or used in connection with the manufacture or sale of such products, and gross income from services is related to gross intangible income if intangible property is incorporated in or directly or indirectly benefits such services. See paragraph (g)(7) of this section (*Example 7*). The amount of the gross receipts used to apportion R&E expenditures also includes gross receipts from sales and leases of products or services of any controlled or uncontrolled party to the extent described in paragraphs (d)(3) and (4) of this section. A royalty or other amount paid to the taxpayer for intangible property constitutes gross intangible income, but is not considered part of gross receipts arising from the sale or lease of a product or service, and so is not taken into account in apportioning the taxpayer's R&E expenditures to its gross intangible income.

(iii) The statutory grouping (or groupings) or residual grouping to which the gross receipts are assigned is the grouping to which the gross intangible income related to the sale, lease, or service is assigned. In cases where the gross intangible income of the taxpayer is income not described in paragraph (d)(3) or (4) of this section, the grouping to which the taxpayer's gross receipts and the gross intangible income are assigned is the same. In cases where the taxpayer's gross intangible income is related to sales, leases, or services described in paragraph (d)(3) or (4) of this section, the gross receipts that will be used for purposes of this paragraph (d) are the gross receipts of the controlled and uncontrolled parties that are taken into account under paragraphs (d)(3) and (4) of this section. The grouping to which the controlled or uncontrolled parties' gross receipts are assigned is determined based on the grouping of the taxpayer's gross intangible income attributable to the license, sale, or other transfer of intangible property to such controlled or uncontrolled party as described in paragraph (d)(3)(i) or (d)(4)(i) of this section, and not the grouping to which the gross receipts would be assigned if the assignment were based on the income earned by the controlled or uncontrolled party. See paragraph (g)(1) of this section (*Example 1*). For purposes of applying this paragraph (d)(1)(iii) to section 250 or section 904 as the operative section, the assignment of gross receipts to the general and foreign branch categories is made after taking into account the assignment of gross intangible income to those categories as adjusted by reason of disregarded payments under the rules of §1.904-4(f)(2)(vi), and by making similar adjustments to gross receipts under the principles of §1.904-4(f)(2)(vi).

(iv) For purposes of applying this section to section 904 as the operative section, because a United States person's gross intangible income cannot include income assigned to the section 951A category, no R&E expenditures of a United States person are apportioned to foreign source income in the section 951A category.

(2) *Apportionment in excess of gross income*. Amounts apportioned under this section may exceed the amount of gross income related to the SIC code category within the statutory or residual grouping. In such case, the excess is applied against other gross income within the statutory or

residual grouping. See §1.861-8(d)(1) for applicable rules where the apportionment results in an excess of deductions over gross income within the statutory or residual grouping.

(3) *Sales or services of uncontrolled parties*—(i) *In general*. For purposes of the apportionment within a class under paragraph (d)(1) of this section, if a taxpayer reasonably expects an uncontrolled party to (through a license, purchase, or transfer): acquire intangible property that would arise from the taxpayer's current R&E expenditures; acquire products in which such intangible property is embedded or used in connection with the manufacture or sale of such products; or receive services that incorporate or directly or indirectly benefit from such intangible property, then the gross receipts of the uncontrolled party from sales, licenses, leases, or services of the particular products or services in which the taxpayer's intangible property is embedded or incorporated or which the taxpayer's intangible property directly or indirectly benefitted are taken into account. If the taxpayer has previously licensed, sold, or transferred intangible property related to a SIC code category to an uncontrolled party, the taxpayer is presumed to expect to license, sell, or transfer to that uncontrolled party all future intangible property related to the same SIC code category. The presumption described in the preceding sentence may be rebutted by the taxpayer with facts that demonstrate that the taxpayer reasonably expects not to license, sell, or transfer future intangible property to the uncontrolled party.

(ii) *Definition of uncontrolled party*. For purposes of this paragraph (d)(3), the term *uncontrolled party* means a person that is not a controlled party as defined in paragraph (d)(4)(ii) of this section.

(iii) *Sales of components*. In the case of a sale or lease of a product by an uncontrolled party that is derived from the taxpayer's intangible property but is incorporated as a component of a larger product (for example, where the product incorporating the intangible property is a component of a large machine), only the portion of the gross receipts from the larger product that are attributable to the component derived from the intangible property is included. For purposes of the preceding sentence, a reasonable estimate based on the principles of section 482 must be made. See paragraph (g)(4)(ii)(B)(*3*) of this section (*Example 4*).

(iv) *Reasonable estimates of gross receipts*. If the amount of gross receipts of an uncontrolled party is unknown, a reasonable estimate of gross receipts must be made annually. Appropriate economic analyses, based on the principles of section 482, must be used to estimate gross receipts. See paragraph (g)(5)(ii)(B)(*3*)(*ii*) of this section (*Example 5*).

(4) *Sales or services of controlled parties*—(i) *In general*. For purposes of the apportionment within a class under paragraph (d)(1) of this section, if the controlled party is reasonably expected to (through a license, sale, or transfer): acquire intangible property that would arise from the taxpayer's current R&E expenditures; acquire products in which such intangible property is embedded or used in connection with the manufacture or sale of such products; or receive services that incorporate or directly or indirectly benefit from such intangible property, then the gross receipts of the controlled party from all of its sales, licenses, leases, or services are taken into account. Except to the extent provided in paragraph (d)(4)(iv) of this section, if the taxpayer has previously licensed, sold, or transferred intangible property related to a SIC code category to a controlled party, the taxpayer is presumed to expect to license, sell, or transfer to that controlled party all future intangible property related to the same SIC code category. The presumption described in the preceding sentence may be rebutted by the taxpayer with facts that demonstrate that the taxpayer will not license, sell, or transfer future intangible property to the controlled party.

(ii) *Definition of a controlled party*. For purposes of this paragraph (d)(4), the term *controlled party* means any person that has a relationship to the taxpayer specified in section 267(b) or 707(b), or is a member of a controlled group of corporations (within the meaning of section 267(f)) to which the taxpayer belongs. Because an affiliated group is treated as a single taxpayer, a member of an affiliated group is not a controlled party. See paragraph (e) of this section.

(iii) *Gross receipts not to be taken into account more than once*. Sales, licenses, leases, or services among the taxpayer, controlled parties, and uncontrolled parties are not taken into account more than once; in such a situation, the amount of gross receipts of the selling person must be subtracted from the gross receipts of the buying person. Therefore, the gross receipts taken into account under paragraph (d)(4)(i) of this section generally reflect the gross receipts from sales made to end users.

(iv) *Effect of cost sharing arrangements*. If the controlled party has entered into a cost sharing arrangement, in accordance with the provisions of §1.482-7, with the taxpayer for the purpose of developing intangible property, then the taxpayer is not reasonably expected to license, sell, or transfer to that controlled party, directly or indirectly, intangible property that would arise from the taxpayer's share of the R&E expenditures with respect to the cost shared intangibles as defined in §1.482-7(j)(1)(i). Therefore, solely for purposes of apportioning a taxpayer's R&E expenditures (which do not include the amount of CST Payments received by the taxpayer; see paragraph (a) of this section) that are intangible development costs (as defined in §1.482-7(d)) with respect to a cost sharing arrangement, the controlled party's gross receipts are not taken into account for purposes of paragraphs (d)(1) and (d)(4)(i) of this section.

(5) *Application of section 864(e)(3)*. Section 864(e)(3) and §1.861-8(d)(2) do not apply for purposes of this section.

(e) *Affiliated groups*. See §1.861-14(e)(2) for rules on allocating and apportioning R&E expenditures of an affiliated group (as defined in §1.861-14(d)).

(f) *Special rules for partnerships*—(1) *R&E expenditures*. For purposes of applying this section, if R&E expenditures are incurred by a partnership in which the taxpayer is a partner, the taxpayer's R&E expenditures include the taxpayer's distributive share of the partnership's R&E expenditures.

(2) *Purpose and location of expenditures*. In applying exclusive apportionment under paragraph (c) of this section, a partner's distributive share of R&E expenditures incurred by a partnership is treated as incurred by the partner for the

same purpose and in the same location as incurred by the partnership.

(3) *Apportionment based on gross receipts*. In applying the remaining apportionment under paragraph (d) of this section, if a taxpayer is a partner in a partnership that incurs R&E expenditures described in paragraph (f)(1) of this section and the taxpayer is not reasonably expected to license, sell, or transfer to the partnership (directly or indirectly) intangible property that would arise from the taxpayer's current R&E expenditures, in the manner described in paragraph (d)(3)(i) or (d)(4)(i) of this section, then the taxpayer's gross receipts in a SIC code category include only the taxpayer's share of any gross receipts in the SIC code category of the partnership. For purposes of the preceding sentence, the taxpayer's share of gross receipts is proportionate to the taxpayer's distributive share of the partnership's gross income in the product category. However, if the taxpayer is reasonably expected to license, sell, or transfer to the partnership (directly or indirectly) intangible property that would arise from the taxpayer current R&E expenditures, in the manner described in paragraph (d)(3)(i) or (d)(4)(i) of this section, then the taxpayer's gross receipts in a SIC code category include the full amount of any gross receipts in the SIC code category of the partnership as provided in paragraph (d)(3)(i) or (d)(4)(i) of this section.

(g) *Examples.* The following examples illustrate the application of the rules in this section.

(1) *Example 1: Controlled party and single product*—(i) *Facts*. X, a domestic corporation, is a manufacturer and distributor of small gasoline engines for lawnmowers. Gasoline engines are a product within the category, Engines and Turbines (SIC Industry Group 351). Y, a wholly owned foreign subsidiary of X, also manufactures and sells these engines abroad. X owns no other foreign subsidiaries. During Year 1, X incurred R&E expenditures of $60,000x, which it deducts under section 174 as a current expense, to invent and patent a new and improved gasoline engine. All of the research and experimentation was performed in the United States. Also in Year 1, the domestic gross receipts of X from sales of gasoline engines total $500,000x and foreign gross receipts of Y from sales of gasoline engines total $300,000x. X provides technology for the manufacture of engines to Y through a license that requires the payment of an arm's length royalty. Because X has licensed its intangible property to Y related to the SIC code, it is presumed to reasonably expect to license the intangible property that would be developed from the current research and experimentation. In Year 1, X's gross income is $210,000x, of which $140,000x is U.S. source income from domestic sales of gasoline engines, $40,000x is income included under section 951A, all of which relates to Y's foreign source income from sales of gasoline engines, $20,000x is foreign source royalties from Y, and $10,000x is U.S. source interest income. None of the foreign source royalties are allocable to passive category income of Y, and therefore, under §§1.904-4(d) and 1.904-5(c)(3), the foreign source royalties are general category income to X.

(ii) *Analysis*—(A) *Allocation*. The R&E expenditures were incurred in connection with developing intangible property related to small gasoline engines and they are definitely related to X's items of gross intangible income related to the SIC code category 351, namely gross income from the sale of small gasoline engines in the United States and royalties received from subsidiary Y, a foreign manufacturer of gasoline engines. Accordingly, under paragraph (b) of this section, the R&E expenditures are allocable to the class of gross intangible income related to SIC code category 351, all of which is general category income of X. X's U.S. source interest income and income included under section 951A are not within this class of gross intangible income and, therefore, no portion of the R&E expenditures are allocated to the U.S. source interest income or foreign source income in the section 951A category.

(B) *Apportionment*—(*1*) *In general*. For purposes of applying this section to section 904 as the operative section, the statutory grouping of gross intangible income is foreign source general category income and the residual grouping of gross intangible income is U.S. source income.

(*2*) *Exclusive apportionment*. Under paragraph (c) of this section, because at least 50% of X's research and experimental activity was performed in the United States, 50% of the R&E expenditures, or $30,000x ($60,000x x 50%), is apportioned exclusively to the residual grouping of U.S. source gross intangible income. The remaining 50% of the R&E expenditures is then apportioned between the statutory and residual groupings on the basis of the relative amounts of gross receipts from sales of small gasoline engines by X and Y that are related to the U.S. source sales income and foreign source royalty income, respectively.

(*3*) *Apportionment based on gross receipts*. After taking into account exclusive apportionment, X has $30,000x ($60,000x – $30,000x) of R&E expenditures that must be apportioned between the statutory and residual groupings. Under paragraph (d)(4) of this section, Y's gross receipts within the SIC code are taken into account in apportioning X's R&E expenditures. Although X has gross intangible income of $140,000x from domestic sales and $20,000x in royalties from Y, X's R&E expenditures are apportioned to that gross intangible income on the basis of the relative amounts of gross receipts arising from the sale of products by X and Y (and not the relative amounts of X's gross intangible income) in the statutory and residual groupings. Therefore, under paragraphs (d)(1) and (4) of this section $11,250x ($30,000x x $300,000x / ($500,000x + $300,000x)) is apportioned to the statutory grouping of X's gross intangible income attributable to its license of intangible property to Y, or foreign source general category income. No portion of the gross receipts by X or Y are disregarded under section 864(e)(3), regardless of whether the income related to those sales is eligible for a deduction under section 250(a)(1)(A). The remaining $18,750x ($30,000x x $500,000x / ($500,000x + $300,000x)) is apportioned to the residual grouping of gross intangible income, or U.S. source income.

(*4*) *Summary*. Accordingly, for purposes of the foreign tax credit limitation, $11,250x of X's R&E expenditures are apportioned to foreign source general category income, and $48,750x ($30,000x + $18,750x) of X's R&E expenditures are apportioned to U.S. source income.

(2) *Example 2: Controlled party and two products in same SIC code category*—(i) *Facts*. The facts are the same as in paragraph (g)(1)(i) of this section (the facts in *Example 1*), except that X also spends $30,000x in Year 1 for research on steam turbines, all of which is performed in the United States, and X has steam turbine gross receipts in the United States of $400,000x. X's foreign subsidiary Y neither manufactures nor sells steam turbines. The steam turbine research is in addition to the $60,000x in R&E expenditures incurred by X on gasoline engines for lawnmowers. X thus has $90,000x of R&E expenditures. X's gross income is $260,000x, of which $140,000x is U.S. source income from domestic sales of gasoline engines, $50,000x is U.S. source income from domestic sales of steam turbines, $40,000x is income included under section 951A all of which relates to foreign source income derived from Y's sales of gasoline engines, $20,000x is foreign source royalties from Y, and $10,000x is U.S. source interest income.

(ii) *Analysis*—(A) *Allocation*. X's R&E expenditures generate gross intangible income from sales of small gasoline engines and steam turbines. Both of these products are in the same three digit SIC code category, Engines and Turbines (SIC Industry Group 351). Therefore, under paragraph (a) of this section, X's R&E expenditures are definitely related to all items of gross intangible income attributable to SIC code category 351. These items of X's gross intangible income are gross income from the sale of small gasoline engines and steam turbines in the United States and royalties from foreign subsidiary Y, a foreign manufacturer and seller of small gasoline engines. X's U.S. source interest income and income included under section 951A is not within this class of gross intangible income and, therefore, no portion of X's R&E expenditures are allocated to the U.S. source interest income or income in the section 951A category.

(B) *Apportionment*—(*1*) *In general*. For purposes of applying this section to section 904 as the operative section, the statutory grouping of gross intangible income is foreign source general category income and the residual grouping of gross intangible income is U.S. source income.

(*2*) *Exclusive apportionment*. Under paragraph (c) of this section, because at least 50% of X's research and experimental activity was performed in the United States, 50% of the R&E expenditures, or $45,000x ($90,000x x 50%), are apportioned exclusively to the residual grouping of U.S. source gross intangible income. The remaining 50% of the R&E expenditures is then apportioned between the statutory and residual groupings on the basis of the

relative amounts of gross receipts of small gasoline engines and steam turbines by X and Y with respect to which gross intangible income is foreign source general category income and U.S. source income.

(*3*) *Apportionment based on gross receipts*. After taking into account exclusive apportionment, X has $45,000x ($90,000x – $45,000x) of R&E expenditures that must be apportioned between the statutory and residual groupings. Although X has gross intangible income of $190,000x from domestic sales and $20,000x in royalties from Y, X's R&E expenditures are apportioned to that gross intangible income on the basis of the relative amounts of gross receipts arising from the sale of products by X and Y (and not the relative amounts of X's gross intangible income) in the statutory and residual groupings. Even though a portion of the R&E expenditures that must be apportioned are attributable to research performed with respect to steam turbines, and Y does not sell steam turbines, because Y is reasonably expected to license all intangible property related to SIC code category 351 from X, including intangible property related to steam turbines, under paragraphs (d)(1) and (4) of this section $11,250x ($45,000x x $300,000x / ($500,000x + $400,000x + $300,000x)) is apportioned to the statutory grouping of gross intangible income, or foreign source general category income attributable to the royalty income to which the gross receipts of Y are related. The remaining $33,750x ($45,000x x ($500,000x + $400,000x) / ($500,000x + $400,000x + $300,000x)) is apportioned to the residual grouping of gross intangible income, or U.S. source gross income.

(*4*) *Summary*. Accordingly, for purposes of the foreign tax credit limitation, $11,250x of X's R&E expenditures are apportioned to foreign source general category income and $78,750x ($45,000x + $33,750x) of X's R&E expenditures are apportioned to U.S. source income.

(3) *Example 3: Cost sharing arrangement*—(i) *Facts*—(A) *Acquisitions and transfers by X*. The facts are the same as in paragraph (g)(1)(i) of this section (the facts in *Example 1*) except that, in Year 2, X and Y terminate the license for the manufacture of engines that was in place in Year 1 and enter into a cost sharing arrangement, in accordance with the provisions of §1.482-7, to share the costs and risks of developing the intangible property related to the engines. Pursuant to the cost sharing arrangement, X has the exclusive rights to exploit the cost shared intangibles within the United States, and Y has the exclusive rights to exploit the cost shared intangibles outside the United States. X's and Y's shares of the reasonably anticipated benefits from the cost shared intangibles are 70% and 30%, respectively. In Year 2, Y makes a PCT Payment (as defined in §1.482-7(b)(1)(ii)) of $50,000x that is characterized and sourced as a royalty for a license of small gasoline engine technology.

(B) *Gross receipts and R&E expenditures*. In Year 2, X and Y continue to sell gasoline engines, with gross receipts of $600,000x in the United States by X and $400,000x abroad by Y. X incurs intangible development costs associated with the cost shared intangibles of $100,000x in Year 2, which consist exclusively of research activities conducted in the United States. Y also makes a $30,000x CST Payment (as defined in §1.482-7(b)(1)(i)) under the cost sharing arrangement. X is entitled to deduct $70,000x of its intangible development costs ($100,000x less the $30,000x CST Payment by Y) by reason of the second sentence under §1.482-7(j)(3)(i) (relating to CST Payments).

(C) *Gross income of X*. In Year 2, X's gross income is $360,000x, of which $200,000x is U.S. source income from domestic sales of small gasoline engines, $50,000x is foreign source general category income attributable to the PCT Payment, $100,000x is income included under section 951A (all of which relates to foreign source income derived from engine sales by Y), and $10,000x is U.S. source interest income.

(ii) *Analysis*—(A) *Allocation*. The $70,000x of R&E expenditures incurred in Year 2 by X in connection with small gasoline engines are definitely related to the items of gross intangible income related to the SIC code category, namely gross income from the sale of small gasoline engines in the United States and PCT Payments from Y. Accordingly, under paragraph (a) of this section, the R&E expenditures are allocable to this class of gross intangible income. X's U.S. source interest income and income included under section 951A are not within this class of gross intangible income and, therefore, no portion of X's R&E expenditures is allocated to X's U.S. source interest income or section 951A category income.

(B) *Apportionment*—(*1*) *In general*. For purposes of applying this section to section 904 as the operative section, the statutory grouping of gross intangible income is foreign source general category income, and the residual grouping of gross intangible income is U.S. source income.

(*2*) *Exclusive apportionment*. Under paragraph (c) of this section, because at least 50% of X's research and experimentation in Year 2 was performed in the United States, 50% of the R&E expenditures, or $35,000x ($70,000x x 50%), is apportioned exclusively to the residual grouping of gross intangible income, U.S. source income.

(*3*) *Apportionment based on gross receipts*. Although X has gross intangible income of $200,000x from domestic sales and $50,000x as a PCT Payment from Y, X's R&E expenditures are apportioned to its gross intangible income on the basis of the relative amounts of gross receipts arising from the sale of products by X (and not the relative amounts of X's gross intangible income) in the statutory and residual groupings. Under paragraph (d)(4)(iv) of this section, because of the cost sharing arrangement, Y's gross receipts from sales are not taken into account in apportioning X's R&E expenditures that are intangible development costs with respect to the cost sharing arrangement. Because all of the gross receipts from sales that are taken into account under paragraph (d)(1) of this section relate to gross intangible income that is included in the residual grouping, $35,000x is apportioned to the residual grouping of gross intangible income, or U.S. source income.

(*4*) *Summary*. Accordingly, for purposes of the foreign tax credit limitation, $70,000x of X's R&E expenditures are apportioned to U.S. source income.

(4) *Example 4: Uncontrolled party*—(i) *Facts*—(A) *X's R&E expenditures*. X, a domestic corporation, is engaged in continuous research and experimentation to improve the quality of the products that it manufactures and sells, which are floodlights, flashlights, fuse boxes, and solderless connectors. All of these products are in the same three digit SIC code category, Electric Lighting and Wiring Equipment (SIC Industry Group 364). X incurs $100,000x of R&E expenditures in Year 1 that is performed exclusively in the United States. As a result of this research activity, X acquires patents that it uses in its own manufacturing activity.

(B) *License to Y and Z*. In Year 1, X licenses its floodlight patent to Y and Z, uncontrolled parties, for use in their own territories, Countries Y and Z, respectively. Y pays X a royalty of $3,000x plus $0.20x for each unit sold. Gross receipts from sales of floodlights by Y for the taxable year are $135,000x (30,000 units at $4.50x per unit), and the royalty is $9,000x ($3,000x + $0.20x/unit × 30,000 units). Y has sales of other products of $500,000x. Z pays X a royalty of $3,000x plus $0.30x for each unit sold. Z manufactures 30,000 floodlights in the taxable year, and the royalty is $12,000x ($3,000x + $0.30x/unit × 30,000 units). The dollar value of Z's gross receipts from floodlight sales is not known to X because, in this case, the floodlights are not sold separately by Z but are instead used as a component in Z's manufacture of lighting equipment for theaters. However, a reasonable estimate of Z's gross receipts attributable to the floodlights, based on the principles of section 482, is $120,000x. The gross receipts from sales of all Z's products, including the lighting equipment for theaters, are $1,000,000x. Because X has licensed its intangible property to Y and Z related to the SIC code, it is presumed to reasonably expect to license the intangible property that would be developed from the current research and experimentation.

(C) *X's gross receipts and gross income*. X's gross receipts from sales of floodlights for the taxable year are $500,000x and its sales of its other products (flashlights, fuse boxes, and solderless connectors) are $400,000x. X has gross income of $500,000x, consisting of U.S. source gross income from domestic sales of floodlights, flashlights, fuse boxes, and solderless connectors of $479,000x, and foreign source gross income from royalties of $9,000x and $12,000x from foreign corporations Y and Z, respectively. The royalty income is general category income to X under §1.904-4(b)(2)(ii).

(ii) *Analysis*—(A) *Allocation*. X's R&E expenditures are definitely related to all of the gross intangible income from the products that it produces, which are floodlights, flashlights, fuse boxes, and solderless connectors. All of these products are in SIC code category 364. Therefore, under paragraph (b) of this section, X's R&E expenditures are definitely related to the class of gross intangible income related to SIC code category 364 and to all items of gross intangible income attributable to the class. These items of X's gross intangible income are gross income from the sale of floodlights, flashlights, fuse boxes, and solderless connectors in the United States and royalties from Corporations Y and Z.

(B) *Apportionment*—(*1*) *In general*. For purposes of applying this section to section 904 as the operative section, the statutory grouping of gross intangible income is foreign source general category income, and the residual grouping of gross intangible income is U.S. source income.

(*2*) *Exclusive apportionment*. Under paragraph (c) of this section, because at least 50% of X's research and experimentation was performed in the United States, 50% of the R&E expenditures, or $50,000x ($100,000x x 50%), is apportioned exclusively to the residual grouping of U.S. source gross intangible income.

(*3*) *Apportionment based on gross receipts*. After taking into account exclusive apportionment, X has $50,000x ($100,000x – $50,000x) of R&E expenditures that must be apportioned between the statutory and residual groupings. Under paragraph (d)(3)(i) of this section, gross receipts from sales of Y and Z are taken into account in apportioning X's R&E expenditures. Although X has gross intangible income of $479,000x from domestic sales and $21,000x in royalties from Y and Z, X's R&E expenditures are apportioned to its gross intangible income on the basis of the relative amounts of gross receipts arising from the sale of products by X, Y and Z (and not the relative amounts of X's gross intangible income) in the statutory and residual groupings. In addition, under paragraph (d)(3)(iii) of this section only the portion of Z's gross receipts that are attributable to the floodlights that incorporate the intangible property licensed from X, rather than Z's total gross receipts, are used for purposes of apportionment. All of X's gross receipts from sales in the entire SIC code category are included for purposes of apportionment on the basis of gross intangible income attributable to those sales. Under paragraph (d)(1) of this section, $11,039x ($50,000x × ($135,000x + $120,000x) / ($900,000x + $135,000x + $120,000x)) is apportioned to the statutory grouping of gross intangible income, or foreign source general category income. The remaining $38,961x ($50,000x × $900,000x / ($900,000x + $135,000x + $120,000x)) is apportioned to the residual grouping of gross intangible income, or U.S. source income.

(*4*) *Summary*. Accordingly, for purposes of the foreign tax credit limitation, $11,039x of X's R&E expenditures are apportioned to foreign source general category income and $88,961x ($50,000x + $38,961x) of X's R&E expenditures are apportioned to U.S. source income.

(5) *Example 5: Uncontrolled party and sublicense*—(i) *Facts*. X, a domestic corporation, is a cloud storage service provider. Cloud storage services are a service within the category, Computer Programming, Data Processing, and other Computer Related Services (SIC Industry Group 737). During Year 1, X incurs R&E expenditures of $50,000x to invent and copyright new storage monitoring and management software. All of the research and experimentation is performed in the United States. X uses this software in its own business to provide services to customers. X also licenses a version of the software that can be used by other businesses that provide cloud storage services. X licenses the software to uncontrolled party U, which sub-licenses the software to other businesses that provide cloud storage services to customers. U does not use the software except to sublicense it. As a part of the licensing agreement with U, U and its sub-licensees are only permitted to use the software in certain countries outside of the United States. Under the contract with U, U pays X a royalty of 50% on the amount it receives from its sub-licensees that use the software to provide services to customers. Because X has licensed its intangible property to U related to the SIC code and U has sublicensed it to other businesses, it is presumed that X is reasonably expected to license the intangible property that would be developed from its current research and experimentation to U and that U would sublicense it to other businesses. In Year 1, X earns $300,000x of gross receipts from providing cloud storage services within the United States. Further, in Year 1 U receives $10,000x of royalty income from its sub-licensees and pays a royalty of $5,000x to X. Thus, X earns $300,000x of U.S. source general category gross income and also earns $5,000x of foreign source general category royalty income from licensing its software to U for use outside of the United States.

(ii) *Analysis*—(A) *Allocation*. The R&E expenditures were incurred in connection with the development of cloud computing software and they are definitely related to the items of gross intangible income related to the SIC Code category, namely gross income from the storage monitoring and management software in the United States and royalties received from U. Accordingly, under paragraph (b) of this section, the R&E expenditures are allocable to this class of gross intangible income.

(B) *Apportionment*—(*1*) *In general*. For purposes of applying this section to section 904 as the operative section, the statutory grouping of gross intangible income is foreign source general category income, and the residual grouping of gross intangible income is U.S. source income.

(*2*) *Exclusive apportionment*. Under paragraph (c) of this section, because at least 50% of X's research and experimental activity was performed in the United States, 50% of the R&E expenditures, or $25,000x ($50,000x x 50%), is apportioned exclusively to the residual grouping of U.S. source gross intangible income.

(*3*) *Apportionment based on gross receipts*—(*i*) *In general*. After taking into account exclusive apportionment, X has $25,000x ($50,000x – $25,000x) of R&E expenditures that must be apportioned between the statutory and residual groupings. Because X has licensed its intangible property related to the SIC code to U and U has licensed it to the sub-licensees, under paragraph (d)(3)(i) of this section, gross receipts from sales of U's sublicensees are taken into account in apportioning X's R&E expenditures. Although X has gross intangible income of $300,000x from domestic sales of services and $5,000x in royalties from U, X's R&E expenditures are apportioned to its gross intangible income on the basis of the relative amounts of gross receipts arising from the sale of services by X and U's sub-licensees (and not the relative amounts of X's gross intangible income) in the statutory and residual groupings.

(*ii*) *Determination of U's sub-licensee's gross receipts*. Under paragraph (d)(3)(iv) of this section, X can make a reasonable estimate of the gross receipts of U's sub-licensees from services incorporating the intangible property licensed by X by estimating, after an appropriate economic analysis, that U would charge a royalty of 5% of the sub-licensee's sales. U received a royalty of $10,000x from the sub-licensees. X then determines U's sub-licensees' foreign sales by dividing the total royalty payments received by U by the royalty estimated rate ($10,000x / .05 = $200,000x).

(*iii*) *Results of apportionment based on gross receipts*. Therefore, under paragraphs (d)(1) and (3) of this section, $10,000x ($25,000x x $200,000x / ($300,000x + $200,000x)) is apportioned to the statutory grouping of gross intangible income, or foreign source general category income. The remaining $15,000x ($25,000x x $300,000x / ($300,000x + $200,000x)) is apportioned to the residual grouping of gross intangible income, or U.S. source income.

(*4*) *Summary*. Accordingly, for purposes of the foreign tax credit limitation, $10,000x of X's R&E expenditures are apportioned to foreign source general category income and $40,000x ($25,000x + $15,000x) of X's R&E expenditures are apportioned to U.S. source income.

(6) *Example 6: Foreign branch*—(i) *Facts*—(A) *Overview for X.* X, a domestic corporation, owns FDE, a disregarded entity that is a foreign branch within the meaning of §1.904-4(f)(3)(vii). FDE conducts activities solely in Country Y. FDE's functional currency is the U.S. dollar. X is a manufacturer and distributor of small gasoline engines for lawnmowers in the United States. Gasoline engines are a product within the category, Engines and Turbines (SIC Industry Group 351). FDE also manufactures and distributes small gasoline engines but only in Country Y. During Year 1, X incurred R&E expenditures of $60,000x, which it deducts under section 174 as a current expense, to invent and patent a new and improved gasoline engine. All of the research and experimentation was performed in the United States. Also in Year 1, the domestic gross receipts of X from gasoline engines total $500,000x. X provides technology for the manufacture of engines to FDE through a license. FDE compensates X for the technology with an arm's length royalty payment of $10,000x, which is disregarded for Federal income tax purposes.

(B) *Overview for FDE*. FDE accrues and records on its books and records $100,000x of gross income from sales of gasoline engines to unrelated persons. FDE's gross income is non-passive category income and is foreign source income. In Year 1, the foreign gross receipts of FDE from sales of gasoline engines total $300,000x. The disregarded royalty payment from FDE to X is not recorded on FDE's separate books and records (as adjusted to conform to Federal income tax principles) within the meaning of paragraph §1.904-4(f)(2)(i) because it is disregarded for Federal income tax purposes. However, the $10,000x disregarded royalty payment would be allocable to foreign source gross income attributable to FDE under §1.904-4(f)(2)(vi)(B)(*1*)(*ii*). Therefore, under §1.904-4(f)(2)(vi)(A) the amount of foreign source gross income attributable to FDE is adjusted downwards and the amount of foreign source gross income attributable to X is adjusted upward to take the $10,000x disregarded royalty payment into account.

(C) *Assignment of X's gross income to separate categories*. In Year 1, X has U.S. source general category gross income of $140,000x from domestic sales of gasoline engines. After application of §1.904-4(f)(2)(vi)(A) to the disregarded payment made by FDE, X has $10,000x of foreign source general category

gross income and X also has $90,000x of foreign source foreign branch category gross income.

(ii) *Analysis*—(A) *Allocation*. The R&E expenditures were incurred in connection with developing intangible property related to small gasoline engines and are definitely related to the items of gross intangible income related to the SIC code category 351, namely gross income from the sale of small gasoline engines in both the United States and Country Y.

(B) *Apportionment*—(*1*) *In general*. For purposes of applying this section to section 904 as the operative section, the statutory groupings of gross intangible income are foreign source general category income and foreign source foreign branch category income, and the residual grouping of gross intangible income is U.S. source income.

(*2*) *Exclusive apportionment*. Under paragraph (c) of this section, because at least 50% of X's research and experimental activity was performed in the United States, 50% of the R&E expenditures, or $30,000 ($60,000x x 50%), is apportioned exclusively to the residual grouping of U.S. source gross intangible income. The remaining 50% of the R&E expenditures is then apportioned between the statutory and residual groupings on the basis of the relative amounts of gross receipts from sales of small gasoline engines that are related to U.S. source income, foreign source general category income, and foreign source foreign branch category income.

(*3*) *Apportionment based on gross receipts*. After taking into account exclusive apportionment, X has $30,000x ($60,000x - $30,000x) of R&E expenditures that must be apportioned between the statutory and residual groupings. Because X's gross intangible income is not described in paragraph (d)(3) or (4) of this section (that is, there is no gross intangible income related to sales, leases or services from controlled or uncontrolled parties that are incorporating intangible property that was licensed, sold, or transferred to controlled or uncontrolled parties), the groupings to which the taxpayer's gross receipts and gross intangible income are assigned is the same. However, because the assignment of X's gross income to the foreign branch and general categories is made by taking into account disregarded payments under §1.904-4(f)(2)(vi), the assignment of gross receipts between the general category and foreign branch category must be determined by making similar adjustments to X's gross receipts under the principles of §1.904-4(f)(2)(vi). See paragraph (d)(1)(iii) of this section. Foreign gross receipts of FDE from gasoline engines total $300,000x. However, those gross receipts are adjusted under the principles of §1.904-4(f)(2)(vi) for purposes of apportioning the remaining R&E expenditures by reducing the gross receipts initially assigned to the foreign branch category by an amount equal to the ratio of the royalty income to FDE's gross income that is initially assigned to the foreign branch category. Accordingly, since the disregarded royalty payment of $10,000x caused an adjustment equal to 10% of FDE's initial gross income of $100,000x, 10% of the gross receipts or $30,000x (10% x $300,000x) are similarly assigned to the grouping of foreign source general category income, and the remaining $270,000x of gross receipts are assigned to the grouping of foreign source foreign branch category income. Therefore, under paragraph (d)(1) of this section, $1,125x ($30,000x x $30,000x / ($500,000x + $270,000x + $30,000x)) is apportioned to the statutory grouping of X's gross intangible income attributable to foreign source general category income. $10,125x ($30,000x x $270,000x / ($500,000x + $270,000x + $30,000x)) is apportioned to the statutory grouping of X's foreign source foreign branch category income. The remaining $18,750x ($30,000x x $500,000x / ($500,000x + $270,000x + $30,000x)) is apportioned to the residual grouping of gross intangible income or U.S. source income.

(7) *Example 7: Indirectly derived gross intangible income*—(i) *Facts*. P, a domestic corporation, develops and publishes an internet website that persons use (referred to as "users" and collectively referred to as "user base") without a fee. P incurs R&E expenditures to update software code and write new software code to maintain the website and develop new products that are incorporated into the website. P's activities consist of services that fall within SIC code category 737 (computer programming, data processing, and other computer related services). P sells space on its website for businesses to advertise to its user base in exchange for a fee. P's technology allows it to collect data on users and to use that data to effectively target advertisements. P does not grant rights to the technology or other intangible property to the businesses advertising on its website. In Year 1, P incurs R&E expenditures of $60,000x, which it deducts under section 174. All the research and experimentation is performed in the United States. Also in Year 1, P earns gross receipts of $200,000x from the sale of advertisements, all of which gives rise to U.S. source gross income.

(ii) *Analysis*—(A) *Allocation*. The R&E expenditures were incurred in connection with developing intangible property used for P's website. Accordingly, they are definitely related and allocable to gross intangible income derived directly or indirectly (in whole or in part) from that intangible property. Because P's advertising sales are dependent on the users attracted to its website, P's gross income from advertising is indirectly derived from intangible property and is included in gross intangible income. Accordingly, under paragraph (b) of this section, the R&E expenditures are allocable to the class of gross intangible income related to SIC code category 737, which consists of U.S. source income.

(B) *Apportionment*. Because all gross receipts from services that the intangible property directly or indirectly benefits result in U.S. source income, no apportionment is required.

(h) *Applicability date*. This section applies to taxable years beginning after December 31, 2019. However, taxpayers may choose to apply this section to taxable years beginning on or after January 1, 2018, and before January 1, 2020, provided they apply this section in its entirety and for any subsequent year beginning before January 1, 2020.

Par. 14. Section 1.861-20 is added to read as follows:

§1.861-20 Allocation and apportionment of foreign income taxes.

(a) *Scope*. This section provides rules for the allocation and apportionment of foreign income taxes, including allocating and apportioning foreign income taxes to separate categories for purposes of the foreign tax credit. The rules of this section apply except as modified under the rules for an operative section (as described in §1.861-8(f)(1)). See, for example, §§1.704-1(b)(4)(viii)(*d*)(*1*), 1.904-6, 1.960-1(d)(3)(ii), and 1.965-5(b)(2). Paragraph (b) of this section provides definitions for the purposes of this section. Paragraph (c) of this section provides the general rule for allocation and apportionment of foreign income taxes. Paragraph (d) of this section provides rules for assigning foreign gross income to statutory and residual groupings. Paragraph (e) of this section provides rules for allocating and apportioning foreign law deductions to foreign gross income in the statutory and residual groupings. Paragraph (f) of this section provides rules for apportioning foreign income taxes among statutory and residual groupings. Paragraph (g) of this section provides examples that illustrate the application of this section. Paragraph (h) of this section provides the applicability date for this section.

(b) *Definitions*. The following definitions apply for purposes of this section.

(1) *Corporation*. The term *corporation* has the same meaning as set forth in §301.7701-2(b) of this chapter, and so includes a reverse hybrid.

(2) *Corresponding U.S. item*. The term *corresponding U.S. item* means the item of U.S. gross income or U.S. loss, if any, that arises from the same transaction or other realization event from which an item of foreign gross income also arises. An item of U.S. gross income or U.S. loss is a corresponding U.S. item even if the item of foreign gross income that arises from the same transaction or realization event differs in amount from the item of U.S. gross income or U.S. loss. A corresponding U.S. item does not include an item of gross income that is exempt, excluded, or eliminated from U.S. gross income, nor does it include an item of U.S. gross income or U.S. loss that is not realized, recognized or taken into account

by the taxpayer in the U.S. taxable year in which the taxpayer paid or accrued the foreign income tax, except as provided in the next sentence. If a taxpayer pays or accrues a foreign income tax that is imposed on foreign taxable income that includes an item of foreign gross income by reason of a transaction or other realization event that also gave rise to an item of U.S. gross income or U.S. loss, but the U.S. and foreign taxable years end on different dates and the event occurred in the last U.S. taxable year that ends before the end of the foreign taxable year, then the item of U.S. gross income or U.S. loss is a corresponding U.S. item.

(3) *Disregarded entity*. The term *disregarded entity* means an entity described in §301.7701-2(c)(2) of this chapter that is disregarded as an entity separate from its owner for Federal income tax purposes.

(4) *Foreign capital gain amount*. The term *foreign capital gain amount* means the portion of a distribution that under foreign law gives rise to gross income of a type described in section 301(c)(3)(A).

(5) *Foreign dividend amount*. The term *foreign dividend amount* means the portion of a distribution that is taxable as a dividend under foreign law.

(6) *Foreign gross income*. The term *foreign gross income* means the items of gross income included in the base upon which a foreign income tax is imposed. This includes all items of foreign gross income included in the foreign tax base, even if the foreign taxable year begins in the U.S. taxable year that precedes the U.S. taxable year in which the taxpayer pays or accrues the foreign income tax.

(7) *Foreign income tax*. The term *foreign income tax* means an income, war profits, or excess profits tax within the meaning of §1.901-2(a) that is a separate levy within the meaning of §1.901-2(d) and that is paid or accrued to any foreign country (as defined in §1.901-2(g)).

(8) *Foreign law CFC*. The term *foreign law CFC* means an entity that is a body corporate under foreign law, certain of the earnings of which are taxable to its shareholder under a foreign law inclusion regime.

(9) *Foreign law disposition*. The term *foreign law disposition* means an event that foreign law treats as a taxable disposition or deemed disposition of property but that Federal income tax law does not treat as a disposition causing the recognition of gain or loss (for example, marking property to market under foreign law).

(10) *Foreign law distribution*. The term *foreign law distribution* means an event that foreign law treats as a taxable distribution (other than by reason of a foreign law inclusion regime) but that Federal income tax law does not treat as a distribution of property within the meaning of section 317(a) (for example, a stock dividend described in section 305 or a foreign law consent dividend).

(11) *Foreign law inclusion regime*. A *foreign law inclusion regime* is a foreign law tax regime similar to the subpart F or GILTI regime described in sections 951 through 959, or the PFIC regime described in sections 1293 through 1295 (relating to qualified electing funds), that imposes a tax on a shareholder of an entity based on an inclusion in the shareholder's taxable income of certain of the entity's current earnings, whether or not the foreign law deems the entity's earnings to be distributed.

(12) *Foreign law inclusion regime income*. The term *foreign law inclusion regime income* means the items of foreign gross income included by a taxpayer with respect to a foreign law CFC by reason of a foreign law inclusion regime.

(13) *Foreign law pass-through income*. The term *foreign law pass-through income* means the items of a reverse hybrid, computed under foreign law, that give rise to an inclusion in a taxpayer's foreign gross income under the laws of a foreign country imposing tax by reason of the taxpayer's ownership of the reverse hybrid.

(14) *Foreign taxable income*. The term *foreign taxable income* means foreign gross income reduced by the deductions that are allowed under foreign law.

(15) *Foreign taxable year*. The term *foreign taxable year* has the meaning set forth in section 7701(a)(23), applied by substituting "under foreign law" for the phrase "under subtitle A."

(16) *Partnership*. The term *partnership* has the same meaning as set forth in §301.7701-2(c)(1) of this chapter.

(17) *Reverse hybrid*. The term *reverse hybrid* means a corporation that is a fiscally transparent entity (under the principles of §1.894-1(d)(3)) or a branch under the laws of a foreign country imposing tax on the income of the entity.

(18) *Taxpayer*. The term *taxpayer* has the meaning described in §1.901-2(f)(1).

(19) *U.S. capital gain amount*. The term *U.S. capital gain amount* means gain recognized by a taxpayer on the sale or exchange of stock or, in the case of a distribution with respect to stock, the portion of the distribution to which section 301(c)(3)(A) applies. However, a U.S. capital gain amount does not include any portion of the gain recognized by a taxpayer that is treated as a dividend under section 964(e) or 1248.

(20) *U.S. dividend amount*. The term *U.S. dividend amount* means the portion of a distribution that is made out of earnings and profits under Federal income tax law, including distributions out of previously taxed earnings and profits described in section 959(a) or (b). It also includes amounts included in gross income as a dividend by reason of section 1248 or section 964(e).

(21) *U.S. gross income*. The term *U.S. gross income* means the items of gross income that a taxpayer recognizes and includes in taxable income under Federal income tax law for its U.S. taxable year.

(22) *U.S. loss*. The term *U.S. loss* means the item of loss that a taxpayer recognizes and includes in taxable income under Federal income tax law for its U.S. taxable year.

(23) *U.S. return of capital amount*. The term *U.S. return of capital amount* means, in the case of the sale or exchange of stock, the adjusted basis of the stock, and in the case of a distribution with respect to stock, the portion of a distribution to which section 301(c)(2) applies.

(24) *U.S. taxable year*. The term *U.S. taxable year* has the same meaning as that of the term *taxable year* set forth in section 7701(a)(23).

(c) *General rule*. A foreign income tax is allocated and apportioned to the statutory and residual groupings that include the items of foreign gross income included in the base on which the tax is imposed. Each foreign income tax (that is, each separate levy) is allocated and apportioned separately under the rules in this section. A foreign income tax is allocated and apportioned to or among the statutory and residual groupings under the following steps:

(1) First, by assigning the items of foreign gross income to the groupings under the rules of paragraph (d) of this section;

(2) Second, by allocating and apportioning the deductions that are allowed under foreign law to the foreign gross income in the groupings under the rules of paragraph (e) of this section; and

(3) Third, by allocating and apportioning the foreign income tax by reference to the foreign taxable income in the groupings under the rules of paragraph (f) of this section.

(d) *Assigning items of foreign gross income to the statutory and residual groupings*—(1) *In general*. Each item of foreign gross income is assigned to a statutory or residual grouping. The amount of the item is determined under foreign law. However, Federal income tax law applies to characterize the item and the transaction or other realization event from which the item arose, and to assign it to a grouping. Except as provided in paragraph (d)(3) of this section, if a taxpayer pays or accrues a foreign income tax that is imposed on foreign taxable income that includes an item of foreign gross income with respect to which the taxpayer also realizes, recognizes, or takes into account a corresponding U.S. item, then the item of foreign gross income is assigned to the grouping to which the corresponding U.S. item is assigned. See paragraph (g)(2) of this section (*Example 1*). If the corresponding U.S. item is a U.S. loss (or zero), the foreign gross income is assigned to the grouping to which a gain would be assigned had the transaction or other realization event given rise to a gain, rather than a U.S. loss (or zero), for Federal income tax purposes, and not (if different) to the grouping to which the U.S. loss is allocated and apportioned in computing U.S. taxable income. Paragraph (d)(3) of this section provides special rules regarding the assignment of the item of foreign gross income in particular circumstances.

(2) *Items of foreign gross income with no corresponding U.S. item*—(i) *In general*. The rules in paragraphs (d)(2)(ii) and (iii) of this section apply for purposes of characterizing an item of foreign gross income and assigning it to a grouping if the taxpayer does not realize, recognize, or take into account a corresponding U.S. item. But see paragraphs (d)(3)(i)(C) and (d)(3)(iii) of this section for special rules with respect to items of foreign gross income attributable to foreign law passthrough income and foreign law inclusion regime income.

(ii) *Foreign gross income from U.S. nonrecognition event, or U.S. recognition event that falls in a different U.S. taxable year*—(A) *In general*. If a taxpayer recognizes an item of foreign gross income arising from a transaction or other foreign realization event that does not result in the recognition of gross income or loss under Federal income tax law in the same U.S. taxable year in which the foreign income tax is paid or accrued or (in the circumstance described in the last sentence of paragraph (b)(2) of this section) in the immediately preceding U.S. taxable year, then the item of foreign gross income is characterized and assigned to the grouping to which the corresponding U.S. item (or the items described in paragraph (d)(3) of this section that are used to assign certain items of foreign gross income to the statutory and residual groupings) would be assigned if the event giving rise to the foreign gross income resulted in the recognition of gross income or loss under Federal income tax law in the U.S. taxable year in which the foreign income tax is paid or accrued.

(B) *Foreign law distributions*. An item of foreign gross income that a taxpayer includes as a result of a foreign law distribution with respect to either stock or a partnership interest is assigned to the same statutory or residual groupings to which the foreign gross income would be assigned if a distribution of property in the amount of the taxable distribution under foreign law were made for Federal income tax purposes on the date on which the foreign law distribution occurred. See paragraph (g)(6) of this section (*Example 5*). See paragraph (d)(3)(i)(B) of this section for rules regarding the assignment of foreign gross income arising from a distribution with respect to stock. For purposes of applying paragraph (d)(3)(i)(B) of this section to a foreign law distribution, the U.S. dividend amount, U.S. capital gain amount, and U.S. return of capital amount are computed as if the distribution occurred on the date the distribution occurs for foreign law purposes. See §1.960-1(d)(3)(ii) for rules for assigning foreign gross income arising from a foreign law distribution to income groups or PTEP groups for purposes of section 960 as the operative section.

(C) *Foreign law dispositions*. A foreign gross income item of gain that a taxpayer includes as a result of a foreign law disposition of property is assigned to the grouping to which a corresponding U.S. item of gain or loss would be assigned on a taxable disposition of the property under Federal income tax law in exchange for an amount equal to the gross receipts or other value used under foreign law to determine the amount of the items of foreign gross income arising from the foreign law disposition in the U.S. taxable year in which the taxpayer paid or accrued the foreign income tax. For example, an item of foreign gross income that results from a deemed disposition of stock under a foreign law mark-to-market regime is assigned under the rules of this paragraph (d)(2)(ii)(C) as though a taxable disposition of the stock occurred under Federal income tax law for an amount equal to the fair market value determined under foreign law for purposes of marking the stock to market. See paragraph (g)(3) of this section (*Example 2*).

(iii) *Foreign gross income of a type that is recognized but excluded from U.S. gross income*—(A) *In general*. If a taxpayer recognizes an item of foreign gross income that is a type of recognized gross income that Federal income tax law excludes from U.S. gross income, then the item of foreign gross income is assigned to the grouping to which the item of gross income would be assigned if it were included in U.S. gross income. See paragraph (g)(4) of this section (*Example 3*). Notwithstanding the first sentence of this paragraph (d)(2)(iii)(A), foreign gross income that is attributable to a base difference is assigned under paragraph (d)(2)(iii)(B) of this section.

(B) *Base differences*. If a taxpayer recognizes an item of foreign gross income that is attributable to a base difference, then the item of foreign gross income is assigned to the residual grouping. But see §1.904-6(b)(1) (assigning foreign gross income attributable to a base difference to foreign source income in the separate category described in section 904(d)(2)(H)(i)) for purposes of applying section 904 as the operative section). An item of

foreign gross income is attributable to a base difference under this paragraph (d)(2)(iii)(B) only if the item results from the receipt of one of the following items:

(*1*) Death benefits described in section 101;

(*2*) Gifts and inheritances described in section 102;

(*3*) Contributions to capital described in section 118;

(*4*) Money or other property in exchange for stock described in section 1032 (including by reason of a transfer described in section 351(a)); or

(*5*) Money or other property in exchange for a partnership interest described in section 721.

(3) *Special rules for assigning certain items of foreign gross income to a statutory or residual grouping*—(i) *Items of foreign gross income that a taxpayer includes by reason of its ownership of an interest in a corporation*—(A) *Scope*. The rules of this paragraph (d)(3)(i) apply to characterize and assign to a statutory or residual grouping an item of foreign gross income that a taxpayer includes in foreign taxable income as a result of its ownership of an interest in a corporation with respect to which there is a distribution under both foreign and Federal income tax law or an inclusion of foreign law pass-through income.

(B) *Foreign gross income items arising from a distribution with respect to a corporation*—(*1*) *In general*. If there is a distribution by a corporation that is treated as a distribution of property for both foreign law and Federal income tax purposes, a taxpayer first applies the rules of paragraph (d)(3)(i)(B)(*2*) of this section, and then (if necessary) applies the rules of paragraph (d)(3)(i)(B)(*3*) of this section to characterize and assign to the statutory and residual groupings the items of foreign gross income that constitute the foreign dividend amount and the foreign capital gain amount, if any, that arise from the distribution. See paragraph (g)(5) of this section (*Example 4*). For purposes of this paragraph (d)(3)(i)(B), the U.S. dividend amount, U.S. capital gain amount, and U.S. return of capital amount that result from a distribution (including a distribution that occurs on the same date, but in different taxable years, for foreign law purposes and Federal income tax purposes) are computed on the date the distribution occurred for Federal income tax purposes. See paragraph (d)(2)(ii)(B) of this section for rules for assigning foreign gross income arising from any portion of a distribution that is a foreign law distribution. See §1.960-1(d)(3)(ii) for rules for assigning foreign gross income arising from a distribution described in this paragraph (d)(3)(i)(B) to income groups or PTEP groups for purposes of section 960 as the operative section.

(*2*) *Foreign dividend amounts*. The foreign dividend amount is, to the extent of the U.S. dividend amount, assigned to the same statutory and residual grouping (or ratably to the groupings) from which a distribution of the U.S. dividend amount is made under Federal income tax law. If the foreign dividend amount exceeds the U.S. dividend amount, the excess foreign dividend amount is an item of foreign gross income that is, to the extent of the U.S. return of capital amount, assigned to the same statutory and residual grouping (or ratably to the groupings) to which earnings equal to the U.S. return of capital amount would be assigned if they were recognized for Federal income tax purposes in the U.S. taxable year in which the distribution is made. These earnings are deemed to arise in the statutory and residual groupings in the same proportions as the proportions in which the tax book value of the stock of the distributing corporation is (or would be if the taxpayer were a United States person) assigned to the groupings under the asset method in §1.861-9 in the U.S. taxable year in which the distribution is made. Any additional excess of the foreign dividend amount over the sum of the U.S. dividend amount and the U.S. return of capital amount is an item of foreign gross income that is assigned to the statutory or residual grouping (or ratably to the groupings) to which the U.S. capital gain amount is assigned.

(*3*) *Foreign capital gain amounts*. The foreign capital gain amount is, to the extent of the U.S. capital gain amount, assigned to the statutory and residual groupings to which the U.S. capital gain amount is assigned under Federal income tax law. If the foreign capital gain amount exceeds the U.S. capital gain amount, the excess is, to the extent of the U.S. return of capital amount, assigned to the statutory and residual groupings to which earnings equal to the U.S. return of capital amount would be assigned if they were recognized in the U.S. taxable year in which the distribution is made. These earnings are deemed to arise in the statutory and residual groupings in the same proportions as the proportions in which the tax book value of the stock of the distributing corporation is (or would be if the taxpayer were a United States person) assigned under the asset method in §1.861-9 in the U.S. taxable year in which the distribution is made. Any excess of the foreign capital gain amount over the sum of the U.S. capital gain amount and the U.S. return of capital amount is assigned ratably to the statutory and residual groupings to which the U.S. dividend amount is assigned.

(C) *Foreign law pass-through income from a reverse hybrid*. An item of foreign law pass-through income that a taxpayer includes in its foreign taxable income as a result of its direct or indirect ownership of a reverse hybrid is assigned to a statutory or residual grouping by treating the taxpayer's items of foreign law pass-through income as the foreign gross income of the reverse hybrid, and applying the rules in this paragraph (d) by treating the reverse hybrid as the taxpayer in the reverse hybrid's U.S. taxable year with or within which its foreign taxable year (under the law of the foreign jurisdiction imposing the owner-level tax) ends. See §1.904-6(f) for special rules that apply for purposes of section 904 with respect to items of foreign gross income that under this paragraph (d)(3)(iii) would be assigned to a separate category that includes income that gives rise to inclusions under section 951A.

(ii) [Reserved]

(iii) *Foreign law inclusion regime income*. A gross item of foreign law inclusion regime income that a taxpayer includes in its capacity as a shareholder under foreign law of a foreign law CFC under a foreign law inclusion regime is assigned to the same statutory and residual groupings as the item of foreign gross income of the foreign law CFC that gives rise to the item of foreign law inclusion regime income of the taxpayer. The assignment is made by treating the gross items of foreign law inclusion regime income of the taxpayer as the items of foreign gross income of the

foreign law CFC and applying the rules in this paragraph (d) by treating the foreign law CFC as the taxpayer in its U.S. taxable year with or within which its foreign taxable year (under the law of the foreign jurisdiction imposing the shareholder-level tax) ends. See paragraphs (g)(7) and (8) of this section (*Examples 6* and *7*). See §1.904-6(f) for special rules with respect to items of foreign gross income relating to items of the foreign law CFC that give rise to inclusions under section 951A for purposes of applying section 904 as the operative section.

(iv) *Gain on sale of disregarded entity*. An item of foreign gross income arising from gain recognized on the sale, exchange, or other disposition of a disregarded entity that is characterized as a disposition of assets for Federal income tax purposes is assigned to statutory and residual groupings in the same proportion as the gain that would be treated as foreign gross income in each grouping if the transaction were treated as a disposition of assets for foreign tax law purposes. See paragraph (g)(9) of this section (*Example 8*).

(e) *Allocating and apportioning deductions (allowed under foreign law) to foreign gross income in a grouping*—(1) *Application of foreign law expense allocation rules*. In order to determine foreign taxable income in each statutory grouping, or the residual grouping, foreign gross income in each grouping is reduced by deducting any expenses, losses, or other amounts that are deductible under foreign law that are specifically allocable to the items of foreign gross income in the grouping under the laws of that foreign country. If expenses are not specifically allocated under foreign law, then the expenses are allocated and apportioned among the groupings under the principles of foreign law. Thus, for example, if foreign law provides that expenses will be apportioned on a gross income basis, the foreign law deductions are apportioned on the basis of the relative amounts of foreign gross income assigned to each grouping.

(2) *Application of U.S. expense allocation rules in the absence of foreign law rules*. If foreign law does not provide rules for the allocation or apportionment of expenses, losses or other deductions to particular items of foreign gross income, then the principles of the section 861 regulations (as defined in §1.861-8(a)(1)) apply in allocating and apportioning such expenses, losses, or other deductions to foreign gross income. For example, in the absence of foreign law expense allocation rules, the principles of the section 861 regulations apply to allocate definitely related expenses to particular categories of foreign gross income and provide the methods for apportioning foreign law expenses that are definitely related to more than one statutory grouping or that are not definitely related to any statutory grouping. For purposes of this paragraph (e)(2), the apportionment of expenses required to be made under the principles of the section 861 regulations need not be made on other than a separate company basis. If the taxpayer applies the principles of the section 861 regulations for purposes of allocating foreign law deductions under this paragraph (e), the taxpayer must apply the principles in the same manner as the taxpayer applies such principles in determining the income or earnings and profits for Federal income tax purposes of the taxpayer (or of the foreign branch, controlled foreign corporation, or other entity that paid or accrued the foreign taxes, as the case may be). For example, a taxpayer must use the modified gross income method under §1.861-9T when applying the principles of that section for purposes of this paragraph (e) to determine the amount of foreign taxable income in each grouping if the taxpayer applies the modified gross income method in determining the income and earnings and profits of a controlled foreign corporation for Federal income tax purposes.

(f) *Allocation and apportionment of foreign income tax*. Foreign income tax is allocated to the statutory or residual grouping or groupings to which the items of foreign gross income are assigned under the rules of paragraph (d) of this section. If foreign gross income is assigned to more than one grouping, then the foreign income tax is apportioned among the statutory and residual groupings by multiplying the foreign income tax by a fraction, the numerator of which is the foreign taxable income in a grouping and the denominator of which is all foreign taxable income on which the foreign income tax is imposed. If foreign law, including by reason of an income tax convention, exempts certain types of income from tax, or if foreign taxable income is reduced to or below zero by foreign law deductions, then no foreign income tax is allocated and apportioned to that income. A withholding tax (as defined in section 901(k)(1)(B)) is allocated and apportioned to the foreign gross income from which it is withheld. If foreign law, including by reason of an income tax convention, provides for a specific rate of tax with respect to certain types of income (for example, capital gains), or allows credits only against tax on particular items or types of income (for example, credit for foreign withholding taxes), then such provisions are taken into account in determining the amount of foreign tax imposed on such foreign taxable income.

(g) *Examples*. The following examples illustrate the application of this section and §1.904-6.

(1) *Presumed facts*. Except as otherwise provided in this paragraph (g), the following facts are assumed for purposes of the examples in paragraphs (g)(2) through (9) of this section:

(i) USP and US2 are domestic corporations, which are unrelated;

(ii) USP elects to claim a foreign tax credit under section 901;

(iii) CFC, CFC1, and CFC2 are controlled foreign corporations organized in Country A, and are not reverse hybrids;

(iv) All parties have a U.S. dollar functional currency and a U.S. taxable year and foreign taxable year that correspond to the calendar year;

(v) No party has expenses for Country A tax purposes or expenses for U.S. tax purposes (other than foreign income tax expense); and

(vi) Section 904 is the operative section, and terms have the meaning provided in this section or §§1.904-4 and 1.904-5.

(2) *Example 1: Corresponding U.S. item*—(i) *Facts*. USP conducts business in Country A that gives rise to a foreign branch (as defined in §1.904-4(f)(3)). In Year 1, in a transaction that is a sale for purposes of the laws of Country A and Federal income tax law, the foreign branch transfers Asset X to US2 for $1,000x. For Country A tax purposes, USP earns $600x of gross income from the sale of Asset X and incurs foreign income tax of $80x. For Federal income tax purposes, USP earns $800x of foreign branch category income from the sale of Asset X.

(ii) *Analysis*. For purposes of allocating and apportioning the $80x of Country A foreign income tax, the $600x of Country A gross income from the sale of Asset X is first assigned to separate categories. The $800x of foreign branch category income from the sale of Asset X is the corresponding U.S. item to the Country A item of gross income. Under paragraph (d)(1) of this section, because USP recognizes a corresponding U.S. item with respect to the Country A item of gross income in the same U.S. taxable year, the $600x of Country A gross income is assigned to the same separate category as the corresponding U.S. item. This is the case even though the amount of gross income recognized for Federal income tax purposes differs from the amount recognized for Country A tax purposes. Accordingly, the $600x of Country A gross income is assigned to the foreign branch category. Additionally, because all of the Country A taxable income is assigned to a single separate category, the $80x of Country A tax is also allocated to the foreign branch category. No apportionment of the $80x is necessary because the class of gross income to which the tax is allocated consists entirely of a single statutory grouping, foreign branch category income.

(3) *Example 2: Foreign law disposition*—(i) *Facts*. USP owns all of the outstanding stock of CFC, which conducts business in Country A. CFC sells Asset X for $1,000x. For Country A tax purposes, CFC's basis in Asset X is $600x, the sale of Asset X occurs in Year 1, and CFC recognizes $400x of foreign gross income and incurs $80x of foreign income tax. For Federal income tax purposes, CFC's basis in Asset X is $500x, the sale of Asset X occurs in Year 2, and CFC recognizes $500x of general category income.

(ii) *Analysis*. For purposes of allocating and apportioning the $80x of Country A foreign income tax in Year 1, the $400x of Country A gross income from the sale of Asset X is first assigned to separate categories. There is no corresponding U.S. item because the sale occurs on a different date and in a different U.S. taxable year for U.S. and foreign tax purposes. Under paragraph (d)(2)(ii)(C) of this section, the item of foreign gross income (the $400x from the sale of Asset X) is characterized and assigned to the groupings to which the corresponding U.S. item would be assigned if for Federal income tax purposes Asset X were sold for $1,000x in Year 1, the same U.S. taxable year in which the foreign income tax accrued. This is the case even though the amount of gross income that would be recognized for Federal income tax purposes differs from the amount recognized for Country A tax purposes. Accordingly, the $400x of Country A gross income is assigned to the general category. Additionally, because all of the Country A taxable income is assigned to a single separate category, the $80x of Country A tax is also allocated to the general category. No apportionment of the $80x is necessary because the class of gross income to which the deduction is allocated consists entirely of a single statutory grouping, general category income.

(4) *Example 3: Foreign gross income excluded from U.S. gross income*—(i) *Facts*. USP conducts business in Country A. In Year 1, USP earns $200x of interest income on a State or local bond. For Country A tax purposes, the $200x of income is included in gross income and incurs $10x of foreign income tax. For Federal income tax purposes, the $200x is excluded from gross income under section 103.

(ii) *Analysis*. For purposes of allocating and apportioning the $10x of Country A foreign income tax, the $200x of Country A gross income is first assigned to separate categories. There is no corresponding U.S. item because the interest income is excluded from U.S. gross income. Thus, the rules of paragraph (d)(2) of this section apply to characterize and assign the foreign gross income to the groupings to which a corresponding U.S. item would be assigned if it were recognized under Federal income tax law in that U.S. taxable year. The interest income is excluded from U.S. gross income but is otherwise described or identified by section 103. Accordingly, under paragraph (d)(2)(iii)(A) of this section, the $200x of Country A gross income is assigned to the separate category to which the interest income would be assigned under Federal income tax law if the income were included in gross income. Under section 904(d)(2)(B)(i), the interest income would be passive category income. Accordingly, the $200x of Country A gross income is assigned to the passive category. Additionally, because all of the Country A taxable income is assigned to a single separate category, the $10x of Country A tax is also allocated to the passive category (subject to the rules in §1.904-4(c)). No apportionment of the $10x is necessary because the class of gross income to which the deduction is allocated consists entirely of a single statutory grouping, passive category income.

(5) *Example 4: Actual distribution*—(1) *Facts*. USP owns all of the outstanding stock of CFC1, which in turn owns all of the outstanding stock of CFC2. CFC1 and CFC2 conduct business in Country A. In Year 1, CFC2 distributes $300x to CFC1. For Country A tax purposes, $100x of the distribution is the foreign dividend amount, $160x is treated as a nontaxable return of capital, and the remaining $40x is the foreign capital gain amount. CFC1 incurs $20x of foreign income tax with respect to the foreign dividend amount and $4x of foreign income tax with respect to the foreign capital gain amount. The $20x and $4x of foreign income tax are each a separate levy within the meaning of §1.901-2(d). For Federal income tax purposes, $150x of the distribution is the U.S. dividend amount, $100x is the U.S. return of capital amount, and the remaining $50x is the U.S. capital gain amount. Under section 904(d)(3)(D) and §§1.904-4(d) and 1.904-5(c)(4), the $150x of U.S. dividend amount consists solely of general category income in the hands of CFC1. Under section 904(d)(2)(B)(i) and §1.904-4(b)(2)(i)(A), the $50x of U.S. capital gain amount is passive category income to CFC1.

(ii) *Analysis*—(A) *In general*. Because the $20x of Country A foreign income tax and the $4x of Country A foreign income tax are separate levies, the taxes are allocated and apportioned separately. For purposes of allocating and apportioning each foreign income tax, the relevant item of Country A gross income (the foreign dividend amount or foreign capital gain amount) is first assigned to separate categories. The U.S. dividend amount and U.S. capital gain amount are corresponding U.S. items. However, paragraph (d)(3)(i)(B) of this section (and not paragraph (d)(1) of this section) applies to assign the items of foreign gross income arising from the distribution.

(B) *Foreign dividend amount*. Under paragraph (d)(3)(i)(B)(*2*) of this section, the foreign dividend amount ($100x) is, to the extent of the U.S. dividend amount ($150x), assigned to the same separate category from which the distribution of the U.S. dividend amount is made under Federal income tax law. Thus, $100x of foreign gross income that is the foreign dividend amount is assigned to the general category. Additionally, because all of the Country A taxable income included in the base on which the $20x of foreign income tax is imposed is assigned to a single separate category, the $20x of Country A tax on the foreign dividend amount is also allocated to the general category. No apportionment of the $20x is necessary because the class of gross income to which the deduction for foreign income tax is allocated consists entirely of a single statutory grouping, general category income. See also section 245A(d) for rules that may apply to disallow a credit or deduction for certain foreign taxes.

(C) *Foreign capital gain amount*. Under paragraph (d)(3)(i)(B)(*3*) of this section, the foreign capital gain amount ($40x) is, to the extent of the U.S. capital gain amount ($50x), assigned to the same separate category to which the U.S. capital gain is assigned under Federal income tax law. Thus, the $40x of foreign gross income that is the foreign capital gain amount is assigned to the passive category. Additionally, because all of the Country A taxable income in the base on which the $4x of foreign income tax is imposed is assigned to a single separate category, the $4x of Country A tax on the foreign dividend amount is also allocated to the passive category. No apportionment of the $4x is necessary because the class of gross income to which the deduction is allocated consists entirely of a single statutory grouping, passive category income.

(6) *Example 5: Foreign law distribution*—(i) *Facts*. USP owns all of the outstanding stock of CFC. In Year 1, for Country A tax purposes, CFC distributes $1,000x of its stock that is treated entirely as a dividend to USP, and Country A imposes a withholding tax on USP of $150x with respect to the $1,000x of foreign gross income. For Federal income tax purposes, the distribution is treated as a stock dividend described in section 305(a) and USP recognizes no U.S. gross income. At the time of the distribution, CFC has $800x of section 965(a) PTEP (as defined in §1.960-3(c)(2)(vi)) in a single annual PTEP account (as defined in §1.960-3(c)(1)), and $500x of earnings and profits described in section 959(c)(3). Section 965(g) is the operative section for purposes of this paragraph (g)(6). See §1.965-5(b)(2). Section 904 is also a relevant operative section, but is not addressed in this paragraph (g)(6).

(ii) *Analysis*. For purposes of allocating and apportioning the $150x of Country A foreign income tax, the $1,000x of Country A gross income is first assigned to the relevant statutory and residual groupings for purposes of applying section 965(g) as the operative section. Under §1.965-5(b)(2), the statutory grouping is the portion of the distribution that is attributable to section 965(a) previously taxed earnings and profits and the residual grouping is the portion of the distribution attributable to other

earnings and profits. There is no corresponding U.S. item because under section 305(a) USP recognizes no U.S. gross income with respect to the distribution. Under paragraph (d)(2)(ii)(B) of this section, the item of foreign gross income (the $1,000x distribution) is assigned under the rules of paragraph (d)(3)(i)(B) of this section to the same statutory or residual groupings to which the foreign gross income would be assigned if a distribution of the same amount were made for Federal income tax purposes in Year 1 on the date the distribution occurs for foreign law purposes. If recognized for Federal income tax purposes, a $1,000x distribution in Year 1 would result in a U.S. dividend amount of $1,000x. Under paragraph (d)(3)(i)(B)(*2*) of this section, the foreign dividend amount ($1,000x) is, to the extent of the U.S. dividend amount ($1,000x), assigned to the same statutory or residual groupings from which a distribution of the U.S. dividend amount would be made under Federal income tax law. Thus, $800x of foreign gross income related to the foreign dividend amount is assigned to the statutory grouping for the portion of the distribution attributable to section 965(a) previously taxed earnings and profits and $200x of foreign gross income is assigned to the residual grouping. Under paragraph (f) of this section, $120x ($150x x $800x / $1,000x) of the Country A foreign income tax is apportioned to the statutory grouping and $30x ($150x x $200x / $1,000x) of the Country A foreign income tax is apportioned to the residual grouping. See section 965(g)(2) and §1.965-5(b) for application of the applicable percentage (as defined in §1.965-5(d)) to the foreign income tax allocated and apportioned to the statutory grouping.

(7) *Example 6: Foreign law inclusion regime, CFC shareholder*—(i) *Facts*. USP owns all of the outstanding stock of CFC1, which in turn owns all of the outstanding stock of CFC2. CFC2 is organized and conducts business in Country B. Country A has a foreign law inclusion regime that imposes a tax on CFC1 for certain earnings of CFC2, a foreign law CFC. In Year 1, CFC2 earns $400x of interest income and $200x of royalty income. CFC2 incurs no foreign income tax. For Country A tax purposes, the $400x of interest income and $200x of royalty income are each an item of foreign law inclusion regime income of CFC2 that are included in the gross income of CFC1. CFC1 incurs $150x of Country A foreign income tax with respect to the foreign law inclusion regime income. For Federal income tax purposes, with respect to CFC2, the $400x of interest income is passive category income under section 904(d)(2)(B)(i) and the $200x of royalty income is general category income under §1.904-4(b)(2)(iii).

(ii) *Analysis*. For purposes of allocating and apportioning CFC1's $150x of Country A foreign income tax, the $600x of Country A gross income is first assigned to separate categories. The $600x of foreign gross income is not included in the U.S. gross income of CFC1, and thus, there is no corresponding U.S. item. Under paragraph (d)(3)(iii) of this section, each item of foreign law inclusion regime income that is included in CFC1's foreign gross income is assigned to the same separate category as the items of foreign gross income of CFC2 that give rise to the foreign law inclusion regime income of CFC1. With respect to CFC2, the $400x of interest income and the $200x of royalty income would be corresponding U.S. items if CFC2 were the taxpayer. Accordingly, $400x of CFC1's foreign gross income is assigned to the passive category and $200x of CFC1's foreign gross income is assigned to the general category. Under paragraph (f) of this section, $100x ($150x x $400x / $600x) of the Country A foreign income tax is apportioned to the passive category and $50x ($150x x $200x / $600x) of the Country A foreign income tax is apportioned to the general category.

(8) *Example 7: Foreign law inclusion regime, U.S. shareholder*—(i) *Facts*. The facts are the same as in paragraph (g)(7)(i) of this section (the facts in *Example 6*), except that both CFC1 and CFC2 are organized and conduct business in Country B, all of the outstanding stock of CFC1 is owned by Individual X, a U.S. citizen resident in Country A, and Country A imposes tax of $150x on foreign gross income of $600x under its foreign law inclusion regime on Individual X, rather than on CFC1. For Federal income tax purposes, in the hands of CFC2, the $400x of interest income is passive category subpart F income and the $200x of royalty income is general category tested income (as defined in §1.951A-2(b)(1)). CFC2's $400x of interest income gives rise to a passive category subpart F inclusion under section 951(a)(1)(A), and its $200x of tested income gives rise to a GILTI inclusion amount (as defined in §1.951A-1(c)(1)) of $200x, with respect to Individual X.

(ii) *Analysis*. The analysis is the same as in paragraph (g)(7)(ii) of this section (the analysis in *Example 6*) except that under §1.904-6(f), because $50x of the Country A foreign income tax is allocated and apportioned under paragraph (d)(3)(iii) of this section to CFC2's general category tested income group to which Individual X's inclusion under section 951A is attributable, the $50x of Country A foreign income tax is allocated and apportioned in the hands of Individual X to the section 951A category.

(9) *Example 8: Sale of disregarded entity*—(i) *Facts*. USP sells FDE, a disregarded entity that is organized and operates a trade or business in Country A, for $500x. FDE owns Asset X and Asset Y in Country A, each having a fair market value of $250x. For Country A tax purposes, FDE has a basis in Asset X of $100x and a basis in Asset Y of $200x, USP's basis in FDE is $100x, and the sale is treated as a sale of stock. Country A imposes foreign income tax of $40x on USP on the Country A gross income of $400x resulting from the sale of FDE, based on its rules for taxing capital gains of nonresidents selling stock of companies operating a trade or business in Country A. For Federal income tax purposes, USP has a basis of $150x in each of Assets X and Y, and so the sale of FDE results in $100x of passive category income with respect to the sale of Asset X and $100x of general category income with respect to the sale of Asset Y.

(ii) *Analysis*. For purposes of allocating and apportioning USP's $40x of Country A foreign income tax, the $400x of Country A gross income resulting from the sale of FDE is first assigned to separate categories. Under paragraph (d)(3)(iv) of this section, USP's $400x of Country A gross income is assigned among the statutory groupings in the same percentages as the foreign gross income in each grouping that would have resulted if the sale of FDE were treated as an asset sale for Country A tax purposes. Because for Country A tax purposes Asset X had a built-in gain of $150x and Asset Y had a built-in gain of $50x, $300x ($400x x $150x / $200x) of the Country A gross income is assigned to the passive category and $100x ($400x x $50x / $200x) is assigned to the general category. Under paragraph (f) of this section, $30x ($40x x $300x / $400x) of the Country A foreign income tax is apportioned to the passive category, and $10x ($40x x $100x / $400x) of the Country A foreign income tax is apportioned to the general category.

(h) [Reserved]

(i) *Applicability date*. This section applies to taxable years beginning after December 31, 2019.

Par. 15. Section 1.881-3 is amended by:

1. Adding two sentences at the end of paragraph (a)(1).

2. Revising paragraph (a)(2)(i)(C).

3. In paragraph (a)(2)(ii)(B)(*1*) introductory text, removing "one of the following" and adding "one or more of the following" in its place.

4. In paragraph (a)(2)(ii)(B)(*1*)(*ii*), removing the word "or" at the end of the paragraph.

5. In paragraph (a)(2)(ii)(B)(*1*)(*iii*), removing the period at the end and adding "; or" in its place.

6. Adding paragraph (a)(2)(ii)(B)(*1*)(*iv*) and reserved paragraph (a)(2)(ii)(B)(*1*)(*v*).

7. In paragraph (c)(2)(ii), adding "(as in effect for taxable years beginning before January 1, 2018)" at the end of the last sentence.

8. Adding reserved paragraph (d)(1)(iii).

9. Adding a sentence at the end of paragraph (e) introductory text.

10. In paragraph (e), designating Examples 1 through 26 as paragraphs (e)(1) through (26), respectively.

11. Redesignating newly designated paragraphs (e)(4) through (26) as paragraphs (e)(5) through (27), respectively.

12. Adding new paragraph (e)(4).

13. For each paragraph listed in the table, remove the language in the ''Remove'' column and add in its place the language in the ''Add'' column:

Paragraph	Remove	Add
(a)(2)(i)(A)	*Examples 1, 2, 3* and *4* of paragraph (e) of this section	paragraphs (e)(1) through (5) of this section (*Examples 1* through *5*)
(a)(2)(i)(B)	*Examples 5* and *6* of paragraph (e) of this section	paragraphs (e)(6) and (7) of this section (*Examples 6* and *7*)
(a)(3)(ii)(E)(*2*)(*ii*)	*Example 7* of paragraph (e) of this section	paragraph (e)(8) of this section (*Example 8*)
(a)(4)(ii)(B)	*Examples 8* and *9* of paragraph (e) of this section	paragraphs (e)(9) and (10) of this section (*Examples 9* and *10*)
(b)(1)	*Examples 12* and *13* of paragraph (e) of this section	paragraphs (e)(13) and (14) of this section (*Examples 13* and *14*)
(b)(2)(i)	*Examples 14, 15* and *16* of paragraph (e) of this section	paragraphs (e)(15) through (17) of this section (*Examples 15* through *17*)
(b)(2)(iii)	*Example 17* of paragraph (e) of this section	paragraph (e)(18) of this section (*Example 18*)
(b)(2)(iv)	*Example 18* of paragraph (e) of this section	paragraph (e)(19) of this section (*Example 19*)
(b)(3)(i)	*Examples 22, 23* and *24* of paragraph (e) of this section	paragraphs (e)(23) through (25) of this section (*Examples 23* through *25*)
(d)(1)(i)	*Example 25* of paragraph (e) of this section	paragraph (e)(26) of this section (*Example 26*)
(d)(1)(ii)(A)	*Example 26* of paragraph (e)	paragraph (e)(27) of this section (*Example 27*)
newly designated paragraph (e)(3)	*Example 2*	paragraph (e)(2) of this section (the facts in *Example 2*)
newly designated paragraph (e)(3)	§301.7701-3	§301.7701-3 of this chapter
newly designated paragraph (e)(8)(ii)	(a)(4)(i)	(a)(4)(i) of this section
newly designated paragraph (e)(22)(i)	*Example 20*	paragraph (e)(21) of this section (the facts in *Example 21*)
newly designated paragraph (e)(22)(ii)	*Example 19*	paragraph (e)(20) of this section (*Example 20*)
newly designated paragraph (e)(22)(ii)	paragraph (i) of this *Example 21*	paragraph (e)(22)(i) of this section (this *Example 22*)
newly designated paragraph (e)(24)(i)	Example 22	paragraph (e)(23) of this section (the facts in *Example 23*)
newly designated paragraph (e)(25)(i)	*Example 22*	paragraph (e)(23) of this section (the facts in *Example 23*)
(f)	Paragraph (a)(2)(i)(C) and *Example 3* of paragraph (e) of this section	Paragraphs (a)(2)(i)(C) and (e)(3) (*Example 3*) of this section

14. In paragraph (f), revising the heading and adding a sentence at the end of the paragraph.

The additions and revisions read as follows:

§1.881-3 Conduit financing arrangements.

(a) * * *

(1) * * * See §1.1471-3(e)(5) for withholding rules applicable to conduit financing arrangements for purposes of sections 1471 and 1472. See also §§1.267A-1 and 1.267A-4 (disallowing a deduction for certain interest or royalty payments to the extent the income attributable to the payment is offset by a hybrid deduction).

(2) * * *

(i) * * *

(C) *Treatment of disregarded entities*. For purposes of this section, the term *person* includes a business entity that is disregarded as an entity separate from its single member owner under §§301.7701-1 through 301.7701-3 of this chapter and, therefore, such entity may, for example, be treated as a party to a financing transaction with its owner. See paragraph (e)(3) of this section (*Example 3*).

(ii) * * *

(B) * * *

(*1*) * * *

(*iv*) The stock or similar interest is treated as debt under the tax law of the issuer's country of residence or, if the issuer is not a tax resident of any country, such as a partnership, the tax law of the country in which the issuer is created, organized, or otherwise established.

* * * * *

(e) * * * For purposes of the examples in this paragraph (e), unless otherwise indicated, it is assumed that no stock is of the type described in paragraph (a)(2)(ii)(B)(*1*)(*iv*) of this section.

* * * * *

(4) *Example 4. Hybrid instrument as financing arrangement*. The facts are the same as in paragraph (e)(2) of this section (the facts in *Example 2*), except that FP assigns the DS note to FS in exchange for stock issued by FS. The stock issued by FS is in form convertible debt with a 49-year term that is treated as debt under the tax law of Country T. The FS stock is not subject to any of the redemption, acquisition, or payment rights or requirements specified in paragraphs (a)(2)(ii)(B)(*1*)(*i*) through (*iii*) of this section. However, because the FS stock is treated as debt under the tax law of Country T, the FS stock is a financing transaction under paragraph (a)(2)(ii)(B)(*1*)(*iv*) of this section. Therefore, the DS note held by FS and the FS stock held by FP are financing transactions within the meaning of paragraphs (a)(2)(ii)(A)(*1*) and (*2*) of this section, respectively, and together constitute a financing arrangement within the meaning of paragraph (a)(2)(i) of this section. See also §1.267A-4 for rules applicable to disqualified imported mismatch amounts.

* * * * *

(f) *Applicability date*. * * * Paragraph (a)(2)(ii)(B)(*1*)(*iv*) of this section applies to payments made on or after November 12, 2020.

Par. 16. Section 1.904-1 is amended by revising the section heading and paragraph (a) as follows:

§1.904-1 Limitation on credit for foreign income taxes.

(a) *In general*. For each separate category described in § 1.904-5(a)(4)(v), the total credit for foreign income taxes (as defined in §1.901-2(a)) paid or accrued (including those deemed to have been paid or accrued other than by reason of section 904(c)) to any foreign country (as defined in §1.901-2(g)) does not exceed that proportion of the tax against which such credit is taken which the taxpayer's taxable income from foreign sources (but not in excess of the taxpayer's entire taxable income) in such separate category bears to the taxpayer's entire taxable income for the same taxable year.

* * * * *

Par. 17. Section 1.904-4 is amended by:

1. Revising paragraph (c)(7)(i), the third and fourth sentences of paragraph (c)(7)(ii), and paragraph (c)(7)(iii).

2. Adding paragraphs (c)(8)(v) through (viii).

3. In paragraph (o), removing the language "§1.904-6(b)" and adding the language "1.904-6(e)" in its place.

4. Revising paragraph (q).

The revisions and additions read as follows:

§1.904-4 Separate application of section 904 with respect to certain categories of income.

* * * * *

(c) * * *

(7) * * *

(i) *In general*. If the effective rate of tax imposed by a foreign country on income of a foreign corporation that is included in a taxpayer's gross income is reduced under foreign law on distribution of such income, the rules of this paragraph (c) apply at the time that the income is included in the taxpayer's gross income, without regard to the possibility of a subsequent reduction of foreign tax on the distribution. If the inclusion is considered to be high-taxed income, then the taxpayer must initially treat the inclusion as general category income, section 951A category income, or income in a specified separate category as provided in paragraph (c)(1) of this section. When the foreign corporation distributes the earnings and profits to which the inclusion was attributable and the foreign tax on the inclusion is reduced, then if a redetermination of U.S. tax liability is required under §1.905-3(b)(2), the taxpayer must redetermine whether the revised inclusion (if any) is considered to be high-taxed income. See §1.905-3(b)(2)(ii) (requiring a redetermination of the amount of the inclusion, the application of the high-tax exception under section 954(b)(4), and the amount of foreign taxes deemed paid). If, taking into account the reduction in foreign tax, the inclusion is not considered high-taxed income, then the taxpayer, in redetermining its U.S. tax liability for the year or years affected, must treat the inclusion and the associated taxes (as reduced on the distribution) as passive category income and taxes. For purposes of this paragraph (c), the foreign tax on an inclusion under section 951(a)(1) or 951A(a) is considered reduced on distribution of the earnings and profits associated with the inclusion if the total taxes paid and deemed paid on the inclusion and the distribution (taking into account any reductions in tax and any withholding taxes) is less than the total taxes deemed paid in the year of inclusion. Therefore, any foreign currency gain associated with the earnings and profits that are distributed with respect to the inclusion is not taken into account in determining whether there is a reduction of tax requiring a redetermination of whether the inclusion is high-taxed income.

(ii) * * * If, however, foreign law does not attribute a reduction in taxes to a particular year or years, then the reduction in taxes shall be attributable, on an annual last in-first out (LIFO) basis, to foreign taxes potentially subject to reduction that are associated with previously taxed income, then on a LIFO basis to foreign taxes associated with income that under paragraph (c)(7)(iii) of this section remains as passive income but that was excluded from subpart F income or tested income under section 954(b)(4) or section 951A(c)(2)(A)(i)(III), and finally on a LIFO basis to foreign taxes associated with other earnings and profits. Furthermore, in applying the ordering rules of section 959(c), distributions shall be considered made on a LIFO basis first out of earnings described in section 959(c)(1) and (2), then on a LIFO basis out of earnings and profits associated with income that remains passive income under paragraph (c)(7)(iii) of this section but that was excluded from subpart F income or tested income under section 954(b)(4) or section 951A(c)(2)(A)(i)(III), and finally on a LIFO basis out of other earnings and profits. * * *

(iii) *Treatment of income excluded under section 954(b)(4) or section 951A(c)(2)(A)(i)(III)*. If the effective rate of tax imposed by a foreign country on income of a foreign corporation is reduced under foreign law on distribution of that income,

the rules of section 954(b)(4) (including for purposes of determining tested income under section 951A(c)(2)(A)(i)(III)) are applied in the year of inclusion without regard to the possibility of a subsequent reduction of foreign tax. See §§1.954-1(d)(3)(iii) and 1.951A-2(c)(6)(iv). If a taxpayer excludes passive income from a controlled foreign corporation's foreign personal holding company income or tested income under section 954(b)(4) or section 951A(c)(2)(A)(i)(III), then, notwithstanding the general rule of §1.904-5(d)(2), the income is considered to be passive category income until distribution of that income. At that time, if after the redetermination of U.S. tax liability required under §1.905-3(b)(2) the taxpayer still elects to exclude the passive income under section 954(b)(4) or section 951A(c)(2)(A)(i)(III), the rules of this paragraph (c)(7)(iii) apply to determine whether the income is high-taxed income upon distribution and, therefore, income in another separate category. For purposes of determining whether a reduction in tax is attributable to taxes on income excluded under section 954(b)(4) or section 951A(c)(2)(A)(i)(III), the rules of paragraph (c)(7)(ii) of this section apply. The rules of paragraph (c)(7)(ii) of this section also apply for purposes of ordering distributions to determine whether such distributions are out of earnings and profits associated with such excluded income. For an example illustrating the operation of this paragraph (c)(7)(iii), see paragraph (c)(8)(vi) of this section (*Example 6*).

(8) * * *

(v) *Example 5*. CFC, a controlled foreign corporation, is a wholly-owned subsidiary of USP, a domestic corporation. USP and CFC are calendar year taxpayers. In Year 1, CFC's only earnings consist of $200x of pre-tax passive income that is foreign personal holding company income that is earned in foreign Country X. Under Country X's tax system, the corporate tax on particular earnings is reduced on distribution of those earnings and no withholding tax is imposed. In Year 1, CFC pays $100x of foreign tax with respect to its passive income. USP does not elect to exclude this income from subpart F under section 954(b)(4) and includes $200x in gross income ($100x of net foreign personal holding company income and $100x of the amount under section 78 (the "section 78 dividend")). At the time of the inclusion, the income is considered to be high-taxed income under paragraphs (c)(1) and (c)(6)(i) of this section and is general category income to USP ($100x > $42x (21% x $200x)). CFC does not distribute any of its earnings in Year 1. In Year 2, CFC has no additional earnings. On December 31, Year 2, CFC distributes the $100x of earnings from Year 1. At that time, CFC receives a $60x refund from Country X attributable to the reduction of the Country X corporate tax imposed on the Year 1 earnings. The refund is a foreign tax redetermination under §1.905-3(a) that under §§1.905-3(b)(2) and 1.954-1(d)(3)(iii) requires a redetermination of CFC's Year 1 subpart F income and the application of section 954(b)(4), as well as a redetermination of USP's Year 1 inclusion under section 951(a)(1), its deemed paid taxes under section 960(a), and its Year 1 U.S. tax liability. As recomputed taking into account the $60x refund, CFC's Year 1 passive category net foreign personal holding company income is increased by $60x to $160x, CFC's foreign income taxes attributable to that income are reduced from $100x to $40x, and the income still qualifies to be excluded from CFC's subpart F income under section 954(b)(4) ($40x > $37.80x (90% x 21% x $200x)). Assuming USP does not change its Year 1 election, USP's Year 1 inclusion under section 951(a)(1) is increased by $60x to $160x, and the associated deemed paid tax and section 78 dividend are reduced by $60x to $40x. Under paragraph (c)(7)(i) of this section, in connection with the adjustments required under section 905(c), USP must redetermine whether the adjusted Year 1 inclusion is high-taxed income of USP. Taking into account the $60x refund, the inclusion is not considered high-taxed income of USP ($40x < $42x (21% x $200x)). Therefore, USP must treat the $200x of income ($160x inclusion plus $40x section 78 amount) and the $40x of taxes associated with the inclusion in Year 1 as passive category income and taxes. USP must also follow the appropriate procedures under §1.905-4.

(vi) *Example 6*. The facts are the same as in paragraph (c)(8)(v) of this section (the facts in *Example 5*), except that in Year 1, USP elects to apply section 954(b)(4) to exclude CFC's passive income from its subpart F income, both before and after the recomputation of CFC's Year 1 subpart F income and USP's Year 1 U.S. tax liability that is required by reason of the Year 2 $60x foreign tax redetermination. Although the income is not considered to be subpart F income, under paragraph (c)(7)(iii) of this section it remains passive category income until distribution. In Year 2, the $100x distribution is a dividend to USP, because CFC has $160x of accumulated earnings and profits described in section 959(c)(3) (the $100x of earnings in Year 1 increased by the $60x refund received in Year 2 that under §1.905-3(b)(2) is taken into account in Year 1). Under paragraph (c)(7)(iii) of this section, USP must determine whether the dividend income is high-taxed income to USP in Year 2. The treatment of the dividend as passive category income may be relevant in determining deductions allocable or apportioned to such dividend income or related stock that are excluded in the computation of USP's foreign tax credit limitation under section 904(a) in Year 2. See section 904(b)(4). Under paragraph (c)(1) of this section, the dividend income is passive category income to USP because the foreign taxes paid and deemed paid by USP ($0x) with respect to the dividend income do not exceed the highest U.S. tax rate on that income.

(vii) *Example 7*. The facts are the same as in paragraph (c)(8)(v) of this section (the facts in *Example 5*), except that the distribution in Year 2 is subject to a withholding tax of $25x. Under paragraph (c)(7)(i) of this section, USP must redetermine whether its Year 1 inclusion should be considered high-taxed income of USP because there is a net $35x reduction ($60x refund of foreign corporate tax – $25x withholding tax) of foreign tax. By taking into account both the reduction in foreign corporate tax and the additional withholding tax, the inclusion continues to be considered high-taxed income of USP in Year 1 ($65x > $42x (21% x $200)). USP must follow the appropriate section 905(c) procedures. USP must redetermine its U.S. tax liability for Year 1, but the Year 1 inclusion and the $65x taxes ($40x of deemed paid tax in Year 1 and $25x withholding tax in Year 2) will continue to be treated as general category income and taxes.

(viii) *Example 8*. (A) CFC, a controlled foreign corporation operating in Country G, is a wholly-owned subsidiary of USP, a domestic corporation. USP and CFC are calendar year taxpayers. Country G imposes a tax of 50% on CFC's earnings. Under Country G's system, the foreign corporate tax on particular earnings is reduced on distribution of those earnings to 30% and no withholding tax is imposed. Under Country G's law, distributions are treated as made out of a pool of undistributed earnings subject to the 50% tax rate. For Year 1, CFC's only earnings consist of passive income that is foreign personal holding company income that is earned in foreign Country G. CFC has taxable income of $110x for Federal income tax purposes and $100x for Country G purposes. Country G, therefore, imposes a tax of $50x on the Year 1 earnings of CFC. USP does not elect to exclude this income from subpart F under section 954(b)(4) and includes $110x in gross income ($60x of net foreign personal holding company income under section 951(a) and $50x of the section 78 dividend). The highest rate of tax under section 11 in Year 1 is 34%. Therefore, at the time of the section 951(a) inclusion, the income is considered to be high-taxed income under paragraph (c) of this section ($50x > $37.4x (34% x $110x)) and is general category income to USP. CFC does not distribute any of its earnings in Year 1.

(B) In Year 2, CFC earns general category income that is not subpart F income or tested income. CFC again has $110x in taxable income for Federal income tax purposes and $100x in taxable income for Country G purposes, and CFC pays $50x of tax to foreign Country G. In Year 3, CFC has no taxable income or earnings. On December 31, Year 3, CFC distributes $60x of its total $120x of earnings and receives a refund of foreign tax of $24x. The $24x refund is a foreign tax redetermination under §1.905-3(a) that under §1.905-3(b)(2) requires a redetermination of CFC's Year 1 subpart F income and USP's deemed paid taxes and Year 1 U.S. tax liability. Country G treats the distribution of earnings as out of the 50% tax rate pool of $200x of earnings accumulated in Year 1 and Year 2, as calculated for Country G tax purposes. However, under paragraph (c)(7)(ii) of this section, the distribution, and, therefore, the reduction of tax is treated as first attributable to the $60x of passive category earnings attributable to income previously taxed in Year 1, and none of the distribution is treated as made out of the $60x of earnings accumulated in Year 2 (which is not previously taxed). Because 40 percent (the reduction in tax rates from 50 percent to 30 percent is a 40 percent reduction in the tax) of the $50x of foreign taxes attributable to the $60x of Year 1 passive in-

come as calculated for Federal income tax purposes is refunded, $20x of the $24x foreign tax refund reduces foreign taxes on CFC's Year 1 passive income from $50x to $30x. The other $4x of the tax refund reduces the taxes imposed in Year 2 on CFC's general category income from $50x to $46x.

(C) Under paragraph (c)(7) of this section, in connection with the section 905(c) adjustment USP must redetermine whether its Year 1 subpart F inclusion is considered high-taxed income. By taking into account the reduction in foreign tax, the inclusion is increased by $20x to $80x, the deemed paid taxes are reduced by $20x to $30x, and the inclusion is not considered high-taxed income ($30x < 34% x $110x). Therefore, USP must treat the revised section 951(a) inclusion and the taxes associated with the section 951(a) inclusion as passive category income and taxes in Year 1. USP must follow the appropriate procedures under §1.905-4.

* * * * *

(q) *Applicability date*. (1) Except as provided in paragraph (q)(2) and (3) of this section, this section applies for taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

(2) Paragraphs (c)(7)(i) and (iii) and (c)(8)(v) through (viii) apply to taxable years ending on or after December 16, 2019. For taxable years that both begin after December 31, 2017, and end on or after December 4, 2018, and also end before December 16, 2019, see §1.904-4(c)(7)(i) and (iii) as in effect on December 17, 2019.

Par. 18. Section 1.904-6 is amended by:

1. Revising the section heading and paragraph (a).

2. Redesignating paragraph (b) as paragraph (e).

3. Adding a new paragraph (b) and paragraph (c).

4. Revising paragraph (d).

5. In newly redesignated paragraph (e)(4)(i), removing the language "paragraph (b)(4)(ii)" and adding the language "paragraph (e)(4)(ii)" in its place.

6. In newly redesignated paragraph (e)(4)(ii)(C), removing the language "paragraph (b)(4)(ii)(B)" and adding the language "paragraph (e)(4)(ii)(B)" in its place.

7. Adding paragraphs (f) and (g).

The revisions and additions read as follows:

§1.904-6 Allocation and apportionment of foreign income taxes.

(a) *In general*. The amount of foreign income taxes paid or accrued with respect to a separate category (as defined in §1.904-5(a)(4)(v)) of income (including U.S. source income assigned to the separate category) includes only those foreign income taxes that are allocated and apportioned to the separate category under the rules of §1.861-20 (as modified by this section). In applying the foreign tax credit limitation under sections 904(a) and (d) to general category income described in section 904(d)(2)(A)(ii) and §1.904-4(d), foreign source income in the general category is a statutory grouping. However, general category income is the residual grouping of income for purposes of assigning foreign income taxes to separate categories. In addition, in determining the numerator of the foreign tax credit limitation under sections 904(a) and (d), where U.S. source income is the residual grouping, the amount of foreign income taxes paid or accrued for which a deduction is allowed, for example, under section 901(k)(7), with respect to foreign source income in a separate category includes only those foreign income taxes that are allocated and apportioned to foreign source income in the separate category under the rules of §1.861-20 (as modified by this section). For purposes of this section, unless otherwise stated, terms have the same meaning as provided in §1.861-20(b). For examples illustrating the application of this section, see §1.861-20(g).

(b) *Assigning an item of foreign gross income to a separate category*. For purposes of assigning an item of foreign gross income to a separate category or categories (or foreign source income in a separate category) under §1.861-20, the rules of this paragraph (b) apply.

(1) *Base differences*. Any item of foreign gross income that is attributable to a base difference described in §1.861-20(d)(2)(ii)(B) is assigned to the separate category described in section 904(d)(2)(H)(i), and to foreign source income in that category.

(2) [Reserved]

(c) *Allocating and apportioning deductions*. For purposes of applying §1.861-20(e) to allocate and apportion deductions allowed under foreign law to foreign gross income in the separate categories, before undertaking the steps outlined in §1.861-20(e), foreign gross income in the passive category is first reduced by any related person interest expense that is allocated to the income under the principles of section 954(b)(5) and §1.904-5(c)(2)(ii)(C). In allocating and apportioning expenses not specifically allocated under foreign law, the principles of foreign law are applied only after taking into account the reduction of passive income by the application of section 954(b)(5). In allocating and apportioning expenses when foreign law does not provide rules for the allocation or apportionment of expenses, losses or other deductions to particular items of foreign gross income, then the principles of section 954(b)(5), in addition to the principles of the section 861 regulations (as defined in §1.861-8(a)(1)), apply to allocate and apportion expenses, losses or other foreign law deductions to foreign gross income after reduction of passive income by the amount of related person interest expense allocated to passive income under section 954(b)(5) and §1.904-5(c)(2)(ii)(C).

(d) *Apportionment of taxes for purposes of applying the high-tax income tests*. If taxes have been allocated and apportioned to passive income under the rules of paragraph (a) this section, the taxes must further be apportioned to the groups of income described in §1.904-4(c)(3) through (5) for purposes of determining if the group is high-taxed income that is recharacterized as income in another separate category under the rules of §1.904-4(c). See also §1.954-1(c)(1)(iii)(B) (defining a single item of passive category foreign personal holding company income by reference to the grouping rules under §1.904-4(c)(3) through (5)). Taxes are related to income in a particular group under the same rules as those in paragraph (a) of this section except that those rules are applied by apportioning foreign income taxes to the groups described in §1.904-4(c)(3) through (5) instead of separate categories.

* * * * *

(f) *Treatment of certain foreign income taxes paid or accrued by United States shareholders*. Some or all of the foreign gross income of a United States shareholder of a controlled foreign corporation that is attributable to foreign law inclusion regime income with respect to a foreign law CFC described in §1.861-20(d)(3)(iii) or foreign law pass-through income from a reverse hybrid described in §1.861-20(d)(3)(i)(C) is assigned to the section 951A category if, were the controlled foreign

corporation the taxpayer that recognizes the foreign gross income, the foreign gross income would be assigned to the controlled foreign corporation's tested income group (as defined in §1.960-1(b)(33)) within the general category to which an inclusion under section 951A is attributable. The amount of the United States shareholder's foreign gross income that is assigned to the section 951A category (or a specified separate category associated with the section 951A category) is based on the inclusion percentage (as defined in §1.960-2(c)(2)) of the United States shareholder. For example, if a United States shareholder has an inclusion percentage of 60 percent, then 60 percent of the foreign gross income of a United States shareholder that would be assigned (under §1.861-20(d)(3)(iii)) to the tested income group within the general category income of a reverse hybrid that is a controlled foreign corporation to which an inclusion under section 951A is attributable is assigned to the section 951A category or the specified separate category for income resourced under a tax treaty, and not to the general category.

(g) *Applicability date*. This section applies to taxable years beginning after December 31, 2019. For taxable years that both begin after December 31, 2017, and end on or after December 4, 2018, and also begin before January 1, 2020, see §1.904-6 as in effect on December 17, 2019.

Par. 19. Section 1.904(b)-3 is amended by revising the first sentence in paragraph (c)(1), adding paragraph (d)(2), and revising paragraph (f) to read as follows:

§1.904(b)-3 Disregard of certain dividends and deductions under section 904(b)(4).

* * * * *

(c) * * *

(1) * * * For purposes of applying the section 861 regulations (as defined in §1.861-8(a)) to the deductions of a United States shareholder, the only gross income included in a section 245A subgroup is dividend income for which a deduction is allowed under section 245A. * * *

* * * * *

(d) * * *

(2) *Net operating losses*. If the taxpayer has a net operating loss in the current taxable year, then solely for purposes of determining the source and separate category of the net operating loss, the overall foreign loss rules in section 904(f) and the overall domestic loss rules in section 904(g) are applied without taking into account the adjustments required under section 904(b) and this section.

* * * * *

(f) *Applicability dates*. (1) Except as provided in paragraph (f)(2) of this section, this section applies to taxable years beginning after December 31, 2017.

(2) Paragraph (d)(2) of this section applies to taxable years ending on or after December 16, 2019.

Par. 20. Section 1.904(g)-3 is amended by:

1. Adding a sentence at the end of paragraph (b)(1) and adding paragraph (j).

2. Revising paragraph (l).

The additions and revision read as follows:

§1.904(g)-3 Ordering rules for the allocation of net operating losses, net capital losses, U.S. source losses, and separate limitation losses, and for the recapture of separate limitation losses, overall foreign losses, and overall domestic losses.

* * * * *

(b) * * *

(1) * * * See §§1.861-8(e)(8), 1.904(b)-3(d)(2), and 1.1502-4(c)(1)(iii) for rules to determine the source and separate category components of a net operating loss.

* * * * *

(j) *Step Nine: Dispositions that result in additional income recognition under the branch loss recapture and dual consolidated loss recapture rules*—(1) *In general*. If, after any gain is required to be recognized under section 904(f)(3) on a transaction that is otherwise a nonrecognition transaction, an additional amount of income is recognized under section 91(d), section 367(a)(3)(C) (as applicable to losses incurred before January 1, 2018), or §1.1503(d)-6, and that additional income amount is determined by taking into account an offset for the amount of gain recognized under section 904(f)(3) and so is not initially taken into account in applying paragraph (b) of this section, then paragraphs (b) through (h) of this section are applied to determine the allocation of any additional net operating loss deduction and other deductions or losses and the applicable increases in the taxpayer's overall foreign loss, separate limitation loss, and overall domestic loss accounts, as well as any additional recapture and reduction of the taxpayer's separate limitation loss, overall foreign loss, and overall domestic loss accounts.

(2) *Rules for additional recapture of loss accounts*. For the purpose of recapturing and reducing loss accounts under paragraph (j)(1) of this section, the taxpayer also takes into account any creation of or addition to loss accounts that result from the application of paragraphs (b) through (i) of this section in the current tax year. If any of the additional income described in paragraph (j)(1) of this section is foreign source income in a separate category for which there is a remaining balance in an overall foreign loss account after applying paragraph (i) of this section, the section 904(f)(1) recapture amount under §1.904(f)-2(c) for that additional income is determined by first computing a hypothetical recapture amount as it would have been determined prior to the application of paragraph (i) of this section but taking into account the additional foreign source income described in this paragraph (j)(2) and then subtracting the actual overall foreign loss recapture determined prior to the application of paragraph (i) of this section (that did not take into account the additional foreign source income). The remainder is the overall foreign loss recapture amount with respect to the additional foreign source income described in this paragraph (j)(2).

* * * * *

(l) *Applicability date*. This section applies to taxable years ending on or after November 2, 2020.

Par. 21. Section 1.905-3 is amended by:

1. Revising the section heading and the first sentence of paragraph (a).

2. Adding paragraphs (b)(2) and (3).

3. Revising paragraph (d).

The revisions and additions read as follows:

§1.905-3 Adjustments to U.S. tax liability and to current earnings and profits as a result of a foreign tax redetermination.

(a) * * * For purposes of this section and §1.905-4, the term *foreign tax rede-*

termination means a change in the liability for foreign income tax, as defined in §1.960-1(b)(5), or certain other changes described in this paragraph (a) that may affect a taxpayer's U.S. tax liability, including by reason of a change in the amount of its foreign tax credit, the amount of its distributions or inclusions under section 951, 951A, or 1293, the application of the high-tax exception described in section 954(b)(4) (including for purposes of determining amounts excluded from gross tested income under section 951A(c)(2)(A)(i)(III) and §1.951A-2(c)(1)(iii)), or the amount of tax determined under sections 1291(c)(2) and 1291(g)(1)(C)(ii). * * *

(b) * * *

(2) *Foreign income taxes paid or accrued by foreign corporations*—(i) *In general*. A redetermination of U.S. tax liability is required to account for the effect of a redetermination of foreign income taxes taken into account by a foreign corporation in the year accrued, or a refund of foreign income taxes taken into account by the foreign corporation in the year paid.

(ii) *Required adjustments*. If a redetermination of U.S. tax liability is required for any taxable year under paragraph (b)(2)(i) of this section, the foreign corporation's taxable income, earnings and profits, and current year taxes (as defined in §1.960-1(b)(4)) must be adjusted in the year to which the redetermined tax relates (or, in the case of a foreign corporation that receives a refund of foreign income tax and uses the cash basis of accounting, in the year the tax was paid). The redetermination of U.S. tax liability is made by treating the redetermined amount of foreign tax as the amount of tax paid or accrued by the foreign corporation in such year. For example, in the case of a refund of foreign income taxes taken into account in the year accrued, the foreign corporation's subpart F income, tested income, and current earnings and profits are increased, as appropriate, in the year to which the foreign tax relates to reflect the functional currency amount of the foreign income tax refund. The required redetermination of U.S. tax liability must account for the effect of the foreign tax redetermination on the characterization and amount of distributions or inclusions under section 951, 951A, or 1293 taken into account by each of the foreign corporation's United States shareholders, on the application of the high-tax exception described in section 954(b)(4) (including for purposes of determining the exclusions from gross tested income under section 951A(c)(2)(A)(i)(III) and §1.951A-2(c)(1)(iii)), and the amount of tax determined under sections 1291(c)(2) and 1291(g)(1)(C)(ii), as well as on the amount of foreign taxes deemed paid under section 960 in such year, regardless of whether any such shareholder chooses to deduct or credit its foreign income taxes in any taxable year. In addition, a redetermination of U.S. tax liability is required for any subsequent taxable year in which the characterization or amount of a United States shareholder's distribution or inclusion from the foreign corporation is affected by the foreign tax redetermination, up to and including the taxable year in which the foreign tax redetermination occurs, as well as any year to which unused foreign taxes from such year were carried under section 904(c).

(iii) *Reduction of corporate level tax on distribution of earnings and profits*. If a United States shareholder of a controlled foreign corporation receives a distribution out of previously taxed earnings and profits described in section 959(c)(1) and (2) and a foreign country has imposed tax on the income of the controlled foreign corporation, which tax is reduced on distribution of the earnings and profits of the corporation (resulting in a foreign tax redetermination), then the United States shareholder must redetermine its U.S. tax liability for the year or years affected. See also §1.904-4(c)(7)(i).

(iv) *Foreign tax redeterminations relating to taxable years beginning before January 1, 2018*. In the case of a foreign tax redetermination of a foreign corporation that relates to a taxable year of the foreign corporation beginning before January 1, 2018, a redetermination of U.S. tax liability is required under the rules of §1.905-5.

(v) *Examples*. The following examples illustrate the application of this paragraph (b)(2).

(A) *Presumed Facts*. Except as otherwise provided in this paragraph (b)(2)(v), the following facts are assumed for purposes of the examples in paragraphs (b)(2)(v)(B) through (E) of this section:

(*1*) All parties are accrual basis taxpayers that use the calendar year as their taxable year both for Federal income tax purposes and for foreign tax purposes and use the average exchange rate to translate accrued foreign income taxes;

(*2*) CFC, CFC1, and CFC2 are controlled foreign corporations organized in Country X that use the "u" as their functional currency;

(*3*) No income adjustment is required to reflect exchange gain or loss (within the meaning of §1.988-1(e)) with respect to the disposition of nonfunctional currency attributable to a refund of foreign income taxes received by any CFC, because all foreign income taxes are denominated and paid in the CFC's functional currency;

(*4*) The highest rate of U.S. tax in section 11 and the rate applicable to USP in all years is 21 percent;

(*5*) No election to exclude high-taxed income under section 954(b)(4) or §1.951A-2(c)(7) is made with respect to CFC, CFC1, or CFC2; and

(*6*) USP's foreign tax credit limitation under section 904(a) exceeds the amount of foreign income taxes it is deemed to pay.

(B) *Example 1: Refund of tested foreign income taxes*—(*1*) *Facts*. CFC is a wholly-owned subsidiary of USP, a domestic corporation. In Year 1, CFC earns 3,660u of general category gross tested income and accrues and pays 300u of foreign income taxes with respect to that income. CFC has no allowable deductions other than the foreign income tax expense. Accordingly, CFC has tested income of 3,360u in Year 1. CFC has no qualified business asset investment (within the meaning of section 951A(d) and §1.951A-3(b)). In Year 1, no portion of USP's deduction under section 250 ("section 250 deduction") is reduced by reason of section 250(a)(2)(B)(ii). USP's inclusion percentage (as defined in §1.960-2(c)(2)) is 100%. In Year 1, USP earns no other income and has no other expenses. The average exchange rate used to translate USP's inclusion under section 951A and CFC's foreign income taxes into dollars for Year 1 is $1x:1u. See section 989(b)(3) and §§1.951A-1(d)(1) and 1.986(a)-1(a)(1). Accordingly, for Year 1, USP's tested foreign income taxes (as defined in §1.960-2(c)(3)) with respect to CFC are $300x. In Year 3, CFC carries back a loss for foreign tax purposes and receives a refund of foreign tax of 100u that relates to Year 1.

(*2*) *Analysis*—(*i*) *Result in Year 1*. In Year 1, CFC has tested income of 3,360u and tested foreign income taxes of $300x. Under section 951A(a) and §1.951A-1(c)(1), USP has a GILTI inclusion amount of $3,360x (3,360u translated at $1x:1u). Under section 960(d) and §1.960-2(c), USP is deemed to have paid $240x (80% x 100% x $300x) of foreign income taxes. Under section 78 and §1.78-1(a), USP is treated as receiving a dividend of $300x (a "section 78

dividend"). USP's section 250 deduction is $1,830x (50% x ($3,360x + $300x)). Accordingly, for Year 1, USP has taxable income of $1,830x ($3,360x + $300x - $1,830x) and pre-credit U.S. tax liability of $384.30x (21% x $1,830x). Accordingly, USP pays U.S. tax of $144.30x ($384.30x - $240x).

(*ii*) *Result in Year 3*. The refund of 100u to CFC in Year 3 is a foreign tax redetermination under paragraph (a) of this section. Under paragraph (b)(2)(ii) of this section, USP must account for the effect of the foreign tax redetermination on its GILTI inclusion amount and foreign taxes deemed paid in Year 1. In redetermining USP's U.S. tax liability for Year 1, USP must increase CFC's tested income and its earnings and profits in Year 1 by the refunded tax amount of 100u, must determine the effect of that increase on its GILTI inclusion amount, and must adjust the amount of foreign taxes deemed paid and the section 78 dividend to account for CFC's refund of foreign tax. Under §1.986(a)-1(c), the refund is translated into dollars at the exchange rate that was used to translate such amount when initially accrued. As a result of the foreign tax redetermination, for Year 1, CFC has tested income of 3,460u (3,360u + 100u) and tested foreign income taxes of $200x ($300x - $100x). Under section 951A(a) and §1.951A-1(c)(1), USP has a redetermined GILTI inclusion amount of $3,460x (3,460u translated at $1x:1u). Under section 960(d) and §1.960-2(c), USP is deemed to have paid $160x (80% x 100% x $200x) of foreign income taxes. Under section 78 and §1.78-1(a), USP's section 78 dividend is $200x. USP's redetermined section 250 deduction is $1,830x (50% x ($3,460x + $200x)). Accordingly, USP's redetermined taxable income is $1,830x ($3,460x + $200x - $1,830x) and its pre-credit U.S. tax liability is $384.30x (21% x $1,830x). Therefore, USP's redetermined U.S. tax liability is $224.3x ($384.30x - $160x), an increase of $80x ($224.30x - $144.30x).

(C) *Example 2: Additional payment of foreign income taxes*—(*1*) *Facts*. CFC is a wholly-owned subsidiary of USP, a domestic corporation. In Year 1, CFC earns 1,000u of general category gross foreign base company sales income and accrues and pays 100u of foreign income taxes with respect to that income. CFC has no allowable deductions other than the foreign income tax expense. The average exchange rate used to translate USP's subpart F inclusion and CFC's foreign income taxes into dollars for Year 1 is $1x:1u. See section 989(b)(3) and §1.986(a)-1(a)(1). In Year 1, USP earns no other income and has no other expenses. In Year 5, pursuant to a Country X audit CFC accrues and pays additional foreign income tax of 80u with respect to its 1,000u of general category foreign base company sales income earned in Year 1. The spot rate (as defined in §1.988-1(d)) on the date of payment of the tax in Year 5 is $1x:0.8u. The foreign income taxes accrued and paid in Year 1 and Year 5 are properly attributable to CFC's foreign base company sales income that is included in income by USP under section 951(a)(1)(A) ("subpart F inclusion") in Year 1 with respect to CFC.

(*2*) *Analysis*—(*i*) *Result in Year 1*. In Year 1, CFC has subpart F income of 900u (1,000u - 100u). Accordingly, USP has a $900x (900u translated at $1x:1u) subpart F inclusion. Under section 960(a) and §1.960-2(b), USP is deemed to have paid $100x (100u translated at $1x:1u) of foreign income taxes. Under section 78 and §1.78-1(a), USP's section 78 dividend is $100x. Accordingly, for Year 1, USP has taxable income of $1,000x ($900x + $100x) and pre-credit U.S. tax liability of $210x (21% x $1,000x). Accordingly, USP's U.S. tax liability is $110x ($210x - $100x).

(*ii*) *Result in Year 5*. CFC's payment of 80u of additional foreign income tax in Year 5 with respect to Year 1 is a foreign tax redetermination as defined in paragraph (a) of this section. Under paragraph (b)(2)(ii) of this section, USP must reduce CFC's subpart F income and its earnings and profits in Year 1 by the additional tax amount of 80u. Further, USP must reduce its subpart F inclusion, adjust the amount of foreign taxes deemed paid, and adjust the amount of the section 78 dividend to account for CFC's additional payment of foreign tax. Under section 986(a)(1)(B)(i) and §1.986(a)-1(a)(2)(i), because CFC's payment of additional tax occurs more than 24 months after the close of the taxable year to which it relates, the additional tax is translated into dollars at the spot rate on the date of payment ($1x:0.8u). Therefore, CFC has foreign income taxes of $200x (100u translated at $1x:1u plus 80u translated at $1x:0.8u) that are properly attributable to CFC's foreign base company sales income that gives rise to USP's subpart F inclusion in Year 1. As a result of the foreign tax redetermination, for Year 1, USP has a subpart F inclusion of $820x (1,000u - 180u = 820u translated at $1x:1u). Under section 960(a) and §1.960-2(b), USP is deemed to have paid $200x of foreign income taxes. Under section 78 and §1.78-1(a), USP's section 78 dividend is $200x. USP's redetermined U.S. taxable income is $1,020x ($820x + $200x) and its pre-credit U.S. tax liability is $214.20x (21% x $1,020x). Therefore, USP's redetermined U.S. tax liability is $14.20x ($214.20x - $200x), a decrease of $95.80x ($110x - $14.20x). If USP makes a timely refund claim within the period allowed by section 6511, USP will be entitled to a refund of any overpayment resulting from the redetermination of its U.S. tax liability.

(D) *Example 3: Two-year rule*—(*1*) *Facts*. CFC is a wholly-owned subsidiary of USP, a domestic corporation. In Year 1, CFC earns 1,000u of general category gross foreign base company sales income and accrues 210u of foreign income taxes with respect to that income. In Year 1, USP earns no other income and has no other expenses. The average exchange rate used to translate USP's subpart F inclusion and CFC's foreign income taxes into dollars for Year 1 is $1x:1u. See sections 989(b)(3) and 986(a)(1)(A) and §1.986(a)-1(a)(1). CFC does not pay its foreign income taxes for Year 1 until September 1, Year 5, when the spot rate is $0.8x:1u. The foreign income taxes accrued and paid in Year 1 and Year 5, respectively, are properly attributable to CFC's foreign base company sales income that gives rise to USP's subpart F inclusion in Year 1 with respect to CFC.

(*2*) *Analysis*—(*i*) *Result in Year 1*. In Year 1, CFC has subpart F income of 790u (1,000u - 210u). Accordingly, USP has a $790x (790u translated at $1x:1u) subpart F inclusion. Under section 960(a) and §1.960-2(b), USP is deemed to have paid $210x (210u translated at $1x:1u) of foreign income taxes. Under section 78 and §1.78-1(a), USP's section 78 dividend is $210x. Accordingly, for Year 1, USP has taxable income of $1,000x ($790x + $210x) and pre-credit U.S. tax liability of $210x (21% x $1,000x). Accordingly, USP owes no U.S. tax ($210x - $210x = 0).

(*ii*) *Result in Year 3*. CFC's failure to pay the tax by the end of Year 3 results in a foreign tax redetermination under paragraph (a) of this section. Because the taxes are not paid on or before the date 24 months after the close of the taxable year to which the tax relates, under paragraph (a) of this section CFC must account for the redetermination as if the unpaid 210u of taxes were refunded on the last day of Year 3. Under paragraph (b)(2)(ii) of this section, USP must increase CFC's subpart F income and its earnings and profits in Year 1 by the unpaid tax amount of 210u. Further, USP must increase its subpart F inclusion, and decrease the amount of foreign taxes deemed paid and the amount of the section 78 dividend to account for the unpaid taxes. As a result of the foreign tax redetermination, for Year 1, USP has a subpart F inclusion of $1,000x (1,000u translated at $1x:1u). Under section 960(a) and §1.960-2(b), USP is deemed to have paid no foreign income taxes. Under section 78 and §1.78-1(a), USP has no section 78 dividend. Accordingly, USP's redetermined taxable income is $1,000x and its pre-credit U.S. tax liability is unchanged at $210x (21% x $1,000x). However, USP has no foreign tax credits. Therefore, USP's redetermined U.S. tax liability for Year 1 is $210x, an increase of $210x.

(*iii*) *Result in Year 5*. CFC's payment of the Year 1 tax liability of 210u on September 1, Year 5, results in a second foreign tax redetermination under paragraph (a) of this section. Under paragraph (b)(2)(ii) of this section, USP must decrease CFC's subpart F income and its earnings and profits in Year 1 by the tax paid amount of 210u. Further, USP must reduce its subpart F inclusion, and adjust the amount of foreign taxes deemed paid and the amount of the section 78 dividend to account for CFC's payment of foreign tax. Under section 986(a)(1)(B)(i) and §1.986(a)-1(a)(2)(i), because the tax was paid more than 24 months after the close of the year to which the tax relates, CFC must translate the 210u of tax at the spot rate on the date of payment of the foreign taxes in Year 5. Therefore, CFC has foreign income taxes of $168x (210u translated at $0.8x:1u) that are properly attributable to CFC's foreign base company sales income that gives rise to USP's subpart F inclusion in Year 1. As a result of the foreign tax redetermination, for Year 1, USP has a subpart F inclusion of $790x (1,000u - 210u = 790u translated at $1x:1u). Under section 960(a) and §1.960-2(b), USP is deemed to have paid $168x of foreign income taxes. Under section 78 and §1.78-1(a), USP's section 78 dividend is $168x. Accordingly, USP's redetermined taxable income is $958x ($790x + $168x), its pre-credit U.S. tax liability is $201.18x (21% x $958x), and its redetermined U.S. tax liability is $33.18 ($201.18x - $168x), a decrease of $176.82x ($210x - $33.18x). If USP makes a timely refund claim within the period allowed by section 6511, USP will be entitled to a refund of any overpayment resulting from the redetermination of its U.S. tax liability.

(E) *Example 4: Contested tax*—(*1*) *Facts*. CFC is a wholly-owned subsidiary of USP, a domestic corporation. In Year 1, CFC earns 360u of general

category gross tested income and accrues and pays 160u of current year taxes with respect to that income. CFC has no allowable deductions other than the foreign income tax expense. Accordingly, CFC has tested income of 200u in Year 1. CFC has no qualified business asset investment (within the meaning of section 951A(d) and §1.951A-3(b)). In Year 1, no portion of USP's section 250 deduction is reduced by reason of section 250(a)(2)(B)(ii). USP's inclusion percentage (as defined in §1.960-2(c)(2)) is 100%. In Year 1, USP earns no other income and has no other expenses. The average exchange rate used to translate USP's section 951A inclusion and CFC's foreign income taxes into dollars for Year 1 is $1x:1u. See section 989(b)(3) and §§1.951A-1(d)(1) and 1.986(a)-1(a)(1). Accordingly, for Year 1, CFC's tested foreign income taxes (as defined in §1.960-2(c)(3)) with respect to USP are $160x. In Year 3, Country X assessed an additional 30u of tax with respect to CFC's Year 1 income. CFC did not pay the additional 30u of tax and contested the assessment. After exhausting all effective and practical remedies to reduce, over time, its liability for foreign income tax, CFC settled the contest with Country X in Year 4 for 20u, which CFC did not pay until January 15, Year 5, when the spot rate was $1.1x:1u. CFC did not earn any other income or accrue any other foreign income taxes in Years 2 through 6 and made no distributions to USP. The additional taxes paid in Year 5 are also tested foreign income taxes of CFC with respect to USP.

(*2*) *Analysis*—(*i*) *Result in Year 1*. In Year 1, CFC has tested income of 200u and tested foreign income taxes of $160x. Under section 951A(a) and §1.951A-1(c)(1), USP has a GILTI inclusion amount of $200x (200u translated at $1x:1u). Under section 960(d) and §1.960-2(c), USP is deemed to have paid $128x (80% x 100% x $160x) of foreign income taxes. Under section 78 and §1.78-1(a), USP's section 78 dividend is $160x. USP's section 250 deduction is $180x (50% x ($200x + $160x)). Accordingly, for Year 1, USP has taxable income of $180x ($200x + $160x - $180x) and a pre-credit U.S. tax liability of $37.80x (21% x $180x). Under section 904(a), because all of USP's income is section 951A category income (see §1.904-4(g)), USP's foreign tax credit limitation is $37.80x ($37.80x x $180x / $180x), which is less than the $128x of foreign income tax that USP is deemed to have paid. Accordingly, USP owes no U.S. tax ($37.80x - $37.80x = 0).

(*ii*) *Result in Year 5*. CFC's accrual and payment of the additional 20u of foreign income tax with respect to Year 1 is a foreign tax redetermination under paragraph (a) of this section. Under §1.461-4(g)(6)(iii)(B), the additional taxes accrue when the tax contest is resolved, that is, in Year 4. However, because the taxes, which relate to Year 1, were not paid on or before the date 24 months after close of CFC's taxable year to which the tax relates, that is, Year 1, under section 905(c)(2) and paragraph (a) of this section CFC cannot take these taxes into account when they accrue in Year 4. Instead, the taxes are taken into account when they are paid in Year 5. Under paragraph (b)(2)(ii) of this section, USP must decrease CFC's tested income and its earnings and profits in Year 1 by the additional tax amount of 20u. Further, USP must adjust its GILTI inclusion amount, the amount of foreign taxes deemed paid, and the amount of the section 78 dividend to account for CFC's additional payment of tax. Under section 986(a)(1)(B)(i) and §1.986(a)-1(a)(2)(i), because CFC's payment of additional tax occurs more than 24 months after the close of the taxable year to which it relates, the additional tax is translated into dollars at the spot rate on the date of payment ($1.1x:1u). Therefore, CFC has tested foreign income taxes of $182x (160u translated at $1x:1u plus 20u translated at $1.1x:1u). As a result of the foreign tax redetermination, for Year 1, CFC has tested income of 180u (200u - 20u). Under section 951A(a) and §1.951A-1(c)(1), USP has a redetermined GILTI inclusion amount of $180x (180u, translated at $1x:1u). Under section 960(d) and §1.960-2(c), USP is deemed to have paid $145.60x (80% x 100% x $182x) of foreign income taxes. Under section 78 and §1.78-1(a), USP's section 78 dividend is $182x. USP's redetermined section 250 deduction is $181x (50% x ($180x + $182x)). Accordingly, USP's redetermined taxable income is $181x ($180x + $182x – $181x), its pre-credit U.S. tax liability is $38.01x (21% x $181x), and its redetermined U.S. tax liability is zero ($38.01x - $38.01x).

(3) *Foreign tax redeterminations of successors or transferees*. If at the time of a foreign tax redetermination the person with legal liability for the tax (or in the case of a refund, the legal right to such refund) (the "successor") is a different person than the person that had legal liability for the tax in the year to which the redetermined tax relates (the "original taxpayer"), the required redetermination of U.S. tax liability is made as if the foreign tax redetermination occurred in the hands of the original taxpayer. Federal income tax principles apply to determine the tax consequences if the successor remits (or receives a refund of) a tax that in the year to which the redetermined tax relates was the legal liability of, and thus under §1.901-2(f) is considered paid by, the original taxpayer.

* * * * *

(d) *Applicability dates*. This section applies to foreign tax redeterminations occurring in taxable years ending on or after December 16, 2019**,** and to foreign tax redeterminations of foreign corporations occurring in taxable years that end with or within a taxable year of a United States shareholder ending on or after December 16, 2019 and that relate to taxable years of foreign corporations beginning after December 31, 2017.

Par. 22. Section 1.905-4 is added to read as follows:

§1.905-4 Notification of foreign tax redetermination.

(a) *Application of this section*. The rules of this section apply if, as a result of a foreign tax redetermination (as defined in §1.905-3(a)), a redetermination of U.S. tax liability is required under section 905(c) and §1.905-3(b).

(b) *Time and manner of notification*—(1) *Redetermination of U.S. tax liability*—(i) *In general*. Except as provided in paragraphs (b)(1)(v) and (b)(2) through (4) of this section, any taxpayer for which a redetermination of U.S. tax liability is required must notify the Internal Revenue Service (IRS) of the foreign tax redetermination by filing an amended return, Form 1118 (Foreign Tax Credit—Corporations) or Form 1116 (Foreign Tax Credit (Individual, Estate, or Trust)), and the statement described in paragraph (c) of this section for the taxable year with respect to which a redetermination of U.S. tax liability is required. Such notification must be filed within the time prescribed by this paragraph (b) and contain the information described in paragraph (c) of this section. If a foreign tax redetermination requires an individual to redetermine the individual's U.S. tax liability, and if, after taking into account such foreign tax redetermination, the amount of creditable foreign taxes (as defined in section 904(j)(3)(B)) that are paid or accrued by such individual during the taxable year does not exceed the applicable dollar limitation in section 904(j), the individual is not required to file Form 1116 with the amended return for such taxable year if the individual satisfies the requirements of section 904(j).

(ii) *Increase in amount of U.S. tax liability*. Except as provided in paragraphs (b)(1)(iv) and (v) and (b)(2) through (4) of this section, for each taxable year of the taxpayer with respect to which a redetermination of U.S. tax liability is required by reason of a foreign tax redetermination that increases the amount of U.S. tax liability, for example, by reason of a downward adjustment to the amount of foreign income taxes paid or accrued by the taxpayer or a foreign corporation with respect to which the taxpayer computes an amount of foreign taxes deemed paid, the taxpayer must file a separate notification by the due date (with extensions) of the

original return for the taxpayer's taxable year in which the foreign tax redetermination occurs.

(iii) *Decrease in amount of U.S. tax liability*. Except as provided in paragraphs (b)(1)(iv) and (v) and (b)(2) through (4) of this section, for each taxable year of the taxpayer with respect to which a redetermination of U.S. tax liability is required by reason of a foreign tax redetermination that decreases the amount of U.S. tax liability and results in an overpayment, for example, by reason of an increase in the amount of foreign income taxes paid or accrued by the taxpayer or a foreign corporation with respect to which the taxpayer computes an amount of foreign taxes deemed paid, the taxpayer must file a claim for refund with the IRS within the period provided in section 6511. See section 6511(d)(3)(A) for the special refund period for refunds attributable to an increase in foreign tax credits.

(iv) *Multiple redeterminations of U.S. tax liability for same taxable year*. The rules of this paragraph (b)(1)(iv) apply except as provided in paragraphs (b)(1)(v) and (b)(2) through (4) of this section. If more than one foreign tax redetermination requires a redetermination of U.S. tax liability for the same affected taxable year of the taxpayer and those foreign tax redeterminations occur within the same taxable year or within two consecutive taxable years of the taxpayer, the taxpayer may file for the affected taxable year one amended return, Form 1118 or Form 1116, and the statement described in paragraph (c) of this section that reflects all such foreign tax redeterminations. If the taxpayer chooses to file one notification for such redeterminations, one or more of such redeterminations would increase the U.S. tax liability, and the net effect of all such redeterminations is to increase the U.S. tax liability for the affected taxable year, the taxpayer must file such notification by the due date (with extensions) of the original return for the taxpayer's taxable year in which the first foreign tax redetermination that would result in an increased U.S. tax liability occurred. If the taxpayer chooses to file one notification for such redeterminations, one or more of such redeterminations would decrease the U.S. tax liability, and the net effect of all such redeterminations is to decrease the total amount of U.S. tax liability for the affected taxable year, the taxpayer must file such notification as provided in paragraph (b)(1)(iii) of this section, within the period provided by section 6511. If a foreign tax redetermination with respect to the taxable year for which a redetermination of U.S. tax liability is required occurs after the date for providing such notification, more than one amended return may be required with respect to that taxable year.

(v) *Amended return required only if there is a change in amount of U.S. tax due*. If a redetermination of U.S. tax liability is required by reason of a foreign tax redetermination (or multiple foreign tax redeterminations, in the case of redeterminations described in paragraph (b)(1)(iv) of this section), but does not change the amount of U.S. tax due for any taxable year, the taxpayer may, in lieu of applying the applicable rules of paragraphs (b)(1)(i) through (iv) of this section, notify the IRS of such redetermination by attaching a statement to the original return for the taxpayer's taxable year in which the foreign tax redetermination occurs. The statement must be filed by the due date (with extensions) of the original return for the taxpayer's taxable year in which the foreign tax redetermination occurs and contain the information described in §1.904-2(f). If a redetermination of U.S. tax liability is required by reason of a foreign tax redetermination (either alone, or if the taxpayer chooses to apply paragraph (b)(1)(iv) of this section, in combination with other foreign tax redeterminations, as provided therein) and the redetermination of U.S. tax liability results in a change to the amount of U.S. tax due for a taxable year, but does not change the amount of U.S. tax due for other taxable years, for example, because of a carryback or carryover of an unused foreign tax under section 904(c), the notification requirements for such other taxable years are deemed to be satisfied if the taxpayer complies with the applicable rules of paragraphs (b)(1)(i) through (iv) of this section with respect to each taxable year for which the foreign tax redetermination changes the amount of U.S. tax due.

(2) *Notification with respect to a change in the amount of foreign tax reported to an owner by a pass-through entity*—(i) *In general*. If a partnership, trust, or other pass-through entity that reports to its beneficial owners (or to any intermediary on behalf of its beneficial owners), including partners, shareholders, beneficiaries, or similar persons, an amount of creditable foreign tax expenditures, such pass-through entity must notify both the IRS and its owners of any foreign tax redetermination described in §1.905-3(a) with respect to the foreign tax so reported. For purposes of this paragraph (b)(2), whether or not a redetermination has occurred within the meaning of §1.905-3(a) is determined as if the pass-through entity were a domestic corporation which had elected to and claimed foreign tax credits in the amount reported for the year to which such foreign taxes relate. The notification required under this paragraph (b)(2) must include the statement described in paragraph (c) of this section along with any information necessary for the owners to redetermine their U.S. tax liability.

(ii) *Partnerships subject to subchapter C of chapter 63 of the Code*. Except as provided in paragraph (b)(4) of this section, if a redetermination of U.S. tax liability that is required under §1.905-3(b) by reason of a foreign tax redetermination described in §1.905-3(a) would require a partnership adjustment as defined in §301.6241-1(a)(6) of this chapter, the partnership must file an administrative adjustment request under section 6227 and make any adjustments required under section 6227. See §§301.6227-2 and 301.6227-3 of this chapter for procedures for making adjustments with respect to an administrative adjustment request. An administrative adjustment request required under this paragraph (b)(2)(ii) must be filed by the due date (with extensions) of the original return for the partnership's taxable year in which the foreign tax redetermination occurs, and the restrictions in section 6227(c) do not apply to such filing. However, unless the administrative adjustment request may otherwise be filed after applying the limitations contained in section 6227(c), such a request is limited to adjustments that are required to be made under section 905(c). The requirements of paragraph (b)(2)(i) of this section are deemed to be satisfied with respect to any item taken into account in an administrative adjustment request filed under this paragraph (b)(2)(ii).

(3) *Alternative notification requirements*. An amended return and Form 1118 (Foreign Tax Credit—Corporations) or Form 1116 (Foreign Tax Credit (Individual, Estate, or Trust)), is not required to notify the IRS of the foreign tax redetermination and redetermination of U.S. tax liability if the taxpayer satisfies alternative notification requirements that may be prescribed by the IRS through forms, instructions, publications, or other guidance.

(4) *Taxpayers under examination within the jurisdiction of the Large Business and International Division*—(i) *In general*. The alternative notification requirements of this paragraph (b)(4) apply if all of the conditions described in paragraphs (b)(4)(i)(A) through (E) of this section are satisfied.

(A) A foreign tax redetermination occurs while the taxpayer is under examination within the jurisdiction of the Large Business and International Division.

(B) The foreign tax redetermination results in an adjustment to the amount of foreign income taxes paid or accrued by the taxpayer or a foreign corporation with respect to which the taxpayer computes an amount of foreign income taxes deemed paid.

(C) The foreign tax redetermination requires a redetermination of U.S. tax liability that increases the amount of U.S. tax liability, and accordingly, but for this paragraph (b)(4), the taxpayer would be required to notify the IRS of such foreign tax redetermination under paragraph (b)(1)(ii) of this section (determined without regard to paragraphs (b)(1)(iv) and (v) of this section) or paragraph (b)(2)(ii) of this section. See paragraph (b)(4)(v) of this section regarding foreign tax redeterminations that decrease the amount of U.S. tax liability.

(D) The return for the taxable year for which a redetermination of U.S. tax liability is required is under examination.

(E) The due date specified in paragraph (b)(1)(ii) or (b)(2)(ii) of this section for providing notice of such foreign tax redetermination is not before the later of the opening conference or the hand-delivery or postmark date of the opening letter concerning an examination of the return for the taxable year for which a redetermination of U.S. tax liability is required by reason of such foreign tax redetermination.

(ii) *Notification requirements*—(A) *Foreign tax redetermination occurring before commencement of the examination*. If a foreign tax redetermination described in paragraphs (b)(4)(i)(B) and (C) of this section occurs before the later of the opening conference or the hand-delivery or postmark date of the opening letter and if the condition provided in paragraph (b)(4)(i)(E) of this section with respect to such foreign tax redetermination is met, the taxpayer, in lieu of applying the rules of paragraphs (b)(1)(i) and (ii) of this section (requiring the filing of an amended return, Form 1116 or 1118, and the statement described in paragraph (c) of this section) or paragraph (b)(2)(ii) of this section (requiring the filing of an administrative adjustment request), must notify the IRS of such redetermination by providing the statement described in paragraph (b)(4)(iii) of this section to the examiner no later than 120 days after the later of the date of the opening conference of the examination, or the hand-delivery or postmark date of the opening letter concerning the examination.

(B) *Foreign tax redetermination occurring within 180 days after commencement of the examination*. If a foreign tax redetermination described in paragraphs (b)(4)(i)(B) and (C) of this section occurs on or after the latest of the opening conference or the hand-delivery or postmark date of the opening letter and on or before the date that is 180 days after the later of the opening conference or the hand-delivery or postmark date of the opening letter, the taxpayer, in lieu of applying the rules of paragraph (b)(1)(i) and (ii) of this section or paragraph (b)(2) of this section, must notify the IRS of such redetermination by providing the statement described in paragraph (b)(4)(iii) of this section to the examiner no later than 120 days after the date the foreign tax redetermination occurs.

(C) *Foreign tax redetermination occurring more than 180 days after commencement of the examination*. If a foreign tax redetermination described in paragraphs (b)(4)(i)(B) and (C) of this section occurs after the date that is 180 days after the later of the opening conference or the hand-delivery or postmark date of the opening letter, the taxpayer must either apply the rules of paragraphs (b)(1)(i) and (ii) of this section or paragraph (b)(2) of this section, or, in lieu of applying paragraphs (b)(1)(i) and (ii) of this section or paragraph (b)(2) of this section, provide the statement described in paragraph (b)(4)(iii) of this section to the examiner within 120 days after the date the foreign tax redetermination occurs. However, the IRS, in its discretion, may either accept such statement or require the taxpayer to comply with the rules of paragraphs (b)(1)(i) and (ii) of this section or paragraph (b)(2) of this section, as applicable.

(iii) *Statement*. The statement required by paragraphs (b)(4)(ii)(A) and (B) of this section must provide the original amount of foreign income taxes paid or accrued, the revised amount of foreign income taxes paid or accrued, and documentation with respect to the revisions, including exchange rates and dates of accrual or payment, and, if applicable, the information described in paragraph (c)(8) of this section. The statement must include the following declaration signed by a person authorized to sign the return of the taxpayer: "Under penalties of perjury, I declare that I have examined this written statement, and to the best of my knowledge and belief, this written statement is true, correct, and complete."

(iv) *Penalty for failure to file notice of a foreign tax redetermination*. A taxpayer subject to the rules of this paragraph (b)(4) must satisfy the rules of paragraph (b)(4)(ii) of this section in order not to be subject to the penalty relating to the failure to file notice of a foreign tax redetermination under section 6689 and §301.6689-1 of this chapter.

(v) *Notification of foreign tax redetermination that decreases U.S. tax liability in an affected year under audit*. A taxpayer may (but is not required to) notify the IRS as provided in this paragraph (b)(4)(v) if the taxpayer has a foreign tax redetermination that meets the conditions in paragraphs (b)(4)(i)(A), (B), and (D) of this section and results in a decrease in the amount of U.S. tax liability that, but for this paragraph (b)(4), would require the taxpayer to notify the IRS of such foreign tax redetermination under paragraph (b)(1)(iii) or (b)(2)(ii) of this section (determined without regard to paragraphs (b)(1)(iv) and (v) of this section). The notification should be made in the time and

manner specified in paragraph (b)(4)(ii) of this section. The IRS, in its discretion, may either accept such alternate notification or require the taxpayer to comply with the rules of paragraphs (b)(1)(i) and (iii) or paragraphs (b)(2) of this section, as applicable.

(5) *Examples*. The following examples illustrate the application of paragraph (b) of this section.

(i) *Example 1*. (A) X, a domestic corporation, is an accrual basis taxpayer and uses the calendar year as its U.S. taxable year. X conducts business through a branch in Country M, the currency of which is the m, and also conducts business through a branch in Country N, the currency of which is the n. X uses the average exchange rate to translate foreign income taxes. X is able to claim a credit under section 901 for all foreign income taxes paid or accrued.

(B) In Year 1, X accrued and paid 100m of Country M income taxes with respect to 400m of foreign source foreign branch category income. The average exchange rate for Year 1 was $1:1m. Also in Year 1, X accrued and paid 50n of Country N income taxes with respect to 150n of foreign source foreign branch category income. The average exchange rate for Year 1 was $1:1n. On its Year 1 Federal income tax return, X claimed a foreign tax credit under section 901 of $150 ($100 (100m translated at $1:1m) + $50 (50n translated at $1:1n)) with respect to its foreign source foreign branch category income. See §1.986(a)-1(a)(1).

(C) In Year 2, X accrued and paid 100n of Country N income taxes with respect to 300n of foreign source foreign branch category income. The average exchange rate for Year 2 was $1.50:1n. On its Year 2 Federal income tax return, X claimed a foreign tax credit under section 901 of $150 (100n translated at $1.5:1n). See §1.986(a)-1(a)(1).

(D) On June 15, Year 5, when the spot rate was $1.40:1n, X received a refund of 10n from Country N, and, on March 15, Year 6, when the spot rate was $1.20:1m, X was assessed by and paid Country M an additional 20m of tax. Both payments were with respect to X's foreign source foreign branch category income in Year 1. On May 15, Year 6, when the spot rate was $1.45:1n, X received a refund of 5n from Country N with respect to its foreign source foreign branch category income in Year 2.

(E) Both of the refunds and the assessment are foreign tax redeterminations under §1.905-3(a). Under §1.905-3(b)(1), X must redetermine its U.S. tax liability for both Year 1 and Year 2. With respect to Year 1, under paragraph (b)(1)(ii) of this section X must notify the IRS of the June 15, Year 5, refund of 10n from Country N that increased X's U.S. tax liability by filing an amended return, Form 1118, and the statement required by paragraph (c) of this section for Year 1 by the due date of the original return (with extensions) for Year 5. The amended return and Form 1118 would reflect the reduced amount of foreign income taxes claimed as a credit under section 901 and the increase in X's U.S. tax liability of $10 (10n refund translated at the average exchange rate for Year 1, or $1:1n (see §1.986(a)-1(c)). With respect to the March 15, Year 6, additional assessment of 20m by Country M, under paragraph (b)(1)(iii) of this section X must notify the IRS within the time period provided by section 6511, increasing the foreign income taxes available as a credit and reducing X's U.S. tax liability by $24 (20m translated at the spot rate on the date of payment, or $1.20:1m). See sections 986(a)(1)(B)(i) and 986(a)(2)(A) and §1.986(a)-1(a)(2)(i). X may so notify the IRS by filing a second amended return, Form 1118, and the statement described in paragraph (c) of this section for Year 1, within the time period provided by section 6511. Alternatively, under paragraph (b)(1)(iv) of this section, when X redetermines its U.S. tax liability for Year 1 to take into account the 10n refund from Country N that occurred in Year 5, X may also take into account the 20m additional assessment by Country M that occurred on March 15, Year 6. If X reflects both foreign tax redeterminations on the same amended return, Form 1118, and in the statement described in paragraph (c) of this section for Year 1, the amount of X's foreign income taxes available as a credit would be reduced by $10 (10n refund translated at $1:1n), and increased by $24 (20m additional assessment translated at the spot rate on the date of payment, March 15, Year 6, or $1.20:1m). The foreign income taxes available as a credit therefore would be increased by $14 ($24 (additional assessment) – $10 (refund)). Because the net effect of the foreign tax redeterminations is to increase the amount of foreign taxes paid or accrued and decrease X's U.S. tax liability for Year 1, under paragraph (b)(1)(iv) of this section the Year 1 amended return, Form 1118, and the statement required in paragraph (c) of this section reflecting foreign tax redeterminations in both years must be filed within the period provided by section 6511.

(F) With respect to Year 2, under paragraph (b)(1)(ii) of this section X must notify the IRS by filing an amended return, Form 1118, and the statement required by paragraph (c) of this section for Year 2, in addition to the amended return, Form 1118, and statement that are required by reason of the separate foreign tax redeterminations that affect Year 1. The amended return, Form 1118, and the statement required by paragraph (c) of this section for Year 2 must be filed by the due date (with extensions) of X's original return for Year 6. The amended return and Form 1118 must reflect the reduced amount of foreign income taxes claimed as a credit under section 901 and the increase in X's U.S. tax liability of $7.50 (5n refund translated at the average exchange rate for Year 2, or $1.50:1n).

(ii) *Example 2*. X, a taxpayer within the jurisdiction of the Large Business and International Division, uses the calendar year as its U.S. taxable year. On November 15, Year 2, X receives a refund of foreign income taxes that constitutes a foreign tax redetermination and necessitates a redetermination of U.S. tax liability for X's Year 1 taxable year. Under paragraph (b)(1)(ii) of this section, X is required to notify the IRS of the foreign tax redetermination that increased its U.S. tax liability by filing an amended return, Form 1118, and the statement described in paragraph (c) of this section for its Year 1 taxable year by October 15, Year 3 (the due date (with extensions) of the original return for X's Year 2 taxable year). On December 15, Year 3, the IRS hand delivers an opening letter concerning the examination of the return for X's Year 1 taxable year, and the opening conference for such examination is scheduled for January 15, Year 4. Because the date for notifying the IRS of the foreign tax redetermination under paragraph (b)(1)(ii) of this section (October 15, Year 3) is before the date of the opening conference concerning the examination of the return for X's Year 1 taxable year (January 15, Year 4), the condition of paragraph (b)(4)(i)(E) of this section is not met, and so paragraph (b)(4)(i) of this section does not apply. Accordingly, X must notify the IRS of the foreign tax redetermination by filing an amended return, Form 1118, and the statement described in paragraph (c) of this section for the Year 1 taxable year by October 15, Year 3.

(6) *Transition rule for certain foreign tax redeterminations*. In the case of foreign tax redeterminations occurring in taxable years ending on or after December 16, 2019, and before November 12, 2020, and foreign tax redeterminations of foreign corporations occurring in taxable years that end with or within a taxable year of a United States shareholder ending on or after December 16, 2019, and before November 12, 2020, any amended return or other notification that under paragraph (b)(1)(ii), (iv), or (v) or (b)(2)(ii) of this section must be filed by the due date (with extensions) of, or attached to, the original return for the taxpayer's taxable year in which the foreign tax redetermination occurs must instead be filed by the due date (with extensions) of, or attached to, the original return for the taxpayer's first taxable year ending on or after November 12, 2020. For purposes of paragraph (b)(4)(i)(E) of this section, the relevant due date is the due date specified in this paragraph (b)(6).

(c) *Notification contents*. The statement required by paragraphs (b)(1)(i) through (iv) and (b)(2) of this section must contain information sufficient for the IRS to redetermine U.S. tax liability if such a redetermination is required under section 905(c). The information must be in a form that enables the IRS to verify and compare the original computation of U.S. tax liability, the revised computation resulting from the foreign tax redetermination, and the net changes resulting therefrom. The statement must include the following:

(1) The taxpayer's name, address, identifying number, the taxable year or years of the taxpayer that are affected by the foreign tax redetermination, and, in the case of foreign taxes deemed paid, the name and identifying number, if any, of the foreign corporation;

(2) The date or dates the foreign income taxes were accrued, if applicable; the date or dates the foreign income taxes were paid; the amount of foreign income taxes paid or accrued on each date (in foreign currency) and the exchange rate used to translate each such amount, as provided in §1.986(a)-1(a) or (b);

(3) Information sufficient to determine any change to the characterization of a distribution, the amount of any inclusion under section 951(a), 951A, or 1293, or the deferred tax amount under section 1291;

(4) Information sufficient to determine any interest due from or owing to the taxpayer, including the amount of any interest paid by the foreign government to the taxpayer and the dates received;

(5) In the case of any foreign income tax that is refunded in whole or in part, the taxpayer must provide the date of each such refund; the amount of such refund (in foreign currency); and the exchange rate that was used to translate such amount when originally claimed as a credit (as provided in §1.986(a)-1(c)) and the spot rate (as defined in §1.988-1(d)) for the date the refund was received (for purposes of computing foreign currency gain or loss under section 988);

(6) In the case of any foreign income taxes that are not paid on or before the date that is 24 months after the close of the taxable year to which such taxes relate, the amount of such taxes in foreign currency, and the exchange rate that was used to translate such amount when originally claimed as a credit or added to PTEP group taxes (as defined in §1.960-3(d)(1));

(7) If a redetermination of U.S. tax liability results in an amount of additional tax due, and the carryback or carryover of an unused foreign income tax under section 904(c) only partially eliminates such amount, the information required in §1.904-2(f); and

(8) In the case of a pass-through entity, the name, address, and identifying number of each beneficial owner to which foreign taxes were reported for the taxable year or years to which the foreign tax redetermination relates, and the amount of foreign tax initially reported to each beneficial owner for each such year and the amount of foreign tax allocable to each beneficial owner for each such year after the foreign tax redetermination is taken into account.

(d) *Payment or refund of U.S. tax*. The amount of tax, if any, due upon a redetermination of U.S. tax liability is paid by the taxpayer after notice and demand has been made by the IRS. Subchapter B of chapter 63 of the Internal Revenue Code (relating to deficiency procedures) does not apply with respect to the assessment of the amount due upon such redetermination. In accordance with sections 905(c) and 6501(c)(5), the amount of additional tax due is assessed and collected without regard to the provisions of section 6501(a) (relating to limitations on assessment and collection). The amount of tax, if any, shown by a redetermination of U.S. tax liability to have been overpaid is credited or refunded to the taxpayer in accordance with subchapter B of chapter 66 (sections 6511 through 6515).

(e) *Interest and penalties*—(1) *In general*. If a redetermination of U.S. tax liability is required by reason of a foreign tax redetermination, interest is computed on the underpayment or overpayment in accordance with sections 6601 and 6611. No interest is assessed or collected on any underpayment resulting from a refund of foreign income taxes for any period before the receipt of the refund, except to the extent interest was paid by the foreign country or possession of the United States on the refund for the period before the receipt of the refund. See section 905(c)(5). In no case, however, will interest assessed and collected pursuant to the preceding sentence for any period before receipt of the refund exceed the amount that otherwise would have been assessed and collected under section 6601 for that period. Interest is assessed from the time the taxpayer (or the foreign corporation, partnership, trust, or other pass-through entity of which the taxpayer is a shareholder, partner, or beneficiary) receives a refund until the taxpayer pays the additional tax due the United States.

(2) *Imposition of penalty*. Failure to comply with the provisions of this section subjects the taxpayer to the penalty provisions of section 6689 and §301.6689-1 of this chapter.

(f) *Applicability date*. This section applies to foreign tax redeterminations (as defined in §1.905-3(a)) occurring in taxable years ending on or after December 16, 2019, and to foreign tax redeterminations of foreign corporations occurring in taxable years that end with or within a taxable year of a United States shareholder ending on or after December 16, 2019.

§1.905-4T [REMOVED]

Par. 23. Section 1.905-4T is removed.

Par. 24. Section 1.905-5 is added to read as follows:

§1.905-5 Foreign tax redeterminations of foreign corporations that relate to taxable years of the foreign corporation beginning before January 1, 2018.

(a) *In general*—(1) *Effect of foreign tax redetermination of a foreign corporation*. Except as provided in paragraph (e) of this section, a foreign tax redetermination (as defined in §1.905-3(a)) of a foreign corporation that relates to a taxable year of the foreign corporation beginning before January 1, 2018, and that may affect a taxpayer's foreign tax credit in any taxable year, must be accounted for by adjusting the foreign corporation's taxable income and earnings and profits, post-1986 undistributed earnings as defined in §1.902-1(a)(9), and post-1986 foreign income taxes as defined in §1.902-1(a)(8) (or its pre-1987 accumulated profits as defined in §1.902-1(a)(10)(i) and pre-1987 foreign income taxes as defined in §1.902-1(a)(10)(iii), as applicable) in the taxable year of the foreign corporation to which the foreign taxes relate.

(2) *Required redetermination of U.S. tax liability*. Except as provided in paragraph (e) of this section, a redetermination of U.S. tax liability is required to account for the effect of the foreign tax redetermination on the earnings and profits and taxable income of the foreign corporation, the taxable income of a United States shareholder, and the amount of foreign taxes deemed paid by the United States shareholder under section 902 or 960 (as in effect before December 22, 2017), in the year to which the redetermined foreign taxes relate. For example, in the case of a refund of foreign income taxes, the subpart F income, earnings and profits, and post-1986 undistributed earnings (or pre-1987 accumulated profits, as applicable) of the foreign corporation are increased in the year to which the foreign tax relates

to reflect the functional currency amount of the foreign income tax refund. The required redetermination of U.S. tax liability must account for the effect of the foreign tax redetermination on the characterization and amount of distributions or inclusions under section 951 or 1293 taken into account by each of the foreign corporation's United States shareholders and on the application of the high-tax exception described in section 954(b)(4), as well as on the amount of foreign income taxes deemed paid in such year. In addition, a redetermination of U.S. tax liability is required for any subsequent taxable year in which the United States shareholder received or accrued a distribution or inclusion from the foreign corporation, up to and including the taxable year in which the foreign tax redetermination occurs, as well as any year to which unused foreign taxes from such year were carried under section 904(c).

(b) *Notification requirements*—(1) *In general*. The notification requirements of §1.905-4, as modified by paragraphs (b)(2) and (3) of this section, apply if a redetermination of U.S. tax liability is required under paragraph (a) or (e) of this section.

(2) *Notification relating to post-1986 undistributed earnings and post-1986 foreign income taxes*. In the case of foreign tax redeterminations with respect to taxes included in post-1986 foreign income taxes, in addition to the information required by §1.905-4(c), the taxpayer must provide the balances of the pools of post-1986 undistributed earnings and post-1986 foreign income taxes before and after adjusting the pools, the dates and amounts of any dividend distributions or other inclusions made out of earnings and profits for the affected year or years, and the amount of earnings and profits from which such dividends were paid or such inclusions were made for the affected year or years.

(3) *Notification relating to pre-1987 accumulated profits and pre-1987 foreign income taxes*. In the case of foreign tax redeterminations with respect to pre-1987 accumulated profits, in addition to the information required by §1.905-4(c), the taxpayer must provide the following: the dates and amounts of any dividend distributions made out of earnings and profits for the affected year or years; the rate of exchange on the date of any such distribution; and the amount of earnings and profits from which such dividends were paid for the affected year or years.

(c) *Currency translation rules for adjustments to pre-1987 foreign income taxes*. Foreign income taxes paid with respect to pre-1987 accumulated profits that are deemed paid under section 960 (or under section 902 in the case of an amount treated as a dividend under section 1248) are translated into dollars at the spot rate for the date of the payment of the foreign income taxes, and refunds of such taxes are translated into dollars at the spot rate for the date of the refund. Foreign income taxes deemed paid by a taxpayer under section 902 with respect to an actual distribution of pre-1987 accumulated profits and refunds of such taxes are translated into dollars at the spot rate for the date of the distribution of the earnings to which the foreign income taxes relate. See section 902(c)(6) (as in effect before December 22, 2017) and §1.902-1(a)(10)(iii). For purposes of this section, the term *spot rate* has the meaning provided in §1.988-1(d).

(d) *Timing and effect of pooling adjustments*. The redetermination of U.S. tax liability required by paragraphs (a) and (e) of this section is made in accordance with section 905(c) as in effect for those taxable years, without regard (except as provided in paragraph (e) of this section) to rules that required adjustments to a foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes in the year of the foreign tax redetermination rather than in the year to which the redetermined foreign tax relates. No underpayment or overpayment of U.S. tax liability results from a foreign tax redetermination unless the required adjustments change the U.S. tax liability. Consequently, no interest is paid by or to a taxpayer as a result of adjustments, required by reason of a foreign tax redetermination, to a foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes in the year to which the redetermined foreign tax relates (or a subsequent year) that did not result in a change to U.S. tax liability, for example, because no foreign taxes were deemed paid in that year.

(e) *Election to account for certain foreign tax redeterminations with respect to pre-2018 taxable years in the foreign corporation's last pooling year*—(1) *In general*. A taxpayer may elect under the rules in paragraph (e)(2) of this section to account for foreign tax redeterminations of a foreign corporation that occur in the foreign corporation's taxable years ending with or within a taxable year of a United States shareholder of the foreign corporation ending on or after November 2, 2020, and that relate to taxable years of the foreign corporation beginning before January 1, 2018, by treating such foreign tax redeterminations as if they occurred in the foreign corporation's last taxable year beginning before January 1, 2018 (the "last pooling year"), and applying the rules in §§1.905-3T(d) and 1.905-5T for purposes of determining whether the foreign tax redetermination is accounted for in the foreign corporation's last pooling year or must be accounted for in the year to which the redetermined foreign tax relates. Except with respect to determining under the preceding sentence whether the foreign tax redetermination is accounted for in the foreign corporation's last pooling year or in the year to which the redetermined foreign tax relates, the rules of this section apply to foreign tax redeterminations covered by an election under this paragraph (e). Therefore, unless an exception in §1.905-3T(d)(3) applies, a foreign tax redetermination to which an election under this paragraph (e) applies is accounted for under paragraph (a)(2) of this section by adjusting the foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes in the last pooling year, rather than in the year to which the redetermined foreign tax relates. For purposes of this paragraph (e), references to §§1.905-3T and 1.905-5T are to such provisions as contained in 26 CFR part 1, revised as of April 1, 2019.

(2) *Rules regarding the election*—(i) *Time and manner of election*. For a foreign corporation's first taxable year that ends with or within a taxable year of a United States shareholder of the foreign corporation ending on or after November 2, 2020 in which the foreign corporation has a foreign tax redetermination (the "first redetermination year"), the controlling domestic shareholders (as defined in §1.964-1(c)(5)) of the foreign corporation make the election described in paragraph (e)(1) of this section by—

(A) Filing the statement required under §1.964-1(c)(3)(ii) with a timely filed original income tax return for the taxable year of each controlling domestic shareholder of the foreign corporation in which or with which the foreign corporation's first redetermination year ends;

(B) Providing any notices required under §1.964-1(c)(3)(iii);

(C) Filing amended returns as required under §1.905-4 and this section for each controlling domestic shareholder's taxable year with or within which ends the foreign corporation's last pooling year and each other affected year before the controlling domestic shareholder's taxable year with or within which ends the foreign corporation's first redetermination year reflecting a redetermination of the controlling domestic shareholder's U.S. tax liability for each such taxable year, in cases where a redetermination of the shareholder's U.S. tax liability for taxable years ending before the foreign corporation's last pooling year ends is not required under the rules in §§1.905-3T(d) and 1.905-5T;

(D) Filing amended returns as required under §1.905-4 and this section with respect to each affected year before the controlling domestic shareholder's taxable year with or within which ends the foreign corporation's first redetermination year reflecting a redetermination of the controlling domestic shareholder's U.S. tax liability for each such taxable year, in cases where a redetermination of the shareholder's U.S. tax liability for taxable years ending before the foreign corporation's last pooling year ends is required under the rules in §§1.905-3T(d) and 1.905-5T and this section; and

(E) Providing any additional information required by applicable administrative pronouncements.

(ii) *Scope, duration, and effect of election*. An election under paragraph (e)(1) of this section with respect to the first redetermination year of a foreign corporation is binding on all persons who are, or were in a prior year to which the election applies, United States shareholders of the foreign corporation. In addition, such election applies to all foreign tax redeterminations in the first redetermination year and all subsequent taxable years of such foreign corporation and cannot be revoked. For foreign tax redeterminations that occur in taxable years after the first redetermination year, all United States shareholders of such foreign corporation must account for the foreign tax redeterminations under the rules in paragraph (e)(1) of this section by filing amended returns and providing other information as required by §1.905-4 and paragraphs (e)(2)(i)(C) through (E) of this section.

(iii) *Requirements for valid election*. An election under paragraph (e)(1) of this section is valid only if all of the requirements in paragraph (e)(2)(i) of this section, including the requirement to provide notice under paragraph (e)(2)(i)(B) of this section, are satisfied by each of the controlling domestic shareholders with respect to the first redetermination year.

(iv) *CFC group conformity requirement*—(A) *In general*. An election made under paragraph (e)(1) of this section applies to all controlled foreign corporations that are members of the same CFC group, and the rules in paragraphs (e)(1) and (e)(2)(i) through (iii) of this section apply by reference to the CFC group. Therefore, an election by the controlling domestic shareholders of any controlled foreign corporation with respect to that controlled foreign corporation's first redetermination year also applies to foreign tax redeterminations of all members of the CFC group that includes that controlled foreign corporation, determined as of the close of that controlled foreign corporation's first redetermination year. The election is binding on all persons who are, or were in a prior year to which the election applies, United States shareholders of any member of the CFC group, applies with respect to foreign tax redeterminations of each member that occur in and after that member's first taxable year with or within which ends such controlled foreign corporation's first redetermination year, and cannot be revoked.

(B) *Determination of the CFC group*—(*1*) *Definition*. Subject to the rules in paragraphs (b)(2)(iv)(B)(*2*) and (*3*) of this section, the term *CFC group* means an affiliated group as defined in section 1504(a) without regard to section 1504(b)(1) through (6), except that section 1504(a) is applied by substituting "more than 50 percent" for "at least 80 percent" each place it appears, and section 1504(a)(2)(A) is applied by substituting "or" for "and." For purposes of this paragraph (e)(2)(iv)(B)(*1*), stock ownership is determined by applying the constructive ownership rules of section 318(a), other than section 318(a)(3)(A) and (B), by applying section 318(a)(4) only to options (as defined in §1.1504-4(d)) that are reasonably certain to be exercised as described in §1.1504-4(g), and by substituting in section 318(a)(2)(C) "5 percent" for "50 percent."

(*2*) *Member of a CFC group*. The determination of whether a controlled foreign corporation is included in a CFC group is made as of the close of the first redetermination year of any controlled foreign corporation for which an election is made under paragraph (e)(1) of this section. One or more controlled foreign corporations are members of a CFC group if the requirements of paragraph (e)(2)(iv)(B)(*2*) of this section are satisfied as of the end of the first redetermination year of at least one of the controlled foreign corporations, even if the requirements are not satisfied as of the end of the first redetermination year of all controlled foreign corporations. If the controlling domestic shareholders do not have the same taxable year, the determination of whether a controlled foreign corporation is a member of a CFC group is made with respect to the first redetermination year that ends with or within the taxable year of the majority of the controlling domestic shareholders (determined based on voting power) or, if no such majority taxable year exists, the calendar year.

(*3*) *Controlled foreign corporations included in only one CFC group*. A controlled foreign corporation cannot be a member of more than one CFC group. If a controlled foreign corporation would be a member of more than one CFC group under paragraph (e)(2)(iv)(B)(*2*) of this section, then ownership of stock of the controlled foreign corporation is determined by applying paragraph (e)(2)(iv)(B)(*2*) of this section without regard to section 1504(a)(2)(B) or, if applicable, by reference to the ownership existing as of the end of the first redetermination year of a controlled foreign corporation that would cause a CFC group to exist.

(3) *Rules for successor entities*. All of the United States persons that own equity interests in a successor entity to a foreign corporation ("U.S. owners") may elect under the principles of paragraph (e)(2) of

this section to apply the rules in paragraph (e)(1) to foreign tax redeterminations of such foreign corporation that occur in taxable years of the successor entity that end with or within taxable years of its U.S. owners ending on or after November 2, 2020.

(f) *Applicability date*. This section applies to foreign tax redeterminations (as defined in §1.905-3(a)) of foreign corporation and successor entities that occur in taxable years that end with or within taxable years of a United States shareholder or other United States persons ending on or after November 2, 2020**,** and that relate to taxable years of such foreign corporations beginning before January 1, 2018.

§1.905-5T [REMOVED]

Par. 25. Section 1.905-5T is removed.

Par. 26. Section 1.951A-2 is amended by adding paragraph (c)(6) to read as follows:

§1.951A-2 Tested income and tested loss.

* * * * *

(c) * * *

(6) *Allocation of deductions attributable to disqualified payments*—(i) *In general*. A deduction related directly or indirectly to a disqualified payment is allocated and apportioned solely to residual CFC gross income, and any deduction related to a disqualified payment is not properly allocable to property produced or acquired for resale under section 263, 263A, or 471.

(ii) *Definitions*. The following definitions apply for purposes of this paragraph (c)(6).

(A) *Disqualified payment*. The term *disqualified payment* means a payment made by a person to a related recipient CFC during the disqualified period with respect to the related recipient CFC, to the extent the payment would constitute income described in section 951A(c)(2)(A)(i) and paragraph (c)(1) of this section without regard to whether section 951A applies.

(B) *Disqualified period*. The term *disqualified period* has the meaning provided in §1.951A-3(h)(2)(ii)(C)(*1*), substituting "related recipient CFC" for "transferor CFC."

(C) *Related recipient CFC*. The term *related recipient CFC* means, with respect to a payment by a person, a recipient of the payment that is a controlled foreign corporation that bears a relationship to the payor described in section 267(b) or 707(b) immediately before or after the payment.

(iii) *Treatment of partnerships*. For purposes of determining whether a payment is made by a person to a related recipient CFC for purposes of paragraph (c)(6)(ii)(A) of this section, a payment by or to a partnership is treated as made proportionately by or to its partners, as applicable.

(iv) *Examples*. The following examples illustrate the application of this paragraph (c)(6).

(A) *Example 1: Deduction related directly to disqualified payment to related recipient CFC—*(*1*) *Facts*. USP, a domestic corporation, owns all of the stock in CFC1 and CFC2, each a controlled foreign corporation. Both USP and CFC2 use the calendar year as their taxable year. CFC1 uses a taxable year ending November 30. On October 15, 2018, before the start of its first CFC inclusion year, CFC1 receives and accrues a payment from CFC2 of $100x of prepaid royalties with respect to a license. The $100x payment is excluded from subpart F income pursuant to section 954(c)(6) and would constitute income described in section 951A(c)(2)(A)(i) and paragraph (c)(1) of this section without regard to whether section 951A applies.

(*2*) *Analysis*. CFC1 is a related recipient CFC (within the meaning of paragraph (c)(6)(ii)(C) of this section) with respect to the royalty prepayment by CFC2 because it is related to CFC2 within the meaning of section 267(b). The royalty prepayment is received by CFC1 during its disqualified period (within the meaning of paragraph (c)(6)(ii)(B) of this section) because it is received during the period beginning January 1, 2018, and ending November 30, 2018. Because it would constitute income described in section 951A(c)(2)(A)(i) and paragraph (c)(1) of this section without regard to whether section 951A applies, the payment is a disqualified payment. Accordingly, CFC2's deductions related to such payment accrued during taxable years ending on or after April 7, 2020, are allocated and apportioned solely to residual CFC gross income under paragraph (c)(6)(i) of this section.

(B) *Example 2: Deduction related indirectly to disqualified payment to partnership in which related recipient CFC is a partner—*(*1*) *Facts*. The facts are the same as in paragraph (c)(6)(iv)(A)(*1*) of this section (the facts in *Example 1*), except that CFC1 and USP own 99% and 1%, respectively of FPS, a foreign partnership, which has a taxable year ending November 30. USP receives a prepayment of $110x from CFC2 for the performance of future services. USP subcontracts the performance of these future services to FPS for which FPS receives and accrues a $100x prepayment from USP. The services will be performed in the same country under the laws of which CFC1 and FPS are created or organized, and the $100x prepayment is not foreign base company services income under section 954(e) and §1.954-4(a). The $100x prepayment would constitute income described in section 951A(c)(2)(A)(i) and paragraph (c)(1) of this section without regard to whether section 951A applies.

(*2*) *Analysis*. CFC1 is a related recipient CFC (within the meaning of paragraph (c)(6)(ii)(C) of this section) with respect to the services prepayment by USP because, under paragraph (c)(6)(iii) of this section, it is treated as receiving $99x (99% of $100x) of the services prepayment from USP, and it is related to USP within the meaning of section 267(b). The services prepayment is received by CFC1 during its disqualified period (within the meaning of paragraph (c)(6)(ii)(B) of this section) because it is received during the period beginning January 1, 2018, and ending November 30, 2018. Because it would constitute income described in section 951A(c)(2)(A)(i) and paragraph (c)(1) of this section without regard to whether section 951A applies, the prepayment is a disqualified payment. In addition, CFC2's deductions related to its prepayment to USP are indirectly related to the disqualified payment by USP. Accordingly, CFC2's deductions related to such payment accrued during taxable years ending on or after April 7, 2020 are allocated and apportioned solely to residual CFC gross income under paragraph (c)(6)(i) of this section.

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Par. 27. Section 1.951A-7 is amended by adding reserved paragraph (c) and paragraph (d) to read as follows:

§1.951A-7 Applicability dates.

* * * * *

(d) *Deduction for disqualified payments*. Section 1.951A-2(c)(6) applies to taxable years of foreign corporations ending on or after April 7, 2020, and to taxable years of United States shareholders in which or with which such taxable years end.

Par. 28. Section 1.954-1 is amended by:

1. In paragraph (c)(1)(i)(C), removing the language "reduced by related person" and adding the language "reduced (but not below zero) by related person" in its place.

2. Adding two sentences to the end of paragraph (d)(3)(iii).

3. Revising paragraph (h)(1).

The revision and additions read as follows:

§1.954-1 Foreign base company income.

* * * * *

(d) * * *

(3) * * *

(iii) * * * In addition, foreign income taxes that have not been paid or accrued

because they are contingent on a future distribution of earnings are not taken into account for purposes of this paragraph (d)(3). If, pursuant to section 905(c) and §1.905-3(b)(2), a redetermination of U.S. tax liability is required to account for the effect of a foreign tax redetermination (as defined in §1.905-3(a)), this paragraph (d) is applied in the adjusted year taking into account the adjusted amount of the redetermined foreign tax.

* * * * *

(h) * * *

(1) *Paragraph (d)(3) of this section*. Paragraph (d)(3) of this section applies to taxable years of a controlled foreign corporation ending on or after December 16, 2019. For taxable years of a controlled foreign corporation ending on or after December 4, 2018, but ending before December 16, 2019, see §1.954-1(d)(3) as contained in 26 CFR part 1 revised as of April 1, 2019.

* * * * *

Par. 29. Section 1.954-2 is amended by:

1. Removing the text "and" from paragraph (h)(2)(i)(H).

2. Redesignating paragraph (h)(2)(i)(I) as paragraph (h)(2)(i)(J).

3. Adding a new paragraph (h)(2)(i)(I).

4. Adding a sentence to the end of paragraph (i)(3).

The additions read as follows:

§1.954-2 Foreign personal holding company income.

* * * * *

(h) * * *

(2) * * *

(i) * * *

(I) Any guaranteed payments for the use of capital under section 707(c); and

* * * * *

(i) * * *

(3) * * * Paragraph (h)(2)(i)(I) of this section applies to taxable years of controlled foreign corporations ending on or after December 16, 2019, and to taxable years of United States shareholders in which or with which such taxable years end.

Par. 30. Section 1.960-1 is amended by:

1. Adding a sentence at the end of paragraph (c)(2).

2. Revising paragraphs (d)(3)(ii)(A) and (B).

3. Removing paragraph (d)(3)(ii)(C).

The addition and revisions read as follows:

§1.960-1 Overview, definitions, and computational rules for determining foreign income taxes deemed paid under section 960(a), (b), and (d).

* * * * *

(c) * * *

(2) * * * An item of income with respect to a current taxable year does not include an amount included as subpart F income of a controlled foreign corporation by reason of the recharacterization of a recapture account established in a prior U.S. taxable year (and the corresponding earnings and profits) of the controlled foreign corporation under section 952(c)(2) and §1.952-1(f).

* * * * *

(d) * * *

(3) * * *

(ii) * * *

(A) *In general*. A current year tax is allocated and apportioned among the section 904 categories under the rules of §1.904-6. An amount of the current year tax that is allocated and apportioned to a section 904 category is then allocated and apportioned among the income groups within the section 904 category under §1.861-20 (as modified by §1.904-6(c)) by treating each income group as a statutory grouping and treating the residual income group as the residual grouping. Therefore, foreign gross income attributable to a base difference is assigned to the residual income grouping under §1.861-20(d)(2)(ii)(B). See, however, paragraph (d)(3)(ii)(B) of this section for special rules for applying §1.861-20 in the case of PTEP groups. For purposes of determining foreign income taxes deemed paid under the rules in §§1.960-2 and 1.960-3, the U.S. dollar amount of a current year tax is assigned to the section 904 categories, income groups, and PTEP groups (to the extent provided in paragraph (d)(3)(ii)(B) of this section) to which the current year tax is allocated and apportioned.

(B) *Foreign taxable income that includes previously taxed earnings and profits*. For purposes of allocating and apportioning a current year tax under this paragraph (d)(3)(ii), a PTEP group that is increased under §1.960-3(c)(3) as a result of the receipt of a section 959(b) distribution in the current taxable year of the controlled foreign corporation is treated as an income group within the section 904 category. In such case, under §1.861-20, the portion of the foreign gross income (as defined in §1.861-20(b)(5)) that is characterized under Federal income tax principles as a distribution of previously taxed earnings and profits that results in the increase in the PTEP group in the current taxable year is assigned to that PTEP group. If a PTEP group is not treated as an income group under the first sentence of this paragraph (d)(3)(ii)(B), and the rules of §1.861-20 would otherwise apply to assign foreign gross income to a PTEP group, that foreign gross income is instead assigned to the subpart F income group or tested income group to which the income that gave rise to the previously taxed earnings and profits would be assigned if the income were recognized by the recipient controlled foreign corporation under Federal income tax principles in the current taxable year. For example, a net basis or withholding tax imposed on a controlled foreign corporation's receipt of a section 959(b) distribution is allocated or apportioned to a PTEP group. In contrast, a withholding tax imposed on a disregarded payment from a disregarded entity to its controlled foreign corporation owner is never treated as related to a PTEP group, even if all of the controlled foreign corporation's earnings are previously taxed earnings and profits, because the payment that gives rise to the foreign gross income from which the tax was withheld does not constitute a section 959(b) distribution in the current taxable year. That foreign gross income, however, may be assigned to a subpart F income group or tested income group.

* * * * *

Par. 31. Section 1.960-2 is amended by adding a sentence at the end of paragraph (b)(3)(iii) to read as follows:

§1.960-2 Foreign income taxes deemed paid under sections 960(a) and (d).

* * * * *

(b) * * *

(3) * * *

(iii) * * * See §1.960-1(c)(2) for a rule regarding the treatment of an increase in the subpart F income of a controlled foreign corporation by reason of the recharacterization of a recapture account and the corresponding accumulated earnings and profits under section 952(c) and §1.952-1(f).

* * * * *

§1.960-3 [Amended]

Par. 32. Section 1.960-3 is amended by removing the language "§1.951A-6(b)(2)" from the twelfth sentence of paragraph (e)(2)(i) and adding the language "§1.951A-5(b)(2)" in its place.

Par. 33. Section 1.960-4 is amended in table 2 to paragraph (f)(1) by revising the entry "Limitation for Year 2 before increase under section 960(c)(1) ($10.50x × $0/$50x)" to read as follows:

§1.960-4 Additional foreign tax credit in year of receipt of previously taxed earnings and profits.

* * * * *

(f) * * *

(1) * * *

Table 2 to paragraph (f)(1)

* * * * * * *		
Limitation for Year 2 before increase under section 960(c)(1) ($10.50x × $0/$50x)		0
* * * * * * *		

* * * * *

Par. 34. Section 1.960-7 is revised to read as follows:

§1.960-7 Applicability dates.

(a) Except as provided in paragraph (b) of this section, §§1.960-1 through 1.960-6 apply to each taxable year of a foreign corporation ending on or after December 4, 2018, and to each taxable year of a domestic corporation that is a United States shareholder of the foreign corporation in which or with which such taxable year of such foreign corporation ends.

(b) Section 1.960-1(c)(2) and (d)(3)(ii) applies to taxable years of a foreign corporation beginning after December 31, 2019, and to each taxable year of a domestic corporation that is a United States shareholder of the foreign corporation in which or with which such taxable year of such foreign corporation ends. For taxable years of a foreign corporation that end on or after December 4, 2018, and also begin before January 1, 2020, see §1.960-1(c)(2) and (d)(3)(ii) as in effect on December 17, 2019.

Par. 35. Section 1.965-5 is amended by:

1. Designating the text of paragraph (b) as paragraph (b)(1).

2. Adding a heading for newly designated paragraph (b)(1).

3. Adding paragraph (b)(2).

The revision and additions read as follows:

§1.965-5 Allowance of a credit or deduction for foreign income taxes.

* * * * *

(b) * * *

(1) *In general.* * * *

(2) *Attributing taxes to section 959(a) distributions of section 965 previously taxed earnings and profits.* For purposes of paragraph (b)(1) of this section, foreign income taxes are attributable to a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits if such taxes would be allocated and apportioned to a distribution of such previously taxed earnings and profits under the principles of §1.904-6(a)(1)(iv), regardless of whether an actual distribution is made or recognized for Federal income tax purposes. Therefore, for example, a credit or deduction for the applicable percentage of foreign income taxes imposed on a United States shareholder that pays foreign tax on a distribution that is not recognized for Federal income tax purposes (for example, in the case of a consent dividend or stock dividend upon which a withholding tax is imposed) is not allowed under paragraph (b)(1) of this section to the extent it is attributable to a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits under the principles of §1.904-6(a)(1)(iv). For taxable years of foreign corporations beginning after December 31, 2019, in lieu of applying the principles of §1.904-6 under this paragraph (b)(2), the rules in §1.861-20 apply by treating the portion of a distribution attributable to section 965(a) previously taxed earnings and profits and the portion of a distribution attributable to section 965(b) previously taxed earnings and profits each as a statutory grouping, and the portion of the distribution that is attributable to other earnings and profits as the residual grouping. See §1.861-20(g)(7) (*Example 6*).

* * * * *

Par. 36. Section 1.965-9 is amended by adding a sentence to the end of paragraph (c) to read as follows:

§1.965-9 Applicability dates.

* * * * *

(c) * * * Section 1.965-5(b)(2) applies to taxable years of foreign corporations that end on or after December 16, 2019, and with respect to a United States person, to the taxable years in which or with which such taxable years of the foreign corporations end.

Par. 37. Section 1.1502-4 is revised to read as follows:

§1.1502-4 Consolidated foreign tax credit.

(a) *In general.* The foreign tax credit under section 901 is allowed to the group only if the agent for the group (as defined in §1.1502-77(a)) chooses to use the credit

in the computation of the consolidated tax liability of the group for the consolidated return year. If that choice is made, section 275(a)(4) provides that no deduction against taxable income may be taken on the consolidated return for foreign taxes paid or accrued by any member. However, if section 275(a)(4) does not apply, a deduction against consolidated taxable income may be allowed for certain taxes for which a credit is not allowed, even though the choice is made to claim a credit for other taxes. See, for example, sections 901(j)(3), 901(k)(7), 901(l)(4), 901(m)(6), and 908(b).

(b) *Computation of foreign tax credit*. The foreign tax credit for the consolidated return year is determined on a consolidated basis under the principles of sections 901 through 909 and 960. All foreign income taxes paid or accrued by members of the group for the year (including those deemed paid under section 960 and paragraph (d) of this section) must be aggregated.

(c) *Computation of limitation on credit*. For purposes of computing the group's limiting fraction under section 904, the following rules apply:

(1) *Computation of taxable income from foreign sources*—(i) *Separate categories*. The group must compute a separate foreign tax credit limitation for income in each separate category (as defined in §1.904-5(a)(4)(v)) for purposes of this section. The numerator of the limiting fraction in any separate category is the consolidated taxable income of the group determined in accordance with §1.1502-11, taking into account adjustments required under section 904(b), if any, from sources without the United States in that category, determined in accordance with the rules of §§1.904-4 and 1.904-5 and the section 861 regulations (as defined in §1.861-8(a)(1)).

(ii) *Adjustments under sections 904(f) and (g)*. The rules for allocation and recapture of separate limitation losses and overall foreign losses under section 904(f) and §1.1502-9 apply to determine the foreign source and U.S. source taxable income in each separate category of the consolidated group. Similarly, the rules for allocation and recapture of overall domestic losses under section 904(g) and §1.1502-9 apply to determine the foreign source and U.S. source taxable income in each separate category of the consolidated group. See §1.904(g)-3 for allocation rules under sections 904(f) and 904(g). The rules of sections 904(f) and 904(g) do not operate to recharacterize foreign income tax attributable to any separate category.

(iii) *Computation of consolidated net operating loss*. The source and separate category of the group's consolidated net operating loss ("CNOL"), as that term is defined in §1.1502-21(e), for the taxable year, if any, is determined based on the amounts of any separate limitation losses and U.S. source loss that are not allocated to reduce U.S. source income or income in other separate categories under the rules of sections 904(f) and 904(g) in computing the group's consolidated foreign tax credit limitations for the taxable year under paragraphs (c)(1)(i) and (ii) of this section.

(iv) *Characterization of CNOL carried to a separate return year*—(A) *In general*. The total amount of CNOL attributable to a member that is carried to a separate return year is determined under the rules of §1.1502-21(b)(2). The source and separate category of the portion of the CNOL that is attributable to a member is determined under this paragraph (c)(1)(iv).

(B) *Tentative apportionment*. For the portion of the CNOL that is attributable to the member described in paragraph (c)(1)(iv) of this section, the consolidated group determines a tentative allocation and apportionment to each statutory and residual grouping (as described in §1.861-8(a)(4) with respect to section 904 as the operative section) under the principles of §1.1502-9(c)(2)(i), (ii), (iv), and (v) by treating the portion of the group's CNOL in each statutory and residual grouping as if it were a CSLL account, as that term is described in §1.1502-9(b)(4). This determination is made as of the end of the taxable year of the consolidated group in which the CNOL arose or, if earlier and applicable, when the member leaves the consolidated group.

(C) *Adjustments*. (*1*) If the total tentative apportionment for all statutory and residual groupings exceeds the portion of the CNOL attributable to the member described in paragraph (c)(1)(iv)(A) of this section (the "excess amount"), then the tentative apportionment in each grouping is reduced by an amount equal to the excess amount multiplied by a fraction, the numerator of which is the tentative apportionment in that grouping, and the denominator of which is the total tentative apportionments in all groupings.

(*2*) If the total tentative apportionment for all statutory and residual groupings is less than the total CNOL attributable to the member described in paragraph (c)(1)(iv)(A) (the "deficiency"), then the tentative apportionment in each grouping is increased by an amount equal to the deficiency multiplied by a fraction, the numerator of which is the CNOL in that grouping that was not tentatively apportioned, and the denominator of which is the total CNOL in all groupings that was not tentatively apportioned.

(v) *Consolidated net capital losses*. The principles of the rules in paragraphs (c)(1)(i) through (iv) of this section apply for purposes of determining the source and separate category of consolidated net capital losses described in §1.1502-22(e).

(2) *Computation of consolidated taxable income*. The denominator of the limiting fraction in any separate category is the consolidated taxable income of the group determined in accordance with §1.1502-11, taking into account adjustments required under section 904(b), if any.

(3) *Computation of tax against which credit is taken*. The tax against which the limiting fraction under section 904(a) is applied will be the consolidated tax liability of the group determined under §1.1502-2, but without regard to §1.1502-2(a)(2) through (4) and (8) and (9), and without regard to any credit against such liability. See sections 26(b) and 901(a).

(d) *Carryover and carryback of unused foreign tax*—(1) *Allowance of unused foreign tax as consolidated carryover or carryback*. The consolidated group's carryovers and carrybacks of unused foreign tax (as defined in §1.904-2(c)(1)) to the taxable year is determined on a consolidated basis under the principles of section 904(c) and §1.904-2 and is deemed to be paid or accrued to a foreign country or possession for that year. The consolidated group's unused foreign tax carryovers and carrybacks to the taxable year consist of any unused foreign tax of the consolidated group, plus any unused foreign tax of

members for separate return years, which may be carried over or back to the taxable year under the principles of section 904(c) and §1.904-2. The consolidated group's unused foreign tax carryovers and carrybacks do not include any unused foreign taxes apportioned to a corporation for a separate return year pursuant to §1.1502–79(d). A consolidated group's unused foreign tax in each separate category is the excess of the foreign taxes paid, accrued or deemed paid under section 960 by the consolidated group over the limitation in the applicable separate category for the consolidated return year. See paragraph (c) of this section.

(2) *Absorption rules*. For purposes of determining the amount, if any, of an unused foreign tax which can be carried to a taxable year (whether a consolidated or separate return year), the amount of the unused foreign tax that is absorbed in a prior consolidated return year under section 904(c) shall be determined by—

(i) Applying all unused foreign taxes which can be carried to a prior year in the order of the taxable years in which those unused foreign taxes arose, beginning with the taxable year that ends earliest; and

(ii) Applying all unused foreign taxes which can be carried to such prior year from taxable years ending on the same date on a pro rata basis.

(e) *Example*. The following example illustrates the application of this section:

(1) *Facts*. (i) Domestic corporation P is incorporated on January 1, Year 1. On that same day, P incorporates domestic corporations S and T as wholly owned subsidiaries. P, S, and T file consolidated returns for Years 1 and 2 on the basis of a calendar year. T engages in business solely through a qualified business unit in Country A. S engages in business solely through qualified business units in Countries A and B. P does business solely in the United States. During Year 1, T sold an item of inventory to P at a gain of $2,000. Under §1.1502-13 the intercompany gain has not been taken into account as of the close of Year 1. The taxable income of each member for Year 1 from foreign and U.S. sources, and the foreign taxes paid on such foreign income, are as follows:

Table 1 to paragraph (e)(1)(i)

Corporation	U.S. Source taxable income	Foreign branch category foreign source taxable income	Foreign branch category foreign tax paid	Total taxable income
P	$40,000			$40,000
T		$20,000	$12,000	20,000
S		20,000	9,000	20,000
Group	$40,000	$40,000	$21,000	$80,000

(ii) The separate taxable income of each member was computed by taking into account the rules under §1.1502-12. Accordingly, T's intercompany gain of $2,000 is not included in T's taxable income for Year 1. The group's consolidated taxable income (computed in accordance with §1.1502-11) is $80,000. The consolidated tax liability against which the credit may be taken (computed in accordance with paragraph (c)(3) of this section) is $16,800.

(2) *Analysis*. Under section 904(d) and paragraph (c)(1)(i) of this section, the aggregate amount of foreign income taxes paid to all foreign countries with respect to the foreign branch category income of $21,000 ($12,000 + $9,000) that may be claimed as a credit in Year 1 is limited to $8,400 ($16,800 x $40,000/$80,000). Assuming P, as the agent for the group, chooses to use the foreign taxes paid as a credit, the group may claim a $8,400 foreign tax credit.

(f) *Applicability date*. This section applies to taxable years for which the original consolidated Federal income tax return is due (without extensions) after January 11, 2021.

Par. 38. Section 1.1502-21 is amended by adding a sentence to the end of paragraph (b)(2)(iv)(B)(*1*) to read as follows:

§1.1502-21 Net operating losses.

* * * * *

(b) * * *

(2) * * *

(iv) * * *

(B) * * *

(*1*) * * * The source and section 904(d) separate category of the CNOL attributable to a member is determined under §1.1502-4(c)(1)(iii).

* * * * *

PART 301—PROCEDURE AND ADMINISTRATION

Par. 39. The authority citation for part 301 is amended by adding an entry for §301.6689-1 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 301.6689-1 also issued under 26 U.S.C. 6689(a), 26 U.S.C. 6227(d), and 26 U.S.C. 6241(11).

* * * * *

Par. 40. Section 301.6227-1 is amended by adding paragraph (g) to read as follows:

§301.6227-1 Administrative adjustment request by partnership.

* * * * *

(g) *Notice requirement and partnership adjustments required as a result of a foreign tax redetermination*. For special rules applicable when an adjustment to a partnership related item (as defined in section 6241(2)) is required as part of a redetermination of U.S. tax liability under section 905(c) and §1.905-3(b) of this chapter as a result of a foreign tax redetermination (as defined in §1.905-3(a) of this chapter), see §1.905-4(b)(2)(ii) of this chapter.

* * * * *

Par. 41. Section 301.6689-1 is added to read as follows:

§301.6689-1 Failure to file notice of redetermination of foreign income taxes.

(a) *Application of civil penalty*. If a foreign tax redetermination occurs, and the taxpayer failed to notify the Internal Revenue Service (IRS) on or before the date and in the manner prescribed in §1.905-4 of this chapter, or as required under section 404A(g)(2), for giving notice of a foreign tax redetermination, then, unless paragraph (d) of this section applies, there is added to the deficiency (or the imputed underpayment as determined under sec-

tion 6225) attributable to such redetermination an amount determined under paragraph (b) of this section. Subchapter B of chapter 63 of the Internal Revenue Code (relating to deficiency proceedings) does not apply with respect to the assessment of the amount of the penalty.

(b) *Amount of the penalty*. The amount of the penalty shall be equal to—

(1) Five percent of the deficiency (or imputed underpayment) if the failure is for not more than one month; plus

(2) An additional five percent of the deficiency (or imputed underpayment) for each month (or fraction thereof) during which the failure continues, but not to exceed in the aggregate twenty-five percent of the deficiency (or imputed underpayment).

(c) *Foreign tax redetermination defined*. For purposes of this section, a foreign tax redetermination is any redetermination for which a notice is required under sections 905(c) or 404A(g)(2). See §§1.905-3 through 1.905-5 of this chapter for rules relating to the notice requirement under section 905(c).

(d) *Reasonable cause*. The penalty set forth in this section shall not apply if it is established to the satisfaction of the IRS that the failure to file the notification within the prescribed time was due to reasonable cause and not due to willful neglect. An affirmative showing of reasonable cause must be made in the form of a written statement that sets forth all the facts alleged as reasonable cause for the failure to file the notification on time and that contains a declaration by the taxpayer that the statement is made under the penalties of perjury. This statement must be filed with the Internal Revenue Service Center in which the notification was required to be filed. The taxpayer must file this statement with the notice required under section 905(c) or 404A(g)(2). If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the notification within the prescribed time, then the delay will be considered to be due to reasonable cause and not willful neglect.

(e) *Applicability date*. This section applies to foreign tax redeterminations occurring in taxable years ending on or after December 16, 2019, and to foreign tax redeterminations of foreign corporations occurring in taxable years that end with or within a taxable year of a United States shareholder ending on or after December 16, 2019.

§301.6689-1T [REMOVED]

Par. 42. Section 301.6689-1T is removed.

Sunita Lough,
Deputy Commissioner for Services and Enforcement.

Approved: September 18, 2020.

David J. Kautter,
Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on November 2, 2020, 11:15 a.m., and published in the issue of the Federal Register for November 12, 2020, 85 F.R. 71998)

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26 CFR 54.9815-2715A1, 54.9815-2715A2, and 54.9815-2715A3: Transparency in coverage

T.D. 9929

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 54

DEPARTMENT OF LABOR
Employee Benefits Security Administration
29 CFR Part 2590

DEPARTMENT OF HEALTH AND HUMAN SERVICES
45 CFR Parts 147 and 158
CMS-9915-F

Transparency in Coverage

AGENCY: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: The final rules set forth requirements for group health plans and health insurance issuers in the individual and group markets to disclose cost-sharing information upon request to a participant, beneficiary, or enrollee (or his or her authorized representative), including an estimate of the individual's cost-sharing liability for covered items or services furnished by a particular provider. Under the final rules, plans and issuers are required to make this information available on an internet website and, if requested, in paper form, thereby allowing a participant, beneficiary, or enrollee (or his or her authorized representative) to obtain an estimate and understanding of the individual's out-of-pocket expenses and effectively shop for items and services. The final rules also require plans and issuers to disclose in-network provider negotiated rates, historical out-of-network allowed amounts, and drug pricing information through three machine-readable files posted on an internet website, thereby allowing the public to have access to health coverage information that can be used to understand health care pricing and potentially dampen the rise in health care spending. The Department of Health and Human Services (HHS) also finalizes amendments to its medical loss ratio (MLR) program rules to allow issuers offering group or individual health insurance coverage to receive credit in their MLR calculations for savings they share with enrollees that result from the enrollees shopping for, and receiving care from, lower-cost, higher-value providers.

DATES: *Effective date*: The final rules are effective on January 11, 2021.

Applicability date: See the SUPPLMENTARY INFORMATION section for information on the applicability dates.

FOR FURTHER INFORMATION CONTACT: Deborah Bryant, Centers for Medicare & Medicaid Services, (301) 492-4293. Christopher Dellana, Internal Revenue Service, (202) 317-5500. Matthew Litton or Frank Kolb, Employee Benefits Security Administration, (202)

693-8335. *Customer Service Information:* Individuals interested in obtaining information from the Department of Labor (DOL) concerning employment-based health coverage laws may call the Employee Benefits Security Administration (EBSA) Toll-Free Hotline at 1–866–444–EBSA (3272) or visit DOL's website (http://www.dol.gov/ebsa). In addition, information from HHS on private health insurance for consumers can be found on the Centers for Medicare & Medicaid Services (CMS) website (www.cms.gov/cciio) and information on health reform can be found at http://www.healthcare.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The final rules require group health plans and health insurance issuers in the individual and group markets to disclose cost-sharing information upon request, to a participant, beneficiary, or enrollee, which, unless otherwise indicated, for the purpose of the final rules includes an authorized representative, and require plans and issuers to disclose in-network provider rates, historical out-of-network allowed amounts and the associated billed charges, and negotiated rates for prescription drugs in 26 CFR part 54, 29 CFR part 2590, and 45 CFR part 147. HHS also finalizes amendments to its MLR program rules in 45 CFR part 158.

A.*Statutory Background and Enactment of PPACA*

The Patient Protection and Affordable Care Act (Pub. L. 111-148) was enacted on March 23, 2010, and the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111-152) was enacted on March 30, 2010 (collectively, PPACA). As relevant here, PPACA reorganized, amended, and added to the provisions of part A of title XXVII of the Public Health Service (PHS) Act relating to health coverage requirements for group health plans and health insurance issuers in the group and individual markets. The term group health plan includes both insured and self-insured group health plans.

PPACA also added section 715 to the Employee Retirement Income Security Act of 1974 (ERISA) and section 9815 to the Internal Revenue Code (Code) to incorporate the provisions of part A of title XXVII of the PHS Act, PHS Act sections 2701 through 2728, into ERISA and the Code, making them applicable to group health plans, and health insurance issuers providing coverage in connection with group health plans.

1.Transparency in Coverage

Section 2715A of the PHS Act provides that group health plans and health insurance issuers offering group or individual health insurance coverage must comply with section 1311(e)(3) of PPACA, which addresses transparency in health coverage and imposes certain reporting and disclosure requirements for health plans that are seeking certification as qualified health plans (QHPs) that may be offered on an Exchange. A plan or coverage that is not offered through an Exchange (as defined by section 1311(b)(1) of PPACA) is required to submit the information required to the Secretary of HHS and the relevant state's insurance commissioner, and to make that information available to the public.

Paragraph (A) of section 1311(e)(3) of PPACA requires a plan seeking certification as a QHP to make the following information available to the public and submit it to state insurance regulators, the Secretary of HHS, and the Exchange:

- claims payment policies and practices,
- periodic financial disclosures,
- data on enrollment,
- data on disenrollment,
- data on the number of claims that are denied,
- data on rating practices,
- information on cost-sharing and payments with respect to any out-of-network coverage, and
- information on enrollee and participant rights under Title I of PPACA.

Paragraph (A) also requires a plan seeking certification as a QHP to submit any "[o]ther information as determined appropriate by the Secretary."

Paragraph (C) of section 1311(e)(3) of PPACA requires plans, as a requirement of certification as a QHP, to permit individuals to learn the amount of cost sharing (including deductibles, copayments, and coinsurance) under the individual's coverage that the individual would be responsible for paying with respect to the furnishing of a specific item or service by an in-network provider in a timely manner upon the request of the individual. Paragraph (C) specifies that, at a minimum, such information must be made available to the individual through an internet website and through other means for individuals without access to the internet.

Together these statutory provisions require the overriding majority of private health plans[1] to disseminate a substantial amount of information to provide transparency in coverage. The portions of the final rules that require plans and issuers to disclose cost-sharing information upon request, to a participant, beneficiary, or enrollee implement paragraph (C) of section 1311(e)(3) of PPACA. The portions of the final rules that require plans and issuers to disclose in-network provider rates, historical out-of-network allowed amounts and the associated billed charges, and negotiated rates for prescription drugs implement paragraph (A) of section 1311(e)(3) of PPACA. The requirements to disclose out-of-network allowed amounts specifically implements the requirement in section 1311(e)(3)(A)(vii) to provide information on "payments with respect to any out-of-network coverage." In addition to payment information on out-of-network charges, the Secretary of HHS determined that payment information on in-network rates and prescription drugs is also appropriate information to require plans and issuers to disclose to provide transparency in coverage under section 1311(e)(3)(A)(ix).

[1] As of 2018, private, non-grandfathered health plans that must comply with these statutory provisions covered more than 92 percent of the almost 177 million people covered by private health coverage. The remaining 7.7 percent were covered by grandfathered health plans or were enrolled in short-term limited duration coverage or health care sharing ministries. *See* Kaiser Family Foundation, Health Insurance Coverage of the Total Population in 2018, https://www.kff.org/other/state-indicator/total-population/?dataView=1&currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D, last accessed October 5, 2020.

PPACA's transparency in coverage requirements were enacted in coordination with a set of requirements that transformed the regulation of private market health plans and issuers. These requirements for the first time apply a comprehensive framework for regulating private health coverage through federal law.[2] Prior to PPACA, federal law relied on states to be the primary regulators of health insurance, but applied only a limited set of federal requirements to govern private health coverage. Where federal law regulated private health coverage, there was a substantial variation in how these regulations applied, depending on whether private health coverage was self-insured group coverage, large group insurance coverage, small group insurance coverage, or individual insurance coverage. To establish a comprehensive framework for regulating private health coverage, PPACA first set out a series of requirements on "Improving Coverage" that generally apply to group health plans and health insurance issuers offering group or individual health insurance coverage.[3] These requirements ranged from the prohibition on lifetime or annual dollar limits in section 2711 of the PHS Act to the requirement to cover out-of-network emergency services in section 2719A of the PHS Act and include the transparency in coverage requirements in section 2715A of the PHS Act.[4] By including transparency in coverage in this set of requirements that apply to most private coverage, Congress established transparency as a key component to PPACA's comprehensive framework for regulating private health coverage.[5]

On March 27, 2012, HHS issued the Exchange Establishment final rule that implemented sections 1311(e)(3)(A) through (C) of PPACA at 45 CFR 155.1040(a) through (c) and 156.220.[6] The Exchange Establishment final rule created standards for QHP issuers to submit specific information related to transparency in coverage. QHPs are required to post and make data related to transparency in coverage available to the public in plain language and submit this same data to HHS, the Exchange, and the relevant state insurance commissioner. In the preamble to the Exchange Establishment final rule, HHS noted that "health plan standards set forth under the final rules are, for the most part, strictly related to QHPs certified to be offered through the Exchange and not the entire individual and small group market. Such policies for the entire individual and small and large group markets have been, and will continue to be, addressed in separate rulemaking issued by HHS, and the Departments of Labor and the Treasury."

2. Medical Loss Ratio

Section 2718(a) of the PHS Act, as added by PPACA, generally requires health insurance issuers offering group or individual health insurance coverage (including a grandfathered health insurance plan) to submit an annual report to the Secretary of HHS that details the percentage of premium revenue (after certain adjustments) expended on reimbursement for clinical services provided to enrollees under health coverage and on activities that improve health care quality. The proportion of premium revenue spent on clinical services and quality improvement activities is called the MLR. Section 2718(b) of the PHS Act requires an issuer to provide annual rebates to enrollees if its MLR falls below specified standards (generally 80 percent for the individual and small group markets, and 85 percent for the large group market). HHS published an interim final rule to implement the MLR program in the December 1, 2010 **Federal Register** (75 FR 74863). A final rule was published in the December 7, 2011 **Federal Register** (76 FR 76573). The MLR program requirements were amended in final rules published in the December 7, 2011 **Federal Register** (76 FR 76595), the May 16, 2012 **Federal Register** (77 FR 28790), the March 11, 2014 **Federal Register** (79 FR 13743), the May 27, 2014 **Federal Register** (79 FR 30339), the February 27, 2015 **Federal Register** (80 FR 10749), the March 8, 2016 **Federal Register** (81 FR 12203), the December 22, 2016 **Federal Register** (81 FR 94183), the April 17, 2018 **Federal Register** (83 FR 16930), the April 25, 2019 **Federal Register** (84 FR 17454), and the February 6, 2020 **Federal Register** (85 FR 7088).

B. *Benefits of Transparency in Health Coverage and Past Efforts to Promote Transparency*

PPACA's transparency in coverage requirements can help ensure the accurate and timely disclosure of information appropriate to support an efficient and competitive health care market. A well-functioning, competitive market depends on information being available to buyers and sellers.[7] As President Trump's "Executive Order on Improving Price and Quality Transparency in American Healthcare to Put Patients First" explains: "To make fully informed decisions about their health care, patients must know the price and quality of a good or service in advance." Yet, as the Executive Order then notes, "patients often lack both access to useful price and quality information and the incentives to find low-cost, high-quali-

[2] *See* Jost, T.S. "Loopholes in the Affordable Care Act: Regulatory gaps and border crossing techniques and how to address them." St. Louis University Journal of Health Law and Policy, Washington & Lee Legal Studies Paper No. 2011-16. August 15, 2011 (explaining that "[t]he Affordable Care Act was meant to regulate health care plans comprehensively" and providing further details on the scope of PPACA). Available at: https://scholarlycommons.law.wlu.edu/wlufac/265/.

[3] Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010), section 1001.

[4] In addition to these requirements, PPACA's "Improving Coverage" requirements include, among other things: the prohibition on rescissions in section 2712 of the PHS Act; the requirement to cover preventive health services without cost sharing requirements in section 2713 of the PHS Act; the extension of coverage to dependents up to age 26 in section 2714 of the PHS Act; the requirement to provide a summary of benefits and coverage in section 2715 of the PHS Act; quality reporting requirements in section 2717 of the PHS Act; and appeals process requirements in section in 2719 of the PHS Act.

[5] Transparency was included as an important and transformative element in other leading comprehensive health reform proposals. *See* Porter, M. and Teisberg, E. *Redefining Health Care*. Harvard Business School Press. Boston, MA. 2006. ("Perhaps the most fundamental role of government in enabling value-based competition is to ensure that universal, high-quality information on provider outcomes and prices for every medical condition is collected and disseminated. This single step will have far-reaching and pervasive effects throughout the system ….").

[6] 77 FR 18310 (Mar. 27, 2012).

[7] Porter, M. and Teisberg, E. *Redefining Health Care*. Harvard Business School Press. Boston, MA. 2006, pg. 54. ("Information is fundamental to competition in any well-functioning market. It enables buyers to shop for the best value and allows sellers to compare themselves to rivals. Without relevant information, doctors cannot compare their results to best practice and to other providers. And without appropriate information, patient choice has little meaning.").

ty care." The lack of this information is widely understood to be one of the root problems causing dysfunction within America's health care system.

The Departments of Labor, HHS, and the Treasury (Departments) are of the view that transparency in health coverage requirements will strengthen America's health care system by giving health care consumers, researchers, regulators, lawmakers, health innovators, and other health care stakeholders the information they need to make, or assist others in making informed decisions about health care purchases. Health care consumers include various persons and entities that finance health care needs through the purchase of insurance. Health care consumers also include uninsured persons without health coverage who must pay out-of-pocket for health care items and services and uninsured persons who may be shopping for health coverage. Employers that sponsor health plans for their employees and government programs that provide health care services and benefits to consumers are also health care consumers.

By requiring the dissemination of price and benefit information directly to consumers and to the public, the transparency in coverage requirements will provide the following consumer benefits:

- enables consumers to evaluate health care options and to make cost-conscious decisions;
- strengthens the support consumers receive from stakeholders that help protect and engage consumers;
- reduces potential surprises in relation to individual consumers' out-of-pocket costs for health care services;
- creates a competitive dynamic that may narrow price dispersion for the same items and services in the same health care markets; and
- puts downward pressure on prices which, in turn, potentially lowers overall health care costs.

The goal of the final rules is to deliver these benefits to all consumers and health care stakeholders through greater transparency in coverage.

Comments received in response to the proposed rules on transparency in coverage (discussed in more detail later in this preamble) have strengthened the Departments' view that this price transparency effort will equip the public with information to actively and effectively participate in the health care system as consumers.[8] The majority of commenters acknowledged the importance of the availability of health care pricing information and appropriate tools to assist consumers in health care decision-making and managing health care costs. For these reasons and those explained in more detail below in this preamble, the Departments continue to be of the view that price transparency efforts are crucial to providing consumers (individual and institutional) with meaningful and actionable pricing information in an effort to contain the growth of health care costs.

1. Transparency provides necessary information for consumers to make more informed health care spending decisions

As explained in the report, "Reforming America's Healthcare System Through Choice and Competition," consumers have an important role to play in controlling costs, but consumers must have meaningful information in order to create the market forces necessary to achieve lower health care costs.[9] When consumers seek care, they do not typically know whether they could have received the same service from another provider at lower prices. Third-party payers negotiate prices on the consumer's behalf and reimburse costs directly to health care providers, concealing the actual price from the consumer at the point of care. After receiving care, consumers typically receive an Explanation of Benefits (EOB), which details the price charged by the provider, contracted or negotiated rate, and consumer cost sharing. Often, only after services are rendered is the cost of care disclosed to the consumer.

Historically, there has been little to no incentive for some consumers to consider price and seek lower-cost care.[10] Rapidly rising health care spending in the past 20 years, however, has led to consumers shouldering a greater portion of their health care costs through increases in out-of-pocket expenses.[11]

Since 1970, per capita out-of-pocket expenditures have nearly doubled due to a number of factors.[12] These factors include increased enrollment in high deductible health plans (HDHPs) and accompanying health savings accounts (HSAs), and increased plan and issuer reliance on payments towards deductibles comprising the proportion of total cost-sharing payments.[13] As explained in the preamble to the proposed rules, these shifts in plan design and enrollment are correlated with consumers bearing a greater share of their overall health care costs in the private health insurance market than in previous years.[14] From 2002 to the enactment of PPACA in 2010, nationally, the percentage of private sector employees enrolled in a health plan with a deductible increased from 47.6 percent to 77.5 percent and continued to increase to 86.6 percent in 2019.[15] Average family deductibles for private sector employees grew from $958 in 2002 to $1,975 in 2010, and then to $3,655 in 2019—an 85 percent increase since the enactment of PPACA.[16] These changes represent a substantial increase in the amount that

[8] 84 FR 65464 (Nov. 27, 2019).
[9] Azar, A. M., Mnuchin, S.T., and Acosta, A. "Reforming America's Healthcare System Through Choice and Competition." United States, Department of Health and Human Services. December 3, 2018. Available at: https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf.
[10] *Id.*
[11] Claxton, G., Levitt, L., Long M. "Payments for cost sharing increasing rapidly over time." Peterson-Kaiser Health System Tracker. April 2016. Available at: https://www.healthsystemtracker.org/brief/payments-for-cost-sharing-increasing-rapidly-over-time/.
[12] "Out-of-pocket spending." Peterson-KFF Health System Tracker. May 2020. Available at: https://www.healthsystemtracker.org/indicator/access-affordability/out-of-pocket-spending/.
[13] HDHP as defined in section 223(c)(2) of the Code; *see also* Claxton, G., Levitt, L., Long, M. "Payments for cost sharing increasing rapidly over time." Peterson-KFF Health System Tracker. April 2016. Available at: https://www.healthsystemtracker.org/brief/payments-for-cost-sharing-increasing-rapidly-over-time/.
[14] 84 FR 65464, 65465 (Nov. 27, 2019).
[15] *See* "Medical Expenditure Panel Survey. Insurance Component National-Level Summary Tables." United States Department for Health and Human Services Agency for Healthcare Research and Quality. Available at: https://www.meps.ahrq.gov/mepsweb/data_stats/quick_tables_search.jsp?component=2&subcomponent=1
[16] *Id.*

consumers must pay for health care before insurance begins to cover items or services.[17] Deductibles made up 52 percent of cost-sharing spending in 2016, up from 30 percent in 2006, while copays dropped from 43 percent to 17 percent of cost-sharing payments over the same period. [18] The gradual shift away from copayments, which are predictable to the consumer through their set dollar amounts for each covered item or service, to deductibles and coinsurance, has increased the need for consumers to know the negotiated price in order to plan ahead and budget for out-of-pocket costs. Over time, price disclosure can improve consumers' ability to better manage costs of utilized health care for a variety of health care plans. Increased enrollment in HDHPs and the shift to coinsurance across plan and benefit designs means that consumers have a vested interest in learning the costs of care prior to paying for items or services, as they are responsible for paying out-of-pocket expenditures, which are directly dependent on the negotiated or contractual price.

These trends in designing health plans have led to consumers bearing an increased share of their health care costs. The fact that more consumers are bearing greater financial responsibility for the cost of their health care provides an opportunity to establish a more consumer-directed and consumer-driven health care market. Eighty-eight percent of consumers support requirements for providers and issuers to disclose prices prior to care.[19] If consumers have better pricing information and can shop for health care items and services more efficiently, they can increase competition and demand for lower prices.[20] However, consumers generally have little information regarding negotiated rates or out-of-network costs until after services are rendered. There is also wide variability in health care prices for the same service.[21] As a result, it can be difficult for consumers to estimate potential out-of-pocket costs.

2. Transparency strengthens stakeholders' ability to support consumers

Making price transparency information publicly available strengthens the work of other health care stakeholders that help provide care or promote access to care to consumers, or otherwise aim to protect consumers and their interests in the health care system. These entities include researchers, regulators, lawmakers, patient and consumer advocates, and businesses that provide consumer support tools and services. A key aspect of transparency in coverage is to make health care pricing information more accessible and useful to consumers by making the information available to persons and entities with the requisite experience and expertise to assist individual consumers and other health care purchasers to make informed health care decisions.

With information on pricing, these other health care stakeholders can better fulfill each of the unique roles they play to improve America's health care system for consumers. For instance, with pricing information researchers could better assess the cost-effectiveness of various treatments; state regulators could better review issuers' proposed rate increases; patient advocates could better help guide patients through care plans; employers could adopt incentives for consumers to choose more cost-effective care; and entrepreneurs could develop tools that help doctors better engage with patients.

3. Transparency reduces the potential for surprise billing

Making the price of care available to consumers before they receive care can reduce the potential for consumers to be surprised by the price of a health care item or service when they receive the bill after receiving care. However, accessible pricing information holds special value for insured consumers.[22] Surprise billing has become a substantial concern for insured consumers, in particular, consumers who receive a bill from an out-of-network provider when they thought an in-network provider was treating them. While price transparency alone is not a complete solution to this problem, the disclosure of pricing directly to consumers could help mitigate some unexpected health care costs. As just noted, making pricing information public can also strengthen other health care stakeholders' ability to protect consumers. In the case of surprise billing, public information on pricing for in-network and out-of-network services could allow stakeholders to develop better tools to help patients avoid surprises and improve oversight of health insurance issuers, plans, and providers.

4. Transparency increases competition and contains costs.

Without transparency in pricing, market forces cannot drive competition. This lack of competition in many health care markets is demonstrated by significant, unexplained variations in prices for procedures, even within a single region.[23] For example, studies of price variation within California and nationally suggest that there is substantial opportunity for increased transparency to save money by

[17] McCarthy-Alfano, M., et al. "Measuring the burden of health care costs for working families." Health Affairs. April 2, 2019. Available at: https://www.healthaffairs.org/do/10.1377/hblog20190327.999531/full/.

[18] Claxton, G. et al. "Increases in cost-sharing payments continue to outpace wage growth." Peterson-KFF Health System Tracker. June 15, 2018. Available at: https://www.healthsystemtracker.org/brief/increases-in-cost-sharing-payments-have-far-outpaced-wage-growth/.

[19] "Harvard CAPS Harris Poll." Harvard University. May 2019. Available at: https://harvardharrispoll.com/wp-content/uploads/2019/06/HHP_May19_vF.pdf?utm_source=hs_email&utm_medium=email&_hsenc=p2ANqtz—NgSdTYggGUP4tWyR2IEQ7i8TCg1s3DcHuQyhErIgkX3KFUi3SFgl9OZKm4-JUOOi9tmMQ.

[20] Azar, A.M., Mnuchin, S.T., and Acosta, A. "Reforming America's Healthcare System Through Choice and Competition." United States, Department of Health and Human Services. December 3, 2018. Available at: https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf.

[21] Cooper, Z., et al. "The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured." *The Quarterly Journal of Economics,* Vol. 134. Issue 1. February 2019. September 4, 2018. Available at: https://academic.oup.com/qje/article/134/1/51/5090426?searchresult=1.

[22] *See* Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health & Human Services. Secretary of Health and Human Services' Report on: Addressing Surprise Medical Billing, at p. 3. July 2020. (recognizing that HHS regulatory action to encourage price transparency by insurers "can serve as the backbone for a more comprehensive surprise billing solution"). Available at https://aspe.hhs.gov/system/files/pdf/263871/Surprise-Medical-Billing.pdf.

[23] *Id.*

shifting patients from high to lower-cost providers.[24] The Departments are of the view that consumers will take advantage of increased transparency to shop for their health care if price transparency is put into place nationwide.[25] Many empirical studies have investigated the impact of price transparency on non-health care markets, with most research showing that "price transparency leads to lower and more uniform prices, a view consistent with predictions of standard economic theory."[26] Studies suggest that consumers want and will use actionable pricing information to shop for more cost-effective care.[27] For example, when automobile prices were presented transparently on the internet, inclusive of the dealer invoice price, the consumers who did not like the traditional bargaining process were able to reduce spending overall by 1.5 percent.[28] Another study demonstrated the public display of life insurance prices for comparison led to a 5 percent decrease in the consumer price.[29] Price transparency also reduced price dispersion across other markets, such as the airline industry, which saw a reduction in price dispersion from 18 percent in 1997 narrowing to 0.3-2.2 percent in 2002 for fares available at multiple travel websites.[30] These lessons from other markets suggest that more thoroughly implementing price transparency across the health care industry could increase competition to provide lower costs and limit price variation.[31]

Despite the general absence of price transparency in the health care sector, there is research showing how price transparency leads to lower and more uniform pricing in health care markets. For instance, as noted in the preamble to the proposed rule, research shows patients saved $7.9 million and issuers saved $36 million on imaging services in New Hampshire after the state launched a website publishing health prices for most consumers with private health insurance.[32] One study found use of a telephone- and email-based tool to search for health care prices reduced the price paid by 10 to 17 percent and reduced the prices paid for care on average by 1.6 percent.[33] Another study of a program that provided health plan participants, beneficiaries, or enrollees with price and quality information to help select high-value imaging services found an increase in the use of lower-cost facilities.[34] This consumer behavior prompted higher-cost facilities to lower their prices, which resulted in a 30 percent reduction in the price variation between low- and high-cost facilities.[35] These studies, as well the numerous studies highlighted in subsequent sections of this rule, offer substantial evidence that price transparency in health care markets will result in consumer benefits similar to those that result from transparency in other markets.

5. The final rules will fill gaps left by state and private transparency efforts.

Currently, the information that consumers need to make informed decisions based on the prices of health care services is not readily available or is presented in a manner that makes it challenging to understand. As noted in the preamble to the proposed rules, the 2011 Government Accountability Office (GAO) report, "Health Care Price Transparency: Meaningful Price Information is Difficult for Consumers to Obtain Prior to Receiving Care," found that the lack of transparency in health care prices, coupled with the wide pricing disparities for particular procedures within the same market, can make it difficult for consumers to understand health care prices and to shop effectively based on cost.[36] The report also explored various price transparency initiatives, including tools that consumers could use to generate price estimates before receiving a health care service. The report notes that pricing information displayed by tools varies across initiatives, in large part due to limits reported by the initiatives in their access or authority to collect certain necessary price data. In particular, the report notes the lack of public disclo-

[24] Boynton, A., Robinson, J. "Appropriate Use of Reference Pricing Can Increase Value." Health Affairs Blog. July 7, 2015. Available at: https://www.healthaffairs.org/do/10.1377/hblog20150707.049155/full/; *see also* Sinaiko, A., Rosenthal, M. "Examining a Health Care Price Transparency Tool: Who Uses it, and How They Shop for Care." 35 Health Affairs 662. April 2016. Available at: https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2015.0746.

[25] *See* Gordon, D., et al. "Health Care Consumer Shopping Behaviors and Sentiment: Qualitative Study." Journal of Participatory Medicine. Volume 12. No. 2. 2020. Available at: https://jopm.jmir.org/2020/2/e13924/ (study demonstrating that consumers already engage in "behaviors related to seeking, comparing, or knowing the prices of care" regardless of the presence of price transparency tools).

[26] Austin, D. A., and Gravelle, J. G. "Does Price Transparency Improve Market Efficiency? Implications of Empirical Evidence in Other Markets for the Health Sector." United States Congress Congressional Research Service. April 29, 2008. Available at: https://crsreports.congress.gov/product/pdf/RL/RL34101; *see also* Grennan, M., Swanson, A. "Transparency and Negotiated Prices: The Value of Information in Hospital-Supplier Bargaining." 128 Journal of Political Economy. April 2020 (Citing research in consumer goods showing that information can help decision making when buyers have imperfect information on costs.). Available at: https://www.nber.org/papers/w22039; *see also* 84 FR 65464, 65466 (Nov. 27, 2019).

[27] Semigran, H.L., et al. "Patients' Views on Price Shopping and Price Transparency." The American Journal of Managed Care. June 26, 2017. Available at: https://www.ajmc.com/view/patients-views-on-price-shopping-and-price-transparency.

[28] Zettlemeyer, F., Morton, F.S., and Silva-Risso, J. "How the Internet Lowers Prices: Evidence from Matched Survey and Automobile Transaction Data." Journal of Marketing Research. May 2006. Available at: https://doi.org/10.1509%2Fjmkr.43.2.168.

[29] Brown, J., and Goolsbee, A. "Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry." Journal of Political Economy, vol. 110, June 2002, pp. 481-507.

[30] Clemons, E.K., Hann, I., and Hitt, L. "Price Dispersion and Differentiation in Online Travel: An Empirical Investigation," Management Science, vol. 48, no. 4, 2001, pp. 521-39; *see also* "Occupational Labor Statistics." United States Bureau of Labor Statistics. Available at: https://www.bls.gov/oes/current/oes_stru.htm.

[31] 84 FR 65464, 65466 (Nov. 27, 2019).

[32] *Id.*

[33] Lieber, E. "Does It Pay to Know Prices in Health Care?" American Economic Journal: Economic Policy. February 2017. Available at https://pubs.aeaweb.org/doi/pdfplus/10.1257/pol.20150124.

[34] Wu, S. J. et al. "Price transparency for MRIs increased use of less costly providers and triggered provider competition." Health Affairs. August 2014. Available at: https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2014.0168.

[35] *Id.*

[36] 84 FR 65464, 65466-65467 (Nov. 27, 2019); *see also* GAO-11-791 at p. 28 (Sep. 2011).

sure of rates negotiated between providers and third-party payers. The GAO report, therefore, recommended that HHS determine the feasibility of, and the next steps for, making estimates of out-of-pocket costs for health care services available to consumers.

States have been at the forefront of transparency initiatives and have adopted a variety of approaches to improve price transparency.[37] More than half of the states have passed legislation establishing price transparency websites or mandating that health plans, hospitals, or physicians make pricing information available to patients.[38] For example, as of September 2020, thirty one states have enacted laws that provide participants, beneficiaries, and enrollees with at least partial protection against the practice of "balance billing."[39] At least eighteen states have All-Payer Claims Databases. However, state transparency requirements are generally not applicable to self-insured group health plans, which cover approximately 58.7 percent of private-sector workers.[40] As a result, the data collected under state law does not include data from self-insured plans, and a significant portion of consumers may not have access to information on their plans.

In response to state action and consumer demands for more information on health care pricing, and to align with increased price transparency in other markets, health insurance issuers and self-insured plans have moved to increase price transparency. For example, some plans are using price transparency tools to incentivize employees to make cost-conscious decisions when purchasing health care services. Most large issuers have comparative cost information, which includes rates that plans and issuers have negotiated with in-network providers and suppliers.

However, many existing tools are either insufficient in the amount of detail they provide or the level of accuracy available. In order to expand price transparency to all consumers, federal action is therefore necessary to establish standards and universal access to this information. In preparation for writing the proposed rules, the Departments met with over 50 stakeholders including plans, issuers, and third-party tool developers. Several stakeholders provided demonstrations of their tools to the Departments. The Departments note that over 90 percent of plans offer some version of a price comparison tool.[41] However, many of the plans and issuers that the Departments met with, who did not have a tool serve large portions of participants, beneficiaries, and enrollees. It is therefore the Departments' understanding that there are still millions of insured Americans that do not have access to any type of health care pricing tool. Also based on these demonstrations, the Departments are of the view that many price transparency tools on the market only offer wide-range estimates or average estimates of pricing that use historical claims data and do not always take into account the accumulated amount a participant, beneficiary, or enrollee has paid toward their deductible or out-of-pocket limit (sometimes referred to as an "accumulator"). The Departments are of the view that wide-range estimates are of limited value to consumers, given that they may not accurately reflect an individual's plan design and benefits, and that ranges should be replaced by actual estimated out-of-pocket costs, in order to allow the consumer to meaningfully predict costs. In addition, the inclusion of negotiated rates in these tools could help show the changes to a participant's, beneficiary's, or enrollee's costs if they have a future need for the same service, conditioned on the level of fulfillment of any cost-sharing responsibilities. This could help the consumer better understand the full value of the health care they are considering and how the cost may be different in the future when the participant's, beneficiary's, or enrollee's accumulator resets in a new plan year. Information on quality and results are also important for assessing the value of care.[42] Through this increased availability of information and consumer comprehension, transparent pricing can apply pressure on providers to demonstrate and improve quality and health care results. Providers may likely then be in the position of having to justify their costs relative to alternative options.

The Departments are of the view that existing price transparency tools often function in a way that makes them difficult for users to navigate. These tools often display information that makes it difficult to compare one plan against another, understand the scope of services covered and their costs, and interpret the terminology plans and issuers use. Consumers may be discouraged by these difficult user interfaces and may be less likely to make fully informed decisions with their healthcare choices. Research demonstrates that poor or confusing user interfaces will lead users to abandon engagement with the hosting website.[43] The Departments are of the view that it is important to establish a minimum set of standards regarding what is acceptable so that consumers can fully utilize all relevant information. Tools that provide consistent information to every consumer across all markets, and that base cost estimates on accurate and recent information, will be a significant improvement over all or most existing options. Accuracy and consistency are intended to give consumers confidence that the information presented by these tools will not

[37] De Brantes, F., et al. "Price Transparency & Physician Quality Report Card 2017." Catalyst for Payment Reform. Available at: https://www.catalyze.org/product/2017-price-transparency-physician-quality-report-card/.

[38] Frakt, A., and Mehrotra, A. "What Type of Price Transparency Do We Need in Health Care?" Annals of Internal Medicine. April 16, 2019. Available at: https://www.acpjournals.org/doi/10.7326/M19.

[39] Kona, M. "State Balance-Billing Protections." The Commonwealth Fund. September 16, 2020. Available at: https://www.commonwealthfund.org/publications/maps-and-interactives/2020/sep/state-balance-billing-protections

[40] "Report to Congress: Self-Insured Health Benefit Plans 2019: Based on Filings through Statistical Year 2016." March, 2019. Available at: https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/annual-report-on-self-insured-group-health-plans-2019.pdf; *see also* Fronstin, P. "Self-Insured Health Plans: Recent Trends by Firm Size 1996-2018." Employee Benefit Research Institute. No. 488. August 1, 2019. Available at: https://www.ebri.org/docs/default-source/ebri-issue-brief/ebri_ib_488_selfinsur-1aug19.pdf?sfvrsn=bd7e3c2f_6.

[41] "Study: Health Plans Implement Price Transparency Tools for Consumers." ACA International. April 2016. Available online at: https://www.expressrecovery.com/file/86c228ef-245f-45cb-abd7-a30edbdec1f3.

[42] See additional discussion of quality information in section II.C.1 of the preamble.

[43] Georgiou, M. "User Experience Is the Most Important Metric You Aren't Measuring." Entrepreneur. March 1, 2018. Available at: https://www.entrepreneur.com/article/309161.

change significantly from the prices they are ultimately charged. Reliability should assure consumers that information in these tools accurately reflects plans' and issuers' best estimates of consumer out-of-pocket costs. The availability of these tools across most private markets will ensure broad access for all participants, beneficiaries, or enrollees to the intended outcomes and potential benefits of the final rules. The Departments anticipate that participants, beneficiaries, and enrollees will become accustomed to having access to this standardized information, no matter what private market plan or coverage they choose, which will make them more comfortable with using this information in health care purchasing decisions. The Departments further anticipate and encourage plans and issuers to include additional functionality and innovation in existing price transparency tools, but a baseline is necessary to give participants, beneficiaries, and enrollees the confidence that, regardless of the tool they use, they can expect the same standard information and functionality.

C. *Stakeholder Feedback and Prior Actions in Support of Transparency*

In the HHS 2020 Notice of Benefit and Payment Parameters (2020 Payment Notice) proposed rule,[44] HHS sought input on ways to provide consumers with greater transparency regarding their own health care data, QHP offerings on the Federally-facilitated Exchanges (FFEs), and the cost of health care services.[45] Additionally, HHS sought comment on ways to further implement section 1311(e)(3) of PPACA, as implemented by 45 CFR 156.220(d), under which, upon the request of an enrollee, a QHP issuer must make available in a timely manner the amount of enrollee cost sharing under the enrollee's coverage for a specific service furnished by an in-network provider. HHS was particularly interested in what types of data would be most useful to improving consumers' abilities to make informed health care decisions, including decisions related to their coverage specifications and ways to improve consumer access to information about health care costs.

Commenters on the 2020 Payment Notice overwhelmingly supported the idea of increased price transparency. Many commenters provided suggestions for defining the scope of price transparency requirements, such as providing costs for both in-network and out-of-network health care, and providing health care cost estimates that include an accounting for consumer-specific benefit information, like progress toward meeting deductibles and annual limitations on cost sharing, as well as remaining visits under visit limits. Commenters expressed support for implementing price transparency requirements across all private markets and for price transparency efforts to be a part of a larger payment reform effort and a provider empowerment and patient engagement strategy. Some commenters advised HHS to carefully consider how such policies should be implemented, warning against federal duplication of state efforts and requirements that would result in plans and issuers passing along increased administrative costs to consumers and cautioning that the proprietary and competitive nature of payment data should be protected.

In the summer and fall of 2018, HHS hosted listening sessions related to the goal of empowering consumers by ensuring the availability of useable pricing information. The listening sessions included a wide representation of stakeholders including providers, issuers, researchers, and consumer and patient advocacy groups. Attendees noted that currently available pricing tools are underutilized, in part because consumers are often unaware that they exist,[46] and even when used, the tools sometimes convey inconsistent and inaccurate information.

Attendees also commented that tool development could be expensive, especially for smaller health plans, which tend to invest less in technology because of the limited return on investment. Attendees further commented that most tools developed to date do not allow for comparison shopping. Attendees stated that existing tools usually use historical claims data, which results in broad, sometimes regional, estimates, rather than accurate and individualized prices. In a national study, there was alignment among patients, employers, and providers in wanting to know and discuss the cost of care at the point of service.[47] However, attendees noted pricing tools are rarely available when and where consumers are likely to make health care decisions, for example, during interactions with providers. Thus, patients are not able to consider relevant cost issues when discussing referral options or the tradeoffs of various treatment options with referring providers. With access to patient-specific cost estimates for services furnished by particular providers, referring providers and their patients could take pricing information into account when considering clinically appropriate treatment options. Separately, CMS has met with members from several state Departments of Insurance to discuss the limits to state authority to require price transparency in a meaningful way and the benefits and drawbacks of All Payer Claims Databases (APCDs). During these discussions, it became clear that APCDs' reliance on historical claims data that is not necessarily linked to a specific plan or issuer limits the utility of such databases for consumers. These conversations helped clarify the types of price transparency information necessary to empower consumers.

CMS has pursued initiatives in addition to the final rules to improve access to the information necessary to empower consumers to make more informed decisions about their health care costs, including a multi-step effort to implement section 2718(e) of the PHS Act. Section 2718(e) of the PHS Act requires each hospital operating within the United States, for each year, to establish (and update) and make public (in accordance with guidelines developed by the Secretary of HHS) a list of the hospital's standard charges for items

[44] 84 FR 227 (Jan. 24, 2019).
[45] The term "Exchanges" means American Health Benefit Exchanges established under section 1311 of PPACA. *See* section 2791(d)(21) of the PHS Act.
[46] Miller, S. "Healthcare Shopping Tools Often Go Unused." Society for Human Resource Management. May 19, 2016. Available at: https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/health-care-shopping.aspx.
[47] "Let's Talk About Money." University of Utah Health Home. Available at: https://uofuhealth.utah.edu/value/lets-talk-about-money.php.

and services provided by the hospital, including for diagnosis-related groups established under section 1886(d)(4) of the Social Security Act (SSA). In the Fiscal Year (FY) 2015 Hospital Inpatient Prospective Payment System and Long-Term Care Hospital Prospective Payment System (IPPS/LTCH PPS) proposed and final rules, CMS reminded hospitals of their obligation to comply with the provisions of section 2718(e) of the PHS Act and provided guidelines for its implementation.[48] At that time, CMS required hospitals to either make public a list of their standard charges or their policies for allowing the public to view a list of those charges in response to an inquiry. In addition, CMS stated that it expected hospitals to update the information at least annually, or more often as appropriate, to reflect current charges. CMS also encouraged hospitals to undertake efforts to engage in consumer-friendly communication of their charges to enable consumers to compare charges for similar services across hospitals and to help them understand what their potential financial liability might be for items and services they obtain at the hospital.

In the FY 2019 IPPS/LTCH PPS proposed and final rules, CMS again reminded hospitals of their obligation to comply with section 2718(e) of the PHS Act and announced an update to its guidelines.[49] The updated guidelines, which have been effective since January 1, 2019, require hospitals to make available a list of their current standard charges (whether in the form of a "chargemaster" or another form of the hospital's choice) via the internet in a machine-readable format and to update this information at least annually, or more often as appropriate.

In response to stakeholder feedback and in accordance with Executive Order 13877, issued on June 24, 2019,[50] CMS took another important step toward improving health care value and increasing competition in the Calendar Year 2020 Hospital Outpatient Policy Payment System (OPPS) Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates: Price Transparency Requirements for Hospitals to Make Standard Charges Public final rule (Hospital Price Transparency final rule) by codifying regulatory requirements that implement section 2718(e) of the PHS Act, as well as a regulatory scheme under section 2718(b)(3) of the PHS Act that enables CMS to enforce those requirements.[51] The price transparency disclosure requirements that CMS finalized in the Hospital Price Transparency final rule will be effective on January 1, 2021, and they require hospitals to make publicly available, as applicable, their gross charges (as found in the hospital's chargemaster), payer-specific negotiated charges, discounted cash prices, and de-identified minimum and maximum negotiated charges for all items and services they provide through a single online machine-readable file that is updated at least once annually. Additionally, the Hospital Price Transparency final rule requires hospitals to display online in a consumer-friendly format, as applicable, the payer-specific negotiated charges, discounted cash prices (or, to the extent one does not exist for a shoppable service, the undiscounted gross charge) and de-identified minimum and maximum negotiated charges for as many of the 70 shoppable services selected by CMS that the hospital provides and as many additional hospital-selected shoppable services as are necessary for a combined total of at least 300 shoppable services (or if the hospital provides fewer than 300 shoppable services, then for as many as the hospital provides). The rule defines a shoppable service as a service that can be scheduled by a health care consumer in advance and further explains that a shoppable service is typically one that is routinely provided in non-urgent situations that does not require immediate action or attention to the patient, thus allowing patients to price shop and schedule such a service at a time that is convenient for them.[52]

In addition to making pricing information available for items and services provided by hospitals, the Administration has also been engaged in increasing transparency of prescription drug pricing and lowering the costs of prescription drugs. Four Executive Orders direct CMS and other HHS agencies to develop and issue tools, models, and several regulations to increase competition and lower patients' drug costs.[53] The actions directed in these Executive Orders supplement those CMS has already taken to increase drug-pricing transparency and lower drug costs. Through the Drug Spending Dashboard, CMS publishes data on Medicare and Medicaid spending for prescription drugs in an interactive web-based tool so researchers and consumers can easily sort the data to identify trends. Over the past four years, CMS has expanded this dashboard to include reporting on payments for prescription drugs in their first year on the market and information on the drugs' manufacturers.[54] Through the Part D Senior Savings model, beginning January 1, 2021, CMS is testing a change to the Manufacturer Coverage Gap Discount Program (the "discount program") to allow Part D sponsors to offer a Part D benefit design that includes predictable copays in the deductible, initial coverage, and coverage gap phases for a broad range of insulins included in the Model by offering supplemental benefits that apply after manufacturers provide a discounted price.[55]

[48] 79 FR 27978, 28169 (May 15, 2014) and 79 FR 49854, 50146 (Aug. 22, 2014), respectively.
[49] 83 FR 20164, 20548 (May 7, 2018) and 83 FR 41144, 41686 (Aug. 17, 2018), respectively.
[50] 84 FR 30849 (Jun. 27, 2019). The Executive Order was issued on June 24, 2019 and was published in the Federal Register on June 27, 2019.
[51] 84 FR 65524 (Nov. 27, 2019).
[52] 84 FR 65524, 65564 (Nov. 27, 2019).
[53] "Trump Administration Announces Historic Action to Lower Drug Prices for Americans." United States Department of Health and Human Services. July 24, 2020. Available at: https://www.hhs.gov/about/news/2020/07/24/trump-administration-announces-historic-action-lower-drug-prices-americans.html.
[54] "CMS Releases Enhanced Drug Dashboards Updated with Data for 2018." Centers for Medicare & Medicaid Services." December 19, 2019. Available at: https://www.cms.gov/newsroom/press-releases/cms-releases-enhanced-drug-dashboards-updated-data-2018; *see also* "CMS Updates Drug Dashboards with Prescription Drug Pricing and Spending Data." Centers for Medicare & Medicaid Services. March 14, 2019. Available at: https://www.cms.gov/newsroom/press-releases/cms-updates-drug-dashboards-prescription-drug-pricing-and-spending-data.
[55] "Part D Senior Savings Model." Centers for Medicare & Medicaid Services. Available online at: https://innovation.cms.gov/innovation-models/part-d-savings-model.

CMS issued regulations addressing prescription drug transparency,[5] including a regulation implementing the statutory prohibition on pharmacist gag clauses,[57] helping to ensure patients have information on lower cost alternatives or that they can save money by paying cash. As part of the Calendar Year (CY) 2018 Medicare Physician Fee Schedule, CMS adopted a policy that all FDA-approved Part B biosimilars would be assigned their own HCPCS codes. Under this revised coding policy, CMS pays for separately payable Part B biosimilars based on its own Average Sales Price (ASP) plus 6 percent of the ASP of its reference product. This policy change was made to promote a stable and robust biosimilars market that drives competition and lowers prices.

In the CY 2019 Medicare Advantage and Part D final rule, CMS adopted a policy to allow for certain low-cost generic drugs to be substituted onto plan formularies at any point during the year, so beneficiaries immediately benefit and have lower cost sharing.[58] The Modernizing Part D and Medicare Advantage To Lower Drug Prices and Reduce Out-of-Pocket Expenses rule[59] finalized in May 2019 requires Part D plans to implement, no later than January 1, 2021, a real-time benefit tool that can be integrated into at least one prescriber's electronic prescribing or EHR system to provide patient-specific formulary and benefit information, including cost sharing.[60] The rule also requires that beginning January 2021, the Explanation of Benefits document that Part D enrollees receive each month must include information on drug price increases and lower-cost therapeutic alternatives. In June 2020, CMS proposed[61] further policy changes that would begin removing barriers to value-based purchasing arrangements between drug manufacturers and payers.[62] Value-based payments for prescription drugs has the potential to increase patient access to new medicines by holding prescription drug manufacturers accountable for outcomes their drug achieves, as well as creating alternatives to traditional cost controls that may impede patient access.[63]

As part of its effort to incentivize states to pursue innovative responses to rising drug prices, CMS approved nine states' (and the District of Columbia's) plan amendment proposals to negotiate supplemental rebate agreements involving value-based purchasing arrangements with drug manufacturers.[64] These supplemental rebate agreements allow states to link payment for prescription drugs to the value delivered to patients. Increasing states' flexibility empowers them to develop policies that are effective and responsive to local conditions and price "hot spots" that lower costs, increase the predictability of expenses, and improve access for patients.

As it currently stands, and despite ongoing Federal efforts to improve price transparency, there continues to be a lack of standardized pricing information to assist consumers in the private market when shopping for health care items and services. While there are several efforts across states, 33 still do not have comprehensive statewide price transparency initiatives,[65] and as noted earlier, sometimes cannot legally require private market plans and issuers to provide real-time, out-of-pocket cost estimates to participants, beneficiaries, and enrollees.

The Departments have concluded that the Hospital Price Transparency final rule and the other efforts described earlier in this section cannot result in enrollees receiving complete price estimates for health care items and services because, as the GAO concluded, complete price estimates require pricing information from both providers and health insurance issuers.[66] In other words, this rule complements existing State, Federal, and private sector price transparency efforts by ensuring that pricing information is available from both hospitals and payers in both the public and private markets and by expanding transparency to pricing information for health care items and services provided outside of a hospital setting. As a result of these rules, regardless of where a consumer seeks information, be it their plan or issuer, or their hospital, they will have guaranteed access to up to date and accurate pricing information. In addition, because section 2718(e) of the PHS Act applies only to items and services provided by hospitals the Hospital Price Transparency final rule does not address price transparency with respect to items and services provided by other health care providers. Accordingly, the Departments have concluded that additional price transparency efforts are necessary and required under the statute to empower a more price-conscious and responsible health care consumer, promote competition in the health care industry,

[56] *See* 84 FR 23832 (May 23, 2019) (HHS final rule finalizing policies that aimed to "increase transparency of drug pricing and drug price increases, giv[e] beneficiaries and prescribers tools to help improve adherence, lower prescription drug costs, and minimize beneficiary out-of-pocket costs"); *see, for example,* 42 CFR 423.128 (requiring additional information in Part D explanations of benefits to increase transparency); 42 CFR 423.160 (requiring adoption of e-prescribing standards to increase transparency).

[57] 42 CFR 423.120(9a)(8)(iii); *see also* Verma, S. "Memorandum to All Part D Plan Sponsors: Unacceptable Pharmacy Gag Clauses." Centers for Medicare & Medicaid Services. May 17, 2018. Available at: https://downloads.cms.gov/files/2018-05-17.pdf.

[58] "CMS lowers the cost of prescription drugs for Medicare beneficiaries." Centers for Medicare & Medicaid Services. April 2, 2018. Available at: https://www.cms.gov/newsroom/press-releases/cms-lowers-cost-prescription-drugs-medicare-beneficiaries.

[59] 84 FR 23832 (May 23, 2019).

[60] "CMS Takes Action to Lower Prescription Drug Prices and Increase Transparency." Centers for Medicare & Medicaid Services. May 16, 2019. Available at: https://www.cms.gov/newsroom/press-releases/cms-takes-action-lower-prescription-drug-prices-and-increase-transparency.

[61] "Establishing Minimum Standards in Medicaid State Drug Utilization Review (DUR) and Supporting Value-Based Purchasing (VBP) for Drugs Covered in Medicaid, Revising Medicaid Drug Rebate and Third Party Liability (TPL) Requirements (CMS 2482-P) Fact Sheet. Centers for Medicare & Medicaid Services. June 17, 2020. Available at: https://www.cms.gov/newsroom/fact-sheets/establishing-minimum-standards-medicaid-state-drug-utilization-review-dur-and-supporting-value-based.

[62] 85 FR 37286 (Jun. 19, 2020).

[63] Verma, S. "CMS's Proposed Rule On Value-Based Purchasing For Prescription Drugs: New Tools For Negotiating Price For The Next Generation Of Therapies." Health Affairs. June 17, 2020. Available at: https://www.healthaffairs.org/do/10.1377/hblog20200617.728496/full/.

[64] "Medicaid State Plan Amendments." Centers for Medicare & Medicaid Services. Available online at: https://www.medicaid.gov/medicaid/medicaid-state-plan-amendments/index.html.

[65] LaPointe, J. "Few States Have Robust Healthcare Transparency Laws." RevCycle Intelligence. May 11, 2020. Available at: https://revcycleintelligence.com/news/few-states-have-robust-healthcare-price-transparency-laws.

[66] GAO-11-791 (Sep. 2011).

and lower the overall rate of growth in health care spending.[67]

The Departments are of the view that the disclosures required under the final rules are necessary and appropriate to more fully implement section 2715A of the PHS Act and section 1311(e)(3)(C) of PPACA to ensure that consumers have ready access to the information they need to estimate their potential out-of-pocket costs for health care items and services before that service is rendered or that item is delivered. The final rules are also intended to empower consumers by incentivizing market innovators to help consumers understand how their plan or coverage pays for health care and to shop for health care items and services based on price, which is a fundamental factor in any purchasing decision.

D. *Executive Order*

On June 24, 2019, President Trump issued Executive Order 13877, "Executive Order on Improving Price and Quality Transparency in American Healthcare to Put Patients First." Section 3(b) of Executive Order 13877 directed the Secretaries of the Departments to issue an advance NPRM (ANPRM), consistent with applicable law, soliciting comment on a proposal to require health care providers, health insurance issuers, and self-insured group health plans to provide or facilitate access to information about expected out-of-pocket costs for items or services to patients before they receive care. The Departments considered the issue, including by consulting with stakeholders, and determined that an NPRM, rather than an ANPRM, would allow for more specific and useful feedback from commenters, who would be able to respond to specific proposals.

E. *Proposed Rules*

In response to Executive Order 13877 and to also implement legislative mandates under sections 1311(e)(3) of PPACA and section 2715A of the PHS Act, the Departments published an NPRM entitled "Transparency in Coverage" on November 27, 2019 (to be codified at 26 CFR part 54, 29 CFR part 2590, and 45 CFR part 147) (the proposed rules) with comments requested by January 14, 2020.[68] In response to requests from stakeholders, the Departments extended the comment period 15 days, to January 29, 2020.[69] The proposed rules set forth proposed requirements for group health plans and health insurance issuers in the individual and group markets to disclose cost-sharing information upon request to a participant, beneficiary, or enrollee, including an estimate of an individual's cost-sharing liability for covered items or services furnished by a particular provider. The Departments proposed that plans and issuers be required to make such information available on an internet website and, if requested, through non-internet means, thereby allowing a participant, beneficiary, or enrollee to obtain an estimate and understanding of the individual's out-of-pocket expenses and effectively shop for items and services. The proposed rules also included proposals to require plans and issuers to disclose in-network provider negotiated rates, and historical out-of-network allowed amounts through two machine-readable files posted on an internet website, thereby allowing the public to have access to health coverage information that can be used to understand health care pricing and potentially dampen the rise in health care spending.

The proposed rules also included requests for information (RFIs) on topics closely related to the rulemaking. Due to the design and capability differences among the information technology (IT) systems of plans and issuers, as well as difficulties consumers experience in deciphering information relevant to health care and health insurance, the Departments sought comment on additional price transparency requirements that could supplement the proposed requirements for disclosing cost-sharing information to participants, beneficiaries, or enrollees and the proposed requirements for public disclosure of negotiated rates and historical allowed amount data for covered items and services from out-of-network providers. Specifically, the Departments sought comment on whether plans and issuers should be required to disclose information necessary to calculate a participant's, beneficiary's, or enrollee's cost-sharing liability through a publicly-available, standards-based application programming interface (API).

Such a requirement would build off a final rule, "Medicare and Medicaid Programs; Patient Protection and Affordable Care Act; Interoperability and Patient Access for Medicare Advantage Organization and Medicaid Managed Care Plans, State Medicaid Agencies, Children's Health Insurance Program (CHIP) Agencies and Chip Managed Care Entities, Issuers of Qualified Health Plans in the Federally-Facilitated Exchanges and Health Care Providers" (CMS Interoperability & Patient Access final rule), that CMS published on May 1, 2020.[70] That rule requires Medicare Advantage organizations, Medicaid and CHIP Fee-for-Service programs, Medicaid managed care plans, CHIP managed care entities, and QHP issuers in the FFEs to provide enrollees with access to select data, including claims data, through a standards-based API that conforms to the technical standards adopted in the Office of the National Coordinator for Health Information Technology (ONC) 21st Century Cures Act final rule at 45 CFR 170.215. The CMS Interoperability & Patient Access final rule requires certain entities, such as FFE QHP issuers, to provide certain data through a standards-based API. The Departments appreciate the comments received in response to the API RFI and will use the comments to inform the need

[67] This view is consistent with the legislative history of PPACA. As initially introduced in the Senate on November 19, 2009, PPACA included only the requirement on hospitals to disclose standard charges included in section 2718. On December 1, 2009, in comments supporting the hospital transparency requirement, Sen. Max Baucus noted, "I think the same should also apply to physicians so people have a better idea what they will pay or their insurance company will pay for these procedures." https://www.congress.gov/111/crec/2009/12/08/CREC-2009-12-08.pdf. Sections 2715A and 1311(e)(3)(C) were then amended to PPACA on December 19 in the final managers amendment before passage in the Senate. Available at: https://www.congress.gov/111/crec/2009/12/19/CREC-2009-12-19.pdf.

[68] 84 FR 65464 (Nov. 27, 2019).

[69] 85 FR 276 (Jan. 3, 2020).

[70] 85 FR 25510 (May 1, 2020).

for future rulemaking regarding whether plans and issuers should be required to disclose information necessary to calculate cost-sharing liability through a publicly-available, standards-based API. HHS will also monitor the implementation of the CMS Interoperability & Patient Access final rule to inform any such future rulemaking.

The proposed rule also included RFIs on how provider quality measurements and reporting in the private health insurance market may be used to complement cost-sharing information for plans and issuers in the private health insurance market. The Departments sought comment on how existing quality data on health care provider items and services could be leveraged to complement the proposals in the proposed rules. The primary goal of the proposed and final rules is making information available to address the absence of price transparency in the health care market; the final rules do not address health care quality at this time.

HHS also proposed to amend its MLR program rules using the authority under section 2718(c) of the PHS Act, under which the standardized methodologies for calculating measures of the activities reported under section 2718(a) of the PHS Act shall be designed to take into account the special circumstances of smaller plans, different types of plans, and newer plans. Specifically, HHS proposed to recognize the special circumstances of a different and newer type of plan for purposes of MLR reporting and calculations for plans that share savings with consumers who choose lower-cost, higher-value providers. HHS proposed to amend 45 CFR 158.221 to add a new paragraph (b)(9) to allow any such "shared savings" payments made by an issuer to an enrollee as a result of the enrollee choosing to obtain health care from a lower-cost, higher-value provider, to be factored into an issuer's MLR numerator, beginning with the 2020 MLR reporting year (for reports filed by July 31, 2021).

The Departments requested comments on all aspects of the proposed rules, as well as a number of specific issues. The Departments received over 25,000 comments in response to the proposed rules from a range of stakeholders, including plans and issuers, health care providers, prescription drug companies, employers, state regulators, health IT companies, health care policy organizations and think tanks, and individuals. No requests for a public hearing were received. The Departments received a number of comments and suggestions that were outside the scope of the proposed rules that are not addressed in the final rules (for example, regarding hospital prices, other methods for reducing health care and prescription drug costs, consumer education and provider directories). After careful consideration of the comments, the Departments are finalizing the proposed rules with certain modifications made in response to comments. These modifications are discussed later in this preamble.

F. *Legal Authority*

Several commenters questioned the Departments' legal authority regarding various aspects of the proposed rules. The Departments are of the view that the legal authorities identified earlier in this preamble are sufficient to support the final rules.

1. Statutory authority under section 1311(e)(3) of PPACA

Several commenters contended that section 1311(e)(3)(A)(ix) of PPACA does not give the Departments statutory authority to require that plans and issuers make the rates they have negotiated with providers and out-of-network allowed amounts publicly available. The commenters noted that section 1311(e)(3)(A) of PPACA enumerates eight specific categories of information subject to the transparency in coverage mandate followed by a ninth "catchall" category consisting of "other information as determined appropriate by the Secretary."[71] These commenters maintained that the Secretary of HHS's authority under section 1311(e)(3)(A)(ix) of PPACA is insufficient to support a requirement to publicize negotiated rates because they are not sufficiently similar to the other categories of information identified under section 1311(e)(3)(A) of PPACA.

The Departments disagree with these comments and are of the view that the information required to be disclosed under this rule fits squarely within the scope of information that plans and issuers may be required to disclose under section 1311(e)(3)(A)(ix) of PPACA and section 2715A of the PHS Act. Section 1311(e)(3)(A)(i) to (viii) of PPACA outlines specific information and data that must be submitted to the Exchange, the Secretary of HHS, the relevant State insurance commissioner, and the public on an accurate and timely basis. In addition, section 1311(e)(3)(A)(ix) of PPACA requires health plans to submit "other information as determined appropriate by the Secretary." Under established principles of statutory construction, when a general term follows a list of specific terms in a statute, the general term is construed to encompass subjects of a similar character to the specific terms. The principle of *ejusdem generis* guides courts in evaluating a catch-all at the end of a list. Therefore, when a statute allows an implementing agency to exercise its discretion by adding additional items to a list, the implementing agency is empowered to add additional items as long as those items are of similar character to the items enumerated in the statute.[7] In this case, the statutory list includes information and data useful to evaluate the coverage offered by plans and issuers with an emphasis on business practices, financial stability, and consumer experience. The list also includes information useful to regulators and the public in general to evaluate plans' and issuers' business practices and activity in the market. Given that the list includes some disclosures that are more immediately useful to individual consumers and others that are more immediately useful to regulators, the catchall provision is reasonably and best read as Congress' recognition that the Secretary of HHS (and, therefore, the Departments, by virtue of their joint authority under section 2715A of the PHS Act) would need broad flexibility to require the disclosure of information as appropriate to deliver the transparency necessary for consumers to understand their coverage

[71] *See* section 1311(e)(3)(A)(i) through (viii) of PPACA.

[72] *See* Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 128-29 (1991).

options and for regulators to hold plans and issuers accountable.

It is important to note that Congress considered one amendment that would have only required public disclosure at least annually of in-network allowed charges and expected allowed charges for out of network without allowing the Secretary discretion to add to the content of the required disclosure.[73] Instead of adopting this prescriptive approach, Congress required public disclosure of a broader set of information that similarly included payments for out-of-network services, as well as providing the Secretary discretion to require disclosure of other information. While Congress did not specifically include in-network allowed charges in the provision enacted, the discretion they provided suggests they understood that the Secretary might later find that requiring the disclosure of additional information, including information considered by Congress, might be useful and appropriate. That Congress considered and rejected a more prescriptive approach strongly suggests Congress intended that the Secretary have the ability to mandate more particularized disclosures in the future, including the disclosure of in-network negotiated rates.[74]

A plan's or issuer's negotiated rates provide important information to help consumers both evaluate their options before buying coverage and, after choosing coverage, evaluate how to use their coverage when they need care. Those shopping for coverage will benefit from knowing how effectively a plan or issuer negotiates rates; for example, by comparing the rates one plan or issuer pays a provider for a particular item or service that this consumer knows they, or their family, will need in the future, which can then allow them to shop and compare which plans and issuers offer the most value. Once coverage is obtained, knowing negotiated rates upfront will ensure consumers covered under a variety of plan designs and coverage options to, in each case, have access to the information they need to obtain health care services in an efficient, cost-effective manner, when considering available options for a shoppable service. As discussed earlier in this preamble, making negotiated rates public also strengthens other health care stakeholders' ability to support consumers. Because negotiated rates provide important information to help people—including consumers, regulators and the general public—evaluate the coverage offered by a plan or issuer, it clearly falls within the scope of information already required under section 1311(e)(3)(A) of PPACA. As discussed in more detail later in this section, out-of-network allowed amounts likewise provide vital information to help evaluate coverage.

Out-of-network allowed charges also provide consumers with important information. Consumers may opt for out-of-network services for numerous reasons, such as the unavailability of an in-network provider who can meet certain medical needs, an existing relationship with an out-of-network provider, the recommendation of another provider, or personal convenience. Disclosure of estimates of out-of-network allowed amounts is essential to the ability of consumers considering out-of-network services to form an estimate of their potential liability. Limiting transparency in pricing requirements to only providers under contract with a carrier would prevent transparency for all such services, contrary to the plain language of the statute.[75] Indeed, the language of the statute (for example, the requirement of section 1311(e)(3)(B) of PPACA that the intended audience, including individuals with limited English proficiency, can readily understand and use because that language is concise, well-organized, and follows other best practices of plain language writing) indicates an intention to assist consumers by enhancing their ability to make cost-conscious decisions; this is an essential component of establishing and maintaining robust market competition with costs that are reasonable and plausibly tethered to standard market discipline. As the preamble to the proposed rules observed, there is substantial evidence that increased price transparency provides consumers and the public at large with the information that is necessary to improve market efficiency.[76] For these reasons, the Departments are of the view that requiring disclosure of estimates of out-of-network allowed amounts, which reflect out-of-network benefits under a plan, is well within both the text and spirit of the statute and its aims to assist consumers in selecting providers, evaluating market options, increasing competition, and reducing market disparities. The Departments have identified these requirements as beneficial to the ongoing efforts of employers and regulators to aid consumers, and as consistent with the goals of the statute; thus, the Departments reject the assertion of commenters that these purposes are beyond the scope of the statute.

Several commenters asserted that the specific justifications the Departments cite as support for mandating the disclosure of negotiated rates are unrelated to the purposes authorized by statute. They asserted that those purposes – assisting consumers in selecting health care providers, assisting consumers in evaluating options in the market, increasing competition and reducing disparities in the market, assisting employers, and assisting state regulators – have no relationship to the statutory purpose of providing transparency in coverage for consumers. Moreover, commenters stated that the statute does not authorize the use of price transparency mechanisms to affect issuer and provider rate negotiations or health care costs generally, to assist employers in negotiations, or to aid state regulators in their duties. The Departments, however, find ample support in PPACA evidencing the relationship between the purposes intended to be served by this final rule, the overall purposes of PPACA, and the PPACA's price transparency measures, including section 1311(e)(3).

[73] Congressional Record 155: 183 (December 8, 2009) p. S12716. Available at: https://www.congress.gov/111/crec/2009/12/08/CREC-2009-12-08-senate.pdf.

[74] *See, for example, Lehman v. Nakshian*, 453 U.S. 156, 167-8 (1981) (citing a rejected amendment to a federal statute as evidence of Congressional intent).

[75] Section 1311(e)(3)(A)(vii) of PPACA.

[76] 84 FR 65464, 65489, 65495 (Nov. 27, 2019); *see also* Austin, D.A., and Gravelle, J. G. "Does Price Transparency Improve Market Efficiency? Implications of Empirical Evidence in Other Markets for the Healthcare Sector." United States Congress Congressional Research Service. July 24, 2007. Available at: https://fas.org/sgp/crs/secrecy/RL34101.pdf; see also Brown, Z. Y. "Equilibrium Effects of Health Care Price Information." 100 Rev. Econ. & Stat. 1 (2018). Available at: http://www-personal.umich.edu/~zachb/zbrown_eqm_effects_price_transparency.pdf; *see also* Enthoven, A. Market Forces and Efficient Health Care Systems. Health Affairs, Vol. 23, No. 2. Available at https://www.healthaffairs.org/doi/full/10.1377/hlthaff.23.2.25.

The purposes underlying the final rule's requirement to disclose negotiated rates are directly tied to providing transparency in coverage to consumers. The negotiated rate information that the final rules require to be disclosed pursuant to the Departments' authority under section 1311(e)(3)(A)(ix) of PPACA, and section 2715A of the PHS Act, is directly relevant to providing consumers with transparent pricing information sufficient to allow them to assess, in advance of receiving services, their liability under a health plan or health coverage in the numerous instances in the course of any plan year in which the negotiated rate will determine all or a portion of a consumer's liability. This is important information that helps consumers under a wide variety of plan designs and cost-sharing arrangements in both choosing and using coverage. The Departments are requiring the disclosure of cost information to further the goal of price transparency and are doing so under the authority of section 1311(e)(3) of PPACA.

Two commenters suggested that the proposal to require the release of negotiated rates in machine-readable format is not authorized under the statute. The statute mandates that transparency in coverage information "shall be provided in plain language... that the intended audience, including individuals with limited English proficiency, can readily understand and use because it is concise, well-organized, and follows best practices of plain writing."[77] These commenters contended that machine-readable information is not plain language that is accessible or understandable to the typical consumer, and is therefore not within the scope of information authorized for public disclosure under section 1311(e)(3)(B) of PPACA.

The Departments disagree with this assertion. Consistent with the statute, the final rules require the machine-readable files to include a plain language description for each billing code. The proposed requirement that two data files be provided in "machine-readable format" – one containing negotiated rates and the other containing out-of-network allowed amounts – is a purely operational consideration intended to ensure that the file data can be imported or read by a computer system directly, without altering the data, and without reliance on proprietary software.[78] Under section 1311(e)(3)(B) of PPACA, the "plain language" requirement concerns information to be made available to the public, the "intended audience," per the statute. The Departments require the publication of data in machine-readable files so that the required information may be presented to all members of the intended audience in a concise, well-organized manner that follows best practices of plain writing relevant to the intended audience.

The Departments explain elsewhere in the preamble that the intended audience for the information required to be published under the final rules includes all consumers and purchasers of health care items and services, including individual consumers, employers, and government health care programs. The intended audience also includes health care stakeholders such as researchers, legislators, and regulators, as well as application developers who could make the information usable and easily understood by laypersons. Accordingly, application developers will be able to access the data in a format that is easily used and understood using skills common to application developers. This same expertise allows such innovators to incorporate large data sets into easy-to-use internet-based tools and mobile applications that will present information to laypersons in easy-to-understand, plain language that is sufficiently concise and well-organized. The Departments are of the view that providing the files in machine-readable format is an effective and necessary mechanism to ensure that price transparency information be made available to all members of the intended audience in a consistent, understandable, plain language format, as the statute requires.

One commenter suggested that the disclosures to the public required under section 1311(e)(3)(A) of PPACA consist of aggregated data only and do not contemplate or allow public disclosure of specific rate and price information. The Departments disagree. While it is true that several of the data elements listed under section 1311(e)(3)(A) of PPACA are general in nature, such as financial disclosures and enrollment data, this fact does not compel the conclusion that all elements listed must be construed as requiring aggregated information. As noted above, the list encompasses information and data useful to the evaluation of plans and issuers by all varieties of health care consumer, including individuals, employers, and government programs. Certain elements provide information specific to the benefits and protections a plan or issuer's coverage provides to an individual, including claims payment policies and information on enrollee rights under the law. In particular, the data element listed at section 1311(e)(3)(A)(vii) of PPACA encompasses "information on cost sharing and payments with respect to any out-of-network coverage," which, by its plain terms, does not contemplate general or cumulative information.

The final rules specify the nature of the information that must be made available pursuant to sections 1311(e)(3)(A)(vii) and (ix) of PPACA, and the manner in which it is to be made available to fully implement the goals and purposes of the statute. Section 1311(e)(3)(C) of PPACA concerns disclosures to participants, beneficiaries, and enrollees receiving services from participating providers only, whereas section 1311(e)(3)(A) of PPACA concerns disclosures to the public generally and incorporates out-of-network payment information as well. Taken together, and as implemented under the final rules, the statute and regulatory schemes cover all persons seeking health pricing information in a given market, and advance the purposes of enhancing competition, reducing price disparities, and ultimately lowering costs through transparency in coverage.

Ultimately, by adding section 2715A of the PHS Act and section 1311(e)(3) of PPACA through the manager's amendment prior to passing PPACA in the Senate, Congress made transparency a key component of the PPACA's comprehensive framework for regulating private health coverage through federal law. Notably, in contrast to the amendment rejected by Congress discussed earlier in this

[77] Section 1311(e)(3)(B) of PPACA.
[78] 84 FR 65464, 65481 (Nov 27. 2019).

preamble, the transparency in coverage provisions signed into law provide a far more comprehensive and expansive approach toward providing transparency. The law covers nearly all private health plans, requires disclosure by plans through an internet website, requires disclosures to more entities, requires a broader set of information disclosures, and provides additional discretion to expand information disclosures. By taking this approach, Congress recognized both the importance and the complexity of requiring transparency. The discretion provided under the statute ensures that the Departments can accommodate changes in technology and health care markets, as well as build on the information disclosures specifically itemized in the statute.

A commenter also contended that the proposal to require issuers to make estimates of out-of-network allowed amounts available through the internet-based self-service tool is not authorized by the statute. This commenter asserted that section 1311(e)(3)(C) of PPACA only authorizes a requirement that payers make available information concerning cost-sharing obligations with respect to items or services furnished by a participating provider, not by out-of-network providers.

The Departments disagree and are of the view that the statute fully supports a requirement that plans and issuers make available information concerning cost-sharing obligations with respect to items or services furnished by out-of-network providers. The information to be made available under section 1311(e)(3) specifically includes "[i]nformation on cost sharing and payments with respect to any out-of-network coverage," as well as "[o]ther information as determined appropriate by the Secretary."[79] While section 1311(e)(3)(C) of PPACA focuses primarily on providing information to enrollees, section 1311(e)(3)(A) of PPACA authorizes the Departments to make certain out-of-network information available to the public, which includes participants, beneficiaries, and enrollees. Thus the Departments reasonably determined that section 1311(e)(3)(A) and (C), together, authorize the requirement that plans and issuers provide cost estimates for covered items and services provided by out-of-network providers.

2. Constitutional Concerns

Several commenters asserted that requiring issuers to make rates they have negotiated with providers available to the public constitutes compelled commercial speech in violation of the First Amendment to the Constitution, and an unlawful taking of trade secrets without just compensation in violation of the Fifth Amendment. Commenters cited various reasons for their belief that the requirement in the proposed rules to disclose negotiated rates to the public could not survive constitutional scrutiny.

Several commenters contended that the proposed requirement constituted compelled commercial speech, and that the rationale the Departments articulated to justify the proposed requirement failed to meet the legal standard necessary to justify such action. One commenter asserted that a standard of constitutional scrutiny higher than that relevant to compelled commercial speech applies to the requirement to publish negotiated rates because, the commenter contended, the disclosure of negotiated rates does not propose a future commercial transaction. Some commenters challenged the proposed rules on the basis that negotiated rates have little or no relevance or value to consumers attempting to ascertain their potential liability for a particular service at a given point in time in the future because negotiated rates do not reflect the terms of different plan designs or the status of the individual consumer at a given point in time in relation to cost-sharing obligations, in particular any annual deductible.

Two commenters asserted that the requirement to publicly disclose negotiated rates would go well beyond the stated goal of providing notice to participants, beneficiaries, and enrollees of cost-sharing liability for covered services because it calls for negotiated rates to be available to the public generally, not just to enrolled consumers inquiring about their coverage. They also claimed that disclosure of negotiated rates would be extremely burdensome because fulfilling the mandate would require the disclosure of millions, or even billions, of data points. One commenter asserted that because the requirement to publish negotiated rates would not be useful to consumers in all situations, the requirements in the proposed rules were not narrowly tailored enough to survive constitutional scrutiny.

Some commenters also contended that the Departments' other stated interests in mandating the publication of negotiated rates, including lowering prices, increasing competition, and informing decision-making in the market generally, are not authorized under relevant statute; therefore, the breadth of these requirements is overly burdensome and inclusive of information not necessary to advance the goals of the statute. These commenters concluded that, to the extent the mandated publication of negotiated rates is calculated to advance those purposes, they are not sufficiently tailored to statutory goals to survive constitutional scrutiny.

a. First Amendment Compelled Speech.

The Departments disagree that the proposed rules and the final rules run afoul of the First Amendment and would not survive constitutional scrutiny. As the United States Supreme Court recognized in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) and recently confirmed in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372, 2376 (2018) ("*NIFLA*"), required disclosures of factual, uncontroversial information in commercial speech are subject to more deferential First Amendment scrutiny. Under the approach articulated in *Zauderer*, courts have upheld required disclosures of factual information in the realm of commercial speech where the disclosure requirement reasonably relates to a government interest and is not unjustified or unduly burdensome such that it would chill protected speech. *See, e.g.*, *Am. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014); *Mass. Ass'n of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 201 (D. Mass. 2016).

The Departments articulated substantial governmental interests in proposing these requirements: assisting consumers

[79] Section 1311(e)(3)(A) of PPACA; *see also* Section 1311(e)(3)(A)(vii) and (ix) of PPACA.

of health care services in understanding the costs for which they will be liable for covered services prior to the delivery of the services; assisting other consumers of health care, such as employers and government health benefits programs, in evaluating and negotiating coverage options and obtaining the most value for health care dollars; and supporting a market-driven health care economy that is sustainable. The preamble to the proposed rules also explained how the information required to be disclosed under the proposed rules is of substantial value to consumers, including health plan participants, beneficiaries, and enrollees who have and have not satisfied their annual deductible or reached their maximum out-of-pocket limit, and that remains true under the final rules. For such consumers who have not met their deductibles, knowledge of negotiated rates is necessary for estimating their out-of-pocket costs because these consumers generally will be responsible for paying the full negotiated rate for health care items and services until they reach their deductible (or the maximum annual limit on cost sharing).

As the Departments noted earlier in the preamble, between the enactment of PPACA and 2019, average family deductibles for private sector employees increased by 85 percent, up to $3,655 in 2019.[80] Consumers in the private health insurance market are increasingly responsible for a greater share of their health care costs through higher deductibles and shifts from copayments to coinsurance.[81] The final rules will give health care consumers and stakeholders information vital to their roles in creating and supporting a sustainable market-driven health care economy.

The final rules also will provide critical information to consumers who have satisfied their deductibles or reached their out-of-pocket limit. These consumers may wish to base their health care spending decisions on underlying prices to avoid excess spending by their issuer or employer that could lead to premium increases, increased out-of-pocket obligations, or lower employer contributions toward employer-sponsored coverage. Knowing the rates negotiated by other issuers in their geographic market will assist consumers during open enrollment, as they search for a plan that may lower their out-of-pocket costs in the coming year.

The government also has a substantial interest in assisting other health care spenders, such as employers and government benefits programs, to make coverage choices that drive value for the public. Given the size and scope of the country's health care market and the fact that choices made by employers and benefits programs operate at scale to direct health care spending, the government can increase the value of health care expenditures by ensuring those entities have access to accurate information. Providing employers and government benefit programs with actionable data may also help drive down total health care spending, as issuers compete to offer higher-value programs.

The government's interest in promoting a sustainable health care economy driven by market forces is substantial, as reflected in section 1311(e) of PPACA. As of 2018, U.S. health care spending had reached $3.6 trillion, or $11,172 per person and accounted for 17.7 percent of the nation's Gross Domestic Product.[82] Given the scope of the market and the earlier-discussed data suggesting that price transparency and market forces can drive down health care costs, the government's interest in increasing price transparency is substantial.

Each of the three interests identified above is furthered by the final rules. For individuals, the data provided will permit them to compare prices for health care items and services and allocate their funds accordingly. For benefit plans and employers, the information provided will guide decision-making about which coverage options to offer, and which providers or third parties, like pharmacy benefit managers (PBMs), to contract with. For the health care economy as a whole, the Departments are of the view (based on available data) that transparency and market forces will drive savings and reduce expenditures. Accordingly, the Departments continue to hold the view that the final rules serve substantial government interests.

Furthermore, the requirement to provide these disclosures does not unduly burden plan or issuer speech because nothing in the final rules would "drown out [a plans' or issuers'] own message" or "effectively rule out" any mode of communication. *See NIFLA*, 138 S. Ct. at 2378. Plans and issuers remain free to communicate with consumers using methods and media they have always used or may choose to use in the future.

The Departments further disagree that the final rules would be subject to a standard of constitutional scrutiny higher than that applied to compelled commercial speech. For First Amendment purposes, commercial speech is speech "related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). Price information concerning the cost of health services is related solely to the economic interests of providers and the consumers who seek their services. The speech in question here, therefore, is commercial speech.

Furthermore, the disclosure of negotiated rates is one concerning "purely factual and uncontroversial information about the terms [i.e., the price] under which services are available." *See Zauderer*, 471 U.S. at 651; *see also Am. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014). Therefore, the imposition on commercial speech by the final rules need only be "reasonably related" to the government's stated interest. For the reasons discussed above, the Departments are of the view that making available negotiated rates to consumers is reasonably related to the government's stated inter-

[80] *See* "Medical Expenditure Panel Survey. Insurance Component National-Level Summary Tables." United States Department for Health and Human Services Agency for Healthcare Research and Quality. Available at: https://www.meps.ahrq.gov/mepsweb/data_stats/quick_tables_search.jsp?component=2&subcomponent=1.\

[81] The preamble to the proposed rules contains a detailed discussion regarding increases in deductibles. S*ee* 84 FR 65464, 65465 (Nov. 27, 2019) (citing Ray, M., Copeland, R., Cox, C. ''Tracking the rise in premium contributions and cost-sharing for families with large employer coverage,'' Peterson-Kaiser Health System Tracker. August 14, 2019. Available at: *https://www.healthsystemtracker.org/brief/tracking-the-rise-in-premium-contributionsand-cost-sharing-for-families-with-large-employercoverage/*.).

[82] "Historical National Health Expenditure Data." Centers for Medicare and Medicare Services. Available at: https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical.

ests in providing greater cost information to consumers and benefit plans, as well as increasing price transparency in the health care market more broadly. While the Departments disagree that the stricter constitutional scrutiny under *Central Hudson* would apply to the final rules for the reasons discussed above, the Departments also are of the view that the government interests described above are "substantial," and the regulations, for the reasons described above, directly advance that governmental interest and are not more extensive than necessary to serve that interest. None of the alternatives considered by the Departments would provide the full panoply of information necessary to achieve the identified interests. Specifically, the only way to provide information concerning a consumer's personal liability for health care services when the negotiated rate is all or any portion of that liability is by disclosing those rates.

The Departments disagree that the rules are excessively burdensome and are invalid because they purportedly exceed the statute's goal of providing notice of cost-sharing liability. The Departments are of the view that, in addition to providing participants, beneficiaries, and enrollees with notice of cost-sharing liability, the final rules are intended to advance a number of concurrent goals, as described earlier in this preamble. These goals are consistent with the full text of section 1311(e)(3) of PPACA and section 2715A of the PHS Act. They include the overarching goal of facilitating a market-driven heath care system by giving consumers of health care services data that will enable consumers to make fully informed, cost-conscious decisions when choosing health care. These transparency requirements will support the creation of a competitive dynamic in health care markets that leads to narrower price differentials for the same services, fosters innovation, and potentially lowers overall health care costs over time.[83] These goals are consistent with the statutory mandate to promote transparency in coverage by making available to the public accurate and timely health care information, including cost-sharing information, and other information as deemed appropriate by the Departments.

The Departments also disagree with any notion that, because published negotiated rates would not be useful to all consumers in all situations, the final rules are not sufficiently tailored to survive constitutional scrutiny. Consumers seeking in-network items or services must have access to negotiated rate information to calculate out-of-pocket costs under the majority of health care payment models. These negotiated rates determine the price they will be obliged to pay, up to the applicable out-of-pocket limit. Thus, disclosing the negotiated rate is important to the consumer's ability to reasonably estimate his or her personal financial liability in advance of receiving services. In particular, and as explained earlier in this preamble, annual deductibles for plans and issuers now routinely obligate consumers to pay several thousand dollars before the plan or issuer pays any benefits. The requirement to disclose negotiated rates to consumers is, therefore, crucial to providing meaningful transparency in health care markets.

b. Fifth Amendment Taking

The Departments also disagree that the requirement to disclose negotiated rates in the final rules constitutes an unlawful taking without just compensation under the Fifth Amendment. As an initial matter, the subject of any "taking" is a cognizable property interest. Commenters asserted that their negotiated rates constitute property because they are trade secrets. The Departments disagree. In order for a piece of information to qualify as a trade secret, it must be the subject of efforts to maintain its secrecy that are reasonable under the circumstances. Under most circumstances, if a piece of information is disclosed to third parties who have no obligation to keep it a secret, it does not qualify for trade secrets protection. Negotiated rates for health care items and services are routinely disclosed in EOBs provided to participants, beneficiaries, and enrollees. Participants, beneficiaries, and enrollees have no obligation to keep the information contained in their EOBs secret; some patients provide them to journalists or upload them to crowd-sourcing websites.[84] The Departments are of the view that this routine disclosure of negotiated rate information is sufficient to defeat any asserted trade-secret protection, and, therefore, the issuers have no proprietary interest in the negotiated rates that could be the subject of a constitutional "taking."

Moreover, plans' and issuers' expectations of confidentiality in information provided as a condition of participation in a highly regulated industry (for example, health insurance) are substantially diminished by the highly regulated nature of the industry. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984) (noting that expectations are necessarily adjusted in areas that "ha[ve] long been the source of public concern and the subject of government regulation"); *Me. Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145 (1st Cir. 2012) (discussing a Maine law requiring health issuers to disclose loss information); *Franklin Mem'l Hosp. v. Harvey*, 575 F.3d 121, 128 (1st Cir. 2009) (holding that a claimant's investment-backed expectations were "tempered by the fact that it operate[d] in the highly regulated hospital industry").[85] Plans and issuers are already subject to extensive regulation under federal and state law. As noted by the 1st Circuit in *Pharmacy Care v. Rowe*:

> If [regulated parties] truly assumed that they would be free from disclosure requirements … this would be more wishful thinking than reasonable expectation. Whether or not the law strikes the right economic balance between competing producer and con-

[83] 84 FR 65465 (Nov. 27, 2019).

[84] Kliff, S. "Why I'm Obsessed With Patients' Medical Bills, New York Times. August 7, 2020. Available at https://www.nytimes.com/2020/08/07/insider/coronavirus-medical-bills.html; *see also* Cerullo, M. "As medical costs soar, more Americans turn to crowdfunding." CBS News. February 21, 2020. Available at: https://www.cbsnews.com/news/health-care-costs-crowdfunding-medical-bills/.

[85] PBMs serve as intermediaries between pharmacies and health benefit plans, including plans covered by ERISA. PBMs contract with pharmacies to establish pharmacy networks and contract with health benefit plans to provide access to those pharmacy networks. When a participant in a health benefit plan fills a drug prescription at a network pharmacy, the PBM pays the pharmacy at the rate negotiated in the contract between the PBM and the pharmacy (less any copayment by the participant), and the health benefit plan then reimburses the PBM at the rate negotiated in the contract between the PBM and the health benefit plan.

sumer interests, it is no more a taking than the requirement that public corporations disclose private corporate information about financial prospects to the public through regular SEC filings.

Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 316 (1st Cir. 2005) (joint concurring opinion representing the opinion of the court). The Court further stated: "Given the absence of a full-scale taking and the presence of a traditional regulatory interest, it is enough to defeat the takings claim that no reasonable investment-backed expectation is present at all." *Id*. at 315; *see also Good v. United States,* 189 F.3d 1355, 1363 (Fed. Cir. 1999) ("We have previously held that the government is entitled to summary judgment on a regulatory takings claim where the plaintiffs lacked reasonable, investment-backed expectations….").

Even if there were some property interest in negotiated rates, the Departments are of the view that this regulation is not a taking. The Supreme Court "has identified several factors that should be taken into account when determining whether a governmental action has gone beyond 'regulation' and effects a 'taking.'" *Monsanto*, 467 U.S. at 1005. Among those factors are "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Id.* (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980)); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978).

In requiring disclosure under the final rules, the government does not do so with the intention that the information is primarily and explicitly for the government's own use, or that any such potential impact is the purpose for requiring the disclosure. Instead, the final rules are intended to, and will, enable consumers to access information needed to make informed decisions on health care services. Under *Penn Central*, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124 (citation omitted). The final rules clearly fall on the other end of the spectrum, arising from statutory provisions, section 1311(e)(3) of PPACA and section 2175A of the PHS Act, that "adjust[t] the benefits and burdens of economic life to promote the common good." *Connolly v. Pension Benefit Guar. Corp*., 475 U.S. 211, 212 (1986).

3. Protections for proprietary, confidential business information, and trade secrets.

Several commenters objected to the proposed rules on grounds that the requirement that issuers make public negotiated rates with providers would require the disclosure of allegedly confidential, proprietary business information, and trade secrets that are expressly protected from disclosure by a variety of federal and state laws, and the statute does not in any way purport to abrogate those protections. Several commenters pointed to the Defend Trade Secrets Act, (DTSA) which protects the property rights of trade secret holders,[86] and the Freedom of Information Act (FOIA),[87] which protects confidential, proprietary business information, and trade secrets from public disclosure, as examples of Congress' intent that such information be protected.

The Departments disagree. As discussed above, the Departments are of the view that the routine disclosure of negotiated rate information to third parties via EOBs means that the rate information is not a trade secret, and the DTSA, therefore, does not apply. Even if it did, there can be no meaningful sense in which the disclosure of this information pursuant to the final rules would constitute a misappropriation by improper means prohibited by the DTSA. The disclosures in question would be made pursuant to a regulatory mandate authorized by law, to effectuate policy priorities enacted by Congress: namely, transparency in health care. These disclosures cannot reasonably be construed as "theft, bribery, or misrepresentation."[88]

The disclosures required under the final rules would also not constitute a breach or inducement of a breach of a duty to maintain secrecy, as the final rules apply prospectively in a regulatory environment in which all parties to provider agreements, and all affected plans and issuers, are being placed on notice and should be aware in advance of the requirements of the final rules. All parties to these contracts are therefore positioned to modify contractual arrangements, or similar policies, practices, or expectations relating to privacy or trade secrets to conform to the final rules. Otherwise, the final rules will supersede these arrangements to the extent necessary to implement these rules.

FOIA is also not relevant to the disclosure that would be required by the final rules.[89] FOIA is a public information law that applies to federal agencies, and generally enables the public to obtain records in possession of an agency.[90] Under the final rules, by contrast, negotiated rate information and out-of-network allowed amount information would be made available for the express purpose of making the information broadly available to the public, consistent with the authority Congress vested in the Departments. FOIA does not apply to disclosures by private entities such as the plans and issuers that would be subject to the disclosure requirements in the final rules. The exemptions found in the FOIA statute apply to disclosures by the government; that a piece of information might be subject to a FOIA exemption does not mean it is entitled to a heightened protection from disclosure when held by a private party.

Neither does FOIA apply to information maintained by private entities and not by an agency or government contractor, as that information would not constitute an agency record. To be an agency record subject to FOIA, an agency must have cre-

[86] 18 U.S.C. 1836(b).
[87] 5 U.S.C. 552.
[88] 18 U.S.C. 1839(5)-(6).
[89] 5 U.S.C. 552.
[90] 5 U.S.C. 552(b)(4).

ated or obtained the materials and must be in control of the materials. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 145 (1989). Regardless of whether the negotiated rates and allowed amounts would constitute trade secrets or commercial information under FOIA, a requirement that private entities make certain information public does not implicate FOIA.

One commenter contended that the proposed disclosure of negotiated rates does not concern trade secrets, and is therefore not prohibited for that reason. The commenter asserted that the proposed disclosures concern end prices, which are comparable to the "sticker price" of a medical service or device. The commenter stated that those prices are not themselves trade secrets, which the commenter contended consist of negotiating tactics which the proposed rules would not require issuers to make available to the public. As indicated above in relation to the DTSA, the Departments agree that the final rules do not implicate trade secrets.

In support of the proposition that Congress could not have intended to undermine existing protections for confidential or proprietary business information and trade secrets when it enacted section 1311(e)(3) of PPACA, one commenter noted that elsewhere in PPACA, where Congress mandated pricing-related disclosures, it included language or arrangements that protected individual negotiated rates and pricing information from disclosure. A provision relating to the disclosure of drug cost information mandates release of only aggregated information and includes a specific designation of the information as confidential and protected from publication except in specific formats and for limited purposes that protect the identity of the parties to particular pricing arrangements.[91] Another provision mandates that hospitals make public a list of standard charges for items and services, not negotiated rates, on an annual basis only.[92] Both of these provisions, the commenter suggested, indicate Congressional intent to protect proprietary business information that is contrary to the requirements of the proposed rule.

The Departments are aware that Congress included provisions preventing or limiting disclosures of health care information in other sections of PPACA but note that Congress did not include such provisions in section 1311(e)(3)(A) of PPACA, indicating no intention that such restrictions apply in this context.[93]

Several commenters also pointed to the Sherman Antitrust Act, and specific applications of antitrust principles relating to the disclosure of trade secrets, including negotiated rates between issuers and providers in the health care context. They contend that Congress could not have intended to indirectly undermine these long-standing standards and policies when it enacted section 1311(e)(3) of PPACA. Several commenters also cited interpretive communications and similar guidance from the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice for the proposition that public disclosure of negotiated prices can have anticompetitive effects and harm consumers, contrary to long standing principles of antitrust law. One commenter recommended that any plan to make public privately negotiated rates should include requirements to aggregate information to ensure that arrangements of specific market participants remain confidential, and that a time lag also should be applied to any released data to ensure current information is not compromised.

The Departments disagree with the notion that the final rules will lead to anticompetitive behavior by plans, issuers, and providers. The Sherman Antitrust Act prohibits any contract, combination, or conspiracy in restraint of trade or commerce.[94] Specifically, the law prohibits any "person" from entering into any such contract, trust, or similar arrangement.[95] "The primary purpose of the antitrust laws is to protect interbrand competition." *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) (citing *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 726 (1988)). The Departments are not of the view that publication of plans' and issuers' negotiated rates with providers is likely to spur plans and issuers ("persons") to violate the law by colluding to fix their prices in a manner that restrains trade. Rather, while the publication of price information sometimes facilitates tacit collusion, based on public comments and the many empirical studies that have investigated the impact of price transparency on other, non-health care markets, the Departments are of the view that transparency of negotiated rates will likely motivate plans, issuers, and providers to reassess the competitiveness of their prices in order to continue to successfully compete with lower premiums, deductibles, and other cost-sharing responsibilities, and lower priced health care items and services. As stated in the preamble of the Hospital Price Transparency Final Rule, many empirical studies have investigated the impact of price transparency on markets, with most research, consistent with predictions of standard economic theory, showing that price transparency leads to lower and more uniform prices.[96] Traditional economic analysis suggests that if consumers were to have better pricing information for health care services, providers would face pressure to lower prices and provide better quality care. Falling prices may, in turn, expand consumers' access to health care.[97]

By disclosing negotiated rates, the Departments are of the view that the public (including patients, employers, clinicians, and other third parties) will have the information necessary to make more informed decisions about their care. The Departments expect that the impact of more expansive transparency in pricing infor-

[91] 42 U.S.C. 1320b-23(c).

[92] 42 U.S.C. 300gg(18)(e).

[93] *See, for example, Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

[94] 15 U.S.C. 1.

[95] *Id.* "Person" or "persons" are defined at 15 U.S.C. 12(a) ("[P]erson" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country").

[96] 84 FR 65464, 65524 (Nov. 27, 2019).

[97] Austin, A. D., and Gravelle, J. G. "Congressional Research Service Report for Congress: Does Price Transparency Improve Market Efficiency? Implications of Empirical Evidence in Other Markets for the Healthcare Sector". April 29, 2008. Available at: https://crsreports.congress.gov/product/pdf/RL/RL34101.

mation will increase market competition and may ultimately drive down the cost of health care services, making care more affordable for all consumers.

Although the Departments appreciate that regulated entities could seek to engage in unlawful behavior in restraint of trade, antitrust law does not proscribe or limit action by the federal government to address chronic issues in the nation's health care markets. Such actions include new, innovative measures that, based on evidence and research, are likely to improve competition and lower costs to consumers. The Departments also are of the view that the statute and the final rules do not constitute an abrogation of antitrust law. Nothing under the final rules creates, compels, or endorses agreements or conspiracies between or among persons to form illegal arrangements or trusts in restraint of trade or commerce. To the contrary, antitrust law enforcement remains an important tool to protect these markets from anticompetitive behavior.

The Departments are of the view that the disclosure of negotiated rates would serve a greater public interest and that "concealing negotiated price information serves little purpose other than protecting dominant providers' ability to charge above-market prices…."[98] For example, in Maine, one state official indicated that "to date, there is no evidence that the release of [Maine Health Data Organization] claims data has resulted in an anticompetitive market. Similarly, disclosure of claims data in New Hampshire has resulted increased competition and reduced prices for health care.[99]

For the reasons set forth in this preamble, the Departments are of the view that the final rules will enhance competition, improve markets, and benefit all consumers of health care, including individuals, employers, and government health care programs. Under the final rules, disclosure of the negotiated rate is critical to the ability of consumers, including those who have not met their annual deductible obligation, to be able to reasonably estimate in advance their personal liability for covered services from participating providers. It is also critical in estimating coinsurance liabilities that are calculated as a percentage of provider charges. In addition, the Departments are of the view that accessible pricing information improves market efficiency.[100]

3. Administrative Procedure Act (APA) and Arbitrary and Capricious Agency Action

Some commenters asserted that the proposed rules were arbitrary and capricious and thus violate the APA. Two commenters contended that the Departments' rationale is entirely speculative. They also contended that the Departments have not quantified in a reliable way the costs or anticipated benefits of the proposed rules, examined relevant data, or articulated a satisfactory explanation for the proposed rules. One commenter held the opposite position and asserted that the proposed rules were fully consonant with APA requirements. The commenter believed the Departments are implementing PPACA appropriately, and that the interpretation of the authorities underlying the proposed rules was reasonable and rationally explained by the Departments.

The Departments are also of the view that the final rules are consistent with the APA. Section 1311(e)(3) of PPACA and section 2715A of the PHS Act are designed to assist consumers by enhancing their ability to make cost-conscious decisions, which is essential to establish and maintain the level of market competition necessary to ensure that health care costs are rational, reasonable, and governed by standard market discipline. As the preamble to the proposed rules observed, there is substantial evidence that increased price transparency improves market efficiency.[101] For these reasons, it is within the scope of the statute to assist consumers with selecting providers, evaluating market options, increasing competition, and reducing market disparities. The carefully targeted information is essential to the goals of price transparency, and there is no other means of making cost-sharing liability information available to consumers whose personal liability is determined in whole or in part by reference to negotiated rates or allowed amounts. The Departments further hold the view that the Departments have made reasonable efforts to quantify all aspects of the final rules, and their potential effects, for which data is available. The Departments also note that efforts have been made to qualitatively address those areas where the Departments are unable to adequately derive quantitative assessments. Responses to additional comments are discussed later in the Regulatory Impact Analysis (RIA) and Regulatory Alternatives Considered sections of this preamble.

This preamble (as well as the preamble to the proposed rules) cites substantial research indicating that increased price transparency increases competition and lowers costs, leads to more uniform pricing within markets, and increases overall market efficiency.[102] This preamble also cites an abundance of evidence indicating that industry and other stakeholders believe that increased price transparency will enhance competition and benefit consumers. As stated earlier in this preamble in relation to comments regarding the First Amendment, the information the final rules require to be disclosed is clearly identified and has a direct nexus to the

[98] Catalyst for Payment Reform. "Report Card on State Price Transparency Laws." July 2015. Available at: https://www.catalyze.org/wp-content/uploads/woocommerce_uploads/2017/04/2015-Report-Card-on-State-Price-Transparency-Laws.pdf.

[99] Brown Z. Y. "Equilibrium Effects of Health Care Price Information." 101 Rev. of Econ. & Stat. 699 (2019). Available at: http://www-personal.umich.edu/~zachb/zbrown_eqm_effects_price_transparency.pdf.

[100] Austin, D. A., and Gravelle, J. G. "CRS Report for Congress: Does Price Transparency Improve Market Efficiency? Implications of Empirical Evidence in Other Markets for the Healthcare Sector." July 24, 2007. Available at: https://fas.org/sgp/crs/secrecy/RL34101.pdf.

[101] 84 FR 65464, 65489; 65495 (Nov. 27, 2019); *see also* Austin, A. D., and Gravelle, J. G. "Congressional Research Service Report to Congress: Does Price Transparency Improve Market Efficiency? Implications of Empirical Evidence in Other Markets for the Healthcare Sector." July 24, 2007. Available at: https://fas.org/sgp/crs/secrecy/RL34101.pdf; see also Brown, Z. Y. "Equilibrium Effects of Health Care Price Information." 100 Rev. Econ. & Stat. 1. Available at: http://www-personal.umich.edu/~zachb/zbrown_eqm_effects_price_transparency.pdf; *see also* Enthoven, A. "Market Forces and Efficient Health Care Systems." Health Affairs, Vol. 23, No. 2. Available at https://www.healthaffairs.org/doi/full/10.1377/hlthaff.23.2.25.

[102] 84 FR 65464, 65466-67 (Nov. 27, 2019).

government's legitimate and substantial interest in ensuring that consumers have sufficient information to calculate out of pocket costs for health care items and services and ultimately assess whether the payment terms of plans and coverages are fair, reasonable, or advantageous to the consumer. Furthermore, in the Impact Estimates of the Transparency in Coverage Provisions and Accounting Table section later in this preamble, the Departments identify ranges of relevant factors and categories of information that the Departments have attempted to quantify, as well as those factors and categories that the Departments cannot quantify at this time. Nevertheless, the Departments are of the view that those determinations are reasonable and sufficiently thorough, and that the Departments' expectations regarding the impacts of the final rules are not speculative.

4. Other legal concerns

Several commenters asserted that requiring issuers to make negotiated prices public could violate various state laws, principles of common law, and tort laws concerned with the protection of trade secrets and proprietary business information. Several commenters specifically stated that the proposal would violate the Uniform Trade Secrets Act (UTSA)[103] as adopted by several states.

The Departments understand these concerns and appreciate that States have passed laws and regulations that may address the same or similar information the final rules require to be publicly disclosed, or disclosed to participants, beneficiaries, or enrollees. The final rules will preempt these laws, to the extent they conflict with federal law and would prevent application of federal requirements, as required under section 1321(d) of PPACA and section 2724(a) of the PHS Act. The Departments discuss this issue in more detail later in this preamble in the context of addressing federalism considerations.

Moreover, the Departments are also of the view that negotiated rates do not constitute trade secrets as defined under the UTSA and under principles of tort law. A trade secret under the UTSA is "information, including a formula, pattern, compilation, program, device, method, technique, or process" that "derives independent economic value… from not being generally known [or] readily ascertainable by proper means by… other persons who can obtain economic value from its disclosure [and] is the subject of efforts to… maintain its secrecy."[104] Critically, and as discussed earlier, negotiated rates are routinely disclosed to beneficiaries in EOBs.

To the extent the final rules require disclosure of trade secrets, the activity that supports a cause of action under tort law includes obtaining the information by improper means or a breach of confidence.[105] No such scenario is implicated where the disclosure is made pursuant to a regulatory mandate authorized by statute. In this context, the disclosure is a legal obligation, and so the disclosure is by definition proper and made in the absence of any duty of confidence.

Finally, even if negotiated rates could constitute trade secrets under a state's law, state law cannot invalidate the authority Congress granted to the Departments under section 1311(e)(3) of PPACA to require disclosure of negotiated rates and other information that the Departments determine appropriate to create a level of transparency in coverage sufficient to address chronic issues in American health care markets, including rising health care prices.

Several commenters asserted that making negotiated rates public would violate contractual arrangements between virtually all issuers and providers, in particular contractual provisions that prohibit disclosure of negotiated rates. One commenter noted that this would, at a minimum, require a considerable effort to amend many existing contracts.

The Departments understand that changes in applicable laws and regulations may necessitate changes to certain business and contractual relationships over time. The Departments are of the view, however, that the final rules are necessary to advance the interests of consumers and to fulfill the goals of the relevant statutes. The Departments also anticipate that in most cases, affected contracts include clauses that specifically anticipate the possibility of future changes to applicable law or regulations. Additionally, even if a contract between a provider and a payer includes a provision prohibiting the public disclosure of its terms, it is the Departments' understanding that such contracts typically include exceptions if a particular disclosure is required by federal law. Finally, as the Supreme Court has found, "[c]ontracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *Norman v. Balt. & Ohio R.R. Co.,* 294 U.S. 240, 307–08 (1935) ("If the regulatory statute is otherwise within the powers of Congress… its application may not be defeated by private contractual provisions.")*; see also Connolly*, 475 U.S. at 224.

Several commenters contended that the proposed rules would be inconsistent with certain executive orders**.** One commenter contended that Executive Order 13877, which the Departments cited as the impetus for the proposed rules, directs the agencies to "require… health insurance issuers… to provide or facilitate access to information about expected out-of-pock-

[103] The Uniform Trade Secrets Act is a model statute that a majority of states have adopted in some form. The UTSA is promulgated by the Uniform Law Commission. S*ee generally*, Uniform Trade Secrets Act with 1985 Amendments, Nat'l Conference of Commissioners on Uniform State Laws, August 1985. UTSA has been adopted in some form by 48 states. New York and North Carolina are the exceptions. *See* "Trade Secrets Act." Uniform Laws Commission. Available at: https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792.

[104] *See* Uniform Trade Secrets Act with 1985 Amendments, Nat'l Conference of Commissioners on Uniform State Laws, August, 1985; Restatement (First) of Torts § 757 (1939).

[105] Restatement (First) of Torts § 757 (1939) ("*GENERAL PRINCIPLE.* One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if (a) he discovered the secret by improper means, or (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, or (c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper means or that the third person's disclosure of it was otherwise a breach of his duty to the other, or (d) he learned the secret with notice of the facts that it was a secret and that its disclosure was made to him by mistake.").

et costs for items or services to patients before they receive care." The commenter asserted that this directive does not rationally encompass a requirement that issuers make public all negotiated rates and allowed amounts. The commenter also asserted that the proposed rules are incompatible with section 3(b) of Executive Order 13877, which provides that any rulemaking be "consistent with applicable law," in that the proposed rules run contrary to antitrust law as well as prohibitions against disclosing trade secrets.

The Departments disagree with these comments. First, Executive Order 13877 clearly states that it 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." Executive Order 13877, Sec. 8(c). Thus, an executive order cannot form the basis of a challenge to a rulemaking. Second, for all the reasons detailed earlier in this preamble, the Departments are of the view that the final rules are necessary and appropriate measures that are sufficiently narrowly tailored to meet the stated goals of the Executive Order. Making public the negotiated rates and out-of-network allowed amounts is essential for consumers to obtain useful information about out-of-pocket costs they are likely to incur before receiving services. Due to the prevalence of high deductibles throughout markets nationwide, this information will be crucial for a significant cohort of persons enrolled in health plans to be able to anticipate costs in advance of each plan year. For the public, access to information concerning allowed amounts is essential to obtain reliable advance estimates of personal liability to facilitate cost-conscious choices that enhance competition and lower overall costs. Finally, as described later in this preamble, the Departments considered many alternatives to the proposed and final rules. The Departments are of the view that the final rules are a straightforward implementation of the mandate of section 1311(e)(3) of PPACA, and that the choices taken in particular instances are well calculated to effectively and fully implement the goals of the authorizing statutes. Moreover, the regulations provide tools and information to consumers that are critical to their ability to access meaningful price information, including the personal liability associated with a substantial portion of health care services. This directly facilitates the meaningful engagement of consumers with their own health care and protects patients from the likelihood of unanticipated health care costs. As such, the regulations fulfill the mandate of Executive Order 13877.

For the foregoing reasons, the final rules adopt the majority of the provisions in the proposed rules, with certain modifications, as described in detail in the following sections of this preamble.

II. Overview of the Final Rules Regarding Transparency – the Departments of the Treasury, Labor, and Health and Human Services

The Departments are finalizing price transparency requirements set forth in the final rules in 26 CFR 54.9815-2715A1, 26 CFR 54.9815-2715A2, 26 CFR 54.9815-2715A3, 29 CFR 2590.715-2715A1, 29 CFR 2590.715-2715A2, 29 CFR 2590.715-2715A3, and 45 CFR 147.210, 147.211, and 147.212. The final rules separate the proposed regulations all contained in 26 CFR 54.9815-2715A, 29 CFR 2590.715-2715A, and 45 CFR 147.210, into three separate regulations for each of the Departments. The regulations set forth the scope and relevant definitions in 26 CFR 54.9815-2715A1, 29 CFR 2590.715-2715A1, and 45 CFR 147.210 (which correspond with paragraph (a) of the proposed regulations). The regulations at 26 CFR 54.9815-2715A2, 29 CFR 2590.715-2715A2, and, 45 CFR 147.211 (which correspond with paragraph (b) of the proposed regulations) include: (1) a requirement that group health plans and health insurance issuers in the individual and group markets disclose to participants, beneficiaries, or enrollees upon request, through a self-service tool made available by the plan or issuer on an internet website, cost-sharing information for a covered item or service from a particular provider or providers, and (2) a requirement that plans and issuers make such information available in paper form, upon request. As explained in more detail later in this preamble, the final rules adopt a three-year, phased-in approach with respect to the scope of the requirement to disclose cost-sharing information. Plans and issuers must make cost-sharing information available for 500 items and services identified by the Departments for plan years (in the individual market, for policy years) beginning on or after January 1, 2023, and must make cost-sharing information available for all items and services for plan years (in the individual market, for policy years) beginning on or after January 1, 2024.

The regulations at 26 CFR 54.9815-2715A3, 29 CFR 2590.715-2715A3, and 45 CFR part 147.212 (at paragraph (c) of the proposed regulations) require that plans and issuers disclose pricing information to the public through three machine-readable files. One file requires disclosure of payment rates negotiated between plans or issuers and providers for all covered items and services. The second file will disclose the unique amounts a plan or issuer allowed, as well as associated billed charges, for covered items or services furnished by out-of-network providers during a specified time period. To reduce the complexity and burden of including prescription drug information in the negotiated rate machine-readable file, the final rules require a third file that will include pricing information for prescription drugs. The final rules modify the applicability date for these provisions to plan years (in the individual market, policy years) beginning on or after January 1, 2022.

The provisions proposed at paragraph (d) of the proposed regulations are finalized in 26 CFR 54.9815-2715A2 and 26 CFR 54.9815-2715A3, 29 CFR 2590.715-2715A2, and 29 CFR 2590.715-2715A3, and 147.211 and 147.212 with non-substantive editorial changes for increased readability, and with effective dates reflecting the phased approach to implementation mentioned earlier and discussed in more detail later in this preamble.

In addition to splitting the final rules into three separate regulations for each Department, the Departments have added severability clauses to the final rules to emphasize the Departments' intent that, to the extent a reviewing court holds that any provision of the final rules is unlawful, the remaining rules should take effect and be

given the maximum effect permitted by law. The final rules provide that any provision held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, shall be severable from the relevant section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

To streamline the final rules, the Departments have removed definitions of terms that are defined in the applicable statute or elsewhere in such statutes' implementing regulations and have revised certain definitions to provide more clarity. Finally, based on comments received, the Departments have reassessed the associated burden estimates in the Economic Impact Analysis and Paperwork Burden section of this preamble.

A. *Definitions*

The final regulations at 26 CFR 54.9815-2715A1(a), 29 CFR 2590.715-2715A1(a), and 45 CFR 147.210(a) (paragraph (a) of the proposed regulations) set forth definitions that are applicable to the regulations at 26 CFR 54.9815-2715A2, 29 CFR 2590.715-2715A2, and 45 CFR 147.211 (paragraph (b) of the proposed regulations) and 26 CFR 54.9815-2715A3, 29 CFR 2590.715-2715A3, 45 CFR 147.212 (paragraph (c) of the proposed regulations). The Departments have revised the proposed definitions of some terms and included new defined terms in order to clarify the final requirements of 26 CFR 54.9815-2715A2, 29 CFR 2590.715-2715A2, and 45 CFR 147.211, and 26 CFR 54.9815-2715A3, 29 CFR 2590.715-2715A3, and 45 CFR 147.212. Comments on the definitions in the proposed rule focused on concerns regarding consistency of definitions across related government programs, the general need for increased clarity in relation to some proposed definitions, and the need for resolution of perceived ambiguities in the proposed definitions. In response to these comments, the Departments are not finalizing certain proposed definitions that are already defined in existing, pertinent regulations. The Departments are finalizing revised versions of other proposed definitions to clarify their meaning, as well as the policies and requirements adopted in the final rules.

Commenters recommended aligning definitions in the proposed regulations with those in other existing regulations to avoid conflicts. In light of these recommendations, the Departments are not finalizing the proposed definition of "participant" under 26 CFR 54.9815-2715A1, 29 CFR 2590.715-2715A1, or part 147.210 because the term is already defined in the Departments' regulations at 26 CFR 54.9801-2, 29 CFR 2590.701-2, and 45 CFR 144.103. Likewise, the Departments are not finalizing the proposed definition of "beneficiary" under proposed 45 CFR 145.210 and 29 CFR 2590.715-2715A1, because the term is already defined under HHS regulation at 45 CFR 144.103 and in statute at ERISA section 3(8). The Departments, however, are finalizing the definition of "beneficiary" proposed under 26 CFR 54.9815-2715A(a) (now at 26 CFR 54.9815-2715A1), because the term is not otherwise defined in Treasury Regulations or the Code. Finally, the Departments are not finalizing the proposed definition for "qualified health plan" at 45 CFR 145.210 since the term is not used in the regulation text.

Some commenters requested clarification of the terms "participants" and "beneficiaries" because the proposed rules' definitions of these terms included individuals who may become eligible for a plan or coverage, and as the proposed rules envisioned personalized feedback to "participants" and "enrollees" it would be impossible to provide such information to an individual not currently enrolled in a plan or coverage. The Departments agree. However, instead of modifying existing, applicable definitions for "participants" and "beneficiaries," the final rules, at 26 CFR 54.9815-2715A2, 29 CFR 2590.715-2715A2, and 45 CFR 147.211, and this preamble below clarify to whom these disclosures are required.

One commenter recommended the Departments define the term "in-network provider" in the final rules to clearly exclude device suppliers and manufacturers that, the commenter suggested, have not traditionally been considered in-network providers and whose price information is of limited value to consumers. The Departments do not agree that device suppliers and manufacturers should be excluded. Based on the numerous public comments from individuals who support broad price transparency for all covered items and services, the Departments are of the view that pricing information for all covered items and services should be available, including pricing for durable medical equipment (DME) or other medical devices that are supplied to a participant, beneficiary, or enrollee by a provider under a contract with a plan or issuer. To clarify, the final rules define in-network provider to mean any provider of items and services with which the plan or issuer, or a third-party for a plan or issuer, has a contract setting forth the terms under which a covered item or service may be provided to a participant, beneficiary, or enrollee. The Departments broadened this definition to clarify that even where a provider and a plan or issuer have a limited rate agreement of some kind, or a rate agreement covering DME, those providers should be considered in-network providers for purposes of the final rules. Additionally, if a plan or issuer enters into a contract or has such payment arrangements, then the pricing information for the specific covered items or services subject to that contract or payment arrangement are required to be disclosed as part of the internet self-service tool and machine-readable files.

The proposed regulations included a definition for "negotiated rate" to mean the amount a group health plan or health insurance issuer, or a third party on behalf of a plan or issuer, has contractually agreed to pay an in-network provider for covered items and services, pursuant to the terms of an agreement between the provider and the plan or issuer, or a third-party on behalf of a plan or issuer. Consistent with the proposed and final definitions of "items and services," plans and issuers are required to disclose "negotiated rates" for encounters, procedures, medical tests, supplies, prescription drugs, durable medical equipment, and fees (including facility fees) to participants, beneficiaries, and enrollees through the internet-based self-service tool (and in paper form) as well as to the public through a machine-readable file. One commenter requested the Departments clarify the meaning of "negotiated rate" for prescrip-

tion drugs, noting that they assumed the Departments expected plans and issuers to provide the drug price negotiated by a PBM on behalf of the plan. Another commenter asserted that the "negotiated rate" of prescription drugs for disclosure should be the price patients will see at the point-of-sale, meaning the undiscounted price of the drug, plus dispensing fees. Conversely, another commenter stated that dispensing fees are not paid by enrollees or used in determining cost-sharing liability. Other commenters suggested that the Departments grant plans and issuers flexibility in determining the appropriate rate for disclosure, as plans and issuers use a variety of different benchmarks, such as the Average Wholesale Price (AWP), or Wholesale Acquisition Cost (WAC) which may be considered as the "negotiated rate" for the purpose of determining cost-sharing liability under the plan or coverage.

In the final rules, the Departments have revised the definition of "negotiated rate" to mean the amount a plan or issuer has contractually agreed to pay for a covered item or service, whether directly or indirectly through a third party administrator (TPA) or PBM, to an in-network provider, including an in-network pharmacy or other prescription drug dispenser, for covered items or services. The final rules adopt the proposed definition with two key modifications. First, the term "third party" from the proposed definition is expanded in the final rules to explicitly refer to "third-party administrator or pharmacy benefit manager." Second, the final definition of "negotiated rate" specifically notes that the term in-network provider includes an in-network pharmacy or other prescription drug dispenser. The purpose of these modifications is to confirm the commenter's inference that in the case of prescription drugs, the plan or issuer should include the price negotiated for that plan or issuer by a PBM. Furthermore, the "negotiated rate" in the final rules is intended to be broad enough to account for different plan designs and benchmarks for determining negotiated rates.

The final rules also add definitions for the following terms that were not included in the proposed regulations: "billed charge," "copayment assistance," "derived amount," "historic net price," "national drug code," and "underlying fee schedule." The addition of these definitions is discussed later in this preamble.

One commenter noted that the Departments have proposed definitions for "accumulated amounts," "cost-sharing liability," and "cost-sharing information" that are unique to the proposed rules and, in some cases, differ from definitions of similar terms used in other related regulations. In particular, this commenter recommended that all definitions should explicitly recognize that cost sharing can be paid by or on behalf of an enrollee, participant, or beneficiary, since that is how cost sharing is defined by HHS regulation. The commenter also requested that the Departments clarify the proposed definition of "accumulated amounts" and suggested revising the definition to state clearly that accumulated amounts are the "amount of financial responsibility a participant, beneficiary, or enrollee has incurred, whether satisfied by or on behalf of the participant, beneficiary, or enrollee.…"

The Departments recognize that cost sharing may be paid by a third-party on behalf of an enrollee, participant, or beneficiary. However, the Departments are of the view that some plans and issuers do not count cost-sharing liability payments made by a third-party towards a participant's, beneficiary's, or enrollee's accumulated amounts, and modifying the definitions as suggested by the commenter could cause confusion in the context of the final rules.

The Departments have added disclosure requirements that are discussed in detail elsewhere in this preamble to address this concern. The definitions being finalized also include non-substantive editorial changes from the proposed regulations for readability to the following terms; "accumulated amounts," "billing code," "bundled payment arrangement," "cost-sharing liability," "cost-sharing information," "covered items or services," "item or services," and "out-of-network allowed amount."

The definitions identified as new or substantively modified in this section, as well as those that are being finalized as proposed, are discussed further in relation to the requirements of 26 CFR 54.9815-2715A2, 29 CFR 2590.715-2715A2, and 45 CFR 147.211 and 26 CFR 54.9815-2715A3, 29 CFR 2590.715-2715A3, and 45 CFR part 147.212 throughout this preamble.

B. *Requirements for Disclosing Cost-Sharing Information to Participants, Beneficiaries, and Enrollees*

The final rules are intended to enable participants, beneficiaries, and enrollees to obtain an estimate of their potential cost-sharing liability for covered items and services they might receive from a particular health care provider, consistent with the requirements of section 2715A of the PHS Act and section 1311(e)(3)(C) of PPACA. Accordingly, the Departments proposed in paragraph (b) of the proposed regulations to require group health plans and health insurance issuers to disclose certain information relevant to a determination of a consumer's out-of-pocket costs for a particular health care item or service in accordance with specific method and format requirements, upon the request of a participant, beneficiary, or enrollee.

A majority of commenters supported the Departments' proposal and urged the Departments to finalize this section of the proposed rules. Many commenters were supportive of being able to know their costs before receiving care in order to make informed shopping decisions. Some commenters agreed that consumers should have access to cost information in advance of receiving care, but suggested modifications to the proposed requirements. The final rules adopt the requirement that plans and issuers disclose certain cost-sharing information for a particular health care item or service, generally as set forth in the proposed rules, but with certain modifications and clarifications explained later in this section of this preamble.

1. Information Required to be Disclosed to Participants, Beneficiaries, or Enrollees

Based on significant research and review of public comments, the Departments concluded that requiring group health plans and health insurance issuers to disclose to participants, beneficiaries, or enrollees cost-sharing information in the manner most familiar to them is the best means to empower individuals to understand their potential cost-sharing liability for covered items and services furnished

by particular providers. The Departments, therefore, modeled the proposed price transparency requirements on existing notice requirements.

Specifically, section 2719 of the PHS Act (incorporated into the Code by section 9815 of the Code and into ERISA by section 715 of ERISA) requires non-grandfathered plans and issuers offering non-grandfathered coverage in the individual or group markets to provide a notice of adverse benefit determination (typically satisfied by the EOB) to participants, beneficiaries, or enrollees after health care items or services are furnished and claims for benefits are adjudicated. EOBs typically include the amount billed by a provider for items and services, negotiated rates or underlying fee schedules with in-network providers or allowed amounts for out-of-network providers, the amount the plan paid to the provider, and the individual's obligation for deductibles, copayments, coinsurance, and any other balance under the provider's bill. Consumers are accustomed to seeing cost-sharing information as it is presented in an EOB. The proposed rules were intended to similarly require plans and issuers to provide the specific price and benefit information on which an individual's cost-sharing liability is based. Based on comments, the Departments are of the view that participants, beneficiaries, and enrollees would also benefit from understanding the price of items and services, even in circumstances when their cost-sharing liability is not based upon a negotiated rate or underlying fee schedule rate. Given this primary goal of overall price transparency, the Departments are requiring disclosure of the negotiated rate, even if it is not the amount used as the basis for cost-sharing liability.

The proposed rules set forth seven content elements that a plan or issuer must disclose, upon request, to a participant, beneficiary, or enrollee for a covered item or service: estimated cost-sharing liability, accumulated amounts, negotiated rates, out-of-network allowed amounts, a list of items and services subject to bundled payment arrangements, a notice of prerequisites, if applicable, and a disclosure notice. These seven content elements generally reflect the same information that is included in an EOB after health care services are provided. The Departments determined that each of the seven content elements, as well as two additional content elements, are necessary and appropriate to implement the mandates of section 2715A of the PHS Act and section 1311(e)(3)(C) of PPACA by permitting individuals to learn the amount of their cost-sharing liability and understand the price for specific items or services under a plan or coverage from a particular provider. The final rules adopt the requirement that plans and issuers must satisfy these elements through disclosure of actual data relevant to an individual's cost-sharing liability that is accurate at the time the request is made. The Departments acknowledge that plans and issuers may not have processed all of an individual's outstanding claims when the individual requests the information; therefore, plans and issuers would not be required to account for outstanding claims that have not yet been fully processed. As set forth in 26 CFR 54.9815-2715A2, 29 CFR 2590.715-2715A2, and 45 CFR 147.211 this cost-sharing information must be disclosed upon request in two ways: (1) through a self-service tool that meets certain standards and is available on an internet website, and (2) in paper form, if requested by the participant, beneficiary, or enrollee.

Furthermore, under the final rules, the cost-sharing information must be disclosed to the participant, beneficiary, or enrollee in plain language. The final rules define "plain language" to mean written and presented in a manner calculated to be understood by the average participant, beneficiary, or enrollee. Determining whether this standard has been satisfied requires an exercise of considered judgment and discretion, taking into account such factors as the level of comprehension and education of typical participants, beneficiaries, or enrollees in the plan or coverage and the complexity of the terms of the plan or coverage. Accounting for these factors would likely require limiting or eliminating the use of technical jargon and long, complex sentences, so that the information provided will not have the effect of misleading, misinforming, or failing to inform participants, beneficiaries, or enrollees.

Several commenters agreed that the information found in an EOB is a good basis for informing individuals of their cost-sharing liability and will effectively further coverage transparency efforts. One commenter stated that information found in an advance EOB is neither a trade secret, nor proprietary, as it is routinely disclosed following care. Other commenters expressed concern about this concept of an advance EOB, stating that most plans and issuers do not have access to all the information necessary to provide beneficiaries with an upfront adjudication of the beneficiary's claim, and that the vast majority of data provided via online tools now rely on estimated costs drawn from publicly available sources rather than personal information and circumstances.

Many commenters expressed concerns that the elements and methods of disclosure proposed by the Departments are overly prescriptive, hindering health plan innovation and requiring potentially significant reworking of existing transparency tools, as well as requiring massive IT and resource investments by all commercial plans and issuers to develop, build or modify, test, and implement tools that meet the new standards. Several commenters recommended providing plans and issuers with flexibility to build upon current systems. Another commenter urged the Departments to evaluate the individualized tools currently available, and that if requirements for cost-estimator tools are adopted, they should give carriers and TPAs maximum flexibility in designing their tools. One commenter felt a better approach would be to educate consumers about the online tools that are currently available and assist employers to encourage their use. Several commenters opposed the requirement to provide the tool and suggested the Departments remove this requirement from the final rules altogether. These commenters stated that price estimator tools should not be required, citing studies showing low tool utilization by consumers and plan participants, beneficiaries, or enrollees. These commenters stated that the administration should instead focus on educating consumers about the online tools that are currently available and assisting employers and plans in encouraging their use.

The Departments are of the view that modeling the pricing disclosures on the elements provided within an EOB is both reasonable and appropriate. The Depart-

ments acknowledge the potential burden of updating existing tools to comply with the final rules, but the Departments think that the potential burden is outweighed by the importance of all enrollees, beneficiaries, and participants having access to self-service tools that provide a baseline of accurate pricing elements. The Departments also acknowledge that, historically, there has been low utilization of existing tools; however, the Departments are of the view that by creating minimum uniform standards, consumers will have access to more reliable, personalized estimates and will be more likely to use the tools.

As described earlier in this preamble, through independent examination and engagement with stakeholders, the Departments are of the view that existing tools vary widely in usability and reliability due to the lack of minimum standards.[106] The Departments received thousands of supportive comments from individuals eager for access to transparent pricing information, indicating that the current tools available are inadequate in practice. Furthermore, as discussed in great detail throughout this preamble, as consumers increasingly become financially responsible for a greater proportion of the cost of their care (through deductible and coinsurance requirements, for example) they have a vested interest in comparing prices of potential providers and such items as prescription drugs. As such, it is likely in the best interest of plans, issuers, and providers to promote and educate their consumers on the benefits of these shopping tools, and the Departments encourage them to do so. The Departments do not agree with the commenter who stated that educating consumers regarding existing tools and encouraging their use would be a better approach than requiring the self-service tool as proposed. While the Departments agree that educating consumers on existing self-service tools is important, it does not replace the benefits of making reliable self-service tools available to most participants, beneficiaries, and enrollees in private market plans and coverages. The Departments are of the view that minimum consistent requirements for all plans and issuers may lead to an increase in health literacy and drive consumerism as participants, beneficiaries, and enrollees become more familiar with how plans and issuers calculate cost-sharing liability. Furthermore, the final rules adopt a phased implementation approach to these requirements as a mechanism to help mitigate the associated implementation burdens.

Some commenters requested that the Departments confirm that the intent of the proposed rules is that only participants and beneficiaries enrolled in the plan would have access to the tool, noting that the proposed regulations used the ERISA definitions of "participant" and "beneficiary," which include individuals who may become eligible for the plan. Many commenters encouraged the Departments to also require that plans and issuers make cost-sharing information easily accessible to authorized representatives—which may include health care providers—so that they can better respond to patient inquiries. These commenters suggested that patients reasonably turn to providers for this information when contemplating or scheduling health care services, but providers often face barriers in accessing the necessary details from issuers to provide a timely, accurate estimate. Commenters suggested that plans and issuers should be required to give providers access to their patients' specific benefit information via a secure website, subject to patient consent. One commenter recommended that the tool be made applicable for the public while they are in the shopping and plan selection phase, not just after someone is enrolled in a plan. This commenter suggested that true cost transparency would not be possible if this information was not made available in advance.

The final rules clarify that disclosures of cost-sharing information are only required to individuals who are enrolled in the plan or coverage; no disclosures are required to be made to a "participant" or "beneficiary" solely because they might become eligible for the plan in the future. This is reflected by a revision to the proposed language being finalized at 26 CFR 54.9815-2715A2(b), 29 CFR 2590.715-2715A2(b), and 45 CFR 147.211(b) to refer to plans and issuers providing cost-sharing information to a participant, beneficiary, or enrollee who is enrolled in a plan or coverage. The Departments understand the value in provider access to cost-sharing information required under the final rules. However, this rulemaking focuses on implementing the statutory obligation for plans to make this information available to participants, beneficiaries, and enrollees. A participant, beneficiary, or enrollee may choose to share information regarding their personal cost-sharing liability with a provider for the purposes of making health care decisions. The final rules also require that this information must be provided to a participant's, beneficiary's, or enrollee's authorized representative. Under other applicable regulations, participants, beneficiaries, or enrollees may appoint a health care provider as their authorized representative.[107]

Regarding whether other types of information should be required to be disclosed in the self-service tool, several commenters expressed concern that information regarding cost without accompanying provider quality information could have a detrimental effect on overall health care cost and delivery of value-based care. One commenter stated that shifting care to a lower-cost provider could have unintended consequences of higher costs associated with unnecessary or improper care. Commenters recommended that a quality metric be included and that quality information be allowed to be included alongside price.

As discussed in the background section of this preamble and later in this preamble, the Departments acknowledge that quality information could be a valuable addition to a self-service tool. However, the Departments did not propose to require disclosure of quality information. Rather, the Departments sought comments regarding quality information in the proposed rules and plan to take those comments into consideration for future action. The De-

[106] "Are healthcare's cost estimate tools making matters worse for patients?" Becker's Hospital CFO Report, November 2015. Available at: https://www.beckershospitalreview.com/finance/are-healthcare-s-cost-estimate-tools-making-matters-worse-for-patients.html. *Citing* Gordon, E. "Patients Want to Price-Shop For Care, But Online Tools Unreliable." NPR. November 30, 2015, Available at https://www.npr.org/sections/health-shots/2015/11/30/453087857/patients-want-to-price-shop-for-care-but-online-tools-unreliable. ("Some estimators reflect a combined range of possible costs, while others are based off historical pricing or claims data from various sources. Many online estimate tools are restricted in the types of procedures they include…").
[107] 29 CFR 2560.503-1(b)(4); *see also* 26 CFR 54.9815-2719(b)(2)(i), 29 CFR 2590.715-2719(b)(2)(ii), and 45 CFR 147.136(b)(2)(ii).

partments encourage plans and issuers to further innovate around the baseline standards outlined above and include quality information and other metrics not required by the final rules that would assist in consumer decision-making.

Several commenters suggested that plans and issuers should be required to disclose information not directly related to cost sharing. One commenter urged the Departments to include an additional requirement in the final rules for plans and issuers to provide consumers with information they need to fully understand their cost-sharing obligations for emergency services at the time they obtain their coverage, and recommended plans and issuers also update this information on an annual basis or when major changes occur that would impact their access to, and overall cost of, emergency care, such as changes to their provider. Another commenter recommended that when consumers enter a search for a primary service or treatment, that they also be provided with an "alert" that additional services, such as anesthesia, pathology, or laboratory tests, likely will be involved and will entail additional costs, which should also be disclosed. Another commenter requested that the Departments add the "type of plan" (for example, ERISA-covered group health plan, a QHP, a Medicare Advantage plan, a Medicaid MCO plan, an individual health plan, or a plan that is grandfathered from PPACA requirements) and in what state the plan is providing coverage as disclosure content elements that health plans would be required to post on the proposed internet-based self-service tool, so that the information is readily available.

The Departments recognize the benefit of providing information for emergency services at the time consumers obtain their coverage. The Departments are of the view, however, that existing rules governing summaries of benefits and coverage are designed to provide such information to consumers at the time they obtain coverage. As such, the Departments are not inclined to duplicate existing requirements in the final rules. The Departments also acknowledge that alerting consumers to additional services associated with a service or treatment for which they searched could be beneficial. For this reason, the final rules provide plans and issuers flexibility to give disclaimers that can address the likelihood that services in addition to the one for which a consumer searched will be necessary. The final rules also require that plans and issuers outline individual services when a consumer requests an estimate for a service that, per the agreement between a payer and a provider, will be provided and billed as a bundle. Plans and issuers are also free to provide such information in any way they so choose, including through an alert. The Departments are also of the view that participants, beneficiaries, and enrollees are generally aware of the type of plan they are enrolled in or can reasonably access this information by contacting their plan or issuer and therefore decline to require this information as part of the final rules.

Scope of Items and Services

Many commenters stated that the requirement to disclose the price of all covered items and services was overly broad and overly burdensome, and instead suggested the Departments limit disclosure to a core set of "shoppable services" that are commonly searched for in existing cost-estimator tools. Many commenters referenced the recently finalized definition of a shoppable service that was included in the Hospital Price Transparency final rule as "a service that can be scheduled by a health care consumer in advance."[108] Two commenters recommended no more than 300 shoppable items and services, while another suggested a limit of 200. As a way to reduce the cost burden, one commenter suggested that the requirements under the rules be limited to services that are priced above a certain threshold and provided $5,000 as an example. One commenter said the Departments should permit health plans and issuers to tailor their tools to best meet their enrollees' and providers' demonstrated needs and priorities, including selection of the items and services for which estimates are most useful and meaningful for participants, beneficiaries, and enrollees. Another commenter recommended that the cost-sharing requirement be limited to items and services where the estimated out-of-pocket price is frequently the same as the final price. Another recommended the tool not require data on those items/services with volatile prices or low volume.

One commenter, representing many plans and issuers, provided a list of 421 items and services that they recommended including under this disclosure requirement. The recommended list of 421 items and services are a result of an analysis the commenter performed which compared member feedback, claims frequency, operational feasibility, and state mandates and regulations, as well as variability of cost and search frequency. All 421 items and services were included by, at the minimum, a subset of issuers, indicating confidence that the covered items and services were shoppable. This commenter also noted that their survey of existing tools found a median of 526 services available to consumers enrolled in commercial coverage.

A few commenters recommended that the Departments limit the list of items and services to only major medical services. One commenter recommended the Departments not include cost sharing for DME. Several commenters suggested that a Technical Expert Panel (TEP) was needed to review data and input from stakeholders, advise on research the Departments should undertake, and determine which items and services and functional requirements would be suitable to include in the future.

Many individual commenters expressed their desire for dental, vision, and other excepted benefits to be included under the requirements of the final rules or in the near future. Further, a majority of individual commenters encouraged the Departments to require the inclusion of all items and services, stating that consumers have a right to know this information for all items and services in advance. Several commenters recommended that the rules be implemented in a more gradual phased-in timeline, by requiring the tool to cover a narrower data set of the most common shoppable services first and then broadened to eventually include all items

[108] 84 FR 65524 (Nov. 27, 2019) (codified at 45 CFR 180.20).

and services. Another commenter stated that to the extent that the services include non-medical estimates like pharmacy and dental costs, those costs could likely only be included by allowing third parties that fulfill those benefits to provide separate transparency tools that integrate with a plan's tool.

The Departments agree with commenters who stated that consumers should be given price estimates in advance, and the Departments understand that what is considered useful and meaningful pricing information is likely to be unique to an individual's circumstances. For these reasons, and the rationale for this rulemaking described throughout this preamble, the Departments decline to accept suggestions related to limiting the number or types of items and services included under this requirement. However, the Departments acknowledge the potential burden of incorporating all items and services into a self-service tool immediately and are therefore finalizing a phased-in implementation timeline. Under the final rules, plans and issuers are required to provide estimates for the 500 items and services identified in Table 1 for plan years (in the individual market, for policy years) beginning on or after January 1, 2023. However, plans and issuers will be required to disclose pricing information with respect to all items and services for plan years (in the individual market, for policy years) beginning on or after January 1, 2024. Given that pricing estimates for all items and services will ultimately be required, the Departments do not find it necessary to convene a TEP to determine which items and services and functional requirements would be suitable to include in the future.

Further, in finalizing the provision that plans and issuers disclose cost-sharing liability information for all covered items and services, the Departments are clarifying that cost-sharing information must also be provided for covered prescription drugs and DME. As discussed later in this preamble, a plan or issuer will be considered compliant with this requirement if it offers its participants, beneficiaries, or enrollees access to the pricing information that is required under 26 CFR 54.9815-2715A2, 29 CFR 2590.715-2715A2, and 45 CFR 147.211, through a third-party tool, such as a PBM tool. As discussed elsewhere in this preamble, the Departments clarify that excepted benefits, such as limited-scope dental benefits offered under a separate policy, certificate, or contract of insurance that are not an integral part of a group health plan or health insurance coverage, are not subject to the requirements established under the final rules.

In developing the list of 500 items and services that are required to be included in the self-service tool during the first year of implementation, the Departments considered the recommendations made by the commenters to include shoppable items and services that are commonly used in existing tools. As mentioned above, in a survey of existing price transparency tools currently in use, one commenter found that the median number of items and services in existing tools is 526. Table 1 lists 500 items and services that will be required to be included in the first phase of implementation of the internet-based self-service tool. The Departments will publish a copy of this list on a publicly available website. The majority of these items and services (416) are based on the recommendation of several stakeholders. The Departments have determined not to include five of the recommended codes because they have since been retired. The Departments augmented the list with 84 additional services. These 84 services reflect some of the most frequently found services in External Data Gathering Environment (EDGE)[109] data, which are representative of services commonly provided in the individual and small group (or merged) markets. The Departments also examined the aggregate claims costs associated with these services nationally and concluded that these services could have significant cost variability, ranging from the 25th percentile to the 75th percentile of costs, depending on service.

Table 1: 500 Items and Services List

Code	Description	Plain Language Description
J0702	BETAMETHASONE ACET&SOD PHOSP	Injection to treat reaction to a drug
J1745	INFLIXIMAB NOT BIOSIMIL 10MG	A biologic medication
G0102	Prostate cancer screening; digital rectal examination	
G0103	Prostate cancer screening; prostate specific antigen test (psa)	
G2061	Qualified non physician healthcare professional online assessment; 5-10 minutes	Qualified non physician healthcare professional online assessment, for an established patient, for up to seven days, cumulative time during the 7 days; 5-10 minutes
G2062	Qualified non physician healthcare professional online assessment service; 11-20 minutes	Qualified non physician healthcare professional online assessment service, for an established patient, for up to seven days, cumulative time during the 7 days; 11-20 minutes

[109] CMS began collecting enrollee-level data from issuers' EDGE servers beginning with the 2016 benefit year. See the HHS Notice of Benefit and Payment Parameters for 2018; Final Rule, 81 FR 94058, 94101-94103 (Dec. 22, 2016). The enrollee-level EDGE data collected by CMS includes an enrollment file, a medical claims file, a pharmacy claims file, and a supplemental diagnosis file for risk adjustment-covered plans in the states where HHS operates the risk adjustment program. CMS does not collect enrollee-identifiable elements to safeguard enrollee privacy and issuers' proprietary information. *See*, for example, 45 CFR 153.720.

Code	Description	Plain Language Description
G2063	Qualified non physician qualified healthcare professional assessment service; 21+ minutes	Qualified non physician qualified healthcare professional assessment service, for an established patient, for up to seven days, cumulative time during the 7 days; 21 or more minutes
G0206	Diagnostic mammography, including computer-aided detection (cad) when performed; unilateral	
G0204	Diagnostic mammography, including computer-aided detection (cad) when performed; bilateral	
G0121	Colon ca scrn; not hi risk ind	Colorectal cancer screening; colonoscopy on individual not meeting criteria for high risk
G0105	Colorectal ca scrn; hi risk ind	Colorectal cancer screening; colonoscopy on individual at high risk
S0285	Cnslt before screen colonosc	Colonoscopy consultation performed prior to a screening colonoscopy procedure
G0289	Arthro, loose body + chondro	Arthroscopy, knee, surgical, for removal of loose body, foreign body, debridement/shaving of articular cartilage (chondroplasty) at the time of other surgical knee arthroscopy in a different compartment of the same knee
G0120	Colon ca scrn; barium enema	Colorectal cancer screening; alternative to g0105, screening colonoscopy, barium enema
460	SPINAL FUSION (POSTERIOR)	Spinal fusion except cervical
470	KNEE REPLACEMENT	Major joint replacement or reattachment of lower extremity
473	SPINAL FUSION (ANTERIOR)	Cervical spinal fusion
743	HYSTERECTOMY	Uterine and adnexa procedures for non-malignancy
1960	Anesthesia for vaginal delivery	
1961	Anesthesia for cesarean delivery	
1967	Anesthesia for labor during planned vaginal delivery	
1968	Anesthesia for cesarean delivery following labor	
10005	FNA W IMAGE	Fine needle aspiration biopsy, including ultrasound guidance; first lesion
10021	FNA W/O IMAGE	Fine Needle Aspiration Biopsy without imaging
10040	ACNE SURGERY	Incision and Drainage Procedures on the Skin, Subcutaneous and Accessory Structures
10060	DRAINAGE OF SKIN ABSCESS	Incision and drainage of abscess; simple or single and complex or multiple
10140	DRAINAGE OF HEMATOMA/FLUID	Incision and drainage of hematoma, seroma or fluid collection
10160	PUNCTURE DRAINAGE OF LESION	Puncture aspiration of abscess, hematoma, bulla, or cyst
11000	DEBRIDE INFECTED SKIN	Removal of infected skin
11056	TRIM SKIN LESIONS 2 TO 4	Paring or cutting of benign hyperkeratotic lesion
11102	BIOPSY SKIN LESION	Tangential biopsy of skin (for example, shave, scoop, saucerize, curette); single lesion
11103	BIOPSY SKIN ADD-ON	Tangential biopsy of skin (for example, shave, scoop, saucerize, curette); each separate/additional lesion

Code	Description	Plain Language Description
11200	REMOVAL OF SKIN TAGS <W/15	Removal of skin tags, multiple fibrocutaneous tags, any area
11401	EXC TR-EXT B9+MARG 0.6-1 CM	Under Excision-Benign Lesions Procedures on the Skin 0.6-1 CM
11422	EXC H-F-NK-SP B9+MARG 1.1-2	Under Excision-Benign Lesions Procedures on the Skin 1.1-2 CM
11602	EXC TR-EXT MAL+MARG 1.1-2 CM	Excision-Malignant Lesions
11721	DEBRIDE NAIL 6 OR MORE	Removal of 6 or more nails
11730	REMOVAL OF NAIL PLATE	Separation and removal of the entire nail plate or a portion of nail plate
11900	INJECT SKIN LESIONS </W 7	Injections to remove up to 7 lesions on the skin
12001	RPR S/N/AX/GEN/TRNK 2.5CM/<	Simple repair of superficial wounds of scalp, neck, axillae, external genitalia, trunk and/or extremities
12011	RPR F/E/E/N/L/M 2.5 CM/<	Simple repair of superficial wounds of face, ears, eyelids, nose, lips and/or mucous membranes
17000	DESTRUCT PREMALG LESION	Destruction of pre-cancerous lesion
17003	DESTRUCT PREMALG LES 2-14	Destruction of 2-14 pre-cancerous lesions
17110	DESTRUCT B9 LESION 1-14	Destruction of 1-14 common or plantar warts
17111	DESTRUCT LESION 15 OR MORE	Destruction of >15 common or plantar warts
17250	CHEM CAUT OF GRANLTJ TISSUE	Chemical destruction of pre-cancerous lesions of the skin
17311	MOHS 1 STAGE H/N/HF/G	Micrographic technique, including removal of all gross tumor, surgical excision of tissue specimens, mapping, color coding of specimens, microscopic examination of specimens
19120	REMOVAL OF BREAST LESION	
20550	INJ TENDON SHEATH/LIGAMENT	Injection of medication into a tendon or ligament
20551	INJ TENDON ORIGIN/INSERTION	Injection of medication into the tendon/ligament origin
20553	INJECT TRIGGER POINTS 3/>	Injection of medication into an area that triggers pain
20600	DRAIN/INJ JOINT/BURSA W/O US	Draining or injecting medication into a small joint/bursa without ultrasound
20605	DRAIN/INJ JOINT/BURSA W/O US	Draining or injecting medication into a large joint/bursa without ultrasound
20610	DRAIN/INJ JOINT/BURSA W/O US	Draining or injecting medication into a major joint/bursa without ultrasound
20612	ASPIRATE/INJ GANGLION CYST	Removal of fluid or injection of medication into a ganglion cyst
27440	Revision of knee joint	Repair of knee joint
27441	Revision of knee joint	Repair of knee joint
27442	Revision of knee joint	Repair of knee joint
27443	Revision of knee joint	Repair of knee joint
27445	Revision of knee joint	Repair of knee joint with hinged prosthesis
27446	Revision of knee joint	Repair of knee joint
28296	CORRECTION HALLUX VALGUS	Under Repair, Revision, and/or Reconstruction Procedures on the Foot and Toes
29826	Subacromial Decompression	Shaving of shoulder bone using an endoscope
29848	WRIST ENDOSCOPY/SURGERY	Carpal tunnel release

Code	Description	Plain Language Description
29880	KNEE ARTHROSCOPY/SURGERY	Surgery to remove of all or part of a torn meniscus in both medial and lateral compartments
29881	KNEE ARTHROSCOPY/SURGERY	Surgery to remove of all or part of a torn meniscus in one compartment
29888	KNEE ARTHROSCOPY/SURGERY	ACL reconstruction
30520	REPAIR OF NASAL SEPTUM	Repair procedures of the nose
31231	NASAL ENDOSCOPY DX	Nasal endoscopy, diagnostic, unilateral or bilateral
31237	NASAL/SINUS ENDOSCOPY SURG	Surgical nasal/ sinus endoscopy with biopsy, polypectomy or debridement
31575	DIAGNOSTIC LARYNGOSCOPY	Flexible, fiberoptic diagnostic laryngoscopy
36415	ROUTINE VENIPUNCTURE	Collection of venous blood by venipuncture
36471	NJX SCLRSNT MLT INCMPTNT VN	Injections to remove spider veins on the limbs or trunk
36475	ENDOVENOUS RF 1ST VEIN	Ablation of incompetent vein
36478	ENDOVENOUS LASER 1ST VEIN	Laser removal of incompetent vein
42820	REMOVE TONSILS AND ADENOIDS	Removal of tonsils and adenoid glands patient younger than age 12
42826	REMOVAL OF TONSILS	Primary or secondary removal of tonsils
42830	REMOVAL OF ADENOIDS	Primary removal of the adenoids
43235	EGD DIAGNOSTIC BRUSH WASH	Diagnostic examination of esophagus, stomach, and/or upper small bowel using an endoscope
43239	EGD BIOPSY SINGLE/MULTIPLE	Biopsy of the esophagus, stomach, and/or upper small bowel using an endoscope
43846	Gastric restrictive procedure, with gastric bypass for morbid obesity; with small intestine reconstruction to limit absorption	Surgical procedure used for weight loss resulting in a partial removal of stomach
44388	Colonoscopy thru stoma spx	Diagnostic examination of large bowel using an endoscope which is inserted through abdominal opening
44389	Colonoscopy with biopsy	Biopsies of large bowel using an endoscope which is inserted through abdominal opening
44394	Colonoscopy w/snare	Removal of large bowel polyps or growths using an endoscope
45378	DIAGNOSTIC COLONOSCOPY	Diagnostic examination of large bowel using an endoscope
45379	Colonoscopy w/fb removal	Removal of foreign bodies in large bowel using an endoscope
45380	COLONOSCOPY AND BIOPSY	Biopsy of large bowel using an endoscope
45381	Colonoscopy submucous njx	Injections of large bowel using an endoscope
45382	Colonoscopy w/control bleed	Control of bleeding in large bowel using an endoscope
45384	Colonoscopy w/lesion removal	Removal of polyps or growths in large bowel using an endoscope
45385	COLONOSCOPY W/LESION REMOVAL	Removal of polyps or growths of large bowel using an endoscope
45386	Colonoscopy w/balloon dilat	Balloon dilation of large bowel using an endoscope
45388	Colonoscopy w/ablation	Destruction of large bowel growths using an endoscope
45390	Colonoscopy w/resection	Removal of large bowel tissue using an endoscope
45391	Colonoscopy w/endoscope us	Ultrasound examination of lower large bowel using an endoscope

Code	Description	Plain Language Description
45392	Colonoscopy w/endoscopic fnb	Ultrasound guided needle aspiration or biopsy of lower large bowel using an endoscope
45398	Colonoscopy w/band ligation	Tying of large bowel using an endoscope
47562	LAPAROSCOPIC CHOLECYSTECTOMY	Removal of gallbladder using an endoscope
47563	LAPARO CHOLECYSTECTOMY/GRAPH	Gallbladder removal with use of an x-ray exam of the bile ducts
49505	PRP I/HERN INIT REDUC >5 YR	Repair of groin hernia patient age 5 years or older
49585	RPR UMBIL HERN REDUC > 5 YR	Repair of umbilical hernia in patients over 5 years old
49650	LAP ING HERNIA REPAIR INIT	Inguinal hernia repair done by laparoscope
50590	FRAGMENTING OF KIDNEY STONE	Surgical procedures on the kidney to break up and remove kidney stones
51741	ELECTRO-UROFLOWMETRY FIRST	A diagnostic test used to measure the flow of urine
51798	US URINE CAPACITY MEASURE	Ultrasound of bladder to measure urine capacity
52000	CYSTOSCOPY	Procedure on the bladder
52310	CYSTOSCOPY AND TREATMENT	Removing an indwelling ureteral stent by cystoscopy
52332	CYSTOSCOPY AND TREATMENT	Ureteral stents inserted internally between the bladder and the kidney and will remain within the patient for a defined period of time
55250	EXCISION PROCEDURES ON THE VAS DEFERENS	Removal of sperm duct(s)
55700	Prostate biopsy	Biopsy of prostate gland
55866	Surgical Procedures on the Prostate	Surgical removal of prostate and surrounding lymph nodes using an endoscope
57022	Incision and drainage of vaginal blood accumulation following delivery	
57288	REPAIR BLADDER DEFECT	Replacement of sling to support the bladder
57454	BX/CURETT OF CERVIX W/SCOPE	Biopsy of cervix or uterus
58100	EXCISION PROCEDURES ON THE CORPUS UTERI	Biopsy of the lining of the uterus
58558	HYSTEROSCOPY BIOPSY	Surgical hysteroscopy with biopsy
58563	HYSTEROSCOPY ABLATION	Surgical procedure used to treat premenopausal abnormal uterine bleeding
58565	HYSTEROSCOPY STERILIZATION	Laparoscopic/Hysteroscopic Procedures on the uterus
58571	TLH W/T/O 250 G OR LESS	Laparoscopic hysterectomy
58661	LAPAROSCOPY REMOVE ADNEXA	Removal of either benign or malignant tissue from the uterus, ovaries, fallopian tubes, or any of the surrounding tissues using a laparoscope
58662	LAPAROSCOPY EXCISE LESIONS	Removal of lesions of the ovary, pelvic viscera, or peritoneal surface
58671	LAPAROSCOPY TUBAL BLOCK	Laparoscopic tubal sterilization is surgery to block the fallopian tubes to prevent pregnancy
59000	AMNIOCENTESIS DIAGNOSTIC	Removal of amniotic fluid from the uterus for diagnostic purposes
59025	FETAL NON-STRESS TEST	A common prenatal test used to check on a baby's health.
59400	OBSTETRICAL CARE	Obstetrical pre- and postpartum care and vaginal delivery
59409	Vaginal delivery	

Code	Description	Plain Language Description
59410	Vaginal delivery with post-delivery care	
59414	Vaginal delivery of placenta	
59425	Pre-delivery care 4-6 visits	
59426	Pre-delivery care 7 or more visits	
59510	CESAREAN DELIVERY	Cesarean delivery with pre- and post-delivery care
59514	Cesarean delivery	
59515	Cesarean delivery with post-delivery care	
59610	VBAC DELIVERY	Vaginal delivery after prior cesarean delivery
59612	Vaginal delivery after prior cesarean delivery	
59614	Vaginal delivery after prior cesarean delivery with post-delivery care	
62322	SPINAL INJECTION FOR PAIN MANAGEMENT	Injection of substance into spinal canal of lower back or sacrum using imaging guidance
62323	Injection of substance into spinal canal of lower back or sacrum using imaging guidance	
63030	LOW BACK DISK SURGERY	Surgical procedure to decompress a herniated vertebra
64483	Transforaminal Epidural Injection	Injections of anesthetic and/or steroid drug into lower or sacral spine nerve root using imaging guidance
64493	INJ PARAVERT F JNT L/S 1 LEV	Injection into lower back of nerve block using imaging guidance
64721	CARPAL TUNNEL SURGERY	Release of the transverse carpal ligament
66821	YAG capusulotomy surgery	Removal of recurring cataract in lens capsule using laser
66984	CATARACT SURG W/IOL 1 STAGE	Removal of cataract with insertion of lens
67028	INJECTION EYE DRUG	Injection of a pharmaceutical agent into the eye
69210	REMOVE IMPACTED EAR WAX	Removal of ear wax from one or both ears
69436	CREATE EARDRUM OPENING	Insertion of tubes into one or both ears
70450	CT HEAD/BRAIN W/O DYE	CT scan head or brain without dye
70486	CT MAXILLOFACIAL W/O DYE	CT Scan of the face and jaw without dye
70491	CT SOFT TISSUE NECK W/DYE	CT scan of neck with dye
70551	MRI BRAIN STEM W/O DYE	MRI of brain stem without dye
70553	MRI BRAIN STEM W/O & W/DYE	MRI scan of brain before and after contrast
71045	CHEST X-RAY	Single view
71046	CHEST X-RAY	2 views, front and back
71047	CHEST X-RAY	3 views
71048	CHEST X-RAY	4 or more views
71101	X-RAY EXAM UNILAT RIBS/CHEST	Radiologic examination of one side of the chest/ribs
71250	CT THORAX W/O DYE	CT scan of the thorax without dye
71260	CT THORAX W/DYE	CT scan of the thorax with dye
71275	CT ANGIOGRAPHY CHEST	Diagnostic Radiology (Diagnostic Imaging) Procedures of the Chest
72040	X-RAY EXAM NECK SPINE 2-3 VW	Radiologic examination of the neck/spine, 2-3 views
72050	X-RAY EXAM NECK SPINE 4/5VWS	Radiologic examination of the neck/spine, 4-5 views
72070	X-RAY EXAM THORAC SPINE 2VWS	Radiologic examination of the middle spine, 2 views
72072	X-RAY EXAM THORAC SPINE 3VWS	Radiologic examination of the middle spine, 3 views
72100	X-RAY EXAM L-S SPINE 2/3 VWS	X-ray of the lower spine 2-3 views

Code	Description	Plain Language Description
72110	X-RAY EXAM L-2 SPINE 4/>VWS	X-ray of lower and sacral spine, minimum of 4 views
72131	CT LUMBAR SPINE W/O DYE	CT scan of lower spine without dye
72141	MRI NECK SPINE W/O DYE	MRI of the neck or spine without dye
72146	MRI CHEST SPINE W/O DYE	MRI of chest and spine without dye
72148	MRI LUMBAR SPINE W/O DYE	MRI scan of lower spinal canal
72156	MRI NECK SPINE W/O & W/DYE	MRI of neck/spine with and without dye
72157	MRI CHEST SPINE W/O & W/DYE	MRI of chest and spine with and without dye
72158	MRI LUMBAR SPINE W/O & W/DYE	MRI of lower back with and without dye
72170	X-RAY EXAM OF PELVIS	Radiologic examination of the pelvis
72192	CT PELVIS W/O DYE	CT of pelvis without dye
72193	CT PELVIS W/DYE	CT scan, pelvis, with contrast
72195	MRI PELVIS W/O DYE	MRI of pelvis without dye
72197	MRI PELVIS W/O & W/DYE	MRI of pelvis before and after dye
73000	X-RAY EXAM OF COLLAR BONE	Radiologic examination of the collar bone
73030	X-RAY EXAM OF SHOULDER	Radiologic examination of the shoulder
73070	X-RAY EXAM OF ELBOW	Radiologic examination, elbow; 2 views
73080	X-RAY EXAM OF ELBOW	Radiologic examination, elbow; 3 or more views
73090	X-RAY EXAM OF FOREARM	Radiologic examination of the forearm
73100	X-RAY EXAM OF WRIST	3 or more views
73110	X-RAY EXAM OF WRIST	Up to 3 views
73120	X-RAY EXAM OF HAND	X-ray of the hand with 2 views
73130	X-RAY EXAM OF HAND	X-ray of the hand with 3 or more views
73140	X-RAY EXAM OF FINGER(S)	Radiologic examination of the finger(s)
73221	MRI JOINT UPR EXTREM W/O DYE	MRI of upper extremity without dye
73560	X-RAY EXAM OF KNEE 1 OR 2	Radiologic examination of the knee with 1 or 2 views
73562	X-RAY EXAM OF KNEE 3	Radiologic examination of the knee with 3 views
73564	X-RAY EXAM KNEE 4 OR MORE	Radiologic examination of the knee with 4 or more views
73565	X-RAY EXAM OF KNEES	Radiologic examination of both knees
73590	X-RAY EXAM OF LOWER LEG	Radiologic examination of the lower leg
73600	X-RAY EXAM OF ANKLE	Radiologic examination of the ankle with 2 views
73610	X-RAY EXAM OF ANKLE	Radiologic examination of the ankle with 3 views
73620	X-RAY EXAM OF FOOT	Radiologic examination, foot; 2 views
73630	X-RAY EXAM OF FOOT	Radiologic examination of the foot with 3 or more views
73650	X-RAY EXAM OF HEEL	Radiologic examination of the heel
73660	X-RAY EXAM OF TOE(S)	Radiologic examination of the toe(s)
73700	CT LOWER EXTREMITY W/O DYE	CT scan of leg without dye
73718	MRI LOWER EXTREMITY W/O DYE	MRI of leg without dye
73721	MRI JNT OF LWR EXTRE W/O DYE	MRI of lower extremity joint (knee/ankle) without dye
73722	MRI JOINT OF LWR EXTR W/DYE	MRI of lower extremity joint (knee/ankle) with dye
73723	MRI JOINT LWR EXTR W/O&W/DYE	MRI of lower extremity joint (knee/ankle) with and without dye
74022	X-RAY EXAM SERIES ABDOMEN	Serial radiologic examination of the abdomen
74150	CT ABDOMEN W/O DYE	CT of abdomen without dye
74160	CT ABDOMEN W/DYE	CT of abdomen with dye

Code	Description	Plain Language Description
74170	CT ABDOMEN W/O & W/DYE	CT of abdomen with and without dye
74176	CT ABD & PELVIS W/O CONTRAST	CT of abdomen and pelvis without dye
74177	CT ABD & PELV W/CONTRAST	CT scan of abdomen and pelvis with contrast
74178	CT ABD & PELV 1/> REGNS	Computed tomography, abdomen and pelvis; without contrast material in one or both body regions, followed by contrast material(s) and further sections in one or both body regions
74181	MRI ABDOMEN W/O DYE	MRI of abdomen without dye
74183	MRI ABDOMEN W/O & W/DYE	MRI of abdomen without and with dye
76000	CHEST X-RAY	Flouroscopy, or x-ray "movie" that takes less than an hour
76001	CHEST X-RAY	Flouroscopy, or x-ray "movie" that takes more than an hour
76512	OPHTH US B W/NON-QUANT A	Ultrasound of the eye
76514	ECHO EXAM OF EYE THICKNESS	A diagnostic procedure that allows a provider to see the organs and other structures in the abdomen
76536	US EXAM OF HEAD AND NECK	Ultrasound of head and neck
76642	ULTRASOUND BREAST LIMITED	Limited ultrasound of the breast
76700	US EXAM ABDOM COMPLETE	Ultrasound of abdomen with all areas scanned
76705	ECHO EXAM OF ABDOMEN	A diagnostic procedure that allows a provider to see the organs and other structures in the abdomen
76770	US EXAM ABDO BACK WALL COMP	Ultrasound of back wall of the abdomen with all areas viewed
76775	US EXAM ABDO BACK WALL LIM	Ultrasound of back wall of the abdomen with limited areas viewed
76801	OB US < 14 WKS SINGLE FETUS	Abdominal ultrasound of pregnant uterus (less than 14 weeks) single or first fetus
76805	OB US >/= 14 WKS SNGL FETUS	Abdominal ultrasound of pregnant uterus (greater or equal to 14 weeks 0 days) single or first fetus
76811	OB US DETAILED SNGL FETUS	Ultrasound of single fetus
76813	OB US NUCHAL MEAS 1 GEST	Evaluation through measurement of fetal nuchal translucency
76815	OB US LIMITED FETUS(S)	Ultrasound of fetus with limited views
76817	TRANSVAGINAL US OBSTETRIC	Transvaginal ultrasound of uterus
76818	FETAL BIOPHYS PROFILE W/NST	Fetal biophysical profile with non-stress test
76819	FETAL BIOPHYS PROFIL W/O NST	Fetal biophysical profile without non-stress test
76830	TRANSVAGINAL US NON-OB	Ultrasound of the pelvis through vagina
76831	ECHO EXAM UTERUS	A diagnostic procedure that allows a provider to see the uterus
76856	US EXAM PELVIC COMPLETE	Complete ultrasound of the pelvis
76857	US EXAM PELVIC LIMITED	Limited ultrasound of the pelvis
76870	US EXAM SCROTUM	Ultrasound of the scrotum
76872	US TRANSRECTAL	Transrectal ultrasound
76882	US LMTD JT/NONVASC XTR STRUX	Diagnostic ultrasound of an extremity excluding the bone, joints or vessels
77047	MRI BOTH BREASTS	Magnetic resonance imaging, breasts, without contrast material; bilateral

Code	Description	Plain Language Description
77065	DX MAMMO INCL CAD UNI	Mammography of one breast
77066	DX MAMMO INCL CAD BI	Mammography of both breasts
77067	SCR MAMMO BI INCL CAD	Mammography of both breasts-2 or more views
77080	BONE DENSITY STUDY OF SPINE OR PELVIS	Scan to measure bone mineral density (BMD) at the spine and hip
77385	Ntsty modul rad tx dlvr smpl	Radiation therapy delivery
77386	Ntsty modul rad tx dlvr cplx	Radiation therapy delivery
77387	Guidance for radia tx dlvr	Guidance for localization of target delivery of radiation treatment delivery
77412	Radiation treatment delivery	Radiation treatment delivery
78014	THYROID IMAGING W/BLOOD FLOW	Scan using a radioactive medication (radiopharmaceutical) to take pictures or images of the thyroid gland.
78306	BONE IMAGING WHOLE BODY	A procedure most commonly ordered to detect areas of abnormal bone growth due to fractures, tumors, infection, or other bone issues
78452	HT MUSCLE IMAGE SPECT MULT	Image of the heart to assess perfusion
78815	PET IMAGE W/CT SKULL-THIGH	Tumor imaging, positron emission tomography (PET) with concurrently acquired computed tomography (CT) for attenuation correction and anatomical localization
80048	METABOLIC PANEL TOTAL CA	Basic metabolic panel
80050	GENERAL HEALTH PANEL	General health panel
80051	Blood test panel for electrolytes (sodium potassium, chloride, carbon dioxide)	
80053	COMPREHEN METABOLIC PANEL	Blood test, comprehensive group of blood chemicals
80055	OBSTETRIC PANEL	Obstetric blood test panel
80061	LIPID PANEL	Blood test, lipids (cholesterol and triglycerides)
80069	RENAL FUNCTION PANEL	Kidney function panel test
80074	ACUTE HEPATITIS PANEL	Acute hepatitis panel
80076	HEPATIC FUNCTION PANEL	Liver function blood test panel
80081	Blood test panel for obstetrics (cbc, differential wbc count, hepatitis b, hiv, rubella, syphilis, antibody screening, rbc, blood typing)	
80197	ASSAY OF TACROLIMUS	Test is used to measure the amount of the drug in the blood to determine whether the concentration has reached a therapeutic level and is below the toxic level
80307	Drug test prsmv chem anlyzr	Testing for presence of drug
81000	URINALYSIS NONAUTO W/SCOPE	Manual urinalysis test with examination using microscope
81001	URINALYSIS; MANUAL OR AUTO WITH OR WITHOUT MICROSCOPY	Manual urinalysis test with examination with or without using microscope
81002	URINALYSIS NONAUTO W/O SCOPE	Manual urinalysis test with examination without using microscope
81003	URINALYSIS; MANUAL OR AUTO WITH OR WITHOUT MICROSCOPY	Automated urinalysis test
81025	URINE PREGNANCY TEST	Urine pregnancy test
82043	UR ALBUMIN QUANTITATIVE	Urine test to measure albumin

Code	Description	Plain Language Description
82044	UR ALBUMIN SEMIQUANTITATIVE	Urine test to measure albumin-semiquantitative
82248	BILIRUBIN DIRECT	Measurement of direct bilirubin
82306	VITAMIN D 25 HYDROXY	Blood test to monitor vitamin D levels
82553	CREATINE MB FRACTION	Blood test to detect heart enzymes
82570	ASSAY OF URINE CREATININE	Test to measure creatinine in the urine
82607	VITAMIN B-12	Blood test to measure B-12
82627	DEHYDROEPIANDROSTERONE	Blood test to measure an enzyme in the blood
82670	ASSAY OF ESTRADIOL	Blood test to measure a type of estrogen in the blood
82728	ASSAY OF FERRITIN	Test to determine level of iron in the blood
82784	ASSAY IGA/IGD/IGG/IGM EACH	Test to determine levels of immunoglobulins in the blood
82803	BLOOD GASES ANY COMBINATION	Test to measure arterial blood gases
82947	ASSAY GLUCOSE BLOOD QUANT	Quantitative measure of glucose build up in the blood over time
82950	GLUCOSE TEST	Test of glucose level in the blood
82951	GLUCOSE TOLERANCE TEST	Test to predict likelihood of gestational diabetes
83001	ASSAY OF GONADOTROPIN (FSH)	Test of hormone in the blood
83002	ASSAY OF GONADOTROPIN (LH)	Test of hormone in the blood
83013	H PYLORI (C-13) BREATH	Test of breath for a stomach bacterium
83036	GLYCOSYLATED HEMOGLOBIN TEST	Blood test to measure average blood glucose levels for past 2-3 months
83516	IMMUNOASSAY NONANTIBODY	Chemical test of the blood to measure presence or concentration of a substance in the blood
83540	ASSAY OF IRON	Blood test to measure the amount of iron that is in transit in the body
83550	IRON BINDING TEST	Blood test that measures the amount of iron carried in the blood
83655	ASSAY OF LEAD	Blood test to determine the concentration of lead in the blood
83718	ASSAY OF LIPOPROTEIN	Blood test to measure the level of lipoproteins in the blood
83880	ASSAY OF NATRIURETIC PEPTIDE	Blood test used to diagnose heart failure
84134	ASSAY OF PREALBUMIN	Blood test to measure level of prealbumin
84153	ASSAY OF PSA TOTAL	PSA (prostate specific antigen)
84154	PSA (prostate specific antigen) measurement	
84436	ASSAY OF TOTAL THYROXINE	Blood test to measure a type of thyroid hormone
84439	ASSAY OF FREE THYROXINE	Blood test to evaluate thyroid function
84443	ASSAY THYROID STIM HORMONE	Blood test, thyroid stimulating hormone (TSH)
84460	ALANINE AMINO (ALT) (SGPT)	Blood test to evaluate liver function
84480	ASSAY TRIIODOTHYRONINE (T3)	Blood test to evaluate thyroid function
84484	ASSAY OF TROPONIN QUANT	Blood test to measure a certain protein in the blood to determine heart muscle damage
84703	CHORIONIC GONADOTROPIN ASSAY	Blood test to assess for pregnancy
85007	BL SMEAR W/DIFF WBC COUNT	Blood test to assess for infection
85018	HEMOGLOBIN	Blood test to measure levels of hemoglobin
85025	COMPLETE CBC W/AUTO DIFF WBC	Complete blood cell count, with differential white blood cells, automated

Code	Description	Plain Language Description
85027	COMPLETE CBC AUTOMATED	Complete blood count, automated
85610	PROTHROMBIN TIME	Blood test, clotting time
85730	THROMBOPLASTIN TIME PARTIAL	Coagulation assessment blood test
86039	ANTINUCLEAR ANTIBODIES (ANA)	Blood test to determine autoimmune disorders
86147	CARDIOLIPIN ANTIBODY EA IG	Blood test to determine cause of inappropriate blood clot formation
86200	CCP ANTIBODY	Blood test to diagnose rheumatoid arthritis
86300	IMMUNOASSAY TUMOR CA 15-3	Blood test to monitor breast cancer
86304	IMMUNOASSAY TUMOR CA 125	Blood test to monitor for cancer
86336	INHIBIN A	Blood test to monitor for cancer in the ovaries or testis
86592	SYPHILIS TEST NON-TREP QUAL	Blood test to screen for syphilis
86644	CMV ANTIBODY	Blood test to monitor for cytomegalovirus
86665	EPSTEIN-BARR CAPSID VCA	Blood test to diagnose mononucleosis
86677	HELICOBACTER PYLORI ANTIBODY	Blood test to if peptic ulcers are caused by a certain bacterium
86703	HIV-1/HIV-2 1 RESULT ANTBDY	Blood test to diagnose HIV
86704	HEP B CORE ANTIBODY TOTAL	Blood test indicating infection with Hepatitis B
86708	HEPATITIS A ANTIBODY	Blood test indicating infection with Hepatitis A
86762	RUBELLA ANTIBODY	Blood test to determine if antibodies exist for rubella
86765	RUBEOLA ANTIBODY	Blood test to determine if antibodies exist for measles
86780	TREPONEMA PALLIDUM	Blood test to determine existence of certain bacterium that causes syphilis
86803	HEPATITIS C AB TEST	Blood test to determine infection with Hepatitis C
86850	RBC ANTIBODY SCREEN	Blood test to screen for antibodies that could harm red blood cells
87040	BLOOD CULTURE FOR BACTERIA	Blood test to screen for bacteria in the blood
87046	STOOL CULTR AEROBIC BACT EA	Blood test to identify bacteria that may be contributing to symptoms in the gastrointestinal tract
87070	CULTURE OTHR SPECIMN AEROBIC	Test of body fluid other than blood to assess for bacteria
87077	CULTURE AEROBIC IDENTIFY	Test of a wound for type of bacterial infection
87081	CULTURE SCREEN ONLY	Medical test to find an infection
87086	URINE CULTURE/COLONY COUNT	Culture of the urine to determine number of bacteria
87088	URINE BACTERIA CULTURE	Culture of the urine to determine bacterial infection
87101	SKIN FUNGI CULTURE	A procedure used to determine if fungi are present in an area of the body
87186	MICROBE SUSCEPTIBLE MIC	A test used to determine which medications work on bacteria for fungi
87205	SMEAR GRAM STAIN	A lab test used to detect bacteria or fungi in a sample taken from the site of a suspected infection
87210	SMEAR WET MOUNT SALINE/INK	A lab test to screen for evidence of vaginal infection
87324	CLOSTRIDIUM AG IA	A test of the stool to diagnose Clostridium difficile (C. diff) infection
87389	HIV-1 AG W/HIV-1 & HIV-2 AB	Test for HIV
87491	CHYLMD TRACH DNA AMP PROBE	Test that detects Chlamydia
87510	GARDNER VAG DNA DIR PROBE	Blood test for vaginitis
87591	N.GONORRHOEAE DNA AMP PROB	Blood test for an STD

Code	Description	Plain Language Description
87624	Hpv high-risk types	Detection test for human papillomavirus (hpv)
87653	STREP B DNA AMP PROBE	Blood test for strep infection
87661	TRICHOMONAS VAGINALIS AMPLIF	Blood test for an STD
87801	DETECT AGNT MULT DNA AMPLI	Blood test to determine genetic material of certain infectious agents
87804	INFLUENZA ASSAY W/OPTIC	Flu test
87807	RSV ASSAY W/OPTIC	Test for RSV
87880	STREP A ASSAY W/OPTIC	Test for strep A
88112	CYTOPATH CELL ENHANCE TECH	Urine test
88141	CYTOPATH C/V INTERPRET	Cervical cancer screening test with interpretation
88142	CYTOPATH C/V THIN LAYER	PAP smear
88150	CYTOPATH C/V MANUAL	Cervical cancer screening test done manually
88175	CYTOPATH C/V AUTO FLUID REDO	PAP smear
88305	TISSUE EXAM BY PATHOLOGIST	Test of tissues for diagnosis of abnormalities
88312	SPECIAL STAINS GROUP 1	Blood test to assist with diagnosis
88313	SPECIAL STAINS GROUP 2	Blood test to assist with diagnosis
88342	IMMUNOHISTO ANTB 1ST STAIN	Pathology test
90460	IM ADMIN 1ST/ONLY COMPONENT	Immunization administration in children <18
90471	IMMUNIZATION ADMIN	Immunization administration by a medical assistant or nurse
90474	IMMUNE ADMIN ORAL/NASAL ADDL	Immunization administered orally or nasally
90632	HEPA VACCINE ADULT IM	Hepatitis A vaccination for adults
90633	HEPA VACC PED/ADOL 2 DOSE IM	Hepatitis A vaccination for adolescents and children
90649	4VHPV VACCINE 3 DOSE IM	3-dose HPV vaccination
90656	IIV3 VACC NO PRSV 0.5 ML IM	Flu shot-high dose for 2019-2020 flu season given by injection
90658	IIV3 VACCINE SPLT 0.5 ML IM	Preservative free flu vaccine
90672	LAIV4 VACCINE INTRANASAL	Nasal flu vaccine
90681	RV1 VACC 2 DOSE LIVE ORAL	Rotavirus vaccination
90686	IIV4 VACC NO PRSV 0.5 ML IM	Flu shot-high dose for 2019-2020 flu season given by injection for people >65
90707	MMR VACCINE SC	Measles, mumps, and rubella vaccine
90710	MMRV VACCINE SC	Measles, mumps, rubella, and varicella vaccine
90715	TDAP VACCINE 7 YRS/> IM	Diphtheria, tetanus acellular, and pertussis vaccine for adults
90716	VAR VACCINE LIVE SUBQ	Varicella vaccine
90732	PPSV23 VACC 2 YRS+ SUBQ/IM	pneumococcal vaccine
90734	MENACWYD/MENACWYCRM VACC IM	meningococcal conjugate vaccine
90736	HZV VACCINE LIVE SUBQ	Shingles vaccine
90746	HEPB VACCINE 3 DOSE ADULT IM	Hepatitis B vaccine
90791	PSYCH DIAGNOSTIC EVALUATION	A diagnostic tool employed by a psychiatrist to diagnose problems with memory, thought processes, and behaviors
90792	PSYCH DIAG EVAL W/MED SRVCS	A diagnostic tool employed by a psychiatrist to determine if medications are needed
90832	PSYTX W PT 30 MINUTES	Psychotherapy, 30 min

Code	Description	Plain Language Description
90833	PSYTX W PT W E/M 30 MIN	Psychotherapy, 30 minutes with patient when performed with an evaluation and management service
90834	PSYTX W PT 45 MINUTES	Psychotherapy, 45 min
90836	PSYTX W PT W E/M 45 MIN	Psychotherapy, 45 minutes with patient when performed with an evaluation and management service
90837	PSYTX W PT 60 MINUTES	Psychotherapy, 60 min
90838	Psychotherapy, 60 minutes	
90839	Psychotherapy for crisis, first 60 minutes	
90840	Psychotherapy for crisis	
90846	Family psychotherapy, 50 minutes	Family psychotherapy, not including patient, 50 min
90847	FAMILY PSYTX W/PT 50 MIN	Family psychotherapy, including patient, 50 min
90853	GROUP PSYCHOTHERAPY	Group psychotherapy
92002	EYE EXAM NEW PATIENT	Intermediate exam
92004	EYE EXAM NEW PATIENT	Complete exam
92012	EYE EXAM ESTABLISH PATIENT	Eye exam on an established patient
92014	EYE EXAM&TX ESTAB PT 1/>VST	Eye exam and treatment for established patient
92083	VISUAL FIELD EXAMINATION(S)	An eye examination that can detect dysfunction in central and peripheral vision
92133	CMPTR OPHTH IMG OPTIC NERVE	Optic nerve imaging
92507	SPEECH/HEARING THERAPY	Therapy for speech or hearing
92523	SPEECH SOUND LANG COMPREHEN	Evaluation of speech sound production with evaluation of language comprehension
92552	PURE TONE AUDIOMETRY AIR	Type of hearing test
93000	ELECTROCARDIOGRAM COMPLETE	Routine EKG using at least 12 leads including interpretation and report
93015	CARDIOVASCULAR STRESS TEST	Test to determine heart abnormalities
93303	ECHO TRANSTHORACIC	Test to screen the heart for abnormalities
93306	Tte w/doppler complete	Ultrasound examination of heart including color-depicted blood flow rate, direction, and valve function
93307	TTE W/O DOPPLER COMPLETE	Echo without doppler study
93320	DOPPLER ECHO EXAM HEART	Echo with doppler
93350	STRESS TTE ONLY	Stress test with echocardiogram
93452	Cardiac Catheterization	Insertion of catheter into left heart for diagnosis
93798	CARDIAC REHAB/MONITOR	Use of EKG to monitor cardiac rehabilitation
93880	EXTRACRANIAL BILAT STUDY	Study of vessels on both sides of the head and neck
93922	UPR/L XTREMITY ART 2 LEVELS	Limited bilateral noninvasive physiologic studies of upper or lower extremity arteries
93970	EXTREMITY STUDY	Complete bilateral study of the extremities
93971	EXTREMITY STUDY	One sided or limited bilateral study
94010	BREATHING CAPACITY TEST	Test to determine how well oxygen moves from the lungs to the blood stream
94060	EVALUATION OF WHEEZING	Test to determine if wheezing is present
94375	RESPIRATORY FLOW VOLUME LOOP	Graphical representation of inspiration and expiration
94726	PULM FUNCT TST PLETHYSMOGRAP	Measures how much air is in the lungs after taking a deep breath
94727	PULM FUNCTION TEST BY GAS	Measure of lung function and gas exchange

Code	Description	Plain Language Description
94729	CO/MEMBANE DIFFUSE CAPACITY	Test to measure how well gases diffuse across lung surfaces
95004	PERCUT ALLERGY SKIN TESTS	Allergy test
95115	IMMUNOTHERAPY ONE INJECTION	Allergy shot-1 shot
95117	IMMUNOTHERAPY INJECTIONS	Multiple allergy shots
95810	POLYSOM 6/> YRS 4/> PARAM	Sleep monitoring of patient (6 years or older) in sleep lab
95811	POLYSOM 6/>YRS CPAP 4/> PARM	Sleep monitoring of patient (6 years or older) in sleep lab using CPAP
95860	MUSCLE TEST ONE LIMB	Test to measure electrical activity of muscles or nerves in 1 limb
95861	MUSCLE TEST 2 LIMBS	Test to measure electrical activity of muscles or nerves in 2 limb
95886	MUSC TEST DONE W/N TEST COMP	Test to assess for nerve damage
96110	DEVELOPMENTAL SCREEN W/SCORE	Childhood test to screen for developmental disabilities
96365	THER/PROPH/DIAG IV INF INIT	Intravenous infusion, for therapy, prophylaxis, or diagnosis-initial infusion
96366	THER/PROPH/DIAG IV INF ADDON	Intravenous infusion, for therapy, prophylaxis, or diagnosis-additional infusions
96374	THER/PROPH/DIAG INJ IV PUSH	Intravenous infusion, for therapy, prophylaxis, or diagnosis-IV push
96375	TX/PRO/DX INJ NEW DRUG ADDON	Intravenous infusion, for treatment, prophylaxis, or diagnosis-new drug add on
96376	TX/PRO/DX INJ SAME DRUG ADON	Intravenous infusion, for treatment, prophylaxis, or diagnosis-same drug add on
96415	CHEMO IV INFUSION ADDL HR	Chemotherapy infusion-each additional hour
96417	CHEMO IV INFUS EACH ADDL SEQ	Chemotherapy infusion-additional IV pushes of the same medication
97010	HOT OR COLD PACKS THERAPY	Use of external hot or cold packs
97012	MECHANICAL TRACTION THERAPY	Form of decompression therapy of the spine
97014	ELECTRIC STIMULATION THERAPY	One time use unattended
97016	VASOPNEUMATIC DEVICE THERAPY	Machines designed to pump cold water into an inflatable wrap or brace, compressing the enveloped area of the body
97026	INFRARED THERAPY	Light-based method to treat pain and inflammation
97032	ELECTRICAL STIMULATION	Repeated application to one or more parts of the body
97033	ELECTRIC CURRENT THERAPY	Psychiatric treatment in which seizures are electrically induced in patients to provide relief from mental disorders
97035	ULTRASOUND THERAPY	Use of sound waves to treat medical problems, especially musculoskeletal problems like inflammation from injuries
97110	THERAPEUTIC EXERCISES	Therapeutic exercise to develop strength, endurance, range of motion, and flexibility, each 15 minutes
97112	NEUROMUSCULAR REEDUCATION	A technique used by physical therapists to restore normal body movement patterns
97113	AQUATIC THERAPY/EXERCISES	Use of water for therapy/exercises
97116	GAIT TRAINING THERAPY	A type of physical therapy
97124	MASSAGE THERAPY	Use of massage
97140	MANUAL THERAPY 1/> REGIONS	Manipulation of 1 or more regions of the body

Code	Description	Plain Language Description
97530	THERAPEUTIC ACTIVITIES	Incorporates the use of multiple parameters, such as balance, strength, and range of motion, for a functional activity
97535	SELF CARE MNGMENT TRAINING	Occupational therapy
97597	RMVL DEVITAL TIS 20 CM/<	Debridement (for example, high pressure waterjet with/without suction, sharp selective debridement with scissors, scalpel, and forceps)
97811	ACUPUNCT W/O STIMUL ADDL 15M	Acupuncture without stimulation
97813	ACUPUNCT W/STIMUL 15 MIN	Acupuncture with stimulation
98940	CHIROPRACT MANJ 1-2 REGIONS	Chiropractic manipulation in 1-2 regions
98941	CHIROPRACT MANJ 3-4 REGIONS	Chiropractic manipulation in 3-4 regions
98943	CHIROPRACT MANJ XTRSPINL 1/>	Chiropractic manipulation not of the spine
98966	Hc pro phone call 5-10 min	Telephone assessment and management service, 5-10 minutes of medical discussion
98967	Hc pro phone call 11-20 min	Telephone assessment and management service, 11-20 minutes of medical discussion
98968	Hc pro phone call 21-30 min	Telephone assessment and management service, 21-30 minutes of medical discussion
98970	Qualified non physician health care professional online digital assessment and management est. patient 5-10 minutes	Qualified non physician health care professional online digital assessment and management, for an established patient, for up to 7 days, cumulative time during the 7 days; 5-10 minutes
98971	Qualified non physician health care professional online digital assessment and management est. patient 11-20 minutes	Qualified non physician health care professional online digital assessment and management, for an established patient, for up to 7 days, cumulative time during the 7 days; 11-20 minutes
98972	Qualified non physician health care professional online digital assessment and management for est. patients 21+ minutes	Qualified non physician health care professional online digital assessment and management, for an established patient, for up to 7 days, cumulative time during the 7 days; 21 or more minutes
99051	MED SERV EVE/WKEND/HOLIDAY	Medical service during off-hours
99173	VISUAL ACUITY SCREEN	Eye test
99201	OFFICE/OUTPATIENT VISIT NEW	New patient office or other outpatient visit, typically 10 minutes
99202	OFFICE/OUTPATIENT VISIT NEW	New patient office or other outpatient visit, typically 20 minutes
99203	OFFICE/OUTPATIENT VISIT NEW	New patient office or other outpatient visit, typically 30 min
99204	OFFICE/OUTPATIENT VISIT NEW	New patient office of other outpatient visit, typically 45 min
99205	OFFICE/OUTPATIENT VISIT NEW	New patient office of other outpatient visit, typically 60 min
99211	OFFICE/OUTPATIENT VISIT EST	Outpatient visit of established patient not requiring a physician
99212	OFFICE/OUTPATIENT VISIT EST	Outpatient visit of established patient requiring a physician
99213	OFFICE/OUTPATIENT VISIT EST	Established patient office or other outpatient visit, typically 15 minutes

Code	Description	Plain Language Description
99214	OFFICE/OUTPATIENT VISIT EST	Established patient office or other outpatient visit, typically 25 minutes
99215	OFFICE/OUTPATIENT VISIT EST	Established patient office or other outpatient, visit typically 40 minutes
99243	OFFICE CONSULTATION	Patient office consultation, typically 40 min
99244	OFFICE CONSULTATION	Patient office consultation, typically 60 min
99283	Emergency dept visit	Emergency department visit, moderately severe problem
99284	Emergency dept visit	Emergency department visit, problem of high severity
99285	Emergency dept visit	Emergency department visit, problem with significant threat to life or function
99381	INIT PM E/M NEW PAT INFANT	Initial visit for an infant
99382	INIT PM E/M NEW PAT 1-4 YRS	Initial visit for new patients 1-4 years old
99383	PREV VISIT NEW AGE 5-11	New preventative visit in new patients 5-11 years old
99384	PREV VISIT NEW AGE 12-17	New preventative visit in new patients 12-17 years old
99385	PREV VISIT NEW AGE 18-39	Initial new patient preventive medicine evaluation (18–39 years)
99386	PREV VISIT NEW AGE 40-64	Initial new patient preventive medicine evaluation (40–64 years)
99387	INIT PM E/M NEW PAT 65+ YRS	Initial visit for new patients 65 and older years old
99391	PER PM REEVAL EST PAT INFANT	Periodic primary re-evaluation for an established infant patient
99392	PREV VISIT EST AGE 1-4	Initial visit for new patients 1-4 years old
99393	PREV VISIT EST AGE 5-11	New preventative visit in new patients 5-11 years old
99394	PREV VISIT EST AGE 12-17	New preventative visit in new patients 12-17 years old
99395	PREV VISIT EST AGE 18-39	Established patient periodic preventive medicine examination age 18-39 years
99396	PREV VISIT EST AGE 40-64	Established patient periodic preventive medicine examination age 40-64 years
99397	PER PM REEVAL EST PAT 65+ YR	Periodic primary re-evaluation for an established patient 65 and older
99421	ONLINE DIGITAL EVALUATION AND MANAGEMENT SERVICE; 5-10 MINUTES	Online digital evaluation and management service, for an established patient, for up to 7 days, cumulative time during the 7 days; 5-10 minutes
99422	Online digital evaluation and management service; 11-20 minutes	Online digital evaluation and management service, for an established patient, for up to 7 days, cumulative time during the 7 days; 11-20 minutes
99441	Phone e/m phys/qhp 5-10 min	Physician telephone patient service, 5-10 minutes of medical discussion
99442	Phone e/m phys/qhp 11-20 min	Physician telephone patient service, 11-20 minutes of medical discussion
99443	Phone e/m phys/qhp 21-30 min	Physician telephone patient service, 21-30 minutes of medical discussion

As outlined above, below are the five codes that appear on the commenter list of recommended items and services that are not being required for the initial list of 500 items and services.

Commenter Codes Not Used	Reason for Removal
10022	Code Retired
11100	Code Retired
11101	Code Retired
77059	Code Retired
A288	Code Retired

The Departments understand that plans and issuers may use different billing codes (for example, MS-DRGs vs. APR DRGs). Therefore, in the first year of the implementation of the self-service tool, when plans and issuers are required to provide cost estimates for the 500 items and services identified by the Departments, plans and issuers are permitted to make appropriate code substitutions as necessary to allow them to disclose cost-sharing information for the 500 items and services through the self-service tool. If necessary, the Departments will issue future guidance regarding standards for code substitutions.

a. First Content Element: Estimated cost-sharing liability

The first content element that plans and issuers are required to disclose under the final rules is an estimate of the cost-sharing liability for the furnishing of a covered item or service by a particular provider or providers. The calculation of the cost-sharing liability estimate is required to be computed based on the other relevant cost-sharing information that plans and issuers are required to disclose, as described later in this section of this preamble.

The proposed rules defined "cost-sharing liability" as the amount a participant, beneficiary, or enrollee is responsible for paying for a covered item or service under the terms of the plan or coverage. The disclosure must include all applicable forms of cost sharing, including deductibles, coinsurance requirements, and copayments. The term cost-sharing liability does not include premiums, any applicable balance billing amounts charged by out-of-network providers, or the cost of non-covered items or services. For QHPs offered through Exchanges, an estimate of cost-sharing liability for a requested covered item or service provided must reflect any cost-sharing reductions the individual would receive under the coverage.

Many commenters supported the disclosure of cost-sharing liability for a particular item or service. One stated that providing cost-sharing amounts to consumers in advance of receiving a service would likely make it easier for providers to collect consumers' cost-sharing amounts. However, some commenters were concerned that information provided in advance of care would not provide an accurate estimate of actual participant, beneficiary, or enrollee liability, which would lead to consumer confusion and frustration. A few commenters requested that the tool include additional information, such as all providers expected to be involved in providing an item or service, and the price of items and services historically provided along with that particular item or service by the provider. Some commenters urged the Departments to ensure appropriate educational information is provided to patients to help them better understand and navigate the information being displayed. Others recommended a federally funded and coordinated outreach and education campaign to encourage the use of price transparency tools and help patients understand the complexities of health care prices. One commenter urged the Departments to clarify that, to the extent that the actual services provided are consistent with those provided under the estimate, plans would not be permitted to hold an enrollee responsible for more than what was provided under the estimate.

The Departments underscore that the estimates required by the final rules are not required to reflect the actual or final cost of a particular item or service. Unforeseen factors during the course of treatment (which may involve additional services or providers) can result in higher actual cost-sharing liability following receipt of care than the estimate provided in advance. Nonetheless, the Departments are finalizing the requirement that cost-sharing liability estimates be built upon accurate information, including the relevant cost-sharing information described in 26 CFR 54.9815-2715A2(b)(1)(ii)-(iv), 29 CFR 2590.715-2715A2(b)(1)(ii)-(iv), and 45 CFR 147.211(b)(1)(ii)-(iv). However, this requirement does not mean that the estimates must reflect the amount ultimately charged to a participant, beneficiary, or enrollee. Instead, the estimate should reflect the amount a participant, beneficiary, or enrollee would be expected to pay for the covered item or service for which cost-sharing information is sought. Thus, the final rules do not require the cost-sharing liability estimate to include costs for unanticipated items or services the individual could incur due to the severity of his or her illness or injury, provider treatment decisions, or other unforeseen events. Attendant notice requirements in 26 CFR 54.9815-2715A2(b)(1)(vii), 29 CFR 2590.715-2715A2(b)(1)(vii), and 45 CFR 147.211(b)(1)(vii) also require inclusion of a statement that actual charges for the participant's, beneficiary's, or enrollee's covered items and services may be different from those described in a cost-sharing liability estimate, depending on the actual items and services received at the point of care.

Additionally, while the Departments acknowledge the value of not allowing group health plans and health insurance issuers to impose higher cost sharing than estimated, to the extent that the actual services provided were consistent with those provided under the estimate, the Departments are of the view that it would not be prudent to hold plans and issuers liable to the exact estimate that is provided through the tool, as cost-sharing obligations may ultimately vary from the estimates provided in advance. Additionally, the Departments are concerned that such a requirement could incentivize plans and issuers to provide high estimates, rather than the most accurate estimates.

Commenters recommended the final rules provide plans and issuers with the flexibility to apply a reasonable methodology for estimating reliable out-of-pocket costs for a specific network provider, and recommended that this methodology could include, but should not be limited to, using current year negotiated rates, historical negotiated rates, historical claims, or a combination of these data points. One commenter urged the Departments to remove the proposed requirement that

cost-sharing liability information be calculated based on negotiated rates, stating that this is not the methodology used by most existing cost-estimate tools.

The Departments understand that plans and issuers with existing cost-estimate tools may use advanced analytics in calculating cost-sharing liability estimates. However, the Departments are of the view that the most accurate estimates of cost-sharing liability should be provided using the actual rates and fees upon which liability is determined. It is the Departments' understanding that, while provider reimbursement may be based on negotiated rates, plans and issuers do not always calculate a consumer's liability using the negotiated rate as defined in paragraph (a) of the proposed rules, such as in capitation arrangements where the provider is reimbursed retrospectively. Rather, some plans and issuers may determine a participant's, beneficiary's, or enrollee's cost-sharing liability on a contractually agreed upon underlying fee schedule between the provider and the plan or issuer.

Therefore, the final rules require that cost-sharing liability for a particular item or service be calculated based on in-network rates, out-of-network allowed amounts, and individual-specific accumulators, such as deductibles and out-of-pocket limits. However, the Departments clarify that plans and issuers may incorporate additional metrics and analytics beyond this minimum standard: for example, by using complex historical analytics to predict total costs of items and services available through a bundled payment arrangement. The Departments will assess how additional useful information can be provided to consumers in this area going forward.

Under the proposed rules, plans and issuers would be required to provide participants, beneficiaries, and enrollees with cost-sharing information for either a discrete item or service or for items or services for a treatment or procedure for which the plan uses a bundled payment arrangement, according to how the plan or issuer structures payment for the item or service. Several commenters pointed out that providing cost-sharing liability estimates for bundled payment arrangements might introduce confusion as consumers may not realize that billing and payment rates are different when items and services are rendered individually versus as part of a bundled item or service. Commenters stated that ultimately, patients would very likely receive inaccurate or misleading estimates in a significant proportion of self-service estimate requests. Similarly, several commenters sought clarification regarding how plans and issuers that incorporate innovative and cost-saving methods like reference-based pricing, value-based insurance design, and direct primary care as part of their services and plan designs would comply with the requirements of the proposed rules.

The Departments recognize the variability in pricing structures and plan designs for many plans and issuers. The Departments understand that developers have demonstrated that formulas for unique pricing models are already being incorporated into existing estimator tools. The Departments further understand that while providing cost estimates in advance for a plan or issuer that incorporates reference-based reimbursement may be complex, it is still feasible to estimate such costs. For example, plans or issuers could develop a method for analyzing past claims of specific providers to look for patterns in their payment rates from which to derive an accurate predictive estimate in advance. In response to the Hospital Price Transparency final rule, one hospital claims to have developed a tool that provides cost estimates with 95 percent to 99 percent accuracy.[110] While some factors associated with the course of care are incorporated after services are rendered, others, like gender or location, are known in advance. Therefore, the Departments expect plans and issuers to provide a reasonable estimate using information the plan or issuer knows about the participant, beneficiary, or enrollee or the average participant, beneficiary, or enrollee.

The Departments again acknowledge that how a provider is reimbursed does not necessarily indicate how a participant, beneficiary, or enrollee will be billed. Specifically, as commenters explained, the bundled payment arrangement as defined in the proposed rules may not reflect the cost-sharing liability for which the consumer is liable. For instance, if a provider is reimbursed in a bundled payment arrangement for a surgical procedure that includes the surgery and pre- and post-surgery office visits, but the enrollee is billed a copayment for each office visit and coinsurance for the surgical procedure, the enrollee should be able to obtain the separate copayment liabilities for each of the office visits and the surgical procedures, not one bundled charge. However, under this example, if the individual is only responsible for one copayment that includes all office visits and the surgical procedures, the plan or issuer could provide the cost-sharing liability estimate for that bundled payment arrangement.

Therefore, the final rules clarify that plans and issuers should provide one overall cost-sharing liability estimate for a bundled payment arrangement if that is the only cost sharing for which the participant, beneficiary, or enrollee would be liable. However, if a plan or issuer reimburses a provider under a bundled payment arrangement for all covered items and services provided for a specific treatment or procedure, but cost sharing is imposed separately for each unique item and service included in the bundled payment, plans and issuers should disclose the cost-sharing liability for those distinct items and services to the participant, beneficiary, or enrollee. The Departments also recognize that providing one estimate that includes all items and services that are typically provided within an episode of care may be consumer-friendly in some situations, even where the items and services are not subject to a bundled payment arrangement. Therefore, the final rules clarify that while plans and issuers are not required to provide bundled estimates where the provider is not reimbursed through a bundled payment arrangement, nothing prohibits plans or issuers from providing bundled estimates in situations where such estimates could be relevant to participants, beneficiaries, or enrollees, as long as the plan or issuer also discloses information about the relevant items or

[110] Meyer, H. "Hospitals roll out online price estimators as CMS presses for transparency." Modern Healthcare. June 23, 2018. Available at https://www.modernhealthcare.com/article/20180623/NEWS/180629994/hospitals-roll-out-online-price-estimators-as-cms-presses-for-transparency.

services individually, as required by the final rules.

Plans and issuers should take a similar approach for plan designs that incorporate alternative payment structures such as direct primary care or other bundled or capitated payment arrangements. The Departments understand that there are many unique plan designs and may issue additional guidance to address specific questions from plans, issuers, and enforcement entities regarding the requirements of the final rules.

The Departments appreciate comments requesting education and outreach to help ensure that participants, beneficiaries, and enrollees know that these consumer tools exist and can understand the information displayed. The Departments recognize that more than 94 percent of plans and issuers recently surveyed already have some variation of an internet self-service tool,[111] yet another study noted that only 12 percent of participants, beneficiaries, or enrollees currently use the tools available to them,[112] which might suggest that there is an opportunity for improved awareness and understanding of these tools. However, the Departments are also of the view that plans and issuers have their own incentives to provide quality customer service and know what types of outreach and messaging would be most helpful to their participants, beneficiaries, and enrollees. Therefore, the Departments have decided not to institute specific outreach and education requirements, but rather strongly encourage plans and issuers to develop educational and outreach materials to promote awareness that self-service tools exist, where to find them on the plan's or issuer's website, how to use the tool, what, if any, further innovations above the baseline standards that differentiates their tool from competitors, and what additional information may be available. In addition, the Departments are of the view that employers may want to conduct outreach and education to encourage their employees to shop for lower-priced services that may slow increases in employer-sponsored coverage premiums.

One commenter stated that the final rules should provide the flexibility for health plans to display cost-sharing information either as dollars or using some proxy variable that either conveys costs relative to other providers or the cost-effectiveness of the providers for a given items or service relative to their peers**.** Another commenter recommended that cost estimates include both an average price and a reasonable range of the possible prices that the treatment could cost. Other commenters recommended the Departments allow cost estimates to be provided as a range.

The Departments are of the view that cost-sharing averages and ranges would not provide personalized and specific cost-sharing information and therefore the final rules adopt, as proposed, the provision that estimated cost-sharing liability be reflected as a dollar amount. However, the Departments understand that providing an estimated range could help consumers understand how their costs may vary depending on the complexity of a procedure. In addition to providing a cost-sharing estimate that is specific to the participant, beneficiary, or enrollee, plans and issuers may also choose to provide low and high ranges of what the consumer may expect to pay to reflect other needed services, complications, and other factors.

Several commenters expressed concerns about the ability of plans and issuers to provide these cost-sharing estimates, noting that few, if any, currently provide this level of disclosure to participants, beneficiaries, or enrollees before the incurrence of a claim. Commenters stated that most major issuers have treatment cost estimators available, but these tools are rudimentary and are not necessarily available for all plan designs. Commenters also stated that few regional issuers currently make any cost-estimation data available and the vast majority of data provided via online tools currently relies on estimated costs drawn from publicly available sources rather than personal information and circumstances.

Another commenter stated that most self-insured group health plans do not have easy access to all the data necessary to provide beneficiaries with what they described as upfront adjudication of the beneficiary's claim, like an EOB. One commenter expressed concern, stating that plans could be subject to significant penalties for failure to comply and highlighted that self-insured plans typically do not establish their own networks, but rather contract with an issuer, TPA or other entity for the use of their network. Another commenter stated that issuers, preferred provider networks, and TPAs continue to maintain network pricing information as confidential and proprietary, even with respect to their own plan clients. Some commenters stated that while the preamble to the proposed rules suggests that plans could renegotiate their contracts in order to gain access to this proprietary information, this ignores the realities of the market. These commenters opined that, in the absence of clearer guidance applicable to issuers and TPAs, plans and issuers will be burdened with trying to force disclosure of this information.

The Departments are of the view that the ability to access cost-sharing liability information in advance of seeking care should not be limited by the participant's, beneficiary's, or enrollee's plan or issuer type. The Departments are aware of several issuers that provide advance cost estimates that are based on an individual's specific information, such as out-of-pocket amount accumulators. The intent of the final rules is to make this information available to a larger number of participants, beneficiaries, and enrollees, empowering them to shop for care that best meets their needs.

Additionally, while the Departments recognize that some self-insured group health plans (or TPAs acting on their behalf) may not currently have access to the information that would be required to calculate a participant's or beneficiary's cost liability, the Departments do not foresee any barriers that would prohibit the plan or TPA from obtaining this information. As

[111] Sharma A., Manning, R., and Mozenter, Z. "Estimating the Burden of the Proposed Transparency in Coverage Rule." Bates White Economic Consulting. January 27, 2020. Available at: https://www.bateswhite.com/newsroom-insight-Transparency-in-Coverage-Rule.html.

[112] *See* Mehrotra, A., Chernew, M., and Sinaiko, A. "Promises and Reality of Price Transparency." April 5, 2018. 14 N. Eng. J. Med. 378. Available at: https://www.nejm.org/doi/full/10.1056/NEJMhpr1715229.

discussed in the preamble to the proposed rules, plans may have to amend existing contracts with issuers, TPAs, or providers. Consistent with the discussion of legal authority elsewhere in this preamble, even if a contract between a self-insured plan and a TPA contains a provision prohibiting the public disclosure of its terms, it is the Departments' understanding that such contracts typically include exceptions where a particular disclosure is required by federal law, and federal law would control over contractual terms in any case.

In response to whether other types of information are necessary to provide an estimate of cost-sharing liability prior to an individual's receipt of items or services from a provider(s), one commenter suggested—in order to enhance the usability and accuracy of these data—that CMS and payers utilize the open-source episode grouper maintained by the not-for-profit Patient-Centered Episode System (PACES) Center, to create a single industry standard for defining clinical episodes of care using current medical record and payment systems and based on consensus across multiple stakeholders including providers, payers, purchasers, and consumers.

While the Departments generally support standardization across the complex health care ecosystem, there is no current required standardization of items and services provided for certain common episodes of care. Because of the lack of this particular standard, requiring plans and issuers to use PACES or similar services to determine costs will not accurately reflect what different plans and issuers actually reimburse for different episodes of care.

The Departments acknowledge that section 2713 of the PHS Act requires non-grandfathered group health plans and issuers offering non-grandfathered coverage in the individual or group markets to provide coverage without the imposition of any cost-sharing requirements for select preventive items and services. However, if the same items or services are furnished for non-preventive purposes, the participant, beneficiary, or enrollee may be subject to the cost-sharing terms of his or her plan. The Departments are of the view that if an item or service will be furnished at no cost to the participant, beneficiary, or enrollee, the participant, beneficiary, or enrollee should know this information. One commenter expressed a desire that price transparency not serve as a disincentive for individuals seeking preventive and maintenance therapy services. The Departments are of the view that clearly indicating when items and services have a $0 cost-sharing liability may have the opposite effect—it may actually encourage consumers to seek preventive care. The Departments understand that determining whether an item or service is preventive or not for an individual may be complex, and, indeed, may be impossible prior to service. Therefore, to the extent an item or service is a recommended preventive service under section 2713 of the PHS Act, and the plan or issuer cannot determine whether the request is for preventive or non-preventive purposes, the plan or issuer must display the non-preventive cost-sharing liability in the internet-based self-service tool, along with a statement that the item or service may not be subject to cost sharing if it is billed as a preventive service. For example, if an individual requests cost-sharing information for an in-network colonoscopy, the plan should display the applicable cost-sharing information for a diagnostic colonoscopy and a statement that the service may not be subject to cost sharing if it is billed as a preventive service from an in-network provider. As an alternative, a plan or issuer may allow an individual to request cost-sharing information for the specific preventive or non-preventive item or service by including the appropriate terms such as "preventive," "non-preventive," or "diagnostic" as a means to request the most accurate cost-sharing information.

b. Second Content Element: Accumulated amounts

The second content element is a participant's, beneficiary's, or enrollee's accumulated amounts. The proposed rules defined "accumulated amounts" as the amount of financial responsibility that a participant, beneficiary, or enrollee has incurred at the time the request for cost-sharing information is made, with respect to a deductible and/or an out-of-pocket limit. If an individual is enrolled in other than self-only coverage, these accumulated amounts would include the financial responsibility a participant, beneficiary, or enrollee has incurred toward meeting his or her individual deductible and/or out-of-pocket limit, as well as the amount of financial responsibility that the individuals enrolled under the plan or coverage have incurred toward meeting the other than self-only coverage deductible and/or out-of-pocket limit, as applicable. The Departments interpret section 2707(b) of the PHS Act as requiring non-grandfathered group health plans to comply with the maximum out-of-pocket limit promulgated under section 1302(c)(1) of PPACA, including the HHS clarification that the self-only maximum out-of-pocket limit applies to each individual, regardless of whether the individual is enrolled in self-only coverage or in other than self-only coverage. Accordingly, the self-only maximum out-of-pocket limit applies to an individual who is enrolled in family coverage or other coverage that is not self-only coverage under a group health plan.[113] For this purpose, the Departments proposed that accumulated amounts would include any expense that counts toward the deductible or out-of-pocket limit (such as copayments and coinsurance), but would exclude expenses that would not count toward a deductible or out-of-pocket limit (such as premium payments, out-of-pocket expenses for out-of-network services, or amounts for items or services not covered under a plan or coverage).

Furthermore, to the extent a plan or issuer imposes a cumulative treatment limitation on a particular covered item or service (such as a limit on the number of items, days, units, visits, or hours covered in a defined time period) independent of individual medical necessity determinations, the accumulated amounts would also include the amount that has accrued

[113] 80 FR 10750, 10824-10825 (Feb. 27, 2015); *see also* FAQs About Affordable Care Act Implementation (Part XXVII), Q1. Available at https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQs-Part-XXVII-MOOP-2706-FINAL.pdf and https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-xxvii.pdf.

toward the limit on the item or service (such as the number of items, days, units, visits, or hours the participant, beneficiary, or enrollee has used).

As discussed in the proposed rules, the Departments understand that independent of cumulative treatment limitations, cost-sharing liability may vary by individual based on a determination of medical necessity and that it may not be reasonable for a plan or issuer to account for this variance as part of the accumulated amounts. Therefore, under the final rules, plans and issuers are required to provide cost-sharing information with respect to an accumulated amount for a cumulative treatment limitation that reflects the status of the individual's progress toward meeting the limitation, and this information does not include any individual determination of medical necessity that may affect coverage for the item or service. For example, if the terms of an individual's plan or coverage limit coverage of physical therapy to 10 visits per plan or policy year, subject to a medical necessity determination, and at the time the request for cost-sharing information is made the individual has had claims paid for three physical therapy visits, the plan or coverage would make cost-sharing information disclosures based on the fact that the individual could be covered for seven more physical therapy visits in that plan or policy year, regardless of whether or not a determination of medical necessity for future visits has been made at that time.

Several commenters supported the inclusion of the accumulated amounts as one of the content elements. One commenter agreed with the proposed requirement that the accumulated amounts include the financial responsibility incurred toward both an individual deductible and/or out-of-pocket limit and toward the other than self-only coverage deductible and/or out-of-pocket limit. One commenter recommended that plans be required to disclose to prospective enrollees whether an enrollee's accumulated amounts are reduced through a plan's accumulator adjustment program because, the commenter noted, having this information prior to enrollment in a plan is crucial because of the impact such programs have on participant, beneficiary, and enrollee access, adherence, and outcomes.

The Departments agree that an essential part of providing accurate cost-sharing estimates is disclosing individuals' progress toward their accumulated amounts. However, the intent of the self-service tool is to provide current participants, beneficiaries, and enrollees with information about their plan or issuer, and, therefore, the Departments are not finalizing any provisions related to disclosures to potential enrollees. The final rules adopt this provision as proposed.

One commenter recommended the Departments confirm amounts made available in account-based arrangements that can or must be used toward cost-sharing expenses under a separate plan need not be reflected in the accumulated amounts or cost-sharing estimate under the tool. The commenter stated that there is an array of these types of arrangements of varying types and structures and to incorporate them into the cost-sharing estimate could be administratively challenging and would impose a significant burden.

The Departments clarify that the estimates do not include amounts made available through separate account-based arrangements. In addition, the Departments encourage, but are not requiring, plans and issuers to issue a disclaimer regarding such arrangements, as necessary.

Certain commenters stated that the proposed requirement to display accumulated amounts toward a cumulative treatment limitation on a particular item or service would be difficult to implement and requested elimination or delay of this requirement. Commenters expressed that in some cases, this information may be tracked by third-party vendors and not integrated into claims systems; for example, plans and issuers often contract with third parties that provide medical benefits management for certain services (physical therapy, for example). Commenters stated that building the connectivity necessary to exchange information on accumulated amounts in real time would take significant time. Other commenters recommended this requirement be optional.

The Departments acknowledge that disclosure of accumulated amounts may present challenges for plans and issuers. However, an accurate estimate of cost-sharing liability cannot be achieved without taking into account a participant's, beneficiary's, or enrollee's accumulated amounts, including cumulative treatment limitations. Nonetheless, to give plans and issuers additional time to prepare, the disclosure requirements related to cost-sharing liability estimates in the final rules are not applicable until plan years (or in the individual market, policy years) beginning on or after January 1, 2023, providing two years for implementation, which should give plans and issuers sufficient time to ensure that they are able to comply.

One commenter urged the Departments to include a requirement for plans to provide the cost for the beneficiary to purchase a non-covered prescription drug and to indicate whether and, if so, to what extent, that cost will be applied against the deductible. The commenter stated that knowing to what extent a non-covered drug expense will count towards meeting a deductible and the annual limitation on cost sharing, if at all, especially with regard to specialty drugs, is critical because there are significant coverage gaps.

While the Departments appreciate the suggestions related to non-covered prescription drugs, this rulemaking is focused on covered items and services. The Departments are not inclined to increase the burden imposed by the final rules by adding requirements to disclose information regarding non-covered services, given that plans and issuers may not have access to the costs of drugs they do not cover and include in their formulary. The Departments will take this suggestion into consideration for future rulemaking.

c. Third Content Element: In-network Rates

Negotiated Rates

In the proposed rules, the Departments proposed to require group health plans and health insurance issuers to disclose the negotiated rate, reflected as a dollar amount, for an in-network provider or providers for a requested covered item or service, to the extent necessary to determine the participant's, beneficiary's, or enrollee's cost-sharing liability. Many commenters did not support the disclosure of negotiated rates, stating that publishing negotiated rates would not meet the Departments' purported goal of helping consumers un-

derstand costs and would possibly make purchasing more confusing and difficult for consumers. Additionally, some commenters expressed concerns that publication of negotiated rates would force plans and issuers to violate non-disclosure contracts with providers. Conversely, many other commenters did support the disclosure of negotiated rates and offered support for their disclosure to participants, beneficiaries, and enrollees. These commenters stated that consumers should be engaged and educated about health care spending, and as discussed in more detail below, several commenters supported the disclosure of negotiated rates even when it is not relevant to a consumer's cost-sharing liability.

The Departments maintain that the disclosure of the negotiated rates is a key element of overall price transparency. Participants, beneficiaries, and enrollees are often responsible for a percentage of the negotiated rate through coinsurance or the entire negotiated rate if they have not yet met their deductible. Consistent with discussions elsewhere in this preamble, the Departments are of the view that such contracts typically include exceptions where a particular disclosure is required by federal law.

In the preamble to the proposed rules, the Departments acknowledged that some provider contracts express negotiated rates as a formula (for example, 150 percent of the Medicare rate), but disclosure of formulas is not likely to be helpful or understandable for many participants, beneficiaries, and enrollees viewing this information. For this reason, the final rules require plans and issuers to disclose the negotiated rates and underlying fee schedules that result from using such a formula, as a dollar amount.

A few commenters recommended disclosing negotiated rate ranges or benchmarks to help consumers compare prices among providers. One commenter stated it would be useful if plans disclosed their range of in-network rates (or their average or median rate) for each service. This commenter stated that, for certain services such as complex surgeries, for which fees may be bundled and may vary widely depending on the severity of a participant's, beneficiary's or enrollee's condition, providing the range of in-network fees may be particularly appropriate. This type of disclosure could alert participants, beneficiaries, and enrollees to consider, and prompt them to consult providers about, the full range of potential expenses for their care. Another commenter recommended that, regardless of the participant's, beneficiary's, or enrollee's out-of-pocket liability, the participant, beneficiary, or enrollee should always be provided the full in-network amount, as well as a comparison of that amount to a benchmark such as the Fair Price or median in-network price. This commenter stated that the in-network price for a service can vary by as much as 200 to 1,000 percent, depending on the provider selected. In order to achieve the goals of transparency, consumers need to know the full price of a service prior to care so they are able to effectively compare providers' prices.

In the Departments' view, disclosure of formulas or ranges are not likely to be helpful or understandable for many participants, beneficiaries, and enrollees viewing this information. The purpose of the internet-based self-service tool is to provide personalized costs based on the participant's, beneficiary's, or enrollee's specific plan or coverage, and ranges and formulas do not achieve this goal. For this reason, the final rules retain the proposed requirement to disclose the rate that results from using such a formula, which is required to be expressed as a dollar amount.

Underlying Fee Schedule Rate

Given the unique nature of certain plan designs, in the proposed rules, the Departments requested comment on whether there were certain reimbursement or payment models that should be exempt from all or certain aspects of the proposed rules. A few commenters urged the Departments to clarify how capitation arrangements and value-based reimbursement designs, including bundled payment arrangements and reference-based pricing, would be regulated under the proposed rules. Commenters stated that provider payment amounts are not knowable under these types of arrangements until after care is provided and that they cannot be attributed to a particular item or service provided to a particular participant, beneficiary, or enrollee. Other commenters stated that participants, beneficiaries, and enrollees should have access to cost-sharing liability data for items and services that might be rendered in the course of their care, but that the Departments' proposed approach downplayed the complexity of payer-provider contracts in a way that could inadvertently lead to participants, beneficiaries, and enrollees receiving misleading estimates of their cost-sharing liability. The commenter stated that only the consumer's cost sharing and the fee-for-service component of reimbursement should be required to be disclosed under these requirements. Another commenter stated that the vast majority of bundled payment arrangements use a retrospective settlement, in which the payer and provider determine a final settlement after all care in the relevant episode has been delivered, suggesting that a negotiated rate under these arrangements could not be provided in advance.

The Departments are of the view that, for transparency in coverage to be truly effective, consumers should have access to all pricing information related to their care so they can make meaningful decisions about their health care spending. Further, the Departments do not agree that the disclosure of negotiated rates will be misleading to participants, beneficiaries, or enrollees. Negotiated rates are already an element of an EOB that participants, beneficiaries, and enrollees are accustomed to receiving after receiving health care items or services. As stated elsewhere in this preamble, providing this information in advance equips a more cost-conscious participant, beneficiary, and enrollee with the necessary information to make a more informed decision about their health care. Furthermore, the Departments are of the view that it is in the best interest of plans and issuers to indicate, when disclosing these rates, what each rate is and how it is applicable to the participant's, beneficiary's, or enrollee's plan or coverage.

To more fully understand the complexity of payer-provider contracts and, in an effort to clarify how the proposed rules would apply to capitated, bundled, and other alternative reimbursement designs, the Departments considered these public comments and conducted additional research to understand different contracting models and the inputs that would be

necessary for determining a participant's, beneficiary's, or enrollee's cost-sharing liability under these models.

Under some capitation arrangements, payers reimburse a provider a set amount per participant, beneficiary, or enrollee for a pre-defined amount of time, regardless of whether the participant, beneficiary, or enrollee uses the provider's services. Capitation payments are generally guided by actuarial principles and may be determined by different factors, such as a participant's, beneficiary's, or enrollee's age and gender. For instance, under some capitated models, plans and issuers pay a provider or a collective panel of providers a per-member-per-month (PMPM) capitation amount, which is the negotiated rate. It is the Departments' understanding that under certain capitated and bundled payment arrangements, providers' payments may be reconciled retrospectively to account for utilization, value adjustments, or other weighting factors that can affect the final payment to a provider. The Departments understand that capitation arrangements also may include at least one underlying fee schedule rate upon which a participant's, beneficiary's, or enrollee's cost-sharing liability is determined.

As the Departments acknowledged earlier in this preamble, negotiated rates, as defined in the final rules, do not always affect a participant's, beneficiary's, or enrollee's cost-sharing liability. To account for alternative reimbursement arrangements such as capitated and bundled payment arrangements, the Departments are renaming the third content element as "in-network rates," comprised of the following elements, as applicable to the plan's or issuer's payment model: negotiated rate and underlying fee schedule rate, reflected as dollar amounts. Plans and issuers must disclose the underlying fee schedule rate used to determine participant, beneficiary, or enrollee cost-sharing liability only where that rate is different from the negotiated rate. As discussed earlier in this preamble, the final rules require that the cost-sharing liability estimate for a requested covered item or service be calculated using the current underlying fee schedule rate if the plan or issuer uses such a fee schedule. The Departments are of the view that disclosing underlying fee schedule rates will provide the most relevant data on which cost sharing is based, if cost sharing is not based on the negotiated rate, as originally proposed.

Disclosing the Negotiated Rate and Underlying Fee Schedule Rate

In the proposed rules, the Departments acknowledged that if the negotiated rate does not impact an individual's cost-sharing liability under a plan or coverage for a covered item or service (for example, if the copayment for the item or service is a flat dollar amount or zero dollars and the individual has met a deductible, or a deductible does not apply to that particular item or service), disclosure of the negotiated rate may be unnecessary to calculate cost-sharing liability for that item or service. Therefore, the Departments proposed that disclosure of a negotiated rate would not be required if it is not relevant for calculating an individual's cost-sharing liability for a particular item or service. The Departments sought comment on whether there are any reasons disclosure of negotiated rates should nonetheless be required under these circumstances.

Many commenters agreed that negotiated rates should only be disclosed to the extent they are used for determining cost-sharing liability. Commenters further expressed that only information meaningful to consumers' cost-sharing liability should be required to be disclosed. One commenter stated that this interpretation should be extended to payments tied to value, such as "shared savings," bonuses, and other performance-based reimbursements.

Conversely, as stated earlier, many commenters supported the disclosure of negotiated rates in all circumstances. One commenter stated that disclosing the amount of the negotiated rate is extremely valuable regardless of whether the disclosure of this information impacts a participant's cost-sharing liability, because it will illuminate the costs of these particular items and services—reflecting the benefit consumers receive from their enrollment in the plan or coverage, as well as helping them to be conscious of the costs incurred by the plan overall. This commenter pointed out that if the plan or issuer has different negotiated in-network rates with different providers furnishing the same item or service, participants, beneficiaries, and enrollees will have the opportunity to compare the different rates among the different providers.

Another commenter suggested a number of benefits that could come from the disclosure of negotiated rates through the cost-sharing tool, even in cases in which that information is not relevant to the specific cost-sharing inquiry. The commenter pointed out that even if the participant's, beneficiary's, or enrollee's cost is not affected, the plan's or issuer's cost could be significantly affected and that allowing participants, beneficiaries, and enrollees awareness and visibility of negotiated rates could provide consumers with a greater understanding of health care costs and enable participants, beneficiaries, and enrollees to seek out lower cost providers. The commenter further stated that although participants, beneficiaries, and enrollees will use the tool to look up estimated cost-sharing for specific items and services, often they will also expect to seek services from the same provider repeatedly (for example, for ongoing treatment and follow-up care).

The Departments agree with those commenters who favored requiring disclosure of negotiated rates even when the negotiated rate is not relevant to determining cost sharing, because it may promote awareness and understanding of health care prices and promotes transparency in coverage. Accordingly, the phrase "to the extent relevant to the participant's or beneficiary's cost-sharing liability" that appeared in paragraph (b)(1) of the proposed regulations has been removed from the final rules. The final rules modify the third content element to require that the negotiated rate always be disclosed with cost-sharing liability estimates, even if it is not used to determine cost sharing, and that the underlying fee schedule rate also be disclosed, to the extent that it is different from the negotiated rate, as applicable to the plan's payment model.

With regard to plans and issuers using an alternative reimbursement model, such as a capitated or bundled payment arrangement that does not have negotiated rates or an underlying fee schedule, one commenter stated that issuers do not always have access to the negotiated rates or internal payment methodologies uti-

lized by capitated medical groups or other providers and would not be able to reliably provide cost transparency based on a negotiated rate at the service level. In contrast, another commenter stated there is no justification for excluding plans that reimburse their providers based on capitation from the internet-based self-service tool requirements as this would result in an incomplete data set, and these plans already assign values to services to administer benefits with deductibles and coinsurance, as well as for risk adjustment and internal reporting purposes. Another commenter stated that the Departments should include Accountable Care Organizations (ACOs) and other capitated arrangements within the ambit of the final rules and should require transparency and full disclosure of financial incentive arrangements that underlie capitated arrangements under a specific plan or contract, not just a consumer's anticipated liability. This commenter stated that any exemptions may actually be incentives for plans and issuers to move toward opaque pricing models.

The Departments acknowledge that it is possible that some plans and issuers using alternative reimbursement models may not have negotiated rates or underlying fee schedule rates to disclose in the internet-based self-service tool. However, the numbers of plans and issuers without negotiated rates or underlying fee schedule rates is limited and the Departments are of the view that an exemption for such arrangements is not necessary. Additionally, the Departments are of the view that providing an exemption for such arrangements will result in incomplete data sets. As stated in the final rules, the in-network rate must be disclosed, as applicable to the plan's or issuer's payment model. If the plan or issuer does not have negotiated rates or underlying fee schedule rates, the third content element does not apply.

Prescription Drugs

The final rules adopt the requirement that group health plans and health insurance issuers disclose to participants, beneficiaries, or enrollees an estimate of cost-sharing liability for each item or service, including prescription drugs. As discussed in the preamble to the proposed rules, this would allow participants, beneficiaries, and enrollees to request cost-sharing information for a specific billing code (as described later in this preamble) associated with a prescription drug or by descriptive terms (such as the name of the prescription drug), which would permit participants, beneficiaries, and enrollees to learn the estimated cost of a prescription drug obtained directly through a provider, such as a pharmacy or mail order service. In addition to allowing participants, beneficiaries, and enrollees to obtain cost-sharing information by using a billing code or descriptive term, the proposed rules would also have permitted participants, beneficiaries, and enrollees to learn the cost of a set of items or services that include a prescription drug or drugs that is subject to a bundled payment arrangement for a treatment or procedure. In the proposed rules, the Departments acknowledged that outside of a bundled payment arrangement, plans and issuers often base cost-sharing liability for prescription drugs on the undiscounted list price, such as the AWP or WAC, which frequently differs from the price the plan or issuer has negotiated for the prescription drug.[114] In these instances, providing the participant, beneficiary, or enrollee with a rate that has been negotiated between the issuer or plan and its PBM could be misleading, as this rate would reflect rebates and other discounts, and could be lower than what the individual would pay—particularly if the participant, beneficiary, or enrollee has not met his or her deductible.

The Departments sought comment as to whether a rate other than the negotiated rate, such as the undiscounted price, should be required to be disclosed for prescription drugs, and whether and how to account for any and all rebates, discounts, and dispensing fees to ensure participants, beneficiaries, and enrollees have access to meaningful cost-sharing liability estimates for prescription drugs.

Several commenters supported disclosure of rebates, discounts, and other price concessions for drugs. One commenter referred to drug price concessions as one of the "most confounding black boxes of health care" and stated that data suggests these concessions are actually increasing out-of-pocket costs for participants, beneficiaries, and enrollees. This commenter urged the Departments to require plans and issuers to disclose the list price, the negotiated rate, a single dollar value reflecting the total amount of price concessions, and the price used to calculate the participant's, beneficiary's, and enrollee's coinsurance along with, if different from the negotiated rate, an explanation as to why the price is different from the negotiated rate. Another commenter opined that participants, beneficiaries, and enrollees have the right to know a drug's undiscounted price, discounted or negotiated price, and the total sum of all price concessions for that drug, including fees, rebates, and discounts. This commenter stated that providing a beneficiary with these three data points strikes the appropriate balance between improving transparency without misleading or overwhelming the participant, beneficiary, or enrollee.

Many commenters suggested that plans and issuers be required to disclose when the participant's, beneficiary's, or enrollee's cost-sharing requirement exceeds the price paid by the plan or issuer. One commenter stated that in cases where plans pass through some or all rebates and other price concessions to participants, beneficiaries, and enrollees, the prices disclosed to participants, beneficiaries, and enrollees should be the price net of those rebates and concessions. The commenter emphasized the importance of plans and issuers also disclosing to participants, beneficiaries, and enrollees when manufacturer rebates and discounts are not passed through to them at the point-of-sale or factored into cost-sharing. One commenter noted that negotiated prices for prescriptions or cash price alternatives may sometimes appear less expensive, but that such alternative rates (for example, cash price options) may increase overall costs if such rates offset the ability to reach a plan's deductible or out-of-pocket maximum thresholds. Therefore, this commenter requested that the Departments provide clarity as to whether plans and issuers would be re-

[114] "Follow the Dollar." PhRMA. November 30, 2017. Available at: https://www.phrma.org/report/follow-the-dollar-report.

sponsible for notifying participants, beneficiaries, and enrollees of such considerations and/or making such calculations. Similarly, two commenters urged the Departments to require disclosure of the negotiated rate for drugs in all situations, even where the beneficiary owes a fixed-amount copayment, and cited reports of cases when, for inexpensive generics, the beneficiary's fixed-amount copay actually exceeded the negotiated rate.

Three commenters recommended that the Departments provide plans the flexibility to display the most meaningful price to an enrollee for drugs. One commenter stated that if the participant, beneficiary, or enrollee's cost sharing is based upon a specified benchmark, the plan should be allowed to specify the benchmark used in the tool's documentation. This commenter suggested that requiring plans to conform to a single standard is not possible, and in effect may be unhelpful to consumers, given the multitude of contracts (and different contract terms) that each plan's PBM may have with pharmacies. Another commenter stated providing this flexibility will allow for issuer innovation in developing cost-estimator functionality that provides real-time, accurate, and useful prescription drug estimates to participants, beneficiaries, or enrollees.

One commenter recommended the Departments consider using "net price" rather than the "negotiated rate" for estimating cost-sharing liability for prescription drugs. The commenter explained that direct and indirect remuneration (DIR) fees under Medicare Part D and similar PBM practices in the private market were originally designed to capture rebates and other mechanisms not included at the point-of-sale. However, the commenter stated that DIR fees and other retroactive fees utilized by PBMs are now being used beyond their original purpose to retroactively adjust pharmacies' payment months after the sale, sometimes below the price paid by the pharmacy.

Some commenters stated that the Departments should not require display of negotiated drug prices, rebates, or other discounts or fees. Two commenters expressed that, rather than increasing transparency or providing actionable or meaningful information to participants, beneficiaries, or enrollees, estimated rebate information would simply confound and frustrate participants, beneficiaries, or enrollees, given its lack of direct relevance to the amount the participant, beneficiary, or enrollee is required to pay for the drug at a pharmacy. Another commenter stated that disclosing highly confidential dispensing fees would benefit only those parties being paid dispensing fees, by giving them a window into the dispensing fees paid to their competitors, and advised that the Departments should avoid requiring any disclosure of drug prices, rebates, discounts, or fees that would undermine plans' and issuers' ability to negotiate lower drug costs.

The Departments also solicited comment as to whether there are scenarios in which including drug pricing information in cost estimates would be problematic. One commenter recommended that the final rules require disclosure of an estimate of the cost-sharing liability associated with a drug only when there is an out-of-pocket cost to the participant, beneficiary, or enrollee that is directly attributable to the drug. Another recommended that when the price of a drug is not the basis of the enrollee's cost-sharing liability, plans should be given the option to publish the benchmark price or omit a price altogether, displaying only the enrollee's cost-sharing liability.

The Departments also sought comment on whether the relationships between plans or issuers and PBMs allow plans and issuers to disclose rate information for drugs, or if contracts between plans and issuers and PBMs would need to be amended to allow plans and issuers to provide a sufficient level of transparency. If those contracts would need to be amended, the Departments sought comment on the time that would be needed to make those changes. While some commenters stated that the rates negotiated between PBMs and pharmacies are considered confidential, other commenters stated that existing contracts would not prevent PBMs or issuers from disclosing the required information. One commenter stated that it is common that contracts be modified in response to changes in a statute or regulation, and that federal public policy imperatives override existing contractual provisions. This commenter stated the public interest in complete disclosure to reduce costs for consumers unquestionably outweighs any confidentiality provisions in current contracts that might otherwise protect disclosure of relevant information to the federal government.

The Departments agree that participants, beneficiaries, and enrollees, as well as health care payers such as employers, should have access to meaningful pricing information related to drug pricing in order to meaningfully evaluate plan and issuer offerings and gain transparency into potential out-of-pocket costs.

The Departments also acknowledge that contract terms may need to be amended based on the final rules. The Departments agree that disclosure of rebates, discounts, and other price concessions would further the goals of price transparency, but also acknowledge other commenters' concerns that disclosing all these elements might cause consumer confusion. The Departments also acknowledge that there could be value in using "net price" rather than "negotiated rate" and in disclosing when a participant's, beneficiary's, or enrollee's cost-sharing liability exceeds the price paid by the plan or issuer. As described by commenters, there are numerous pricing inputs throughout the drug supply chain that affect the final price for the consumer—making complete transparency on drug pricing more complex than that of other items and services. The Departments aim to strike a balance between illuminating some of the factors that drive drug costs and not overwhelming consumers with information that is not directly relevant to their cost-sharing liability. To that end, the final rules require plans and issuers to disclose in element (i), an individual's out-of-pocket cost liability for prescription drugs, and in element (iii), the negotiated rate of the drug. As discussed elsewhere in this preamble, the Departments recognize that the negotiated rate might be different for branded and generic drugs. For instance, the negotiated rate might be the WAC for branded drugs and the Maximum Allowed Cost (MAC) for generic drugs. The Departments also acknowledge that this price might be established differently for different plans and issuers. The Departments anticipate this disclosure generally will not necessitate the disclosure of information on discounts, rebates, or price concessions for a drug.

The Departments recognize there may be circumstances in which a drug carries no cost-sharing liability for a participant, beneficiary, or enrollee. If there is no cost sharing associated with a prescription drug, under the final rules, the tool should reflect a cost-sharing value of $0 for clarity, but the negotiated rate must be displayed.

The proposed rules sought comment on the possibility of requiring access to the APIs used by pharmacies in accessing drug prices. One commenter stated that drug prices frequently differ from period to period over the course of the year, as well as across pharmacy locations even within the same national pharmacy chain. The commenter recommended that the Departments consider requiring PBMs to provide payers, group plans, and third parties with access to the same price APIs accessed by pharmacies, stating that, with access to an open API, the plan or third party could request the estimated price for the same prescription at multiple retail pharmacies and receive real-time retail pricing based upon the participant's, beneficiary's, or enrollee's plan. The Departments recognize the value in requiring cost-sharing information be made available through an API and will use the comments received to inform future rulemaking.

Commenters requested that the Departments confirm that issuers may provide a link to prescription drug cost tools offered through PBMs or vendors to satisfy the requirement to provide pricing information for prescription drugs. One commenter also urged the Departments to prohibit the internet-based, self-service tool from being used by prescribers' e-prescribing and electronic medical record systems or by plans to steer patients to pharmacies other than a patient's pharmacy of choice, such as those owned wholly or partially by health plans or PBMs.

The Departments agree that plans and issuers who provide participants', beneficiaries', or enrollees' cost-sharing liability estimates and negotiated rates through a standalone tool provided by a PBM or third-party vendor satisfy the requirements under the final rules. The Departments also clarify that if the PBM or other third-party vendor fails to provide full or timely information, then the plan or issuer, not the PBM or third-party vendor, violates these transparency disclosure requirements. Regarding a prohibition on steering patients to certain pharmacies by plans or prescribers, the Departments are not finalizing any prohibitions at this time and will monitor the implementation of these disclosure requirements.

d. Fourth Content Element: Out-of-network allowed amount

The fourth content element is the out-of-network allowed amount for the requested covered item or service. In the proposed rules, the Departments proposed to define "out-of-network allowed amount" to mean the maximum amount a group health plan or health insurance issuer would pay for a covered item or service furnished by an out-of-network provider. Under the proposed rules, plans and issuers would be required to disclose an estimate of cost-sharing liability for a participant, beneficiary, or enrollee. Therefore, the Departments proposed that, when disclosing an estimate of cost-sharing liability for a covered item or service from an out-of-network provider, a plan or issuer would disclose the out-of-network allowed amount and any cost-sharing liability the participant, beneficiary, or enrollee would be responsible for paying. For example, if a plan has established an out-of-network allowed amount of $100 for an item or service from a particular out-of-network provider and the participant, beneficiary, or enrollee is responsible for paying 30 percent of the out-of-network allowed amount ($30), the plan would disclose both the allowed amount ($100) and the individual's cost-sharing liability ($30), indicating that the individual is responsible for 30 percent of the out-of-network allowed amount. Under the proposed rules, this element would only be relevant when a participant, beneficiary, or enrollee requests cost-sharing information for a covered item or service furnished by an out-of-network provider.

In the proposed rules, the Departments explained that the definition of cost-sharing liability does not include amounts charged by out-of-network providers that exceed the out-of-network allowed amount, which participants, beneficiaries, or enrollees must pay (sometimes referred to as balance bills). Therefore, it may be difficult for participants, beneficiaries, or enrollees to determine their likely out-of-pocket costs for covered items and services furnished by an out-of-network provider. The Departments also explained that the statutory language of section 1311(e)(3)(A)(vii) of PPACA and section 2715A of the PHS Act indicates that Congress intended that participants, beneficiaries, enrollees, and other members of the public have access to accurate and timely information regarding cost sharing and payments with respect to any out-of-network coverage. In the Departments' view, requiring plans and issuers to disclose out-of-network allowed amounts and a participant's, beneficiary's, or enrollee's cost-sharing obligation for covered items and services is necessary and appropriate to fulfill this statutory mandate, and would give individuals information necessary to estimate their out-of-pocket costs, assuming they request additional information from an out-of-network provider about how much the provider would charge for a particular item or service.

One commenter encouraged the Departments to eliminate the proposed "maximum amount" standard and to instead incorporate usual, customary, and reasonable (UCR) amounts as the required plan disclosure for out-of-network cost estimates under any final rulemaking. The commenter stated that the "maximum amount" a plan may be willing to pay a given provider for a service is not necessarily predetermined. This commenter stated that while some out-of-network providers and plans may participate in super-regional or national "discount" arrangements through third parties, in many cases payments to out-of-network providers are individually negotiated. Further, while a plan might generally start with payment that is consistent with UCR calculations (with every intention of paying no more than this amount), other circumstances may result in negotiated increases to that reimbursement. As such, prospectively reporting an accurate "maximum amount" is impossible in some cases. Additionally, this commenter stated that because many out-of-network reimbursements, and in particular high-cost claims, are individually negotiated, initial disclosure of a plan's true maximum reimbursement, insofar as this can be calculated or

even estimated in advance, would materially reduce a plan's bargaining power by notifying non-contracted providers in advance of the amount they are likely to secure from a plan if they assert all available leverage in a negotiation. To the extent participant, beneficiary, or enrollee cost-sharing liability is ultimately derived from out-of-network payment amounts, this requirement is likely to increase out-of-pocket costs for consumers when seeking care from out-of-network providers.

Conversely, one commenter stated that while larger, for-profit, national health plans can afford to utilize the UCR, smaller, regional health plans are at a market disadvantage if they are compelled to base allowed amounts on the UCR, rather than negotiating on a case-by-case basis in a constrained market. As a result, some health plans will struggle to determine and provide information about maximum out-of-network allowed amounts—a range of possible "allowed amounts" may be the most information some health plans have available.

The Departments agree with commenters that the UCR may be a more accurate estimate of the amount a plan or issuer will pay an out-of-network provider for covered items or services, if the plan relies on UCR to determine out-of-network rates. However, the Departments acknowledge that basing allowed amounts on the UCR may disadvantage smaller plans. The Departments also acknowledge that a plan or issuer may be able to provide a participant, enrollee, or beneficiary with a more accurate estimate of an out-of-network allowed amount by using calculations based on historical claims data, because the plan or issuer does not have a pre-determined negotiated rate with out-of-network providers. The Departments acknowledge the concern that plans may lose bargaining power by disclosing out-of-network allowed amount to consumers; however, the Departments are of the view that the out-of-network allowed amount is a critical element of price transparency and its disclosure is essential to enabling consumers to estimate their out-of-network costs in advance. To this end, the Departments are modifying this provision to require plans and issuers to disclose the out-of-network allowed amount or any other calculation that provides a more accurate estimate of the amount a plan will pay for the requested covered item or service, such as a UCR. Allowing plans and issuers to provide an amount other than the out-of-network allowed amount could better serve consumers with a more accurate estimate of what a plan or issuer may reimburse an out-of-network provider. The Departments clarify that if a plan or issuer chooses to use another metric that provides a reasonably accurate estimate of what a plan or issuer will pay for a covered item or service from an out-of-network provider, the plan or issuer must still provide a participant, beneficiary, or enrollee with information regarding any cost sharing the participant, beneficiary, or enrollee would be responsible for paying.

Some commenters recommended the Departments not require plans and issuers to provide allowed amount and cost-sharing information for covered services furnished by an out-of-network provider. One commenter stated it is not possible for issuers to include allowed amounts for out-of-network providers because, without a provider contract, issuers do not have the necessary information, including provider names, National Provider Identifier (NPI), address, specialty, or other demographic information to include these providers in a price transparency tool. One commenter stated that providing real-time disclosures of allowed amounts could be challenging to the extent that plans and issuers determine the allowed amount for certain out-of-network items and services based on a percentage of billed charges, as billed charges are unknown by the plan or issuer prior to a claim for health care services.

The Departments acknowledge the challenges plans and issuers may face disclosing this element, but the Departments are of the view that information regarding out-of-network coverage is essential to the goal of price transparency. With regard to plans and issuers lacking the necessary information for providers with whom they do not contract, the Departments are of the view that plans and issuers should know what they are willing to pay for certain items and services, irrespective of provider. The final rules provide flexibility for plans and issuers to provide an estimate of what the plan will pay by allowing plans and issuers to disclose either the out-of-network allowed amount or another amount that would provide a reasonably accurate estimate of what a plan would reimburse an out-of-network provider for a covered item or service. Given that some plans and issuers determine the allowed amount for certain out-of-network items and services based on a percentage of billed charges, the final rules provide that a percentage can be disclosed instead of a dollar amount, if plans and issuers reimburse out-of-network providers a percentage of the billed charges for a covered item or service.

One commenter sought clarification that the tool is meant to provide cost-sharing information for out-of-network providers and not just the allowed amounts.

As discussed earlier in this preamble under the first content element, under the final rules, the plan or issuer is required to disclose both the out-of-network allowed amount, as described earlier in this preamble, and any cost-sharing liability, based on that allowed amount, that the participant, beneficiary, or enrollee would be responsible for paying.

One commenter stated that the Departments should not require Health Maintenance Organizations' (HMOs') out-of-pocket calculators to provide out-of-network data. The commenter noted that the proposed rules limited the tool to covered services, and HMOs generally do not cover benefits provided by out-of-network and, therefore, should not be required to estimate out-of-network costs.

The Departments understand that some plans and issuers may not provide any reimbursement to an out-of-network provider for an otherwise covered item or service. Nonetheless, it is the Departments' understanding that some HMOs reimburse an out-of-network provider for covered items and services in certain circumstances and, therefore, the Departments expect HMOs to provide cost-sharing information with regard to out-of-network coverage. The Departments recognize that in many cases, an HMO's maximum allowed amount for an out-of-network service will be $0. However, the Departments are of the view that it is important for a participant, enrollee, or beneficiary to understand what the plan or issuer will or will not pay for out-of-network costs. Therefore, if the plan or issuer, including

an HMO, does not provide any reimbursement for an item or service provided by an out of network provider, the Departments expect the plan or issuer to disclose $0 as the allowed amount.

e. Fifth Content Element: Items and services content list

The fifth content element is a list of those covered items and services for which cost-sharing information is being disclosed for items or services subject to a bundled payment arrangement. The Departments proposed that this requirement would apply only when a participant, beneficiary, or enrollee requests cost-sharing information for an item or service that is subject to a bundled payment arrangement that includes multiple items or services. The Departments proposed that, in cases in which an individual requests a cost-sharing liability estimate for a covered item or service that is subject to a bundled payment arrangement, plans and issuers would be required to disclose a list of each covered item and service included in the bundled payment arrangement and the individual's cost-sharing liability for those covered items and services as a bundle, but not a cost-sharing liability estimate separately associated with each covered item or service included in the bundle.

While some commenters supported the inclusion of cost-sharing information for bundled payment arrangements, others did not support requiring the disclosure of bundled payment arrangements and the items and services included in the arrangement. These commenters stated disclosure of this information would likely be unhelpful to the participant, beneficiary, or enrollee and might cause confusion. One commenter encouraged the Departments to clarify that disclosure for diagnostic imaging procedures in particular should be presented to consumers in a method that is inclusive of the combined professional and technical rates, or the globally billed rate.

The Departments are of the view that understanding which items and services are included in a bundled payment arrangement will provide helpful information for participants, beneficiaries, and enrollees, so that they understand what items and services are accounted for in calculating their cost-sharing liability. The Departments are of the view that this list is unlikely to cause confusion. Instead, it will reduce confusion by clearly identifying what individual items and services would be covered under their estimated cost-sharing liability. If the plan or issuer reimburses a procedure, such as imaging, at a global rate that includes both professional and technical charges, then that global rate is a rate for a bundled payment arrangement for which the applicable content elements must be disclosed, just as for all other items and services. The final rules adopt the provision that plans and issuers provide a list of items or services for items and services subject to bundled payment arrangements for which a cost-sharing liability estimate is being disclosed, with non-substantive edits for improved readability.

f. Sixth Content Element: Notice of prerequisites to coverage

The sixth content element is a notification, whenever applicable, informing the individual that a specific covered item or service for which the individual requests cost-sharing information may be subject to a prerequisite for coverage. The proposed rules defined the term prerequisite to mean certain requirements relating to medical management techniques for covered items and services that must be satisfied before a plan or issuer will cover the item or service. Specifically, the proposed rules provided that prerequisites include such techniques as concurrent review, prior authorization, and step-therapy or fail-first protocols. In the proposed rules, the Departments intended for the definition of prerequisite to capture medical management techniques that apply to an item or service that require action by the participant, beneficiary, or enrollee before the group health plan or health insurance issuer will cover the item or service. Accordingly, the proposed definition of prerequisite did not include medical necessity determinations generally, or other forms of medical management techniques that do not require action by the participant, beneficiary, or enrollee. While the prerequisites enumerated in the proposed rules were provided as an illustrative list, the Departments solicited comment on whether there are any additional medical management techniques that should be explicitly included as prerequisites in the final rules.

Several commenters supported the inclusion of this element. One commenter stated that helping patients understand any coverage prerequisites prior to care, such as prior authorization, may help to eliminate some of the confusion and unnecessary administrative burden following care. Another stated that requiring a plan to disclose prerequisites in an easily understandable format may help patients complete required protocols and thus would improve adherence.

A few commenters recommended additional disclosures or offered suggestions to strengthen these requirements. One commenter encouraged the Departments to include clinical coverage policies for services that are more specific than general medical necessity criteria. For example, some plans and issuers utilize coverage policies that require specific diagnoses or documented symptoms before an item or service may be covered. The commenter explained that while these policies may not technically require an action by the beneficiary, they are important in determining whether the specific item or service is covered. Another commenter recommended that plans and issuers clearly disclose every utilization control that stands between the participant, beneficiary, or enrollee and a prescription, suggesting that this type of disclosure would help patients meet utilization control standards. Another commenter urged the Departments to strengthen this requirement by requiring plans and issuers to provide a description of the actual required prerequisites. The commenter stated that the proposed regulation requires only notification of the existence of a prerequisite, but not any detail about what the prerequisite is and how it can be satisfied. Two commenters encouraged the Departments to standardize this type of notification language to ensure that all consumers receive a consistent message regarding the provision of health care services.

One commenter requested that the Departments provide that the prerequisites listed in proposed rules (that is, concurrent review, prior authorization, step-therapy,

and fail-first protocols) are an exclusive list. Another commenter stated that prerequisite notification should be limited to simple notifications that prerequisites apply to a service, and communication of specific prerequisites should not be required until a Fast Healthcare Interoperability Resources (FHIR) standard for transmission of this information is established and operationalized.

As discussed in the proposed rules, the Departments intended for the definition of prerequisite to capture medical management techniques that apply to an item or service that require action by the participant, beneficiary, or enrollee before the plan or issuer will cover the item or service. The Departments consider plan or policy provisions that require a diagnosis or documented symptoms before a service or item would be covered to be medical necessity determination requirements that do not require action on behalf of the participant, beneficiary, or enrollee. Therefore, the Departments did not include such terms in the proposed prerequisite requirement. The Departments are finalizing regulation text to reflect that concurrent review, prior authorization, and step-therapy or fail-first protocols are the exhaustive list of prerequisites about which plans and issuers would need to provide notice. Furthermore, while the Departments acknowledge that providing a complete description of prerequisites might be helpful to consumers, the Departments are not of the view that requiring plans or issuers to provide such descriptions is necessary. The Departments determined that requiring a complete description of the prerequisite would create unnecessary complexity and impose significant burdens on plans and issuers regarding information that is already available in plan documents. Additionally, while the Departments recognize the importance of FHIR in the push towards greater interoperability, it is not necessary to delay finalizing these rules until the FHIR standards are finalized as the final rules do not require any APIs to be built nor exposed for public consumption. The final rules adopt this content element requirement, with the modifications discussed in this section.

g. Seventh Content Element: Disclosure notice

The seventh and final content element proposed is a notice that communicates certain information in plain language, including several specific disclosures. First, the Departments proposed that this notice would include a statement that out-of-network providers may bill participants, beneficiaries, or enrollees for the difference between providers' billed charges and the sum of the amount collected from the group health plan or health insurance issuer and the amount collected from the participant, beneficiary, or enrollee in the form of cost-sharing (the difference often referred to as balance billing) and that these estimates do not account for those potential additional amounts. In the proposed rules, the Departments acknowledged that there are numerous state laws that address balance-billing practices such that the notice described in the proposed content element regarding balance bills may be misleading or inaccurate for beneficiaries, participants, or enrollees enrolled in a plan or coverage in certain states. The Departments requested comment on whether any modifications to this content element would be appropriate to allow plans and issuers to accurately advise participants, beneficiaries, or enrollees of their potential exposure to or protection from any balance bills.

Second, the Departments proposed that the notice be required to convey that actual charges for the participant's, beneficiary's, or enrollee's covered items and services may be different from those described in a cost-sharing liability estimate, depending on the actual items and services received at the point of care.

Third, the Departments proposed that the notice be required to include a statement that the estimated cost-sharing liability for a covered item or service is not a guarantee that coverage will be provided for those items and services.

Finally, the Departments proposed that plans and issuers be permitted to include any additional information, including other disclaimers that the plan or issuer determines appropriate, so long as the additional information does not conflict with the information they are required to provide. For example, plans and issuers would have been permitted to include additional language so long as the language could not reasonably be read to disclaim the plan's or issuer's responsibility for providing a participant, beneficiary, or enrollee with accurate cost-sharing information, or plans and issuers could choose to provide a disclaimer that informs consumers who are seeking estimates of cost-sharing liability for out-of-network allowed amounts that they may have to obtain a price estimate from the out-of-network provider in order to fully understand their out-of-pocket cost liability. Plans and issuers would also have been permitted to provide a disclaimer indicating how long the price estimate will be valid, based on the last date of the contract term for the negotiated rate or rates (if multiple providers with different contract terms are involved). The Departments are of the view that this type of disclaimer could provide participants, beneficiaries, and enrollees with a better understanding of how their cost estimate may change over time. The Departments sought comment on whether a specific disclaimer indicating the expiration of the cost estimate should be required. Furthermore, the Departments explained in the proposed rules that plans and issuers may also include disclaimer information regarding prescription drug cost estimates and whether rebates, discounts, and dispensing fees may impact the actual cost to the participant, beneficiary, or enrollee.

The Departments developed model language that plans and issuers could use, but would not be required to use, to satisfy the disclosure notice requirements described above. This model language was proposed contemporaneously with, but separate from, the proposed rules.[115] The Departments sought comment on the proposed model language and any additional information that stakeholders believed should be included in the model notice or any information that should be omitted from the model notice.

The proposed rules clarified that this disclosure notice would be in addition to the information that QHP issuers are

[115] "Transparency in Coverage. Model Notice." United States Department of Labor. Available at: https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/transparency-in-coverage-draft-model-disclosure.pdf.

currently required to publish on their websites pursuant to 45 CFR 156.220(a)(7) regarding cost-sharing and payments with respect to out-of-network coverage. In addition, some portions of this disclosure may overlap with network adequacy disclosure standards under 45 CFR 156.230(e). That section requires QHP issuers to count the cost-sharing paid by an enrollee for an out-of-network essential health benefit (EHB) provided by an out-of-network ancillary provider in an in-network setting toward the enrollee's out-of-pocket limit or provide a notice to the enrollee that additional costs may be incurred for an EHB, including balance billing charges, if applicable.

The Departments requested comment on the proposed notice disclaimers and whether any additional disclaimers would be necessary or beneficial to participants, beneficiaries, and enrollees in learning about their potential cost-sharing liability for covered items and services. For example, the Departments inquired whether the Departments should require a notice that explains that the cost-sharing information provided may not account for claims a participant, beneficiary, or enrollee has submitted that the plan or issuer has not yet processed. The Departments also considered whether to require plans and issuers to provide a participant, beneficiary, or enrollee information regarding non-covered items or services for which the individual requests cost-sharing information. For example, there could be a requirement that a plan or issuer provide a statement, as applicable, indicating that the item or service for which the participants, beneficiaries, and enrollees has requested cost-sharing information is not a covered benefit under the terms of the plan or coverage, and expenses charged for that item or service will not be reimbursed by the plan or coverage.

Several commenters agreed with the proposed disclosure notice requirements. Specifically, many commenters supported the disclosure that estimates may not reflect the amount ultimately charged to the participant, beneficiary, or enrollee. One commenter recommended the disclosure include examples of circumstances under which a participant's, beneficiary's, or enrollee's actual cost-sharing liability may differ from the estimate provided by their plan or issuer (for example, comorbidities or unanticipated complications). The commenter stated that a more comprehensive explanation of how participant, beneficiary, or enrollee characteristics might affect charges for covered items and services would help them better understand their potential exposure to higher cost-sharing amounts. One commenter suggested that the notice include stronger wording to educate the plan participant about the strong likelihood of a surprise amount due that differs greatly from the estimate. One commenter recommended that the notice include information that DIR Fees charged to pharmacies inflate participants', beneficiaries', and enrollees' cost sharing and that plans and issuers may claw back that inflated cost sharing from the pharmacy.

One commenter recommended that plans and issuers be required to disclose additional information to help participants, beneficiaries, and enrollees understand the appropriate point of contact for questions and complaints. This commenter recommended that the final rules require issuers to provide participants, beneficiaries, and enrollees with contact information for their state departments of insurance when covered by insurance that is primarily state-regulated. For group health plans that are not fully insured, the commenter recommended that the plan provide contact information for the appropriate federal regulator.

One commenter requested flexibility with disclaimer language regarding a notice provided in paper form to reflect that the estimate may not be reflective of services received or claims processing, or to direct the participant, beneficiary, or enrollee to call their plan or issuer or use the internet for more up-to-date information. Similarly, one commenter recommended that a timestamp be required for notices provided in paper form to account for potential price changes. Several commenters supported requiring plans and issuers to add to the notice a date on which the estimate will expire, while other commenters did not.

One commenter expressed concern regarding the statement in the preamble to the proposed rules that the required disclosure notice regarding balance-billing information "may be misleading or inaccurate for beneficiaries, participants, or enrollees enrolled in a plan or coverage in certain states," given the multi-state nature of most employer-sponsored plans. Another commenter stated that state regulators should be able to direct issuers to include information in the disclosure that accurately describes the state's balance billing laws, and that any notice provided to consumers in advance of receiving services should have information as to whether the participant, beneficiary, or enrollee is likely to be protected from liability under state or federal balance billing laws. The commenter further stated that some states already have state laws related to disclosure of costs to consumers and the final rules should be clear that this requirement does not preempt these state requirements. Two commenters urged the Departments to make clear that participants, beneficiaries, and enrollees are not protected from out-of-network provider and facility balance billing, except where balance billing would be barred by state law.

The final rules are not intended to preempt state laws regarding balance billing. In the final rules, the Departments have modified this requirement to clarify that the balance billing statement is only required if balance billing is permitted under state law. Plans and issuers have flexibility to use the model notice language or create their own notices with greater specificity regarding their state's laws.

One commenter expressed concern that allowing plans to include a statement that the estimated cost-sharing liability is not a guarantee of coverage negates the intent of the proposed rules, given that consumers who receive a notice from their health plan regarding estimated out-of-pocket costs would naturally assume coverage of those services.

The Departments acknowledge this concern; however, there are many reasons estimated cost-sharing information may not be accurate when items and services are ultimately furnished. For example, it is possible for coverage to end (for example, due to non-payment of premiums) between the time an estimate is provided and an item or service is furnished. Additionally, an estimate may show the cost for an item or service as a treatment for a certain condition, but the item or service may not be covered for the condition that is

ultimately diagnosed at the point of care. Therefore, the final rules adopt the provision as proposed.

Several commenters recommended that the Departments issue guidelines as to what is considered "plain language." The commenters recommended that the Departments provide examples of typical disclosure language compared to its "plain language" equivalent. They further recommended that these examples be tested through various focus groups to ensure consumer comprehension.

The final rules define "plain language" to mean language written and presented in a manner calculated to be understood by the average participant, beneficiary, or enrollee.[116] Determining whether this standard has been satisfied requires taking into account such factors as the level of comprehension and education of typical participants, beneficiaries, or enrollees in the plan or coverage and the complexity of the terms of the plan. Accounting for these factors would require limiting the use of technical jargon and long, complex sentences, so that the information provided will not have the effect of misleading, misinforming, or failing to inform participants, beneficiaries, or enrollees. The Departments are of the view that the final rules and this preamble provide sufficient detail regarding the meaning of plain language.

Some commenters recommended that plans and issuers should disclose whether they count copayment assistance and other third-party payments in the calculation of the beneficiary's deductible and out-of-pocket maximum. The commenter noted that as more plans implement copay accumulators that do not count these payments, issuers should be required to disclose these policies to their beneficiaries.

The Departments are of the view that knowing whether these payments apply to accumulators is germane to price transparency and should be required in the final rules. To that end, the final rules adopt a fifth notice content requirement (codified at 26 CFR 54.9815-2715A2(b)(1)(vii)(D), 29 CFR 2590.715-2715A2(b)(1)(vii)(D), and 45 CFR 147.211(b)(1)(vii)(D)) that plans and issuers must provide a statement disclosing whether copayment assistance and other third-party payments are included in the calculation of the participant's, beneficiary's, or enrollee's deductible and out-of-pocket maximum.

As discussed under the first content element, some items or services may not be subject to cost sharing if they are furnished as preventive items or services, while the same item or service could be subject to cost sharing if it is furnished for non-preventive purposes or provided by an out-of-network provider. Therefore, the final rules adopt an additional notice requirement (codified at 26 CFR 54.9815-2715A2(b)(1)(vii)(E), 29 CFR 2590.715-2715A2(b)(1)(vii)(E), and 45 CFR147.211(b)(1)(vii)(E)) stating that, for an item or service that is a recommended preventive service under section 2713 of the PHS Act where the plan or issuer cannot determine whether the request is for a preventive or non-preventive item or service, the plan or issuer must provide a statement that the item or service may not be subject to cost-sharing if it is billed as a preventive service.

One commenter recommended information be included to help participants, beneficiaries, and enrollees understand the appropriate point of contact for questions and complaints. This commenter recommended issuers provide consumers with contact information for the appropriate regulator—either the State Department of Insurance or the appropriate Federal office.

The Departments appreciate this recommendation, but are declining to finalize this additional requirement because the Departments are of the view that plans and issuers already have avenues in place to address participants', beneficiaries', and enrollees' complaints.

Several commenters recommended that additional notice disclaimers be provided. One commenter suggested that the final rules require a statement that cost-sharing liability estimates may differ from actual costs, depending on changes after claims are processed. Another commenter recommended that the Departments develop model disclaimers stating that quoted amounts for drugs may be time-limited and subject to manufacturer pricing practices. Another commenter recommended the addition of consumer disclaimers indicating that "services subject to the cost estimate may be provided and billed by providers associated with multiple payer contracts which will result in multiple EOBs." Another commenter recommended the Departments permit plans to require participants, beneficiaries, and enrollees to review and acknowledge a disclaimer prior to viewing or searching for any pricing information, which would help ensure that consumers understand that what they are receiving may not be an accurate estimate of their total out-of-pocket costs. Another commenter recommended that the presentation of the out-of-network information make clear that the issuer is unable to provide an estimate for the full cost of the service. The commenter suggested that this disclosure should be presented on the same screen as the maximum allowed amount and the participant, beneficiary, or enrollee's cost liability because it may be unclear that the maximum allowed amount is not the total cost of care. Another commenter requested that the Departments add a requirement that plans or issuers provide participants, beneficiaries, or enrollees with meaningful and simple explanations regarding emergency care, including informing them of the prudent layperson standard.[117] Another commenter that recommended plans and issuers be required to provide explanatory information about the operation of their plans, including glossaries of relevant terms and explanations of insurance plan features and health care services, including in-network and out-of-network costs, limited plan designs, deductibles, telehealth, and additional features in consumer-friendly language.

The Departments decline to adopt these commenters' suggestions for additional notice disclaimers. The Departments are of the view that adopting these additional requirements would add to the burden imposed on plans and issuers without creating corresponding benefits for participants, beneficiaries, or enrollees that would outweigh the burden, and would be unhelpfully prescriptive regarding the

[116] 29 CFR 2520.102-2(a).
[117] 42 CFR 438.114.

information plans and issuers are required to convey to these individuals. Existing plan and issuer resources for this information, such as the uniform glossary required under the Summary of Benefits and Coverage (SBC) final regulation[118] provide consumer-friendly language definitions of insurance terms. Additionally, in response to comment, the Departments are providing flexibility to plans and issuers to design their internet-based tools and disclosures so that they meet the needs of their participants, beneficiaries, and enrollees. However, the Departments encourage plans and issuers to provide additional information at their discretion, if appropriate. The final rules adopt these provisions as proposed, with one correction of a typographical error ("bill" rather than "billed") in 26 CFR 54.9815-2715A2(b)(1)(vii)(A), 29 CFR 2590.715-2715A2(b)(1)(vii)(A), and 45 CFR 147.211(b)(1)(vii)(A) and a clarification that this statement element is only required if balance billing is permitted under state law, with paragraph (b)(1)(vii)(D) re-designated as paragraph (b)(1)(vii)(F), and with new paragraphs (b)(1)(vii)(D) and (E) added, as described earlier in this section of this preamble.

2. Required Methods for Disclosing Information to Participants, Beneficiaries, or Enrollees

Section 1311(e)(3)(C) of PPACA requires that cost-sharing information be made available through an internet website and other means for individuals without access to the internet. Therefore, in the proposed rules, the Departments proposed to require that group health plans and health insurance issuers disclose to participants, beneficiaries, or enrollees the cost-sharing information described earlier in this preamble in two ways: (1) through a self-service tool that meets certain standards and is available on an internet website, and (2) in paper form.

a. First Delivery Method: Internet-based self-service tool

Under the proposed rules, plans and issuers would be required to make available a self-service tool on an internet website for their participants, beneficiaries, or enrollees to use, without a subscription or other fee, to search for cost-sharing information for covered items and services. The tool would be required to allow users to search for cost-sharing information for a covered item or service provided by a specific in-network provider, or by all in-network providers. The tool also would be required to allow users to search for the out-of-network allowed amount for a covered item or service provided by out-of-network providers. The tool would be required to provide users real-time responses that are based on cost-sharing information that is accurate at the time of the request.

Many commenters supported the Departments' proposal to require plans and issuers to make available personalized out-of-pocket cost information for all covered health care items and services through an internet-based self-service tool and urged the Departments to finalize this section of the regulation as proposed. Some commenters recommended the Departments identify a core set of functional requirements that must be included in all price transparency tools. Commenters suggested that these functional requirements should ensure all people enrolled in commercial products have access to the same baseline functionality, while providing enough flexibility for issuers to develop, and iterate on, innovative existing internet-based self-service tools**.** Examples of functional requirements include providing tailored information to participants, beneficiaries, or enrollees on their benefit summary (plan coverage, copayments, deductibles); being able to browse by service category (for example, medical specialty, procedures, drugs, imaging, labs) or diagnosis; or being able to select from an A-Z list of popular searches or episodes of care. One commenter recommended the following functional requirements: (1) provide individuals with their personal health plan details, a digital ID card, deductible and copay information, the ability to download and view claims, and information on provider network status and quality performance; (2) display cost and quality information in clear, user-friendly language to facilitate and inform health care decisions; (3) allow consumers to compare facilities and clinicians based on curated cost estimates, common quality measures, value metrics, and patient ratings; (4) offer personalized out-of-pocket cost estimates for episodes of care, services, and prescriptions, calculated using their specific health plan design before they receive care; (5) comply with all state and federal health care data privacy and security laws, including the Health Insurance Portability and Accountability Act (HIPAA) privacy and security rules and the Health Information Trust (HITRUST) Common Security Framework.

The Departments agree that the self-service tool requirements should ensure all people enrolled in group health plans and health insurance coverage have access to the same baseline functionality, while providing enough flexibility for plans and issuers to develop and iterate on innovative internet-based self-service tools. It is the Departments' intent that the required elements be broad enough to avoid being overly prescriptive for plans and issuers. The Departments agree that certain additional content elements could be beneficial to participants, beneficiaries, and enrollees, including general benefit summary information and quality metrics. However, the primary initial goal of the self-service tool is to provide personalized out-of-pocket cost estimates for episodes of care, services, and prescriptions, and to provide transparency around the pricing elements that determine out-of-pocket costs. Therefore, the Departments are not inclined to require additional elements unrelated to this primary goal at this time. The Departments note that the intent of the final rules is to provide a minimum standard for the disclosure of pricing information to lay a foundation for transparency in coverage and the Departments may consider additional disclosure requirements to build upon the final rules in the future. To that end, the Departments are finalizing the required content elements for the self-service tool as described earlier in this preamble to the final rules. The final rules include a change regarding

[118] 80 FR 34292 (Jun. 16, 2015).

the search function related to out-of-network allowed amounts. Specifically, that element is modified to include the other metrics that a plan or issuer is permitted to use in place of out-of-network allowed amounts, as discussed earlier in this preamble in connection with the fourth content element that must be disclosed to participants, beneficiaries, and enrollees. Additionally, the Departments encourage plans and issuers to add additional elements to their tools according to the needs of the populations they serve.

In order for plans and issuers to provide accurate cost-sharing information, the Departments noted that the participant, beneficiary, or enrollee will have to input certain data elements into the tool. Therefore, under the proposed rules, plans and issuers would be required to make available a tool that allows users to search for cost-sharing information: (1) by billing code (for example, Current Procedural Terminology (CPT) Code 87804) or, (2) by a descriptive term (for example, "rapid flu test"), at the option of the user. The tool also would be required to allow users to input the name of a specific in-network provider in conjunction with a billing code or descriptive term, to produce cost-sharing information, and a cost-sharing liability estimate for a covered item or service provided by that in-network provider. Regarding a request for cost-sharing information for all in-network providers, under the proposed rules, if a plan or issuer utilizes a multi-tiered network, the tool would be required to produce the relevant cost-sharing information for the covered item or service for individual providers within each tier. In the proposed rules, the Departments explained that to the extent that cost-sharing information for a covered item or service under a plan or coverage varies based on factors other than the provider, the tool would also be required to allow users to input sufficient information for the plan or issuer to disclose meaningful cost-sharing information. For example, if the cost-sharing liability estimate for a prescription drug depends on the quantity and dosage of the drug, the tool would be required to allow the user to input a quantity and dosage for the drug for which he or she is seeking cost-sharing information. Similarly, to the extent that the cost-sharing liability estimate varies based on the facility at which an in-network provider furnishes a service (for example, at an outpatient facility versus in a hospital setting), the tool would be required to either permit a user to select a facility, or display in the results cost-sharing liability information for every in-network facility at which the in-network provider furnishes the specified item or service.

It remains the Departments' understanding that a plan or issuer may require certain information, in addition to the identification of a covered item or service, before it can provide an out-of-network allowed amount for a covered item or service, and that plans and issuers may have different ways of establishing an allowed amount for covered items or services from an out-of-network provider (such as by zip code or state). Therefore, under the final rules, plans and issuers are required to allow users to search for the out-of-network allowed amount or other metric as discussed in the fourth content element, for a covered item or service provided by out-of-network providers, by inputting a billing code or descriptive term and the information that is necessary for the plan or issuer to produce the out-of-network allowed amount (such as the zip code for the location of the out-of-network provider).

To the extent a user's search returns multiple results, the tool would be required to have functionalities that would allow users to refine and reorder results (also referred to as sort and filter functionalities) by geographic proximity of providers and the amount of estimated cost-sharing liability. The Departments solicited comment on whether the tool should be required to have additional refining and reordering functionality, including whether it would be helpful or feasible to refine and reorder by provider subspecialty (such as providers who specialize in pediatric psychiatry), or by the quality rating of the provider, if the plan or issuer has available data on provider quality.

Some commenters stated that it is unrealistic to expect consumers to know and understand CPT/Diagnosis Related Group (DRG)/International Classification of Disease-10 (ICD-10) codes and supported the inclusion of descriptive terms. One commenter stated that search capability by standard medical terms will be crucial, and that, to be successful, this type of search system will need to be broad and user-friendly, accommodating an extensive range of consumer inputs and terms. Another commenter recommended the tool also contain a layperson-friendly descriptor of the service to improve understanding. Other commenters lauded the requirement that issuers must use plain language when disclosing price information, which would ensure that patients can understand their expected costs without expert knowledge of insurance language and practices. Some commenters recommended that the Departments follow industry standards and use the CMS-approved National Correct Coding Initiative (CCI) for consumer searches, as well as for any information relating to standards for services that fall into bundled payment arrangements.

One commenter expressed concern that the conversion of thousands of CPT codes into plain English by thousands of health plans, carriers, and TPAs is inefficient, and will result in inconsistencies across the country. For example, there are multiple CPT codes for procedures in a hospital that differ in price depending upon severity, which is often unknown when a procedure is first recommended.

The Departments agree that it is essential for tools to support descriptive terms because consumers may not be familiar with specific procedure codes. The Departments acknowledge the challenge of converting CPT code descriptions to plain language but are of the view that the benefit to consumers outweighs the burden to plans and issuers. The Departments also acknowledge the potential value in requiring the use of CCI standards but are of the view that their use should be voluntary, not required, in order to avoid placing additional burdens on plans and issuers in the absence of clear benefits to consumers. As noted earlier in this preamble, the intent of the final rules is to provide foundational requirements and to allow plans and issuers maximum flexibility to build upon existing tools while providing consumers with reliable cost estimates. The Departments also highlight that the phased implementation of the final rules affords plans and issuers additional time

to address administrative challenges. Accordingly, the final rules adopt this provision as proposed.

One commenter sought clarification that the tool is not required to support searches with multiple parameters at the same time (for example, by provider name and medical code at once). Another commenter suggested that the Departments allow that, as one permissible method, the tool may provide for geographic proximity based on a zip code entered by the participant, beneficiary, or enrollee to enable the consumer to choose whether to search based on the proximity to home or work or some other location.

The self-service tool must allow users to search for cost-sharing information for a covered item or service by inputting the name of a specific in-network provider in conjunction with a billing code or descriptive term, as well as other relevant factors like location of service, facility name, or dosage. For covered items and services provided by out-of-network providers, the tool should provide the out-of-network allowed amount, percentage of billed charges, or other rate that provides a reasonably accurate estimate of the amount a plan or issuer will pay by allowing consumers to input a billing code, descriptive code, or other relevant factor, such as location. In addition, the final rules adopt the requirement that the tool must allow the user to refine and reorder search results based on geographic proximity of in-network providers. The final rules require refining and reordering search results only for in-network providers, as the Departments are of the view that doing so for out-of-network providers would be too burdensome at this stage. The Departments expect that in order for beneficiaries, participants, and enrollees to search for out-of-network providers, they would have to input, at minimum, the billing code or name of an item or service and the geographical location of the provider. In addition, in order to align with revisions to the fourth content element allowing flexibility to provide another rate instead of the out-of-network allowed amount, the final rules have been revised to reflect that participants, beneficiaries, and enrollees can search for the out-of-network allowed amount, the percentage of billed charges, or other rate that provides a reasonably accurate estimate of the amount a plan or issuer will pay for a covered item or service provided by out-of-network providers. This "other rate" is also included in paragraph (b)(2)(i)(B)(2) of the final regulations for consistency.

Regarding refining and reordering features, one commenter suggested that the tools include an ability to display only in-network providers and an ability to filter or sort by provider quality if a quality metric is made available. Three commenters requested that requirements not limit plans to developing provider and service filters that only account for price and geographic proximity: they suggested that the tools should also have functionality filters based on sub-specialty and a measure of value. Another commenter requested that any additional functionality relating to refining and reordering search results be optional for plans and issuers at this time.

One commenter stated that, to enhance the accuracy of the tool and better account for fluctuations in cost-sharing amounts, the Departments should require that it be configured to allow users to self-select health characteristics (for example, chronic conditions, body mass index) in order to further personalize its outputs for consumers. The commenter recommended that payers be given flexibility to dictate the specific health characteristics to be included in their tools based on their participant, beneficiary, and enrollee populations, the types of products that they offer, and other elements that might cause cost-sharing estimates to fluctuate.

The Departments agree that plans and issuers should have flexibility to design tools that can maximize consumer utility and acknowledge that the suggested additions to search functionality could be beneficial to consumers. However, the Departments decline to require the adoption of these suggestions to preserve plans and issuers' discretion regarding the most effective way to provide search results and to avoid being overly burdensome or prescriptive.

The Departments intend that plans and issuers create user-friendly internet-based self-service tools, but the proposed rules did not include a definition for "user-friendly" because there are a variety of ways a tool can be designed to be user-friendly. The Departments wish to preserve plan and issuer flexibility to create tools that are best for their participants, beneficiaries, or enrollees, including by soliciting user feedback and consumer testing in the development of their tools. However, it is the Departments' view that a user-friendly tool would mean a tool that allows intended users to search for the cost-sharing information outlined in the final regulations efficiently and effectively, without unnecessary steps or effort. The Departments are of the view that plans and issuers can look to federal plain language guidelines, ERISA requirements for a Summary Plan Description's method of presentation at 29 CFR 2520.102-2(a), and general industry standards for guidance when designing and developing their internet-based self-service tools.[119]

The Departments also received comments on whether the self-service tool should be made available through an internet website, through a mobile application, or both. The proposed rules provided that the self-service tool be made available on an internet website to be consistent with section 1311(e)(3)(C) of PPACA, which provides that "at a minimum," cost-sharing information be made available through an "internet website." However, the Departments sought feedback on whether this term should be interpreted to include other comparable methods of accessing internet-based content. The statute was enacted in 2010, when the primary mode of accessing internet-based content was through a personal computer. Since that time, ownership of mobile devices with internet access and use of internet-based mobile applications has become much more common. The Departments acknowledged that there may be technical differences between a website and other methods of viewing internet-based content, such as mobile applications. However, as stated in the proposed rules, the Departments also understand that technology

[119] "Federal plain language guidelines." United States General Services Administration. Available at: https://www.plainlanguage.gov/guidelines/.

evolves over time, and it is the Departments' view that Congress did not intend to limit the ability to access information via alternative methods of viewing internet-based content that may be available now or in the future.

The Departments acknowledged that mobile applications may provide benefits beyond those of traditional websites. Due to the portability of mobile devices, a self-service tool that is made available through a mobile application might provide participants, beneficiaries, enrollees, and their health care providers greater opportunities to use the tool together at the point of care to evaluate treatment options based on price. The Departments further acknowledged that mobile applications, as a general matter, may offer greater privacy and security protections than an internet website, accessed either from a mobile device or a computer.[120] Accordingly, the Departments sought comment on whether the final rules should permit the proposed disclosure requirements to be satisfied with a self-service tool that is made available through a website or comparable means of accessing the internet, such as a mobile application, or whether multiple means, such as websites and mobile applications, should be required. The Departments also sought comment on the relative resources required for building an internet website versus an internet-based mobile application.

Some commenters recommended that the Departments finalize the proposed rules with the self-service tool requirement satisfied by being made available through a website or comparable means of accessing the internet. Others believed that plans and issuers should be free to determine whether to offer a mobile app, an internet website, or both. One commenter stated the resources necessary for building and supporting a mobile application are significantly greater than building a website and did not support a proposal to require multiple applications, while other commenters supported a mobile application to enable patients to make cost-effective decisions in the doctor's office. Another commenter recommended both a mobile application and an internet-based platform with fully responsive internet-based design. Two commenters recommended that the requirements not preclude a plan, issuer, or TPA from developing other means of electronic delivery beyond internet disclosure.

The Departments have considered these comments and are of the view that requiring an internet website, as opposed to a comparable means of accessing the internet, such as a mobile application or both, ensures access to a broader set of consumers while limiting the burden on plans and issuers to produce both an internet site and a mobile application. Internet websites can be accessed on mobile devices and people without access to the internet or mobile devices can access tools through resources where internet access may be available, such as a local library. Conversely, if the tool were available only through a mobile device, people without a capable mobile device would not have access to the tool. The final rules, therefore, adopt the requirement that the self-service tool be provided via internet website; however, the Departments encourage plans and issuers to also provide a mobile application version in addition to an internet website.

b. Second Delivery Method: Paper form

Paragraph (e)(3)(C) of section 1311 of PPACA specifies that at a minimum, cost-sharing information be made available to an individual through an internet website and such other means for individuals without access to the internet. Therefore, the proposed rules included a proposal that group health plans and health insurance issuers would have to furnish, at the request of the participant, beneficiary, or enrollee, without a fee, all of the information required to be disclosed under paragraph (b)(1) of the proposed regulations, as outlined earlier in this preamble, in paper form. Further, the proposed rules included a proposal that a plan or issuer would be required to provide the information in accordance with the requirements under paragraph (b)(2)(i) of the proposed regulations and as described earlier in this preamble. That is, the plan or issuer would be required to allow an individual to request cost-sharing information for a discrete covered item or service by billing code or descriptive term, according to the participant's, beneficiary's, or enrollee's request. Further, the plan or issuer would be required to provide cost-sharing information for a covered item or service in connection with an in-network provider or providers, or an out-of-network allowed amount for a covered item or service provided by an out-of-network provider, according to the participant's, beneficiary's, or enrollee's request, permitting the individual to specify the information necessary for the plan or issuer to provide meaningful cost-sharing liability information (such as dosage for a prescription drug or zip code for an out-of-network allowed amount). To the extent the information the individual requests returns more than one result, the individual would also be permitted to request that the plan or issuer refine and reorder the information disclosed by geographic proximity and the amount of the cost-sharing liability estimates.

The Departments proposed that this information would be required to be mailed to a participant, beneficiary, or enrollee via the U.S. Postal Service or other delivery system no later than 2 business days after a participant's, beneficiary's, or enrollee's request is received.

Two commenters supported the Departments' proposal to allow individuals the ability to access their information through electronic means or via paper form, given that many Americans lack access to high-speed internet services. Some commenters opposed the requirement to deliver the cost-sharing information to participants in paper form due to administrative burden, while others recommend limiting the requirements. Several recommended the timeframe to respond be expanded, including a range of 5 days to 10 days. One commenter requested that the compliance time for producing paper copies of personalized information be consistent with current federal requirements for furnishing paper copies of the

[120] Kassner, M. "Apps vs. mobile websites: Which option offers users more privacy?" Tech Republic. September 30, 2016. Available at https://www.techrepublic.com/article/apps-vs-mobile-websites-which-option-offers-users-more-privacy/; *see also* Colburn, K. "Is using a banking app safer for managing your account online?" AZcentral. September 17, 2018. Available at https://www.azcentral.com/story/money/business/tech/2018/09/17/online-banking-app-safety-security-smartphone-tech-tips/1212736002/; see also Ogata, M., et al. "Vetting the Security of Mobile Applications." National Institute of Standards and Technology, United States Department of Commerce. April 2019. Available at: https://doi.org/10.6028/NIST.SP.800-163r1.

SBC, Summary Plan Description, or Consolidated Omnibus Budget Reconciliation Act (COBRA) notices. Other commenters expressed concern about volume, given that a participant, beneficiary, or enrollee could request cost estimates for all in-network providers of a given service, which could be tens of thousands of providers, resulting in thousands of pages of results. Some recommended a reasonable limit to the volume of information that would be provided in response to any single request for a covered item or service—for, example, no more than 20 or 25 providers per request.

Several commenters recommended that the Departments reconsider mandating paper responses "without a fee." While these commenters did not support charging participants, beneficiaries, or enrollees for access to cost-sharing information in general, they asserted that it is unreasonable to expect health plans to provide what could easily be boxes worth of information in response to multiple requests per enrollee.

Nothing in the proposed rules would have prohibited a plan or issuer from providing participants, beneficiaries, or enrollees with the option to request disclosure of the information required under paragraph (b)(1) of the proposed regulations through other methods (such as, over the phone, through face-to-face encounters, by facsimile, or by email). The Departments requested comment on these proposed disclosure methods, including whether additional methods of providing information should be required, rather than permitted. The Departments were particularly interested in feedback on whether plans and issuers should be required to provide the information over the phone, or by email, at the request of a participant, beneficiary, or enrollee.

Several commenters requested alternatives to the paper disclosure, particularly a phone option. One commenter recommended the final rules require that plans or issuers set up a designated toll-free number that participants, beneficiaries, or enrollees can call to receive pricing information, in addition to offering that as an option on their main consumer information phone line. Two commenters urged the Departments to consider making the second form of disclosure one of the plan or issuer's choice (that is, paper or phone service). Conversely, one commenter stated that the volume and complexity of information that a given request could produce would preclude providing this information over the phone or in-person. Another commenter recommended the alternative format to include telephone, in-person, or fax. One commenter recommended emailing digital versions of the paper requests to a participant's, beneficiary's, or enrollee's inbox at the participant's, beneficiary's, or enrollee's request, and another requested that if results were emailed, the same information should not also need to be provided via paper form.

The Departments acknowledge commenters' concerns that the volume of paper requests could be unwieldy. To that end, the final rules adopt the requirement that cost-sharing information be provided in paper form, but a plan or issuer may limit any results for a paper request to 20 providers per request, as suggested by some commenters. The Departments are of the view that the commenters' suggestion of limiting paper request to 20 providers per request is a reasonable approach to balancing the burdens on plans and issuers with the benefits of providing consumers with enough information to be able to compare cost and provider options. The final rules provide an additional flexibility that, to the extent participants, beneficiaries, or enrollees request disclosure by another means (for example, by phone or e-mail), plans and issuers may provide the disclosure through the means requested by the participant, beneficiary, or enrollee, provided the participant, beneficiary, or enrollee agrees that disclosure through such means is sufficient to satisfy the request and the request is fulfilled at least as rapidly as required for the paper method. The Departments further acknowledge that requiring plans and issuers to set up a designated toll-free number for pricing information could be beneficial to participants, beneficiaries, and enrollees, but are not requiring this step given the Departments' view that its burden outweighs its benefit in light of the other available disclosure methods, including the flexibility to provide this information via the preferred disclosure method of the participant, beneficiary, or enrollee.

3. Special Rule to Prevent Unnecessary Duplication

a. Insured Group Health Plans

The proposed rules included a special rule to streamline the provision of the required disclosures and to avoid unnecessary duplication of the disclosures with respect to group health insurance coverage. The Departments are finalizing this special rule, which provides that, to the extent coverage under a plan consists of fully-insured group health insurance coverage, the plan satisfies the requirements of the final rules if the plan requires the issuer offering the coverage to provide the information pursuant to a written agreement between the plan and issuer. For example, if a plan and an issuer enter into a written agreement under which the issuer agrees to provide the information required under the final rules, and the issuer fails to provide full or timely information, then the issuer, but not the plan, has violated the transparency disclosure requirements.[121]

Many commenters requested that the Departments extend the special rule to self-insured group health plans that are administered by an administrative service organization or other TPA. These commenters stated that self-insured plan sponsors that contract in good faith with their TPAs to comply with the reporting requirements should be held harmless with respect to compliance obligations and liability under this regulation because in many instances a provider network is merely rented from a TPA, necessary information may not be held by the plan itself, and because liability could be contractually assigned to the TPA.

Section 2715A of the PHS Act provides the authority for the Departments to require this information from plans and issuers, but not TPAs. Therefore, it is ultimately the responsibility of the plan or

[121] Under section 4980D(d)(1) of the Code, the excise tax for group health plans failing to satisfy the final rules is not imposed on a small employer (generally fewer than 50 employees) which provides health insurance coverage solely through a contract with an issuer on any failure which is solely because of the health insurance coverage offered by the issuer.

issuer to provide the information required by the final rules. Nonetheless, the Departments note that nothing in the final rules prevents a self-insured plan from contracting with another party to provide the required disclosure, including, to the extent permitted under other federal or state law, entering into an agreement for the other party to indemnify the plan in the event the other party fails to make the full or timely disclosure required by the final rules. However, the plan must monitor the other party to ensure that the entity is providing the required disclosure. Moreover, the Departments are of the view that the special rules providing certain safe harbors for actions taken in good faith as further described later in this preamble provide adequate protections for self-insured plans. The final rules also include the addition of the phrase "insured group health plans" to clarify that this special rule applies to insured group plans.

b. Other contractual arrangements

The Departments also received requests for clarification about the responsibility of employer plan sponsors that offer benefits under a level-funded arrangement. In general, under a level-funded arrangement, a plan sponsor self-insures expected claims and purchases stop-loss insurance for claims that exceed a specified threshold. Group health plans that are offered through a level-funded arrangement are subject to the final rules. Just like self-insured plans that are not level-funded, nothing in the final rules prevents a level-funded plan from contracting with another party to provide the required disclosures, but the level-funded plan remains liable for compliance with the final rules, and must monitor the other party to ensure that the entity is providing the required disclosure.

In several of the comments that addressed the special rule to prevent unnecessary duplication, commenters requested that the Departments permit plans and issuers to fulfill pricing disclosure requirements for prescription drugs through a third-party tool, such as a PBM tool. The Departments agree that this approach is permissible under the final rules. The Departments recognize that self-insured plans may rely on written agreements with other parties, such as PBMs, to obtain the necessary data to comply with the disclosure requirements. A plan or health insurance issuer may satisfy the requirements for prescription drug items and services under paragraph (b) by entering into a written agreement under which another party (such as a PBM or other third-party) provides the information required by paragraph (b) related to prescription drugs in compliance with this section. Nonetheless, if a plan or issuer chooses to enter into such an agreement and the party with which it contracts fails to provide the information in compliance with the final rules, the plan or issuer may be held responsible for violating the transparency disclosure requirements of the final rules for the same reasons explained above in connection with self-insured plans entering into agreements with TPAs.

c. Application to account-based arrangements

Another commenter sought clarification about the responsibility of employer plan sponsors that offer the following types of coverage to employees: (1) individual coverage health reimbursement arrangements (HRAs); (2) qualified small employer HRAs (QSEHRAs); and (3) flexible spending arrangements (FSAs) that are not fully integrated with group major medical coverage, stating that these types of plans were not explicitly addressed in the exemptions and the anti-duplication provisions outlined in the proposed rules.

The final rules do not apply to account-based group health plans, such as HRAs, including individual coverage HRAs, or health FSAs. QSEHRAs are not group health plans and are, thus, not subject to the requirements of section 2715A of the PHS Act.[122] Therefore, these types of arrangements are not required to comply with the final rules.

4. Privacy, Security, and Accessibility

The requirements for group health plans and health insurance issuers to provide cost-sharing liability estimates and related cost-sharing information will operate in tandem with existing state and federal laws governing the privacy, security, and accessibility of the information that will be disclosed under these disclosure requirements. For example, the Departments are aware that the content to be disclosed by plans and issuers may be subject to the privacy, security, and breach notification rules under HIPAA or similar state laws. Nothing in the final rules is intended to alter or otherwise affect plans', issuers', and other entities' data privacy and security responsibilities under the HIPAA rules or other applicable state or federal laws.

The Departments also expect that plans and issuers will follow applicable state and federal laws regarding persons who may or must be allowed to access and receive the information that is required to be disclosed under the final rules. The final rules refer to such persons as "authorized representatives" and do not establish any new class of persons or entities who are authorized to access the information specified by the final rules.

One commenter expressed concerns about potential privacy violations related to implementation and compliance with the proposed measure. This commenter stated that all entities need to be made aware of their existing privacy and data-security responsibilities and that states and federal regulators need to be diligent about compliance and enforcement. This commenter further stated it is important to note that employers, TPAs, and carriers may incur increased costs related to complying with the proposed rules regarding potential data breaches, increased liability, and cyber-coverage costs that could impact plan premiums.

The Departments agree that it is important that entities subject to the final rules be aware of their privacy and data-security responsibilities. Accordingly, the Departments are finalizing, as proposed, a provision that reminds plans and issuers of their duty to comply with requirements under other applicable state or federal laws, including requirements governing the accessibility, privacy, or security of information, or those governing the ability of properly authorized representatives to

[122] Section 9831(d)(1) of the Code; section 733(a)(1) of ERISA; and section 2791(a)(1) of the PHS Act.

access participant, beneficiary, or enrollee information held by plans and issuers.

The Departments further appreciate the concern that employers, TPAs, and issuers may incur cybersecurity costs related to providing an online tool that provides some access to participant, beneficiary, and enrollee protected health information (PHI). However, given the Departments' understanding that as many as 94.4 percent of surveyed plans and issuers already maintain and operate an internet-based self-service tool,[123] the Departments anticipate any additional costs associated with cybersecurity will not be substantial.[124] The Departments have otherwise evaluated the burden of operating an internet-based self-service tool in section VI, later in this preamble.

One commenter expressed concern that certain requests for cost-sharing information could include items and services that may reveal particularly sensitive health information (for example, information related to substance abuse, mental health, or HIV). This commenter recommended the Departments provide carve-outs so that plans and issuers are not required to disclose such information through unsecured methods of communication (for example, email or phone). Alternatively, they recommended that the Departments provide more clarity or examples of when plans and issuers are not required to disclose certain information to comply with HIPAA and other federal and state privacy laws.

The Departments remind stakeholders that current privacy and security requirements applicable under HIPAA rules and other applicable federal requirements continue to apply under these rules. As noted earlier in this section of the preamble, the final rules are not intended to alter or otherwise affect plans', issuers', or other entities' responsibilities under HIPAA or other applicable federal privacy laws. Furthermore, to the extent that state laws are more stringent regarding the disclosure of information subject to the final rules, plans and issuers are required to comply with the relevant state laws. The Departments acknowledge that there have been several recent security breaches affecting plans, issuers, and third-party vendors that may have compromised the PII and PHI of participants, beneficiaries, and enrollees. As acknowledged elsewhere in this preamble, privacy and security are important to the Departments and, while outside the scope of this rule, these are issues the Departments will continue to monitor. In light of existing risks and new risks that may arise as a result of increased innovation in the health care space, the Departments encourage plans and issuers to continue to educate their participants, beneficiaries, and enrollees about these risks and about ways to minimize or prevent unintended usage or sharing of their health data and encourage consumers to pay close attention to any new internet-based tools or applications they may choose to use.

C. *Requirements for Public Disclosure of In-Network Rates, Historical Allowed Amount Data, and Prescription Drug Pricing Information for Covered Items and Services from In- and Out-of-Network Providers*

As explained earlier in this preamble and in the proposed rules, the Departments proposed to exercise specific authority under section 1311(e)(3)(A)(vii) and (ix) of PPACA (as applied to group health plans and health insurance issuers in the individual and group markets through section 2715A of the PHS Act), which requires plans and issuers to publicly disclose information on cost-sharing and payments with respect to any out-of-network coverage and any other information the Secretary of HHS determines to be appropriate to enhance transparency in health coverage. Consistent with this authority, the Departments proposed for plans and issuers to make public negotiated rates with in-network providers and data outlining the different amounts a plan or issuer has paid for covered items or services, including prescription drugs, furnished by out-of-network providers. The Departments proposed to require plans and issuers to make this information available in machine-readable files that would include information regarding negotiated rates with in-network providers, allowed amounts for all covered items or services furnished by particular out-of-network providers, and other relevant information in accordance with specific method and format requirements. The Departments proposed to require plans and issuers to update this information on a monthly basis to ensure it remains accurate. The Departments are finalizing these policies and requirements with modifications to clarify the proposed requirements and underlying policies, and to respond to commenter suggestions and concerns.

The preamble to the proposed rules outlined several reasons why the public disclosure of negotiated rates and historical out-of-network allowed amounts is both appropriate and necessary for transparency in coverage. First, the Departments asserted that the public availability of negotiated rates and historical out-of-network allowed amounts would empower the nation's 26.1 million uninsured consumers to make more informed health care decisions.[125] Uninsured consumers generally must pay a provider's full charges for health care items and services. Though negotiated rates will not apply to the uninsured, it will offer a baseline when negotiating with providers. Pricing information is critical to their ability to evaluate their service options and control their health care spending. Uninsured consumers could also use publicly available pricing information to find which providers offer the lowest price, depending on the consumer's personal needs and priorities. The Departments noted in the preamble to the proposed rules that provider lists of standard charges often do not reflect the true cost of particular items and services.[126] Again, although a provider's negotiated

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[124] Sharma A., Manning, R., and Mozenter, Z. "Estimating the Burden of the Proposed Transparency in Coverage Rule." Bates White Economic Consulting. January 27, 2020. Available at: https://www.bateswhite.com/newsroom-insight-Transparency-in-Coverage-Rule.html.

[125] Income, Poverty and Health Insurance Coverage in the United States: 2019." United States Census Bureau. September 15, 2020. Available at: https://www.census.gov/newsroom/press-releases/2020/income-poverty.html.

[126] Arora, V., Moriates, C., and Shah, N. "The Challenge of Understanding Health Care Costs and Charges." 17 AMA J. Ethics 1046 (2015). Available at: https://journalofethics.ama-assn.org/article/challenge-understanding-health-care-costs-and-charges/2015-11.

rates with plans and issuers do not necessarily reflect the prices providers charge to uninsured patients, uninsured consumers could use this information to gain an understanding of the payment amounts a particular provider accepts for a service. Uninsured patients or participants, beneficiaries, or enrollees seeking care from an out-of-network provider also may use this data to negotiate a price prior to receiving an item or service or negotiate down a bill after receiving a service.[127]

Second, the Departments stated in the proposed rules that information regarding negotiated rates and historical out-of-network allowed amounts is critical for any consumer, insured, or uninsured, who wishes to evaluate available options for group or individual market coverage. Specifically, negotiated rate information for different plans or coverage and their in-network providers is key to consumers' ability to effectively shop for coverage that best meets their needs at prices they can afford, whether the consumer wishes to purchase new coverage or change existing coverage. Publicly-available negotiated rate data will assist all consumers in choosing the coverage that best meets their needs in terms of deductible requirements, coinsurance requirements, and out-of-pocket limits—all factors frequently determined by plan's or issuer's in-network rates, including negotiated rates, or out-of-network allowed amounts. This information, added to plan premium information and benefit design (for example coinsurance percentages), will give consumers an understanding of how affordable a particular coverage option will be.

In the preamble to the proposed rules, the Departments noted that publicly available historical allowed amount data for covered items and services provided by out-of-network providers would enable consumers who require specialized services to find the best coverage for their circumstances. For instance, plans and issuers often place limitations on benefits for specialized services, which causes many specialists to reject insurance; this can make it difficult, if not impossible, for consumers in need of certain services to find in-network providers in their area who are accepting new patients or who have sufficient availability or expertise to meet their needs. The Departments understand, for example, that many speech therapists and pathologists do not accept insurance because of the limitations plans and issuers place on coverage for their services, such as annual visit limits on speech therapy services. Accordingly, consumers who have a need for such specialized services may base their coverage choices primarily, if not solely, on a plan's or issuer's out-of-network benefits. Historical data outlining different amounts paid to out-of-network providers will enable consumers who rely on out-of-network providers to ascertain potential out-of-network benefits among different plans and issuers.

Third, the Departments stated in the preamble to the proposed rules that public disclosure of pricing information is necessary to enable consumers to use and understand price transparency data in a manner that will increase competition, potentially reduce disparities in health care prices, and potentially lower health care costs. One of the recognized impediments to increased competition for health care items and services is the widespread lack of knowledge many consumers have regarding health care pricing. In the preamble to the proposed rules, the Departments noted that many consumers do not fully comprehend the basics of health coverage, much less the more complex facets of the health care system that can affect an individual's out-of-pocket cost for items and services, including: its specialized billing codes and payment processes; the various specialized terms used in plan and coverage contracts and related documents (such as copayment and coinsurance); and the various billing and payment structures plans and issuers use to compensate providers and assign cost-sharing liability to individuals (for example, bundled payment arrangements).[128] Pricing information is necessary to spur innovation that will help educate consumers on how to get the most value out of their plan or coverage. Making the required pricing information public could facilitate and incentivize the design, development, and offering of internet-based self-service tools and support services that are necessary to address the general inability of consumers to use or otherwise understand the available health care pricing information.

In developing the proposed rules, the Departments considered that, due to the complexity of the health care system and the data that drives plan and issuer payments for health care items and services, such raw data is likely to be difficult for the average consumer to understand and effectively use. As a result, the Departments determined that proposing to make public negotiated rates with in-network providers and historical payment data outlining out-of-network allowed amounts would be appropriate because it would encourage innovation that could ultimately help consumers understand and effectively use price transparency information.

The Departments stated that the proposed requirement to make pricing information publicly available could allow health care software application developers and other innovators to compile, consolidate, and present this information to consumers in a manner that allows consumers to consider price as a factor when making meaningful comparisons between different coverage options and providers.[129] For instance, third-party developers could develop mobile applications that operate as look-up tools and permit comparison of prices for specific services across plans. The tools could also allow consumers to access their medical records or other information about their health care utilization and create estimates based upon patient-specific information. Ulti-

[127] "How to Research Health Care Prices." Wall Street Journal. Dec. 4, 2009. Available at: https://guides.wsj.com/health/health-costs/how-to-research-health-care-prices/ ("Researching health-care pricing online can also help after you've already had a medical procedure, if you want to dispute a bill, negotiate it down, or figure out if you've been overcharged.").

[128] Satter, M. "Survey: Most workers don't understand health insurance." BenefitsPRO. September 30, 2016. Available at: https://www.benefitspro.com/2016/09/30/survey-most-workers-dont-understand-health-insuran/?slreturn=20190803010341 (a UnitedHealthcare Consumer Sentiment Survey found that even though 32 percent of respondents were using websites and mobile apps to comparison shop for health care, only 7 percent had a full understanding of all four basic insurance concepts: plan premium, deductible, coinsurance, and out-of-pocket maximum; although 60 percent of respondents were able to successfully define plan premium and deductible, respondents were not as successful in defining out-of-pocket maximum (36 percent) and coinsurance (32 percent)).

[129] The Departments recognize that implementation of the API discussed in section III, Request for Information, could go even further toward the goal of empowering application developers and other innovators to support price transparency in the health care market.

mately, the Departments are of the view that improved access and usability of this information has the potential to increase health insurance literacy, consumerism, and competition, resulting in more reasonable costs for health care items and services.

Fourth, in the proposed rules the Departments noted that, along with consumers, sponsors of self-insured and fully-insured group health plans are also disadvantaged by the lack of price transparency.[130] Absent action taken such as through the final rules, health care cost trends are expected to continue to outpace inflation, with employer-sponsored large group plans' annual per employee costs expected to increase between 5.5 to 9.0 percent over the next decade.[131] Without information related to what other plans or issuers are actually paying for particular items and services, employer plans currently lack the pricing information necessary to shop or effectively negotiate for the best coverage for their participants and beneficiaries. In the proposed rules, the Departments stated that public availability of pricing information is appropriate to empower plans to make meaningful comparisons between offers from issuers and evaluate the prices offered by providers who wish to be included in their pool of in-network providers. The Departments noted that the pricing information would also assist employer plans that contract with TPAs or issuers to provide a network of physicians. That information would provide valuable data an employer plan could use to assess the reasonableness of network access prices offered by TPAs and issuers by evaluating the specific price providers in a TPA's or issuer's network are accepting for their services.

Armed with transparency data, employers could also use their leverage to negotiate for lower prices for their participants and beneficiaries and, potentially, if enough employers take action, it could help lower health care prices.[132] For instance, employers could employ network and benefit design tools to move participants and beneficiaries toward lower-priced providers and shift from less favorable provider contracting models (such as a discounted-charge contact, which can be vulnerable to list-price inflation) to more favorable, alternative value-based contracting models (such as reference-based pricing and bundled payment arrangements).[133] As stated elsewhere in this preamble, based on 2019 Census data, there are 183 million Americans enrolled in employer-sponsored health coverage through a household member's employer at some point during the year.[134] Based on estimates of the United States population in 2019, this would mean that more than 56 percent of the nation's insured population has employer-sponsored coverage. Therefore, the ability of employer plans to effectively negotiate pricing for coverage and services could be a boon to competition in the health care market.

Fifth, the Departments stated in the proposed rules that public disclosure of price transparency information is also appropriate because it could assist health care regulators in carrying out their duties to oversee issuers in their states, as well as in designing and maintaining sustainable health care programs. Regulators may be able to independently access, aggregate, and analyze the data to support oversight of plans and issuers. For example, because the machine-readable files must be updated regularly, regulators could use the pricing information to identify trends in rates of items and services over time or identify potentially collusive practices or substantial price variations within a geographic area that may be in need of additional monitoring or future regulatory action. It may also become possible for regulators to use the pricing information related to items and services to assist in better understanding and monitoring premium rate fluctuations and increases in their respective markets; further allowing them to assess whether the trend rates issuers use in their rate filings are reasonable in order to assess whether proposed rates should be approved. Because the in-network applicable rate data will be reasonably current, regulators may be able to address potential concerns more quickly than at present.

Local, state, and federal agencies responsible for implementing health care programs that rely on issuers to provide access to care would be privy to actual pricing information that could inform their price negotiations with issuers. Insights gained from research using the pricing information could support regulators in their oversight of plans and issuers and could also help identify new ideas for market reforms to enhance the performance and efficiency of health insurance markets.

The public availability of health care pricing information offers researchers the ability to better understand the impact of specific plan, issuer, and provider characteristics on negotiated rates and out-of-network payments, evaluate and supplement existing models and predictions, and formulate new policies and regulatory improvements to improve competition and lower health care spending. Researchers have already utilized localized and state-wide data to review trends in issuer market share, issuer location, and covered services and their corollary effects on consumer pricing and experience in the market.[135] They have also examined these similar effects on consumers by provider market shares, structures, and offered similar data. Expanding the availability of this data could allow for the expansion and validation of these and other models and

[130] Whaley, C., et al. "Nationwide Evaluation of Health Care Prices Paid by Private Health Plans: Findings from Round 3 of an Employer-Led Transparency Initiative." RAND Corporation. 2020. Available at: https://www.rand.org/pubs/research_reports/RR4394.html.

[131] Congressional Budget Office, "The Budget and Economic Outlook: 2019 to 2029." Congress of the United States Congressional Budget Office. January 2019. Available at: https://www.cbo.gov/system/files/2019-03/54918-Outlook-3.pdf; *see also* "Medical cost trend: Behind the numbers 2020." PwC Health Research Institute. June 2019. Available at: https://heatinformatics.com/sites/default/files/images-videosFileContent/pwc-hri-behind-the-numbers-2020.pdf.

[132] Whaley, C., et al. "Nationwide Evaluation of Health Care Prices Paid by Private Health Plans: Findings from Round 3 of an Employer-Led Transparency Initiative." RAND Corporation. 2020. Available at: https://www.rand.org/pubs/research_reports/RR4394.html.

[133] *Id.*

[134] "Income, Poverty and Health Insurance Coverage in the United States: 2019." United States Census Bureau. September 15, 2020. Available at: https://www.census.gov/newsroom/press-releases/2020/income-poverty.html.

[135] *See* Brown, Z. Y. "Equilibrium Effects of Health Care Price Information." The Review of Economics and Statistics. Volume. 101. No. 4. September 30, 2019. Available at: https://www.mitpressjournals.org/doi/full/10.1162/rest_a_00765; *see also* Wu, S. et al "Price Transparency For MRIs Increased Use Of Less Costly Providers And Triggered Provider Competition." Health Affairs. August 2014. Available at: https://www.healthaffairs.org/doi/10.1377/hlthaff.2014.0168.

hypotheses. With larger and more complete datasets, researchers could refine their policy and regulatory suggestions regarding payment and delivery models, including those that are most likely to mitigate upwards pricing pressure from issuer, provider, consumer, and geographic factors. The release of this data could also supplement ongoing efforts to help control health care costs.

The Departments acknowledge that these stakeholders, notably researchers, may have access to some pricing data through existing sources, such as the Health Care Cost Institute (HCCI) and databases established through state health care price transparency efforts. However, it is the Departments' understanding that these health care pricing datasets are often costly to purchase, only contain older, historical data, and generally only include de-identified plan data for a limited number of plans and issuers who voluntarily participate in the data collection.[136]

By contrast, the pricing information required through the final rules would generally be current data for all plans and issuers and will be available to the public free of charge. This data, where it is related to in-network coverage, can also be tied back to specific plans and issuers and the geographic regions in which they provide plans or coverage. With access to the pricing data required through the final rules, researchers may be able to design new studies that develop novel insights into the health insurance markets. Stakeholders, including employers, may be able to gain insights, inform oversight efforts, negotiate improved terms for items and services, or make improvements to insurance products, such as plans and issuers moving toward value-based plan designs or broadening or narrowing networks based on customer shopping habits. The pricing information could also support market innovation and improvements by plans and issuers. For example, researchers and industry experts could use pricing information to establish baseline data to assist in identifying, designing, and testing new or existing health care delivery and coverage models.

While all of these stakeholders stand to benefit from access to the pricing information required through the final rules, the Departments continue to be of the view that the ultimate beneficiaries of access to pricing information are consumers. Indeed, public access to health care pricing information could lead to more targeted oversight, better regulations, market reforms to ensure healthy competition, improved benefit designs, and more consumer-friendly price negotiations.

The Departments expressed the view that effective downward pressure on health care pricing cannot be fully achieved without public disclosure of pricing information. Standard economic theory holds that markets work best when there is price competition.[137] When consumers shop for services and items based on price, providers and suppliers typically compete to lower prices and improve quality.[138] Based on this understanding of standard economic principles and past experience, the Departments are persuaded that innovators and other entities in the health care market will be incentivized to innovate in the price transparency and health care consumerism space once access to pricing information that allows for meaningful evaluation of different options for delivering health care items or services, coverage options, and provider options becomes available.

1. Information Required to be Disclosed to the Public.

The Departments are finalizing requirements, under 26 CFR 54.9815-2715A3(b), 29 CFR 2590.715-2715A3(b), and 45 CFR 147.212(b), for plans and issuers to make public applicable rates, including negotiated rates, with in-network providers; data outlining the different billed charges and allowed amounts a plan or issuer has paid for covered items or services, including prescription drugs, furnished by out-of-network providers; and negotiated rates and historical net prices for prescription drugs furnished by in-network providers.[139] The Departments are of the view that public availability of in-network applicable rates, including negotiated rates, billed charges and historical out-of-network allowed amounts, and in-network negotiated rates and historical net prices for prescription drugs is appropriate and necessary to provide comprehensive effective transparency in coverage, which may, in turn, empower consumers to make informed decisions about their health care, spur competition in health care markets, and slow or potentially reverse the rising cost of health care items and services.

The vast majority of the commenters agreed with the Departments' objectives of price transparency under the proposed rule. Many commenters offered general support (in whole or in part) of the proposed requirements for public disclosure of in-network negotiated rates and out-of-network allowed amounts. One commenter supported the public disclosure of out-of-network allowed amounts but expressed concerns about disclosure of in-network negotiated rates.

Disclosure of Pricing Information Generally

Some commenters who offered support stated that the requirements will help create more efficient and value-based health care systems by, for example, encouraging plans and issuers to adopt innovative benefit designs that push patients toward lower-cost care. Another commenter who offered support stated that requiring plans and issuers to share publicly the negotiated rates for in-network providers and allowed

[136] For example, HCCI is expected to release their "2.0" dataset in December 2020. The "2.0" dataset includes over one billion commercial claims and 60 million covered lives per year from Aetna, Humana, Kaiser Permanente, and the Blue Cross Blue Shield (BCBS) companies from 2012 through 2018. The data is nearly three years old and will cost $45,000 annually on a per-project basis and does not include other "standard add-ons," such as data mergers. Institutional membership prices will be customized for each organization. Taken from "Power Up Your Analytics on the Privately Insured." Health Care Cost Institute. Available at: https://healthcostinstitute.org/images/pdfs/Health_Care_Cost_Institute_-_Power_Up_Your_Analytics.pdf. In addition to the HCCI dataset, BCBS companies also sell their data through their analytics and consulting platform, Blue Health Intelligence, with 20.3 billion claims from 203 unique member organizations. The access price is not listed on their website. More information is available at: https://www.bluehealthintelligence.com/.

[137] "FTC Fact Sheet: How Competition Works." United States, Federal Trade Commission. Available at: https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_How-Comp-Works.pdf.

[138] Kessler, D., and McClellan, M. "Is Hospital Competition Socially Wasteful?" 115 Q. J. of Econ. 577. May 2, 2000. Available at: https://www.nber.org/papers/w7266.

[139] As discussed in section II.B of this preamble, the Departments are also finalizing requirements under 26 CFR 54.9815-2715A2(b)(1)(iii) – (iv), 29 CFR 2590.715-2715A2(b)(1)(iii) – (iv), and 45 CFR 147.211(b)(1)(iii) – (iv) that plans and issuers include negotiated rates and out-of-network allowed amounts within the internet-based self-service tool.

amounts for out-of-network providers has the potential to increase competition among issuers. One commenter stated that public disclosure of negotiated rates is needed to address the provider consolidation that is driving up health care costs and leading to more favorable reimbursements to large hospitals with bargaining power. Another commenter recommended the Departments reject arguments against transparency that payment data should be protected as proprietary, and adopt a presumption in favor of transparency.

The Departments received comments from state and local government regulators who were supportive of the rules generally and provided suggestions for improving the proposals. Regulators recognized that greater transparency holds promise in improving pricing of health care items and services in ways that improve consumer comprehension and policymakers' ability to manage the health care system. One local government commenter supported the goal of price transparency, but voiced concern that the proposed rules might unintentionally drive up the cost of health care. Individual consumers who submitted comments offered general support and emphasized the importance of obtaining pricing information in advance of receiving health care for their personal health care decision-making. Some individual commenters noted that consumers seek the price of a product or service in every other sector prior to making a spending decision and should be able to do so when purchasing health care. Other individual commenters stated their support for policies that will help consumers choose whether to seek care from an in-network or out-of-network provider.

Many other commenters, comprised largely of health insurance issuers and health care providers, offered support for the objective of price transparency, but did not support the requirements for public disclosure of in-network provider rates and out-of-network allowed amounts, expressing particular concerns about the in-network provider rate disclosure requirements

Commenters stated that, as proposed, the disclosure of payer-specific negotiated rates could distort the markets, creating an unbalanced focus on costs at the expense of other factors influencing market dynamics, such as quality, efficiency, and effectiveness. Some commenters stated that negotiated rates reflect factors other than price such as experience, previous volumes/market power, anticipated growth, strategic initiatives, and select concessions.

The Departments do not agree that publication of negotiated rates for items and services will have negative distortive effects on health care markets. Rather, the Departments are of the view that the final rules will help to counteract the recognized price distortions that result from the unavailability of pricing information to health care consumers.[140] As discussed elsewhere in this preamble, the current unavailability of pricing information for health care items and services prohibits the health care markets from achieving a meaningful level of competition based on price because it ensures that health care consumers typically are not able to include price in their health care purchasing decisions. The Departments are of the view that making pricing information available could begin to ameliorate price distortions in health care by encouraging consumer decision-making that takes cost into account.

Another commenter stated that the release of negotiated rates would inappropriately result in the steering of consumers to particular providers based on contractual prices. The commenter stated that informed decision-making is not solely based on price, but is multi-factorial, involving looking at a provider's clinical expertise, ability to coordinate care, quality, effectiveness of utilization management, and guidance from a referring physician. The Departments agree that informed decision-making is not solely based upon price. The final rules are only one part of the solution to address issues contributing to the lack of competition in the health care market and resulting increases in health care costs. While the Departments address the problem of price transparency through this rulemaking, other government and industry stakeholders are working to address other issues highlighted by commenters, such as the availability of reliable quality data.

The Departments, in shaping the proposed and final rules, considered that there is quality data available to individual consumers and other consumers of health care like employers and government programs. Various government and industry stakeholders sponsor programs that aim to provide reliable health care quality information to health care purchasers. For instance, HHS engages in continual efforts to develop quality measures that are meaningful and accurately reflect hospital quality. CMS's Hospital Inpatient Quality Reporting Program collects quality data from certain hospitals with the goal of driving quality improvement through measurement and transparency.[141] CMS publicly displays this quality data to help consumers make more informed decisions about their health care.[142] HHS's Agency for Healthcare Research and Quality (AHRQ) publishes comparative information on health plans that include reports sponsored by federal and state agencies, private organizations, and purchasing coalitions.[143] The Departments appreciate comments received through the RFI in the proposed rule and are also evaluating future actions to help ensure quality information is more readily available.

The Departments are also of the view that it is worth noting that private sector entities have been working to provide use-

[140] Under ideal market conditions, consumers have sufficient information to make good choices. When consumers do not have information on price, standard market forces cannot operate, and prices for health care are distorted resulting in price discrimination (charging consumers different prices for the same product) and other problems that currently plague the health care markets. *See generally* Mwachofi, Ari, and Assaf F. Al-Assaf. "Health care market deviations from the ideal market." Sultan Qaboos University Medical Journal vol. 11, 3 (2011): 328-37. Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210041/.

[141] *See* CMS Hospital inpatient Quality Reporting Program Webpage at https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/HospitalRHQDAPU, last accessed Sep. 21, 2020.

[142] CMS Hospital Compare Website at https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/HospitalRHQDAPU, last accessed Sept. 21, 2020.

[143] AHRQ Comparative Reports on Health Plans, https://www.ahrq.gov/talkingquality/resources/comparative-reports/health-plans.html, last accessed Sept. 21, 2020.

ful quality information to consumers.[144] For example, the National Quality Forum (NQF) is a private standard-setting organization focused on the evaluation and endorsement of standardized performance measurements that makes available on its website all NQF work products, reports, and quality measures.[145] As another example, the Joint Commission is a not-for-profit organization that develops and applies standards that focus on patient safety and quality of care.[146] Finally, the National Committee for Quality Assurance (NCQA) measures and accredits health plans as well as the quality of medical providers and practices. For example, more than 191 million people are enrolled in health plans that report quality results using NCQA's Healthcare Effectiveness Data and Information Set (HEDIS),[147] which includes more than 90 measures across six "domains of care," including effectiveness of care, access/availability of care, and experience of care.[148]

Once pricing data is available through the final rules, existing quality data can be considered with pricing data to produce a more complete and accurate picture of total value. The same third-party developers who will have access to the information published pursuant to these final rules could develop platforms capable of presenting available quality data alongside pricing information. The Departments, therefore, anticipate that making health care prices transparent may spur consumers to seek and consider available quality and price information to determine whether a particular item or service is worth a higher or lower price. There is evidence from retail sector studies showing that consumers want high-quality, low-priced goods and will seek the lower price among products of the same quality.[149] Given the high cost of health care, the Departments are of the view that the same trend toward seeking lower prices will more likely than not hold true in the health care market when prices become transparent.[150]

The Departments received many comments stating that publishing negotiated rates is unlikely to meet the Departments' goal of helping consumers understand their health coverage and reasonably predict their out-of-pocket costs. Many of these commenters stated that negotiated rates information would not provide consumers with meaningful, actionable pricing information, and could possibly make purchasing decisions more confusing and difficult for consumers. One commenter noted that the public disclosure of negotiated rate information could distract from relevant participant, beneficiary, or enrollee-specific cost-sharing information such as accumulated amounts. One commenter stated that confusing and unhelpful pricing information would erode consumer trust and present long-term challenges for the health care system.

The Departments disagree that public knowledge of the price of health care items and services will increase individual consumers' confusion regarding health coverage or distract them from other information relevant to their out-of-pocket costs, such as the status of their accumulated amounts and note that commenters who raised this point cited no empirical or anecdotal evidence supporting these concerns. On the contrary, as explained throughout this preamble, the Departments are of the view that standard economic theory, experience from several states, and evidence from other markets demonstrate that increased transparency leads to better-informed purchasing decisions, generally lower prices, and quality improvements. Moreover, the Departments expect that third-party developers will compete to make pricing information available to the public in formats that are user-friendly, so disclosure of detailed pricing information is unlikely to lead to significant consumer confusion.

As noted earlier in this preamble, the Departments expect the public disclosure of pricing information related to health care items and services to help both uninsured and insured individuals in their health care and health coverage purchasing decisions. Furthermore, research suggests that having access to pricing information can increase consumers overall satisfaction and provide opportunities for education and engagement on health care pricing.[151] For instance, when the Children's Hospital of Philadelphia incorporated a Patient Cost Estimate Department, they found that cost estimates resulted in "fewer billing-related complaints, decreased revenue losses, and increased overall patient satisfaction."[152] A targeted study in the American Surgeon journal found five out of six medical centers that adopted price transparency reported increases in patient satisfaction and patient engagement after price transparency.[153]

One commenter stated that public disclosure of pricing information through

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[144] *See, for example,* Ranard, B. L., Werner, R. M., Antanavicius, T., Schwartz, H. A., Smith, R. J., Meisel, Z. F., Asch, D. A., Ungar, L. H., & Merchant, R. M. (2016). "Yelp Reviews Of Hospital Care Can Supplement And Inform Traditional Surveys Of The Patient Experience Of Care. Health Affairs" (Project Hope), 35(4), 697–705. Available at: https://doi.org/10.1377/hlthaff.2015.1030 ("Online consumer-review platforms such as Yelp can supplement information provided by more traditional patient experience surveys and contribute to our understanding and assessment of hospital quality.").

[145] *See* the National Quality Forum Website, http://www.qualityforum.org/how_we_do_it.aspx, last accessed Oct. 8, 2020.

[146] *See* The Joint Commission Website, https://www.jointcommission.org/about-us/facts-about-the-joint-commission/joint-commission-faqs/, last accessed Oct. 8, 2020.

[147] *See* NCQA Website, https://www.ncqa.org/hedis/, last accessed Oct. 8, 2020.

[148] *Id.*

[149] Shirai, M. "Impact of 'High Quality, Low Price' Appeal on Consumer Evaluations." Journal of Promotion Management. December 2015. Available at https://www.tandfonline.com/doi/full/10.1080/10496491.2015.1088922.

[150] Recent research evaluating the impact of New Hampshire's price transparency efforts shows that providing insured patients with information about prices can have an impact on the out-of-pocket costs consumers pay for medical imaging procedures, not only by helping users of New Hampshire's website choose lower cost options, but also by leading to lower prices that benefited all patients, including consumers in New Hampshire that did not use the website. *See* Brown, Z. Y. "Equilibrium Effects of Health Care Price Information." The Review of Economics and Statistics. Volume. 101. No. 4. Available at: https://www.mitpressjournals.org/doi/full/10.1162/rest_a_00765; *see also* Brown, Z. Y. "An Empirical Model of Price Transparency and Markups in Health Care." August 2019. Available at: http://www-personal.umich.edu/~zachb/zbrown_empirical_model_price_transparency.pdf.

[151] Revere, F. L., et al. "A consumer-based evaluation of Healthcare Price and Quality Transparency." Journal of Health Care Finance. Summer 2016. Available at: http://www.healthfinance-journal.com/index.php/johcf/article/download/72/74.

[152] Otero, H., et al. "The Cost-Estimation Department: A Step Toward Cost Transparency in Radiation." Journal of the American College of Radiology. Vol 16. Issue 2. February 2019. Available at: https://doi.org/10.1016/j.jacr.2018.07.033.

[153] Mehta, A., et al. "The Impact of Price Transparency for Surgical Services." The American Surgeon. April 2018. Available at: https://pubmed.ncbi.nlm.nih.gov/29712614/.

the machine-readable files is unlikely to benefit uninsured consumers, in particular, as it will be difficult for them to make the necessary comparisons or negotiate with providers as providers are not incentivized to negotiate with uninsured consumers. Another commenter stated that the machine-readable files would not be very helpful for current beneficiaries, participants, or enrollees, but acknowledged they could benefit uninsured individuals and enrollees considering alternative coverage.

By contrast, other commenters, including many individual commenters, stated that access to negotiated rate information would empower both insured and uninsured consumers by helping to correct the lack of consumer choice and information and help support efforts by other market actors. In particular, one commenter stated that consumers would likely use the pricing information, especially if their cost-sharing liability is in the form of coinsurance that is tied to the negotiated rates. One commenter stated that release of information on negotiated rates would help consumers by spurring innovation by third-party application developers to create tools to help consumers and payers, especially self-insured group health plans. Finally, one commenter did not support the requirements for public disclosure of in-network provider rates but did acknowledge that public disclosure of de-identified aggregated data for both in-network and out-of-network providers could empower consumer decision-making.

The Departments agree that transparency would help provide more consumer information and support consumer choice for both insured and uninsured consumers. The Departments continue to be of the view that market actors, including IT developers, researchers, industry experts, and plans and issuers would be incentivized to innovate in the price transparency and health care consumerism space once access to the pricing information required to be disclosed through the final rules becomes available. In the proposed rule, the Departments emphasized that individual consumers need easy to use tools and resources to help them better understand their current health care coverage, health coverage they consider purchasing, and their out-of-pocket exposure under those plans. Health care stakeholders and other industry participants, including web and mobile application developers, are already attempting to meet this need, despite the incomplete pricing information available to them. Given actionable data that can improve such tools and resources, industry actors will likely be incentivized to design innovations to deliver the help and information consumers need to make informed health care decisions based, at least in part, on the important factor of price. The final rules will support current and future efforts to help guide consumers to the lowest cost items and services that meet their specific needs and qualifications. To spur this innovation, the pricing information must allow for meaningful evaluation of different options for delivering health care items or services, coverage options, and provider options. One of the main avenues through which the Departments assumed this innovation would materialize is through IT developers who could be incentivized to design and make available internet-based tools and mobile applications that could guide consumers in accessing available price information; as well as researchers who would have the ability to analyze health care pricing at local and national levels and provide the public with their findings. Industry experts and plans and issuers would also have the ability to use pricing information to develop innovative plan benefit designs that could result increased competition and cost savings. Based on comments received from interested IT developers and other innovators, the Departments continue to believe many innovators are interested in utilizing this pricing information, once available, to spur innovation in the health care space, as intended. The Departments expect internet-based tools and mobile applications will increase the likelihood that both insured and uninsured consumers will be able to use the information to make informed health care purchasing decisions. And, as stated by a commenter, the information required to be made public through the proposed rules would help reduce wasteful spending because it would support efforts by employers, state regulators, and other purchases of health care to evaluate prices and identify unwarranted spending variation. Therefore, the Departments did not intend or expect that behavioral changes emanating from public disclosure of this information will be limited to consumers but will benefit a variety of stakeholders.

The goals the Departments seek to achieve through these requirements for public disclosure are not mutually exclusive. The Departments expressed a desire to bring about an outcome where innovators, including researchers, would enter or expand in the health care purchasing space to develop tools, applications, and public information that would support consumer decision-making. Thus, the Departments disagree with commenters who argued that public disclosure of negotiated rates would not support consumer decision-making.

The Departments disagree with commenters who suggested that pricing information presented through the public disclosures would be confusing and misleading to consumers and could erode consumer trust and present long-term challenges for the health care system. Based on the review of the over 25,000 comments received on the proposed rules, the vast majority of which were submitted by individuals, consumer trust in the health care system is already quite low, due in substantial part to the opacity of health care pricing.[154] In one study of a nationally representative sample, researchers found that participants often believed that providers and issuers set prices that do not reflect either the quality or the cost of goods and services, contributing to the study's conclusion that most Americans do not perceive the price and quality of health care to be associated. Study participants described prices as both too high and irrational, noting that prices varied within their regions for unknown reasons.[155] The Departments' transparency

[154] *See, for example,* Phillips, K. A., Schleifer, D., and Hagelskamp, C. "Most Americans Do Not Believe That There Is An Association Between Health Care Prices And Quality Of Care." Health Affairs. 2016. Available at https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2015.1334.
[155] *Id.*

efforts are meant to increase transparency of health care pricing information. The Departments do not agree that this information would further frustrate consumers compared to the status quo, even if it is difficult to navigate for the average consumer without the use of internet-based tools or applications.

One commenter stated that disclosure of negotiated rates could harm the ability of health issuers to reward high performing providers with higher reimbursements. Additionally, some commenters noted that focus on price could particularly harm small health plans and TPAs who may have been able to negotiate discounted rates by offering health plans in a limited service area.

The Departments understand that requiring release of this pricing information may impact commercial arrangements and result in certain one-time and ongoing administrative costs, which could disproportionately affect small group plans, TPAs, and issuers offering coverage in the small group market. However, the Departments view making this information available to consumers and the public as beneficial to the public's long-term interests in facilitating a consumer-oriented, information-driven, and more competitive market. In addition, as discussed below, the Departments are establishing several special rules for streamlining the provision of public disclosures required through the final rules. These special rules will help mitigate the concerns of small group plans and issuers by allowing them to leverage a contractual relationship through an issuer or clearinghouse to satisfy the public disclosure requirements of the final rules.

Several commenters submitted feedback on how disclosures in the proposed rules could affect contractual arrangements. One commenter expressed the view that the requirement to release negotiated rates threatens contracts negotiated between two private entities. Several commenters submitted comments related to gag clauses or non-disclosure agreements contained in provider contracts as well as other contract terms that are often included in contracts between providers and payers (such as anti-steering and anti-tiering provisions) that may limit the ability of third parties to use the data. Gag clauses, which also may be referred to as non-disclosure agreements, are terms that are often included in provider-payer contracts, which prohibit one or both parties from making public the negotiated rates therein.[156] Anti-steering and anti-tiering provisions are terms that may be included in provider-payer contracts (usually between issuers and hospital systems), which prohibit the plan or issuer from directing participants, beneficiaries, or enrollees toward higher-quality or lower-cost providers, and require that all providers associated with the contracting provider (for example, for a hospital system this could include hospitals, other affiliated facilities, and physicians) to be placed in the most favorable tier of providers.[157]

One commenter stated that if the Departments do not fully address the implications of non-disclosure agreements in provider and payer contracts, legal complications could arise from payers attempting to meet the requirements to disclose negotiated rates and violating these agreements in the process. Another commenter strongly supported revisions to the proposed rules to address the barriers associated with gag clauses. To address this issue, another commenter recommended the Departments provide that the final rules supersede any provider contract gag clause to the extent the final rules conflict with current or future contractual language.

The Departments understand that this requirement may require alterations to some existing contracts. For example, payers and providers may need to remove contract terms that conflict with the requirement to disclose negotiated rates such as gag clauses or non-disclosure agreements.[158] It is not uncommon for new or modified regulatory requirements or new statutory provisions to alter private contractual arrangements such as those between a health insurance payer and health care provider. Because changes in law or statute that may need to be reflected in payer-provider contracts is not uncommon, the Departments expect that providers and payers have processes in place address to these requirements of the final rules. Often, the possibility that that new or modified regulatory requirements or new statutory provisions could alter such contracts is contemplated by the contracts themselves; for example, drafters may include contract language that indicates terms may be altered by changes in law or regulation. Such language would obviate the need for updates outsides of the regular contracting schedule.

As a general matter, the onus for ensuring a contract provision does not violate applicable law rests with the parties to the contract. Nothing in the final rules prevents providers and payers from implementing contract revisions to ensure terms are not in conflict with the requirements of the final rules. Because the Departments are of the view that prescription or prohibition of specific contract terms or language in payer-provider contracting is not necessary, the Departments leave it to plans, issuers, and providers to avoid contract terms that would prohibit or frustrate either party's compliance with the final rules.

Many commenters who did not support the requirements for public disclosure of in-network provider rates and out-of-network allowed amounts requested that the Departments withdraw the proposed rules or otherwise work with stakeholders to develop policy solutions that meet consumer needs with less burden and guard against potential unintended consequences. Some commenters suggested the Departments collect more data about the potential impacts of public disclosure of negotiated rates to ensure the policy is modified, if needed, to protect against the risk of unintended consequences, noted earlier. One commenter suggested the Departments pilot the requirement for public disclosure of negotiated rates. Another commenter

[156] "Provider Contracts." The Source on Healthcare & Price Competition, UC Hastings College of Law. Available at: https://sourceonhealthcare.org/provider-contracts/.

[157] *Id*.

[158] The Departments note that gag clauses that would prohibit a pharmacy from informing a participant, beneficiary, or enrollee of any differential between that individual's out-of-pocket cost under the coverage option offered by his or her plan or issuer regarding acquisition of the drug and the amount that individual would pay without using any health plan or health coverage are already prohibited. *See* Sec. 2729 of the PHS Act.

recommended the Departments pilot the release of negotiated rates in a state where there are a few small carriers to gain a clearer understanding of potential consequences of the public disclosure requirements. Another commenter recommended the Departments pilot full price transparency in several markets and conduct longitudinal studies on the impacts.

Some commenters suggested the Departments refocus transparency efforts to already existing solutions or different initiatives. Some commenters recommended that the final rules require plans and issuers to send claims data to the HCCI to ensure that health care cost data reaches the public domain through researchers without disclosing confidential information or distorting the market. A few commenters suggested the Departments leverage existing data sources such as all-payer claims databases to promote transparency goals. One commenter stated the Administration should support congressional and states' efforts to pursue and expand upon transparency efforts, including through all-payer claims databases.

The Departments appreciate both private and public transparency efforts already underway. In the development of the proposed and final rules, the Departments sought feedback from industry and other stakeholders. While the Departments agree that expanding data sent to HCCI will help researchers gain a better understanding of market dynamics, the Departments are of the view that health care pricing data should be coupled with plan and issuer information. If the information were to be decoupled, as through HCCI or in an all-payer claims database, it would not provide the degree of transparency in prices needed to effectuate the objectives the Departments seek to achieve through the final rules. For example, pricing data, decoupled from plan and issuer data, would not provide actionable information to consumers that seek to evaluate health coverage options, as they would not be able to connect pricing to specific plans.

The Departments view the disclosure requirements set forth in the final rules as complementary to and supportive of state-level efforts. States act as incubators for transparency efforts. Nothing in the final rules precludes states from continuing to establish and run state-level transparency efforts. Indeed, the Departments intend for state regulators to be able to use the disclosures required to be made public through the machine-readable files to support their oversight of health insurance markets, including supporting their own state-level transparency efforts such as all-payer claims databases. However, the Departments are also aware that there are limits to the pricing information that states can obtain through state-level transparency efforts. For instance, states are not able to obtain pricing information from self-insured group health plans; the final rules will help states obtain this information.

The Departments further maintain that the final rules are significantly more likely to achieve positive results for consumers and health care markets than they are likely to result in the potential negative consequences outlined by certain commenters. The Departments are of the view that traditional market forces that affect prices in any market, including competition between providers; the threat of new market entrants that offer quality, lower cost services; and the increased bargaining power of consumers will be supported by the final rules. The Departments also are of the view that providers who choose to arbitrarily or unreasonably increase their prices based on publicly-available negotiated rate data are more likely to damage their own competitive positions and reputation than they are to cause widespread health care cost increases in their particular markets. For these reasons, the Departments remain confident that the final rules' requirements for disclosure of negotiated rate information will benefit health care consumers by giving them information necessary to effectively shop for and choose the health care coverage and providers that fit their needs and budgets. As consumers make more informed choices, based on available price data, market forces will have a chance to operate and potentially correct the current course of unsustainable increases in health care costs.

In light of the Departments' commitment to health care price transparency and the importance of addressing the distortive effects of the absence of pricing information, the Departments are not convinced there is a need to change the policies in the final rules to mitigate the risk of unintended consequences or violations of law such as price fixing and collusion among providers. As discussed elsewhere in this preamble, research, academic literature, and the experience of various state efforts have provided support for the Departments' conclusion that the public availability of in-network rate information is substantially more likely than not to lead to more informed health care choices, increased competition, and lower prices.

The Departments note that price transparency is not a novel concept, even in health care pricing. Several states, including New Hampshire and Maine, have implemented state-level price transparency efforts. While the Departments acknowledge that these state efforts differ in material ways from the disclosure requirements of the final rules, the same underlying principle of price transparency that undergirds state efforts also undergirds the final rules. These state efforts provide evidence that transparency at a more localized geographic level does not result in the extreme unintended consequences postulated by some commenters. The Departments acknowledge that other national health policy initiatives are sometimes tested through pilots; however, the Departments are of the view that such an approach is not necessary for price transparency, in part, because there is already evidence through state initiatives that price transparency is achievable.

The proposed and final rules reflect the Departments' conclusion that an expansive implementation of these requirements will be the most effective manner in which to reasonably ensure that the impact will be spread across all markets, rather than isolated to particular geographic areas, markets, or groups of consumers. The goal of the final rules is to expand access to price transparency information among the public, which will not be realized without an expansive implementation. The Departments are concerned that if pricing information for group health plans and insurance in the individual and group markets is not made available to the public or is made public in a piecemeal fashion, there will be little incentive for health care researchers, third-party application developers, or other industry actors to invest scarce resources into a tool that will only offer regional or otherwise limited pricing data. Other stakeholders, such

as researchers and regulators, would also find incomplete pricing information less useful to their efforts to better understand, better oversee, and develop innovations in the health care markets. Finally, the Departments are concerned that limiting the implementation of this rule, by scope or by geographic market area, will limit the impact for the millions of consumers (both individuals and employers) who are expected to benefit from the public disclosures required through the final rules. Consumers located in a geographic market where data would not be made available under a more limited requirement would not experience any benefit from the availability of actionable pricing information in other markets. Even those consumers located in geographic markets where pricing information would be made available under a more limited requirement would likely experience more limited benefits than with a market-wide requirement to release pricing information because these consumers would likely not have access to tools developed by third-party application developers. These consumers would also be less likely to experience downstream benefits from contributions expected from other stakeholders, such as researchers and regulators.

In addition to establishing a preference for establishing market-wide rules, in the preamble to the proposed rules, the Departments explained the importance of timely action to increase transparency.[159] The Departments observed that continuously rising health care costs and increases in out-of-pocket liability, without transparent, meaningful information about health care pricing, have left consumers poorly equipped to make cost-conscious decisions when purchasing health care items and services. In addition, consumers across all markets should come to expect and receive the same access to standardized pricing information and estimates. This broader applicability also has the greatest potential to reform health care markets. The Departments recognized the need for a faster and nimbler approach to addressing the pressing issue of rising health care prices. For these reasons, the Departments are of the view that a pilot approach in a specific geographic area or an otherwise phased-in approach for the requirement to publicly disclose negotiated rates through the machine-readable files would not be sufficient to meet the requirement for transparency in coverage.

Because the Departments have determined a need for an expansive implementation of transparency in coverage requirements, and for the reasons discussed at length in response to public comments, the final rules adopt the requirement to publicly disclose negotiated rates for all group health plans and individual and group market issuers, regardless of geographic market.

Scope of Pricing Information to be Made Publicly Available

Several commenters explicitly supported public disclosure of negotiated rates and out-of-network allowed amounts for all items and services. However, other commenters recommended the Departments limit the items and services to only the most common items and services or a narrow set of shoppable services in order to make the machine-readable files more meaningful to consumers. Another commenter did not support the negotiated rate disclosure proposals, but acknowledged that disclosure of rates for a subset of shoppable services would be manageable, could allow issuers to account for innovative payment arrangements, and could be used to gather empirical evidence on the impact of transparency on the health care markets.

The Departments understand that requiring plans and issuers to include all items and services in the machine-readable files could produce large data sets that could be cumbersome and may be costlier to maintain than a more limited file of shoppable services. However, the Departments are of the view that release of this information for all items and services, as proposed, is crucial for advancing the key objectives of the final rules to spur innovation, increase competition, and empower consumer activities in the health insurance markets. The Departments are of the view that limiting the data in the machine-readable files would undermine efforts to achieve these objectives. In particular, the Departments are concerned that if the requirement were to be modified to apply to only a shoppable subset of items and services, then third-party application developers may not be as interested in innovating in this area.

Furthermore, the Departments are of the view that efficiencies will be gained after initial development of these files. Although the initial implementation burden for some plans and issuers may be sizeable, future releases of data could be automated, greatly reducing the burden in subsequent years.

One commenter stated the type of data being required to be disclosed is prohibited from disclosure by CMS for laboratory services under section 1834A of the SSA, which requires CMS to keep confidential payer rates reported by applicable laboratories. The commenter stated section 1834A of the SSA should also apply to disclosure of similar information by health plans.

Section 1834A of the SSA is applicable to reporting of private sector payment rates for the limited purpose of establishing Medicare reimbursement rates for laboratory services. Section 1834A protects the confidentiality of information disclosed to HHS by a laboratory and prohibits the Secretary of HHS or a Medicare contractor from disclosing the information in a manner that identifies the particular payer or laboratory, identifies the prices charged, or identifies the payments made to any such laboratory notwithstanding any other provision of law. The confidentiality protections of the data required to be disclosed to HHS under section 1834A protects laboratories and payers from re-disclosure by HHS and Medicare contracts. These protections are not applicable to the public disclosures required under the final rules. First, the final rules require plans and issuers to publicly disclose in-network providers' negotiated rates and out-of-network providers' allowed amounts for all covered items and services. These disclosures must be made through machine-readable files posted in a public location on a plan or issuer's web-

[159] 84 FR 65464, 65465 (Nov. 27, 2019).

site. HHS or contractors of HHS will have no active role in publicizing the information required to be public through the final rules. Second, the confidentiality requirements in section 1834A are applicable "notwithstanding any other provision of law." The public disclosure requirements in the final rules are being finalized through an exercise of specific authority under section 1311(e)(3)(A)(vii) and (ix) of PPACA (as applied to plans and issuers in the individual and group markets through section 2715A of the PHS Act). Even if the public disclosures were to be subject to section 1834A of the SSA, the confidentiality provision of section 1834A would not be applicable because the public disclosure requirements established under the final rules are required by an exercise of authority under a separate provision of law. For these reasons, and because laboratory services fall within the scope of all covered items and services, the final rules clarify that disclosure by plans and issuers of pricing information for laboratory services is required under the final rules.

As discussed earlier in this preamble, the Departments are modifying the proposed requirements relating to inclusion of all items and services in the internet-based self-service tool. For the internet-based self-service tool, 26 CFR 54.9815-2715A2, 29 CFR 2590.715-2715A2, and 45 CFR 147.211 adopt a phased-in approach under which plans and issuers are required to include only include a subset of items and services during the initial year of implementation. However, plans and issuers will still eventually be required to include all covered items and services in their internet-based self-service tools in order to meet the requirements of the final rules. The Departments are of the view that a similar phased-in approach for the machine-readable files is not necessary and would not support the achievement of the goals of the final rules.

For these reasons, the final rules adopt, as proposed, the requirement to include all covered items and services, including prescription drugs, in the public disclosures required to be made through the machine-readable files.

One commenter made the point that in order to provide meaningful transparency to consumers, as well as to address the issues of inconsistent pricing among hospitals in particular, the Departments should require public disclosure of data related to pricing in addition to the negotiated rate. The commenter stated the data elements should include the following: number of procedures performed by the provider in the reported period, number of bed days, total billed charges in the reporting period, total amount received/paid for services in the reporting period, mean billed charged amount, mean accepted amount, median billed charged amount, mean accepted amount, median billed charged amount, median accepted payment, minimum billed charged amount, maximum billed charged amount, minimum accepted payment, and maximum accepted payment.

A goal of the final rules is to provide transparency for all covered health care items and services. To this end, the final rules' public disclosures are tailored to require only certain critical pricing information that the Departments view as most likely to achieve this goal, while minimizing the burdens for plans and issuers of producing and maintaining the information. Requiring additional data elements, such as those listed by the commenter, would introduce an increased level of complexity to the machine-readable files and increase the burden of making the public disclosures.

Additionally, the Departments are of the view that it would be unnecessarily burdensome to isolate hospital pricing information for additional disclosure when hospitals already have separate price transparency disclosure obligations. As discussed elsewhere in this preamble, the Hospital Price Transparency final rule requires hospitals to make public their standard charges for items or services they provide.[160] The Hospital Price Transparency final rule requires disclosure of five types of standard charges:

• the gross charge (the charge for an individual item or service that is reflected on a hospital's chargemaster absent any discounts);

• the discounted cash price (the charge that applies to an individual who pays cash, or cash equivalent, for a hospital item or service);

• the payer-specific negotiated charge (the charge that a hospital has negotiated with a third-party payer for an item or service);

• the de-identified minimum negotiated charge (the lowest charge that a hospital has negotiated with all third-party payers for an item or service); and

• the de-identified maximum negotiated charge (the highest charge that a hospital has negotiated with all third-party payers for an item or service).

The Departments are of the view that the public disclosure requirements for hospitals under the Hospital Price Transparency final rule, in combination with the public disclosure requirements of the final rules, will address the concern raised by one commenter regarding inconsistent pricing among hospitals. The disclosure required for hospitals under the Hospital Price Transparency final rule will help provide local and more specific pricing information through the availability of information on five types of standard charges, but the information will only be made publicly available for the items and services that hospitals provide. The final rules supplement this information by providing information related to negotiated rates or derived amounts and allowed amounts for all covered items and services. Thus, the final rules will provide a window into pricing for all items and services, while the Hospital Price Transparency final rule requires disclosure of more specific pricing information for the items and services provided by hospitals. Finally, the final rules also supplement the Hospital Price Transparency final rule because the final rules make the information for all contracted network hospitals available from one plan or issuer in a single, centralized file. Therefore, the final rules permit consumers—especially when using third-party web-based tools—to more readily compare hospital rates within and across plans and issuers.

Several commenters expressed concerns about participant, beneficiary, and enrollee privacy related to the proposed disclosures of negotiated rates and allowed amounts. Some commenters ex-

[160] 84 FR 65524 (Nov. 27, 2019).

pressed concerns about how third-party developers or other downstream entities would use and protect participant, beneficiary, and enrollee data. They noted that even though the Departments' disclosure requirements do not include PHI, patients could be enticed to share personal data with third-party developers and other secondary entities who could potentially use the information to re-identify consumers. Some commenters stated that parties not subject to HIPAA could seek to commercialize consumers' information. One commenter suggested the Departments look to HCCI as an example of how de-identified data can advance the goals of transparency, which could mitigate concerns about proprietary information while maintaining meaningful, granular information that illuminates price variation in the health care system.

One commenter stated that the Departments should consider the proposed rules in the context of other HHS rules related to the interoperability of data and delay the implementation of all such rules until HHS develops consumer privacy and protection requirements for third-party applications developed by non-HIPAA-covered entities. Another commenter recommended that, if the rules are finalized without additional privacy protections, the Departments should conduct an educational campaign to inform consumers of the consequences of providing information to third-party application developers. A commenter also expressed national security concerns regarding the machine-readable files, noting that the health status of Americans is a valuable commodity for foreign intelligence services.

The Departments acknowledge commenters' concerns about third-party application developers and other entities gaining access to personally identifiable information (PII) and PHI through consumer use of online applications. The Departments further acknowledge comments that consumers may not always fully understand how their information, including sensitive medical information, will be used or stored by such third parties. However, the Departments also acknowledge that consumers have a right to access, use, and share their own health information, both generally and under HIPAA. The Departments are also of the view that there is ample evidence that consumers require help to understand their health coverage, their out-of-pocket costs for health care items and services, and how their health care choices affect the overall costs of their health coverage and health care items and services.[161] The final rules will allow access to data, supplementary resources, and other assistance consumers need to make informed choices by fostering innovation and offering access to tools that consumers may use to make informed health care choices.

The Departments likewise considered evidence of significant consumer reliance on the internet for all kinds of information, but especially for health information. In a study conducted by the Pew Internet & American Life Project and published in July 2003, researchers found that 80 percent of internet users, or about 93 million Americans, have searched for a health-related topic online, a 62 percent increase since 2001.[162] Popular search topics included health insurance (25 percent); a particular doctor or hospital (21 percent); and alternative treatments (28 percent).[163] By 2013, the number of Americans searching for health information online had nearly doubled from 2003, to about 182 million people.[164] A 2018 study found a significant correlation between the use of online resources to obtain health information and the decisions consumers take concerning health care services.[165]

The Departments are of the view that many American consumers have some experience with dealing with the disclosure of sensitive health information on the internet[166] and that consumer reliance on the internet for health care information will only increase despite inherent privacy risks. The Departments considered that websites and internet applications that collect consumer information provide information through privacy policies and terms of service that are available to users of how their information may be used and shared. Federal laws and enforcement mechanisms are in place to help protect consumers from unfair and deceptive practices, including deceptive data collection and the sale of data collected without adequate consumer notice.[167] Given existing measures to protect consumer privacy on the internet, the Departments are of the view that common internet privacy risks should not operate to deprive consumers of the information, tools, and support they need to make informed choices related to health care coverage, providers, items, and services.

Even though the Departments are not persuaded that privacy risks common to the use of internet applications outweigh the benefits of the disclosures under these

[161] Arora, V., Moriates, C., and Shah, N. "The Challenge of Understanding Health Care Costs and Charges." The American Medical Association Journal of Ethics. November 2015. Available at: https://journalofethics.ama-assn.org/article/challenge-understanding-health-care-costs-and-charges/2015-11.

[162] "Health Searches and email Have Become More Commonplace, But There is Room for Improvement in Searches and overall internet access." Internet Health Resources. Pew Research Center. July 16, 2003. Available at: https://www.pewresearch.org/internet/2003/07/16/internet-health-resources/.

[163] *Id.*

[164] Fox, S., and Duggan, M. "Health Online 2013." Pew Research Center. January 15, 2013. Available at: https://www.pewresearch.org/internet/2013/01/15/health-online-2013/.

[165] Chen, Y. et al. "Health Information Obtained From the Internet and Changes in Medical Decision Making: Questionnaire Development and Cross-Sectional Survey." Journal of Medical Internet Research. Volume 20. No. 2. February 2017. Available at: https://www.jmir.org/2018/2/e47/pdf.

[166] Zhu, P., Shen, J., and Xu, M. "Patients' Willingness to Share Information in Online Patient Communities" Questionnaire Study." Journal of Medical Internet Research. Volume 22. No. 4. April 2020. Available at: https://pubmed.ncbi.nlm.nih.gov/32234698/.

[167] "Privacy & Data Security Update: 2019." United States Federal Trade Commission. Available online at: https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2019/2019-privacy-data-security-report-508.pdf; *see also* "Privacy and Security Enforcement." United States Federal Trade Commission. Available at: https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/privacy-security-enforcement ("the FTC can and does take law enforcement action to make sure that companies live up to [the] promises" regarding how consumer information will be safeguarded); *see also* Complaint in *United States v. Facebook,* Case No. 19-cv-2184, U.S. District Court for the District of Columbia. Available at: https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_complaint_filed_7-24-19.pdf (FTC complaint leading to a historic $5 billion fine for, among other things, deceptive practices in violation of section 5(a) of the FTC Act where the social media company failed to effectively disclose that consumer information would also be used for advertising). The referenced fine can be found at: https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions, last accessed Sep. 11, 2020 (press release announcing fine).

the final rules or the general need for price *transparency*, ensuring the privacy and security of consumer PII and PHI is a top priority for the Departments. The Departments will work with plans and issuers to provide information they can use to educate participants, beneficiaries, and enrollees about sharing their health information with third party applications. This will include information on about the roles of federal agencies such as the Office for Civil Rights (OCR), the FTC, and ONC, which already focus on ensuring that consumer privacy rights and interests are appropriately protected. The Departments will encourage plans and issuers to share this information with their participants, beneficiaries, and enrollees who might elect to share health information with third-party applications.

In finalizing the rules, the Departments considered the large number of consumers who have decided to share personal information because they have determined that the benefits offered by an internet website or mobile application outweigh potential risks to their privacy. The Departments are of the view that consumers will be able to make similar determinations with regard to applications that make use of data to be disclosed through the machine-readable files required by the final rules.

As discussed earlier in the preamble to the final rules, the Departments also are not persuaded by the argument that the disclosures required under the final rules, or disclosures consumers may make to applications that leverage the data required, could introduce national security concerns. First, the information the Departments are requiring to be disclosed through the machine-readable files does not include PHI or PII. Additionally, as discussed in more detail later in this preamble, in an effort to ensure that the disclosures balance price transparency with the need to protect privacy, the Departments have modified the proposed rules to increase the minimum disclosure threshold from 10 to 20 unique payment amounts, where any historical payment amounts connected to less than 20 claims for payment would be omitted from the machine-readable file containing out-of-network allowed amounts and historical billed charges (the Allowed Amount File). The increase will further limit the possibility that individual participants, beneficiaries, and enrollees may be identified through historical allowed amount data. Second, the information a consumer could share with applications incorporating data required to be disclosed through the final rules is not significantly different from data consumers already actively share through similar applications. Therefore, the Departments are not convinced there are unique national security concerns flowing from the disclosures required by the final rules.

One commenter was concerned about allowing third parties to use plan and issuer information to provide cost and pricing information to consumers without those third parties being obligated to provide accurate and relevant information to consumers. The accuracy of third-party internet-based tools and applications will be important to achieving the goals of transparency in coverage. However, the cost and pricing information included in third-party internet-based tools, and tools developed by other secondary entities, would only be as accurate as the public disclosures made by plans and issuers. Therefore, the Departments are of the view that it is in the best interest of plans and issuers to ensure data accuracy through a robust quality assurance process if they have concerns about the accuracy of cost and pricing information being provided to consumers through third-party internet-based tools. Furthermore, nothing in the final rules prohibits plans and issuers from including comprehensive data dictionaries and other supplementary documentation along with the machine-readable files. Plans and issuers are also free to provide plan-specific disclaimers or clarifications regarding the information they are required to produce. Finally, the Departments expect that consumers, plans, issuers, and other health care stakeholders will monitor third-party internet-based tools for accuracy and will and report concerns to the developer, the public, and appropriate state and federal agencies, including the Departments, for evaluation and potential action.

The Departments further expect that market forces will act to weed out applications that do not provide reliable information. Consumers who use a third-party application or other online tools for health care decision support and later conclude that the tool misled or misinformed them will, at minimum, cease use of the tool. Such consumers are also likely to rate the application poorly or leave unfavorable reviews, reducing the likelihood that other consumers who see the rating or review will rely on the tool. Over time, consumers and other stakeholders may collectively identify the most accurate and highest quality tools, while reducing use of less accurate, unreliable tools. The Departments also expect that third-party tools will inform users of limitations on the accuracy of their information and will present relevant disclaimers informing consumers that any estimates of out-of-pocket liability are not guarantees regarding consumer liability for services. Tool users also will have the opportunity to evaluate and could attempt to confirm any cost estimates provided by online tools by contacting the plan, issuer, or health care provider they ultimately choose based on information provided by the tool. Such measures will address the risk that consumers will be led to unreasonably rely on any cost estimate provided by a third-party tool to their financial detriment.

The Departments are of the view that it is in plans', issuers', and developers' best interests to provide accurate information. However, the Departments will monitor the accuracy of the information provided through third-party developers and secondary entities and will take information obtained through this monitoring into account for future regulatory action or guidance, as appropriate.

One commenter recommended that any information made available to the public should provide an explanation of why the cost of care is variable among hospitals. The commenter further suggested the explanation reference unique challenges faced by essential hospitals that care for a larger proportion of vulnerable patients.

Being mindful of the goal to provide sufficient technical flexibility in the formatting of the machine-readable files, the Departments decline to require plans and issuers to include specific supplementary information beyond reporting the data specified for the machine-readable file formats. As noted above, nothing in the final rules prevents a plan or issuer from providing supplementary materials, including footnotes, disclaimers, data dictionaries,

and other explanatory language, as accompaniments with the machine-readable files. The Departments are of the view that any additional context around the machine-readable files that can be provided through supplementary materials are likely to be a benefit to consumers and others who seek to understand and use the data contained in the machine-readable files. The Departments recommend plans and issuers work closely with providers, consumers, developers, community leaders, and other stakeholders to ensure that all perspectives are taken into account when developing materials supplemental to the machine-readable files. While declining to require plans and issuers to include a specific explanation for why the cost of care could vary among hospitals, the Departments acknowledge that this information is an example of appropriate explanatory language that could accompany the machine-readable files.

The final rules adopt, with modifications, the requirements that plans and issuers publicly disclose applicable in-network rates (including negotiated rates, derived amounts, and underlying fee schedule rates), out-of-network allowed amounts for covered items and services, including prescription drugs, through machine-readable files. The final rules also adopt the requirement that plans and issuers publicly disclose in-network historical net prices for covered prescription drugs through a machine-readable file. In recognition of the unique pricing attributes of prescription drugs, the final rules require the reporting of information on prescription drugs that would have been included in the In-network Rate File (referred to as the Negotiated Rate File in the proposed rules) in a separate machine-readable file, as described later in this preamble. The Departments continue to be of the view that the release of this information is appropriate and necessary to empower consumers to make informed decisions about their health care, spur competition in health care markets, and to slow or potentially reverse the rising cost of health care items and services.

The Departments stated the intention in the proposed rules to make available non-substantive technical implementation guidance through the collaborative GitHub platform (an online hosting platform for development and source code management that permits version control), which will facilitate further technical assistance in addressing how unique plan designs can comply with the requirements of the final rules, as needed. The Departments received comments that supported the Departments' development of specific technical standards for the files to which plans and issuers must adhere. One commenter recommended the Departments provide guidance to plan sponsors who are able to provide some, but not all, of the file data elements. Another commenter stated that the proposed rules do not make clear how to report items and services provided through capitated and bundled payment arrangements in the files; noting that this information is necessary for consumers to measure provider value. One commenter supported the Departments' statement that it would provide technical implementation guidance for the files but requested a robust public comment solicitation far in advance of the applicability date for the rules.

The Departments are of the view that providing specific technical direction in separate technical implementation guidance, rather than in the final rules, will better enable the Departments to update the file technical requirements to keep pace with and respond to technological developments. The Departments note that the technical implementation guidance is intended to facilitate a collaborative effort between the Departments and plans and issuers in order for plans and issuers to meet the public disclosure requirements of the final rules, while providing flexibility to account for unique IT systems, and issuer and plan attributes. To the extent a plan's or issuer's unique attributes (such as use of an alternative contracting model) are not addressed sufficiently through the technical implementation guidance, the Departments intend to provide targeted technical assistance to help ensure all plans and issuers are able to meet the public disclosure requirements under the final rules. Therefore, the Departments are developing technical implementation guidance for plans and issuers, which will be available on GitHub, to assist them in developing the machine-readable files.

In the proposed rules, the Departments indicated that minimum requirements for standardized data elements would be necessary to ensure users would have access to accurate and useful pricing information. Without such baseline requirements, the negotiated rate and allowed amount data for out-of-network services made available by each group health plan and health insurance issuer could vary dramatically. This would further create a disincentive to health care innovators developing tools and resources to enable consumers to accurately and meaningfully use, understand, and compare pricing information for covered items and services across providers, plans, and issuers. Accordingly, under the proposed rules, a plan or issuer would be required to publish two machine-readable files. The first file would include information regarding rates negotiated with in-network providers. The second file would include historical data showing allowed amounts for covered items and services furnished by out-of-network providers. The preamble to the proposed rules referred to these files as the Negotiated Rate File and the Allowed Amount File, respectively. For the final rules, the file referred to as the Negotiated Rate File in the proposed rules has been renamed the In-network Rate File to reflect modifications made in the final rules to ensure the file accommodates plans and issuers operating under payment models other than the fee-for-service (FFS) model. The final rules adopt the requirement to produce both the In-network Rate File and Allowed Amount File with the modifications discussed elsewhere in this preamble. As previously discussed, the final rules also adopt the requirement to produce an additional file, referred to in this preamble as the Prescription Drug File through which plans and issuers are required to publicly disclose negotiated rates and historical net prices connected to prescription drugs.

As noted, the final rules modify the In-network Rate File requirements to clarify the expectations for reporting negotiated rates (or comparable derived amounts, which are explained in detail later in this section) for plans and issuers using alternative reimbursement models. The final rules also clarify that plans and issuers must include an underlying fee schedule rate when one is used to determine cost-sharing liability, where that amount

differs from the negotiated rate (or comparable derived amount) used to determine provider reimbursement.

The final rules modify the Allowed Amount File to clarify that it must also include information related to billed charges in addition to allowed amounts. The final rules also finalize additional requirements for the In-network Rate File, Allowed Amount File, and Prescription Drug File to require plans and issuers to include a Place of Service Code and a provider tax identification number (TIN) in addition to the provider NPI. These modifications are discussed in more detail later in this section of this preamble.

Specific Content Elements

In the proposed rule, the Departments indicated that the Negotiated Rate File and the Allowed Amount File would be required to include content elements discussed in this section of this preamble. In the final rules, these content elements continue to apply to the In-network Rate File and the Allowed Amount File, as well as to the Prescription Drug File, except where otherwise indicated.

a. First Content Element: Name and Identifier for Each Coverage Option

The first content element that plans and issuers will be required to include in the machine-readable files is the name and identifier for each coverage option offered by a group health plan or health insurance issuer. For the identifier, the Departments proposed that plans and issuers use their Employer Identification Number (EIN) or Health Insurance Oversight System (HIOS) IDs, as applicable. The Departments sought comment on whether EINs and HIOS IDs are the appropriate identifiers for this purpose. The Departments also sought comment on whether there are other plan or issuer identifiers that should be considered and adopted.

The Departments did not receive any comments on this content element, and the final rules adopt this provision with modifications to ensure clarity of the expectations for reporting. As reflected in the updated regulatory text, the Departments are clarifying whether an EIN or HIOS ID is applicable for this element. Plans and issuers must include their HIOS ID at the 14-digit product level unless the plan or issuer does not have a HIOS ID at the plan or product level, in which case the plan or issuer must use the HIOS ID at the 5-digit issuer level. If a plan or issuer does not have a HIOS ID, it must use its EIN.

b. Second Content Element: Billing Codes

The second content element that plans and issuers will be required to include in the machine-readable files is any billing code consistent with the definition of billing code provided in the final rules, including:

- a CPT code,
- a Healthcare Common Procedure Coding System (HCPCS) code,
- a DRG,
- a National Drug Code (NDC) (The final rules define the NDC code as a unique 10-digit or 11-digit 3-segment number assigned by the Food and Drug Administration (FDA), which provides a universal product identifier for drugs in the United States),[168] or
- another common payer identifier used by a plan or issuer, such as a hospital revenue code, as applicable, and a plain language description for each billing code.

The Departments proposed to require that plans and issuers associate each negotiated rate or out-of-network allowed amount with a CPT, HCPCS code, DRG, NDC, or other common payer identifier, as applicable, because plans, issuers, and providers uniformly understand these codes and commonly use them for billing and paying claims (including for both individual items and services and items and services provided under a bundled payment arrangement). The Departments also proposed that plans and issuers must include plain language descriptions for each billing code. In the case of items and services that are associated with common billing codes (such as the HCPCS codes), the Departments specified that the plan or issuer could use the codes' associated short text description.

In order to ensure that the machine-readable files provide meaningful information to consumers, as well as other stakeholders, the final rules adopt this content element as proposed, with the following modifications. For clarity, the regulation text is amended to remove language that merely restated the definition for the term "billing code" for each machine-readable file.[169] This modification has been made purely to streamline the regulatory language, and it does not substantively alter the requirement to include a billing code, except as otherwise noted in this preamble. Additionally, along with separating prescription drugs into a separate machine-readable file, the final rules include a modification that clarifies that, in the case of prescription drugs, plans and issuers may only use the NDC as the billing code type because, as discussed later in this preamble, the accuracy of pricing information for prescription drugs requires precise and specific product information, including package size and manufacturer, which can only be achieved through the use of the NDC billing code. However, the Departments recognize that prescription drug products may be included in the In-network Rate File to the extent a plan or issuer uses an alternative payment arrangement, such as a bundled payment arrangement that includes prescription drugs. Therefore the final rules clarify that the In-network Rate file must include the required information under paragraph (b)(1)(i) of the final rules for all covered items and services, except for prescription drugs that are subject to a fee-for-service reimbursement arrangement, which would

[168] In the preamble to the HIPAA regulations, HHS stated that it was adopting a uniform 11-digit format to conform with customary practice used in computer systems (65 FR 50314, 50329). (Aug. 17, 2000). The HIPAA 11-digit NDC format is standardized such that the labeler code is always 5 digits, the product code is always 4 digits, and the package code always 2 digits. To convert a 10-digit NDC to an 11-digit HIPAA standard NDC, a leading zero is added to the appropriate segment to create the 11-digit configuration as defined above. *See* 83 FR 38666 (Aug. 7, 2018).

[169] Specifically, the Departments have removed the following language from billing code requirements for the machine-readable files: "…or other code used by the group health plan or health insurance issuer to identify covered items or services for purposes of claims adjudication and payment."

be reported in the prescription drug machine-readable file pursuant to paragraph (b)(1)(iii) of the final rules.

The final rules require plans and issuers to include in the machine-readable files a billing code or other code used to identify covered items or services for purposes of claims adjudication, payment, and cost-sharing liability when making public the disclosure required under 26 CFR 54.9815-2715A3, 29 CFR 2590.715-2715A3, and 45 CFR 147.212. The final rules adopt the requirement that plans and issuers associate each amount required to be reported with a CPT, HCPCS, DRG, NDC, or other common payer code identifier, as applicable, because plans, issuers, and providers uniformly understand these codes and commonly use them for billing and paying claims (including for both individual items and services and for bundled payment arrangement). As provided by the definition of billing code in the final rules, the Departments intend to provide flexibility to plans and issuers to make the data available through the codes that they use for billing services. While the final rules do not require plans and issuers to use a specific billing code (for example, CPT codes) for making public the disclosures required through the final rules, definition of billing code states that it is the code used by the plan or issuer "for purposes of billing, adjudicating, and paying claims for a covered item or service." Therefore, where a plan or issuer uses a CPT code to identify a covered item or service for purposes of billing, adjudicating, and paying claims for that covered item or service, then they would need to use the CPT code in order to make public the disclosure required through the final rules for that item or service.

One commenter recommended that the negotiated rates should be clearly stated in plain language that should be easy to understand rather than provided by billing codes through the machine-readable files. As an alternative, the Departments received some comments stating that the Departments should require hospitals and health insurance issuers to disclose all negotiated reimbursements by International Classification of Disease (ICD) code.

The preamble to the proposed rules identified several common billing codes, noting that the list provided was not exhaustive. Further, the Departments did not explicitly prohibit including ICD-10 codes on the file. The Departments note that nothing in the final rules would constrain plans or issuers from including ICD codes in the machine-readable files when these codes are used by the plan or issuer in a manner that meets the definition of a billing code in the final rules. In other words, where the plan or issuer uses an ICD code to identify health care items or services for the purpose of billing, adjudicating, and paying claims for a covered item or service, the plan or issuer may use the ICD code in the machine-readable files. As discussed earlier in this preamble, the Departments intend to issue technical implementation guidance; this guidance will include sample file schemas for the machine-readable files. To facilitate identification of the billing code type, there will be an indicator in the file schemas that will allow plans and issuers to specify the particular type of billing code entered for each data entry in the machine-readable files.

The Departments are aware that some covered items and services may not have a corresponding HCPCS, ICD, DRG, NDC or CPT code. The Departments clarify that plans and issuers are still required to include these covered items and services in their machine-readable files regardless of whether all corresponding data elements are available. When a covered item or service does not have a corresponding HCPCS, ICD, DRG, or CPT code associated with an item or service, a plan or issuer is permitted to choose its own indicator or other method to communicate to the public that there is no corresponding code. In the alternative, a plan or issuer is permitted to use the code to be defined by the Departments in technical implementation guidance issued along with the final rules that indicates that an item or service is not defined.

At this time, the Departments have concluded that the common data requirements adopted by the final rules, which include a requirement to include a plain language description for each billing code, provides consumers with sufficient information to meaningfully inform health care purchasing decisions.

Regarding information about prescription drug pricing, a commenter also suggested that, in lieu of NDC or HCPCS codes, a useful unit for reporting for drugs would be the RxNorm concept unique identifier (RxCUI).[170] The commenter suggested use of RxCUIs because it would minimize burden by reducing the list of entries (3,000 to 4,000 RxCUIs down from 100,000 active NDCs) and because existing prescription drug machine-readable file requirement for Medicare Part D (Part D) and QHPs use RxCUIs.

The Departments appreciate the commenter's alternative suggestion for including prescription drug information in the machine-readable files. The Departments considered requiring prescription drug pricing information through an alternative identifier. The Departments understand that an RxCUI could minimize the burden on plans and issuers by reducing the number of codes required to be included in the Prescription Drug File. RxCUI is a drug naming system that is produced by the National Library of Medicine (NLM), and RxCUIs are unique identifiers, which can represent multiple NDCs for similar drug products with the same brand name, active ingredient, strength and dose form (for example, multiple package sizes and/or manufacturers can be represented by a single RxCUI). The NDC, in contrast, is a unique 10-digit or 11-digit 3-segment number, which provides a universal product identifier for drugs in the United States. The three segments of the NDC identify: the labeler (any firm that manufactures the drug); the product (specific strength, dosage form, and formulation of a drug); and the commercial package size and types. As noted above, multiple NDCs can be encompassed by one RxCUI, which is why there are many fewer RxCUI codes than NDCs. However, the

[170] The Departments note that the comments used the term "Rx Common Unit Identifier" to identify the full phrase for the RxCUI. The Departments assume that this is a misnomer and that the commenter was referring to RxNorm concept unique identifier, which is the generally accepted term for the acronym RxCUI.

accuracy of pricing information requires precise and specific product information, including package size and manufacturer. The Departments are concerned that permitting drug pricing information disclosures to be made through RxCUIs would potentially lead to inaccurate or misleading information being provided to the consumer. If drug pricing information is provided in the machine-readable files in the form of RxCUIs, then plans and issuers may not be able to provide the manufacturer negotiated rate, especially for those RxCUIs that include NDCs from several manufacturers.

Some commenters noted that, because RxCUI is used by the Part D program and in the QHP program, the Departments should also require RxCUI in the machine-readable file for consistency across programs. While the Departments acknowledge that RxCUI is used in some contexts in both the Part D and QHP programs, namely formulary development, these programs do not exclusively use RxCUI. Indeed, both the Part D and QHP programs use NDC in addition to RxCUI, and NDCs are more generally used when information is required to be submitted to CMS for payment programs. For example, the Part D program receives the NDC on claims submitted by Part D plan sponsors through Prescription Drug Events (PDEs) and issuers in the individual and small group market include NDCs on claims data submitted to issuers' EDGE servers for HHS risk adjustment purposes. In short, other programs cited by commenters actually use NDCs for prescription drugs data submissions, particularly for payment that is similar to the pricing data required by the final rules. The Departments therefore conclude that requiring use of NDCs for the prescriptions drug pricing information included in the machine-readable files is consistent with the practices CMS follows in other programs. Therefore, as stated earlier, the Departments are requiring that the only allowable billing code for prescription drugs in the machine-readable files is the NDC. The Departments determined that the NDC should be the required billing code for the reasons stated above and because the NDC is a standard billing code required for prescription drug transactions.

c. Third Content Element: In-Network Applicable Amounts (Negotiated Rates, Amounts in Underlying Fee Schedules, and Derived Amounts); Out-of-Network Allowed Amounts; or Negotiated Rates and Historical Net Prices for Prescription Drugs

The third-content element in the machine-readable files depends on the type of file: in-network amounts for the In-network Rate File, allowed amounts and historical billed charges for the Allowed Amount File, or negotiated rates and historical net prices for the Prescription Drug File.

All Machine-Readable Files

The proposed rules specified that the specific pricing information within each file would have to be associated with a provider identifier, specifically the provider's NPI. Some commenters suggested additional data elements to support accurately identifying the provider through the machine-readable files. One commenter recommended that the Departments include the Place of Service Code in the machine-readable files. The commenter explained that this data element would clarify prices when provider entities associated with the same NPI have multiple sites of service. Place of Service Codes are CMS-maintained two-digit codes that are placed on professional claims, including Medicare, Medicaid, and private insurance, to indicate the setting in which a service was provided.[171] The Place of Service code set is required for use in the implementation guide adopted as the national standard for electronic transmission of professional health care claims under HIPAA.[172]

The Departments have considered this comment and agree that, in addition to NPI, including a Place of Service Code is important where a provider could be using the same NPI for multiple places of service. For instance, the same procedure from the same provider NPI received at an ambulatory surgery center (Place of Service Code 24) could have a significantly different price if received at an on-campus outpatient hospital (Place of Service Code 22). The Departments are of the view that being able to identify the place of service would be beneficial to consumers seeking to rely on the machine-readable files or third-party applications developed using the information publicly disclosed through the machine-readable files, in order to make health care purchasing decisions. The Departments are also of the view that this data element will help provide valuable insights regarding market dynamics for researchers, employers, regulators, and other files users. Because the Place of Service Code is information that must be included on a professional medical claim, the Departments do not foresee any issue with plans and issuers including this data element in the machine-readable files in addition to the NPI. For these reasons, the Departments are finalizing a requirement to include the Place of Service Code in all three machine-readable files.

In addition to the NPI and the Place of Service Code, the Departments have also become aware, through independent research, that a provider's TIN can be relevant to communication of accurate negotiated rates and allowed amounts information. It is the Departments' understanding that negotiated rates for items and services are based on the unique combination of a provider (NPI), service or item location (Place of Service code), and the TIN under which the provider is furnishing the item or service. If the TIN is not required in the file, the Departments are concerned that plans and issuers could report multiple negotiated rates for the same NPI for the same item or service without context to identify the underlying source of the difference. For example, if a provider NPI has a relationship with two different entities that have negotiated rates and bills under both of these entities, the same item or service for that provider NPI could appear in the report with two different negotiated rates. Without the TIN, consumers of the file would not be able to discern the reason for the difference in the two distinct negotiated rates. With the TIN,

[171] "Place of Service Code Set." Centers for Medicare & Medicaid Services. Available at: https://www.cms.gov/Medicare/Coding/place-of-service-codes/Place_of_Service_Code_Set.
[172] "Place of Service Codes." Centers for Medicare & Medicaid Services. Available at: https://www.cms.gov/Medicare/Coding/place-of-service-codes.

consumers of the file could see that the provider is billing for the same services under two separate entities. Therefore, if this unique combination of NPI, Place of Service Code, and TIN is not required, the pricing information represented in the machine-readable files might not present a complete and accurate picture of the market or provide consumers with reliable data upon which to base health care purchasing decisions. The Departments are of the view that this information is crucial to ensure that consumers are ultimately receiving location-specific pricing information upon which they can rely to help make informed health care purchasing decisions. In order for the machine-readable files to provide meaningful and actionable information, the final rules adopt a modification to all three machine-readable files, to require plans and issuers to provide the provider TIN in the file in addition to provider NPI and the Place of Service Code.

The Departments have updated the technical implementation guidance and schemas for all three machine-readable files, so that location-specific pricing information can be provided in the machine-readable files. This guidance will also provide more details on how the Place of Service Code, TIN, and NPI should be reported in order to represent the information for which public disclosure is required through the machine-readable files. The Departments are aware that this modification to the machine-readable files will increase the complexity and size of the machine-readable files and have considered this additional burden in the Information Collection Requests (ICR) section of the of the final rules. The benefits of including the Place of Service Code and TIN outweigh the costs, as the Departments are of the view that location-specific pricing information is critical to the meaningfulness of these files for the public.

Another commenter noted that using NPIs to identify providers would make it difficult for consumers to use the machine-readable files because consumers do not usually have NPI information. The commenter stated that it would also be useful for consumers using the In-network Rate Files (including the uninsured and those shopping for alternative coverage) to have access to public information that lists the providers who participate in local plan and issuer networks.

The Departments agree that including provider names in the machine-readable files in addition to NPIs would help consumers and other stakeholders review and use the machine-readable files. However, the Departments have some concerns about requiring inclusion of provider names in the files. From a technical perspective, the Departments are concerned that inclusion of provider names, which do not have a consistent character length and can be quite long, will increase the size of the machine-readable files and, therefore, increase the burden of the files for plans and issuers. Additionally, provider names may include non-alphanumeric or other non-standard character encoding types that could interfere with the coding of the machine-readable files and cause defects. The Departments are concerned that the additional quality assurance procedures that plans and issuers would need to implement in order to address these issues could add even more burden with limited benefit.

In addition, because the Departments expect the greatest benefits of these machine-readable files will be through the innovative tools developed by third parties, the Departments are of the view that the lack of availability of provider names in the machine-readable files is not a significant concern. The Departments anticipate that third-party internet-based developers and other secondary entities will be able to link the NPIs in the machine-readable files to publicly available provider information. The Departments note that there are several internet-based NPI lookup tools available online, including CMS's National Plan & Provider Enumeration System (NPPES) NPI registry.[173] Nothing in the final rules prevents a plan or issuer from linking to an NPI lookup tool or providing more information for consumers and other stakeholders on its website through supplementary materials supporting the machine-readable files.

For these reasons, the final rules do not require plans and issuers to include provider names in addition to NPI, TINs, and Place of Service Codes in the three machine-readable files.

In-Network Rate File

The Departments finalize with modifications the proposed requirement that group health plans and health insurance issuers publish as the third content element negotiated rates in a machine-readable file for all covered items and services—except that the Negotiated Rate File in the proposed rules has been re-named the In-network Rate File. With the exception of information relevant to prescription drug products that are included as part of an alternative payment arrangement (such as a bundled payment arrangement), the In-network Rate File will exclude information relevant to prescription drugs, as that information will be provided in the third machine-readable file. Based on comments and technical expertise within the agencies, the Departments have made modifications to clarify the expectations for reporting negotiated rates (or comparable derived amounts as explained elsewhere in this section) for plans and issuers using alternative reimbursement models for health care items and services. These modifications also clarify that plans and issuers must include an underlying fee schedule rate when one is used to determine cost-sharing liability, where that amount differs from the negotiated rate (or comparable derived amount) used to determine provider reimbursement. The Departments also finalize this change to reflect other modifications to the proposed rules meant to ensure the required In-network Rate File accommodates plans and issuers operating under payment models other than a standard fee-for-service (FFS) model.

In the proposed rules, the third content element was negotiated rates under a plan or coverage regarding each covered item or service, including prescription drugs furnished by in-network providers. To the extent a plan or issuer reimburses providers for an item or service based on a formula or reference based-pricing (such as a percentage of a Medicare reimburse-

[173] CMS's NPPES registry is available online at the following website address: https://npiregistry.cms.hhs.gov/.

ment rate), the proposed rules would have required the plan or issuer to provide the calculated dollar amount of the negotiated rate for each provider.

In the proposed rules, the Departments expressed the understanding that some plans and issuers do not vary negotiated rates across in-network providers. For instance, some plans and issuers have a negotiated rate that applies to every provider in a certain network tier. In such a case, the Departments proposed to require the plan or issuer to provide the negotiated rate for a covered item or service separately for every provider that participates in that tier of the network. If the plan or issuer reimburses for certain items and services (for example, maternity care and childbirth) through a bundled payment arrangement, the Departments proposed to require the plan or issuer to identify the bundle of items and services by the relevant billing code.

The Departments also proposed to require plans and issuers to include the last date of the contract term for each provider-specific negotiated rate that applies to each item or service (including rates for both individual and bundled items and services).

Several commenters suggested modifications to the requirement for public disclosure of negotiated rates, which they claimed would help mitigate the risk of unintended consequences, such as anti-competitive practices and increased health care prices. Commenters suggested that the final rules require plans and issuers to disclose the median rate or lowest negotiated rate instead of negotiated rates. Other commenters also expressed the opinion that information presented as summary or aggregated data would be more helpful for consumers. One of these comments noted that this could be achieved through plans identifying a range of in-network rates for common services.

The Departments considered modifying the requirement to require plans and issuers to report the median negotiated rate, the lowest negotiated rate, or some other aggregated negotiated rate. The Departments noted in the proposed rules that consumers, researchers, and regulators gaining access to pricing information, including information on the variation in prices, could place downward pressure on health care prices and reduce overall health care spending, which is one of the goals of the final rules. The Departments are concerned that using an aggregated or otherwise summarized rate would not sufficiently address issues of pricing variation and could undermine other goals of price transparency efforts. A median or summarized rate would not be as reliable for insured or uninsured consumers to use when making health care purchasing decisions as it is individual prices upon which these consumers must rely to make health care purchasing decisions. Under standard economic theory, it is individual prices, and consumers' responses to those prices, that drive market forces. If the public disclosures do not include specific individual prices for in-network items and services, consumers may not have actionable information upon which to rely to make specific decisions.[174] A median or summarized rate would not address the issue of price variation or dispersion, as it would mask the variation in a given geographic area.[175] Additionally, a median or summarized rate could mask the differences between plans and coverages in a manner incompatible with drawing comparisons between coverage options. Therefore, the Departments are of the view that release of alternative data points, such as aggregated negotiated rates, or other summarized forms of negotiated rates, would not sufficiently advance the price transparency efforts and could undermine the intended impacts of the In-network Rate File.

Commenters suggested the Departments limit the requirement for public disclosure of negotiated rate information in a way that protects plans and issuers from reverse engineering specific rates. For example, a commenter suggested the Departments limit the disclosure to plans and employer plan sponsors, while another commenter suggested that the final rules require plans and issuers to provide limited information to the public, such as statistical ranges, or rates distributions and require the provision of more detailed information to other stakeholders.

The Departments considered limiting these disclosures by stakeholder type such that the disclosure of the most detailed information to the widespread public would be more limited. The Departments' determined that these limitations would conflict with the statute, which requires public disclosure, and the goals of the final rules. The Departments' goal is to empower consumers through the disclosure of actionable pricing information through the In-network Rate Files, as translated into consumer-friendly tools by third-party application developers.

Some commenters expressed the view that public disclosure of rates by plans and issuers with alternative reimbursement models should be required and suggested the Departments work with stakeholders to establish requirements that are consistent with innovative payment models. One commenter stated that the Departments should not exclude from the negotiated file requirements plans with reimbursement arrangements different from FFS arrangements, such as plans with reimbursements based on a capitated amount or a value-based agreement. Some commenters noted that the release of negotiated rates places emphasis on FFS provider contracting and may hinder innovation in alternative payment contracting models, such as value-based contracting.

The Departments received some comments on how the Departments could require plans and issuers to report capitated and bundled payment arrangements through the In-network Rate File. One commenter noted that plans with a capitated arrangement should be able to assign a price to items and services based on an internal methodology. The commenter observed that plans with capitated payment arrangements must assign prices for purposes of submission of claims in support of the HHS risk adjustment program under 45 CFR 153.710(c). Some commenters, however, argued that implementing some aspects of the proposed rules would not be feasible, such as listing prices for quality-adjusted and risk-adjusted contracts, which can only be calculated after the fact.

[174] Stigler, G. "The Economics of Information." The Journal of Political Economy. Volume 69. Issue 3. June 1961. Available at https://home.uchicago.edu/~vlima/courses/econ200/spring01/stigler.pdf.
[175] *Id*.

By contrast, other commenters did not support a requirement for plans and issuers with alternative reimbursement arrangements to make public the disclosures required through the In-network Rate File. Commenters stated that releasing negotiated rate information for bundled or capitation arrangements would be a significant operational burden and could lead to inaccuracies and misinformed consumers. For example, several commenters noted that the entire suite of services that a consumer might need to look up for an episode of care is not known to patients or providers prior to the receipt of care. Another commenter noted that the information could be misleading to consumers because prices may not include the services provided by all providers that are involved in a patient's hospital care such as surgeons and anesthesiologists.

The Departments agree that plans and issuers that use alternative reimbursement arrangements should still be subject to requirements to disclose rates through the In-network Rate File. Nowhere in the proposed rules did the Departments indicate that only plans and issuers that reimburse on a standard FFS model would be required to make public the disclosure of negotiated rates. As evidenced by the discussion of reporting of bundled payment arrangements and plans and issuers using alternative reimbursement models such as formula-based or reference-based pricing in the proposed rules, the Departments intended the disclosures required through the final rules to apply to all plans and issuers, regardless of reimbursement model. The Departments clarify that plans and issuers that reimburse providers on a basis that is different from a standard FFS model would still be required to make public the disclosures of in-network negotiated rates, out-of-network allowed amounts and prices for prescription drugs as required by the final rules.

Later in this preamble, the Departments have summarized the general reporting expectations for several alternative reimbursement models, including bundled payment arrangements and capitation arrangements (including sole capitation arrangements and partial capitation arrangements), reference-based pricing without a defined network, reference-based pricing with a defined network, and value-based purchasing. This summary is not meant to be exhaustive, as the Departments are aware that other alternative reimbursement or contracting models exist. However, before clarifying how these payment arrangements would work under the final rules, the Departments note modifications to the requirements for the pricing information that must be publicly disclosed through the In-network Rate File.

Some commenters stated that the proposed rules did not acknowledge that negotiated rates alone provide an inaccurate or incomplete picture of health care item and service pricing. In response, the Departments conducted additional research to understand how the final rules could require the appropriate level of detail in the In-network Rate File and provide a more complete and transparent picture of prices of health care items and services. In response to comments, and as a result of this additional research, the Departments are modifying the language describing the requirement for the pricing information that must be publicly disclosed through the file. Specifically, the Departments are clarifying that the In-network Rate File should include all applicable rates, even where not referred to as negotiated rates. As described in the final rules, this could include negotiated rates, an underlying fee schedule rate or, derived amounts, as applicable. These modifications are intended to clarify disclosure requirements for plans and issuers that use alternative reimbursement arrangements and to ensure that the rates upon which consumer cost-sharing liability is determined as well as negotiated rates are publicly disclosed through the In-network Rate File. The Departments are of the view that this approach is consistent with the goals of transparency as outlined in the proposed rules because it ensures that the In-network Rate File will be both meaningful for consumers and requires transparency in price disclosures that will promote increased competition in health care markets. Without this clarification, the In-network Rate File could have potentially excluded rates that are used to determine cost-sharing liability, which is essential information upon which consumers would need to rely to make health care purchasing decisions. Further, retaining as proposed the requirement to include the negotiated rates that plans and issuers use to determine provider reimbursement is crucial to price transparency efforts, which will help foster competition and lower prices. Public disclosure of negotiated rates and derived amounts will also support research and regulatory oversight. For example, this information will help researchers evaluate alternative payment models in relation to the traditional FFS payment model, which could help spur more innovation in health care markets. State regulators will also be able to gain further insight into the various payment models, which would support general oversight of plans and issuers using different payment models, and could support market reform efforts.

One commenter noted that plans and issuers that use capitated reimbursement arrangements may assign prices to items and services as a normal course of business. Thus, they should be able to disclose those prices as part of the In-network Rate File. The Departments agree. The final rules require a plan or issuer that does not have a negotiated rate to disclose a "derived amount," which is defined as the price that a plan or issuer assigns an item or service for the purpose of internal accounting, reconciliation with providers, or for the purpose of submitting data in accordance with the requirements of 45 CFR 153.710(c).

45 CFR 153.710(c) sets forth a process through which capitated plans that do not generate individual enrollee claims in the normal course of business must submit data for the purpose of the HHS-operated risk adjustment program.[176] As stated in the preamble to the HHS Notice of Benefit and Payment Parameters for 2014 final rule, many capitated plans currently use some form of encounter data pricing methodology to derive claims' prices, often by imputing an amount based upon the

[176] HHS has operated the risk adjustment program for the individual and small group markets under section 1343 of PPACA on behalf of all states and the District of Columbia since the 2017 benefit year.

Medicare fee-for-service equivalent price or the usual, customary, and reasonable equivalent that would have been paid for the service in the applicable state market risk pool.[177] For the purposes of 45 CFR 153.710(c), an issuer offering a capitated plan is required to use its principal internal methodology for pricing those encounters for purposes of submitting risk adjustment data, such as the methodology in use for other State or Federal programs (for example, a methodology used for the Medicare Advantage market).[178] If an issuer, including an issuer of a capitated risk adjustment covered plan, has no such methodology, or has an incomplete methodology, it must supplement the methodology in a manner that yields derived claims that are reasonable in light of the specific market that the plan is serving. Given these requirements under 45 CFR 153.710(c), the Departments are of the view that most issuers offering capitated plans that do not process claims on an individual basis, and therefore do not have negotiated rates, will have a derived amount.

The Departments acknowledge that 45 CFR 153.710(c)does not apply to group health plans or all health insurance issuers subject to these rules and so they may not calculate derived amounts for this purpose. The final rules do not require plans or issuers to develop a new methodology for providing derived amounts if the plan or issuer does not have an existing methodology used in the normal course of business. Therefore, the final rules require plans and issuers that do not have a negotiated rate to provide a derived amount, to the extent these amounts are already calculated in the normal course of business. Where a plan or issuer does not have a derived amount calculated in the normal course of business, they are not required to provide a derived amount.

The Departments also note that under the final rules, where a plan or issuer includes in the In-network Rate File a comparable derived amount in lieu of the negotiated rate (for example, under a capitation arrangement where a specific negotiated rate is not available for a particular item or service), they will be required to add a notation to the machine-readable files indicating that the rate is subject to an alternative payment arrangement. The Departments are also aware that some plan and issuer contracting models use a mixture of approaches and note that plans and issuers should follow the general guidelines (to be provided by the Departments in the technical implementation guidance) based on how a particular covered item or service is reimbursed where a mixture of approaches is used in the same plan or coverage.

The final rules clarify that, where plans and issuers use negotiated rates or a comparable derived amount and an underlying fee schedule rate as defined in the final rules, they are required to report both the negotiated rate or comparable derived amount and the underlying fee schedule rate used for that item or service. Therefore, the Departments are also modifying the In-network Rate File to require public disclosure of an underlying fee schedule rate, when applicable. The Departments are aware that under some reimbursement models, one set of negotiated rates is used for provider reimbursement (or comparable derived amounts are used for internal accounting purposes) and another set of rates, referred to in the final rules as an underlying fee schedule rate, is used for determining consumer cost-sharing liability. The Departments view the modification to the In-network Rate File to require public disclosure of an underlying fee schedule rate important to ensuring the public disclosures required through the rules include transparency in the prices used by all plans and issuers in making determinations of consumer cost-sharing liability. The final rules define the underlying fee schedule rates as the rate for an item or service that a plan or issuer uses to determine a participant's, beneficiary's, or enrollee's cost-sharing liability from a particular provider or providers, when that rate is different from the negotiated rate. For instance, under certain capitation payments which reimburse a provider a PMPM rate, the PMPM rate would be the negotiated rate. However, the plan or issuer would also have assigned a price for an item or service from that provider for the purpose determining cost-sharing liability; that amount is the underlying fee schedule rate. Therefore, in this example, in the In-network Rate File, the plan or issuer would be required to report the negotiated rate, which in this case is the PMPM rate, and the underlying fee schedule rate used to determine cost-sharing liability.

In the final rules, plans and issuers are required to disclose only those rates that are applicable to their particular reimbursement arrangement model. If a plan or issuer only uses one rate for determining both provider reimbursement and consumer cost-sharing liability, then only that rate would be applicable to the plan or issuer, and therefore required to be disclosed through the In-network Rate File. Where a plan or issuer uses an alternative reimbursement arrangement and does not have a negotiated rate, as defined in the final rules, the plan or issuer would be required to publicly disclose through the In-network Rate File the derived amount, to the extent the plan or issuer generates such an amount in the normal course of business. If a plan or issuer has a negotiated rate or a derived amount but does not also use that applicable rate to make determinations of consumer cost-sharing liability, then the plan or issuer would be required to publicly disclose both the negotiated rate or derived amount and the underlying fee schedule rate used to determine consumer cost-sharing liability.

The Departments note that, while a scenario where a plan or issuer uses both negotiated rates or a comparable derived amount and an underlying fee schedule rate in their operations is more likely to occur under an alternative reimbursement model, it is possible to have both a negotiated rate and an underlying fee schedule rate in an FFS reimbursement arrangement. Such a scenario is possible where a plan that uses a traditional negotiated rate to reimburse a provider for a particular covered item or service and bases participant, beneficiary, or enrollee cost-sharing liability upon a different rate for the same item or service.

Under bundled payment arrangements, plans and issuers may reimburse a provider for multiple services and items under a single billing code. Under these arrange-

[177] 78 FR 15410, 15499-15500 (Mar. 11, 2013).
[178] *Id.*, *see also* 78 FR 15410, 15470-71 (Mar. 11, 2013).

ments, plans and issuers should provide a negotiated rate (or comparable derived amount) for that single billing code and list the items and services, including prescription drugs, that are included in that bundle. If a negotiated rate (or comparable derived amount) exists for each item and service, including prescription drugs, within the bundle, the plan or issuer should include the negotiated rate for the total bundle and also include in the In-network Rate File the respective negotiated rates (or comparable derived amount) for all covered items or services included in the bundle.

It is the Departments' understanding that, if the bundled payment arrangement exists to the exclusion of any reimbursement arrangement for the underlying services and items, payers and providers often continue to track, for purposes of informing renegotiation of the bundle, reimbursement at the level of the individual item or service using a derived amount. For the In-network Rate File, plans and issuers with this type of model are required to disclose the negotiated rate for the total bundle and the derived amounts for individual items or services in the bundled payment arrangement. If a derived amount for these purposes does not exist, then plans and issuers would not be required to report a derived amount. Where a plan or issuer uses a derived amount or reasonable estimate in lieu of the negotiated rate, they will be required to add a notation to the machine-readable files indicating that the rate is subject to an alternative payment arrangement.

The Departments acknowledge that there are many different types of capitation models. As stated in the example earlier, for capitation arrangements that reimburse a provider a capitated amount, such as a PMPM, or a similar direct primary care arrangement, the plan or issuer would report the negotiated rate, which in this case is the PMPM amount, and the underlying fee schedule, as applicable. Under certain other capitation models, the provider's capitation amount may be weighted dependent upon certain characteristics of the participant, beneficiary, or enrollee, such as age, gender, or co-morbidities. Plans and issuers with this type of capitation arrangement should provide the base negotiated rate, which is the negotiated rate before adjustments have been made for certain participant, beneficiary, or enrollee characteristics. Plans and issuers using capitation arrangements should notate any entry that represents a capitated amount and list all items and services, including prescription drugs that are covered under a particular capitation amount in the In-network Rate File.

In some cases, a sole capitation arrangement exists, such as staff model HMOs under which services are provided by in-network salaried providers and there are neither negotiated rates nor an underlying fee schedule rate. In this case, plans and issuers are required to include a derived amount in the In-network Rate File. If an applicable rate (a negotiated rate, derived amount, or underlying fee schedule rate) does not exist for an item or service, then plans and issuers are not be required to report pricing information for that particular item or service.

The Departments are aware that some plans and issuers use a partial capitation model where the plan or issuer reimburses providers under a variable FFS amount in addition to a flat capitation amount. The Departments expect plans and issuers using a partial capitation model to make public the FFS negotiated rate as well as the capitation amount. Plan and issuers must also add a notation to the file indicating that a capitation arrangement (or a partially capitated arrangement) exists. For specific items and services where plans and issuers using this model do not have an FFS negotiated rate in addition to a capitation amount (that is, for items and services where they do follow a full capitation model), plans and issuers are required to follow the reporting requirements described for sole capitation arrangements.

Reference-based pricing without a defined network is an arrangement where payers reimburse providers based on a percentage (usually 120 percent to 200 percent) of the Medicare rate, but do not have contractual agreements with providers. The Departments expect there will be no In-network Rate File for this type of arrangement because the plan or issuer does not have in-network providers as defined in the final rules.

By contrast, under a reference-based pricing model with a defined network, payers have contractual agreements to reimburse providers based on a percentage of a different rate that is known or determinable by the parties (usually 120 percent to 200 percent of the Medicare rate), which is subject to change based upon adjustments that can be specific to the participant, beneficiary, or enrollee, such as age, gender, and severity of illness. To represent this type of arrangement, and other provider reimbursement models that are based upon participant, beneficiary, or enrollee-specific adjustments, the final rules clarify that plans and issuers are required to include for each item or service in the In-network Rate File, the base negotiated rate that applies before adjusting for participant, beneficiary, or enrollee -specific characteristics. The negotiated rate in the referenced-based pricing model must be represented as a dollar value that is the result of the calculation of the referenced amount and the applicable reference-based percentage. For example, a plan calculates provider reimbursement using a reference-based pricing model that sets reimbursement to Provider X at 120 percent of the Medicare rate for covered Item A. The reference-based percentage used to determine the base negotiated rate would be 120 percent. In the general course of business, the plan determines the Medicare rate for Item A using participant, beneficiary, or enrollee-specific characteristics, but, because there is no specific participant, beneficiary, or enrollee for purposes of populating the In-network Rate File, the plan or issuer must report the base negotiated rate that would apply prior to application of any participant, beneficiary, or enrollee-specific characteristics. In this example, the Medicare rate for Item A is $150, before applying adjusters for participant, beneficiary, or enrollee-specific characteristics. Therefore, the plan would report a negotiated rate for Item A when received from Provider X of $180 ($150 multiplied by 120 percent) and must include this rate in the In-network Rate File.

Finally, under a reimbursement arrangement that adjusts payments or reconciles provider payments after providing care, such as in many value-based purchasing models, the plan or issuer must also provide the base negotiated rate for the specific provider in the In-network File. For instance, in a value-based pur-

chasing model, payers may adjust negotiated rates for a particular provider if the provider meets certain contractual goals, which may be related to quality, volume, and efficiency of care. The Departments clarify that quality or value dependent weighting factors or adjusters are not required to be included in the negotiated rate made public under the final rules.

As noted earlier in this preamble, nothing in the final rules prevents a plan or issuer from providing supplementary materials, including footnotes, disclaimers, data dictionaries, and other explanatory language, as accompaniments with the machine-readable files. For example, a plan or issuer may choose to provide clarifying information related to how the negotiated rate, if reported as a base negotiated rate, may change depending on quality or value-dependent weighting factors, or participant, beneficiary, or enrollee-specific factors such as the severity of illness, age, or gender. Because base rates unadjusted for participant, beneficiary, or enrollee-specific factors are required to be reported for reference-based pricing arrangements, the Departments note that it is a best practice to include a disclaimer noting that the rate could change subject to participant, beneficiary, or enrollee-specific characteristics.

Some commenters noted that simply listing the negotiated rates without context regarding overall cost would not help consumers make informed decisions. The commenter further noted that consumer decision-making could be harmed if relying on negotiated rate information without context regarding provider billing practices. Other commenters stated that non-negotiated billed charges would be useful as an additional category of pricing information for the public, especially for the uninsured and those seeking out-of-network care. Another commenter agreed that information on provider-billed charges is important for transparency, but this commenter suggested that providers, not issuers, would be the appropriate source of this information.

As discussed later in this preamble, the Departments are of the view that inclusion of billed charges in the In-network Rate File is unnecessary to achieve the goals of the final rules because in-network providers are not permitted to balance bill participants, beneficiaries, or enrollees as in-network providers have agreed to accept the negotiated rate as payment in full (less any participant, beneficiary, or enrollee cost-sharing liability) for the item or service. However, inclusion of billed charges in the Allowed Amount File will provide meaningful information when coupled with allowed amount information because it will allow consumers to estimate their potential balance billing liability when receiving items and services furnished by out-of-network providers if balance billing is allowed in their state. Therefore, inclusion of billed charges in the In-network Rate File would not provide additional value for consumers.

Moreover, the Departments are of the view that inclusion of the billed charge could be more misleading in the In-network Rate File because the billed charge is very rarely what the consumer or the payer ends up paying for a particular claim and may not have a clear relationship with the negotiated rate or underlying fee schedule. While the Departments agree that inclusion of billed charges in the In-network Rate File would provide another data point for developers in developing the tools, adding billed charges would also increase both the size and complexity of the In-network Rate File. Because it appears that inclusion of this data element could obscure other pricing information and would not increase transparency of actual prices paid by participants, beneficiaries, enrollees, or payers, the Departments decline to add a billed charge data element requirement to the In-network Rate File at this time.

As discussed earlier in this preamble, the final rules finalize a requirement for plans and issuers to associate the pricing information disclosed on each of the three machine-readable files with three data elements that identify the provider and the location where the service was provided: NPI, TIN, and Place of Service Code. For the In-network Rate File, the Departments proposed that the negotiated rate should be the rate that applies to each item or service that is associated with the last date of contract term for each provider NPI. The final rules modify this requirement to clarify that the applicable rates publicly disclosed in the In-network Rate File should be the rates that apply to each item or service that is associated with the last date of the contract term or the contract expiration date for each provider as identified by NPI, TIN, and Place of Service Code.

Allowed Amount File

For the Allowed Amount File, the third content element is historical out-of-network allowed amounts for covered items and services. The proposed rules would require plans and issuers to include in the Allowed Amount File each unique out-of-network allowed amount in connection with covered items or services furnished by a particular out-of-network provider during the 90-day time period that begins 180 days prior to the publication date of the Allowed Amount File. As with the In-network Rate File, where a plan or issuer reimburses providers for an item or service based on a formula or reference based-pricing (such as a percentage of a Medicare reimbursement rate), the plan or issuer would be required to provide the calculated dollar amount of the allowed amount for each provider. Allowed amounts would have to be associated with the provider's NPI, TIN, and Place of Service code.

The Departments designed this reporting requirement to elicit payment data that reflects recent out-of-network allowed amounts in connection with claims for out-of-network covered services. The Departments assumed these amounts would provide payment data that is useful to consumers because it is reflective of the most recent reimbursements. Specifically, the Departments proposed to require reporting based on dates of service within 180 days of the Allowed Amount File publication date to ensure that data is composed of recent claims (rather than older claims from multiple time periods) and to avoid the reporting of payments from inconsistent periods of time. The Departments took the view that payment data from defined periods of time would enable users to make meaningful comparisons across plans and coverage options.

When disclosing an out-of-network allowed amount under this requirement, the Departments proposed to require a plan or issuer to disclose the actual amount the plan or issuer paid to the out-of-network provider, plus the participant's, beneficiary's, or enrollee's share of the cost. For

instance, if the out-of-network allowed amount for a covered service was $100, and the plan or issuer paid 80 percent of the out-of-network allowed amount ($80) per the terms of the plan or coverage, so that the participant, beneficiary, or enrollee was responsible for paying twenty percent of the out-of-network allowed amount ($20), the plan or issuer would report an out-of-network allowed amount of $100. This unique payment amount would be associated with the particular covered item or service (identified by billing code) and the particular out-of-network provider who furnished the item or service (identified by NPI, TIN, and Place of Service Code).

The Departments clarify that, in contrast to the In-network Rate File, no special considerations for reporting alternative payment arrangements are necessary for the Allowed Amount File because plans and issuers are required to disclose actual amounts paid in the Allowed Amount File and can therefore account for retrospective reconciliations and weighting factors that require special considerations. For the Allowed Amounts File, the Departments expect plans and issuers that reimburse in-network providers using alternative payment methodologies to adhere to the standard requirement of providing allowed amounts on historical claims paid to out-of-network providers for each covered item or service during the applicable reference period. Plans and issuers generally do not reimburse out-of-network providers, with whom they do not maintain a contractual relationship, under an alternative payment arrangement. However, to the extent a plan or issuer uses an alternative payment arrangement to reimburse out-of-network providers, the plan or issuer would still be required to report the allowed amount paid to the out-of-network provider. The Departments will address, through the technical implementation guidance, how a plan or issuer will be able to represent data in the Allowed Amount File, as necessary. The Departments anticipate that plans and issuers that reimburse providers using reference-based pricing without a network will have larger than average Allowed Amount Files, as all of the payments would be made to out-of-network providers and would therefore be subject to this requirement.

Some commenters supported disclosure of the "historical" payments made by plans and issuers to out-of-network providers. One commenter acknowledged that bulk de-identified data that informs a consumer of historical out-of-network allowed amounts may be relevant to consumer decision-making regarding a particular provider or procedure. One commenter pointed out that if the Departments failed to adopt this requirement in tandem with the In-network Rate File requirement, providers could withdraw from networks to avoid transparency requirements.

By contrast, other comments were less supportive of the Allowed Amount File proposal. Several commenters stated that publishing historical out-of-network allowed amounts would not meet the Departments' purported goal of helping consumers understand costs and would possibly lead to consumer confusion. Commenters expressed concern that the Allowed Amount File could result in consumers receiving misleading information, which would lead to negative financial consequences for consumers because the file would not provide all information about potential out-of-network costs, such as those that could be incurred through balance billing, if allowed in their state. One commenter stated that inclusion of billed charges would allow the development of open source charge schedules. One commenter pointed out that the information in the machine-readable files would not address scenarios where a participant, beneficiary, or enrollee receives out-of-network care in an in-network facility. Still other commenters expressed concerns about the reliability of the data as historical allowed amounts with out-of-network providers may not provide an accurate portrait of future cost information because issuers do not have contracts with out-of-network providers. Similarly, another commenter stated that health plans should not be responsible for publishing rates for providers with whom they do not maintain a relationship.

One commenter recommended the Departments withdraw the proposal, making the argument that small health plans are unlikely to have a sufficient number of claims billed for any one procedure from a particular provider to make the file meaningful. In lieu of requiring the Allowed Amount File, another commenter suggested the Departments instead place the onus on out-of-network providers or suppliers to provide consumers with information about the costs of their services.

The Departments continue to be of the view that release of this information is appropriate and necessary to empower consumers to make informed decisions about their health care, spur competition in health care markets, and to slow or potentially reverse the rising cost of health care items and services. As noted earlier in this preamble and in the preamble to the proposed rules, limiting access to data to a subset of consumers would not promote the transparency goals of PPACA and the final rules, and would reduce the potential for the final rules to drive down health care costs by increasing competition. If the Departments were to eliminate the Allowed Amount File requirement or reduce its scope, it would significantly reduce the benefits of the final rules for uninsured consumers and insured consumers evaluating out-of-network treatment options.

The information in the Allowed Amount File, especially as filtered through innovative platforms and tools, will help consumers make more informed decisions regarding changes to their health coverage (for example, the purchase of new coverage or switching to a new plan). Furthermore, this information may help insured consumers make more informed health care decisions when seeking out-of-network treatment; and may help uninsured consumers make health care decisions and potentially allow them to negotiate more effectively with providers. Finally, the creation of Allowed Amount Files may help researchers and regulators monitor plan benefit design and help spur innovation.

While there is some potential for some consumers to be confused by the information in the Allowed Amount Files, the Departments do not agree that the files will provide misleading information to consumers. The Departments expect most consumers to access this information through tools created by third-party application developers and other stakeholders, which will be able to provide additional context for the average consumer.

The Departments proposed to require plans and issuers to report out-of-network

allowed amounts for services furnished at least 90 days in the past to help ensure the availability of reasonable volumes of out-of-network allowed amount data in the Allowed Amount File. The Departments expressed the view that a 90-day lag between the end of a reporting period and the publication of required out-of-network allowed amount data will allow plans and issuers sufficient time to adjudicate and pay claims from out-of-network providers for the relevant reporting period. Claims processing times may vary between plans and issuers, and external factors may increase processing timelines. For example, the Departments noted in the proposed rules that many out-of-network providers do not send claims directly to plans and issuers but instead require participant, beneficiary, or enrollee to file out-of-network claims. This could mean that an out-of-network claim may not reach a plan or issuer for 6 to 12 months after a service is rendered. Such delays could negatively affect the volume of out-of-network allowed amount data and the ultimate usefulness of this data. For this reason, the Departments sought comment regarding whether requiring plans and issuers to report out-of-network allowed amounts for items and services furnished at least 90 days in the past is sufficient to ensure the proposed disclosures will yield sufficient volumes of historical data to be useful to consumers who wish to shop for services based on price. The Departments requested comment on whether there should be more time between the end of the reporting period and publication of the data, such as 120 days, 180 days, or longer, which would increase the likelihood that out-of-network claims from the relevant reporting period have been adjudicated and paid by the time of publication.

The Departments did not receive comments directly in response to this comment solicitation and are finalizing the Allowed Amount File historical lookback period as proposed. The final rules, therefore, adopt a requirement for the Allowed Amount Files to include data for the 90-day period beginning 180 days before the file publication date. For example, a file published on June 30, 2021, should include data for a 90-day period beginning on January 1, 2021. The Departments will monitor the implementation of this requirement for the Allowed Amount Files and may revisit the lookback period if the 90-day reporting period beginning 180 days before file publication fails to yield sufficient out-of-network data on allowed amounts.

The Departments specifically sought comment on whether the required disclosures of historical out-of-network allowed amounts would provide useful information that can assist consumers in locating services at an affordable cost, or whether there could be additional information that would be both useful to anticipated users and practical for plans and issuers to disclose for this purpose. For instance, the Departments stated in the preamble to the proposed rules that the Departments considered requiring plans and issuers to disclose amounts out-of-network providers have charged participants, beneficiaries, and enrollees for covered services in the Allowed Amount File. The Departments noted they understood that such charged amounts would be included in any claim for out-of-network benefits and could be helpful to consumers shopping for services based on price. The Departments sought comment on this data element.

As summarized earlier in this preamble regarding the In-network Rate File, some commenters who supported the inclusion of non-negotiated billed charges in the In-network Rate File also supported inclusion of billed charges in the Allowed Amount File. These commenters noted that billed charge information would be especially useful for the uninsured or those seeking out-of-network care. Another commenter agreed that information on provider-billed charges is important for transparency, but this commenter stated that providers, not issuers, would be the appropriate source for this information.

Regarding these comments, the Departments agree that that a billed charges data element is important to ensure that the public disclosures required through the out-of-network Allowed Amount File are as useful to consumers as possible, including in the scenario where an insured consumer receives items or services from an out-of-network provider. Although the Departments are aware that the amount an out-of-network provider will ultimately balance bill (if allowed in their state) a consumer for an item or service does not always equal the difference between the billed charge and the allowed amount, the Departments are of the view that this information would aid consumers in understanding their potential out-of-pocket liability. In the jurisdictions that do not prohibit or limit balance billing, information on billed charges could aide consumers in their health care decision-making as it is possible that consumers may choose to receive or forgo a particular item or service from a particular provider based on the additional out-of-pocket liability they could be expected to pay through a balance billing charge from a provider.

Consumers may be able to shop for a particular out-of-network provider based on total cost of an item or service. For example, in a state that allows providers to balance bill, a consumer has a coinsurance of 40 percent for Service X when Service X is furnished by an out-of-network provider. Out of network Provider A's billed charge for Service X is $200, and the consumer's plan allows an amount of $100 to be paid to the provider. Therefore, the consumer is responsible for a coinsurance amount of $40 ($100 allowed amount multiplied by the consumer's 40 percent coinsurance) and the consumer may be balance billed an additional $100 ($200 billed charge minus the $100 allowed amount). In comparison, out-of-network Provider B's billed charge for Service X is $120 and the consumer's plan allows the same amount of $100 to be paid to the provider. If the consumer receives Service X from Provider B, they will be responsible for the same coinsurance amount of $40 ($100 allowed amount multiplied by the consumer's 40 percent coinsurance). However, if the consumer receives Service X from Provider B, the consumer may only be balance billed $20 ($120 billed charge minus $100 allowed amount), which would be an $80 savings to the consumer compared with receiving the Service X from Provider A. Note that this example assumes that both Provider A and Provider B will balance bill consumers, which is not always true even in states that allow balance billing. Consumers should also contact providers to inquire whether they will balance bill before making health care purchasing decisions using this information. Therefore, with information on both allowed amounts and billed charges, the consumer may choose to re-

ceive Service X from Provider B because their total out-of-pocket costs will likely be lower.

The Departments note that it is possible that plans and issuers will populate the Allowed Amount File with multiple billed charges for the same item or service furnished by the same out-of-network provider. If this is the case, the billed charge in the Allowed Amount File will present an expected range and give consumers access to a reasonably accurate estimate of how much they can expect to be balance billed by an out-of-network provider, but the billed charge cannot provide to the consumer the exact amount they can expect to be balance billed when receiving items and services furnished by the out-of-network provider.

For these reasons, the Departments are of the view that inclusion of the billed charges in the Allowed Amounts File will help provide a more complete picture of the full amount a provider could receive for a particular item or service, either from plans and issuers or directly from a participant, beneficiary, or enrollee. Furthermore, the Departments are of the view that requiring this information is consistent with the goal of providing consumers an understanding of their potential out-of-pocket liability in advance, similar to an EOB provided in advance, as billed charges are included on a participant's, beneficiary's, or enrollee's EOB and are often the first data available for understanding a participants, beneficiary's, or enrollee's out-of-pocket liability.

The Departments are aware that plans and issuers have information regarding providers' billed charges, even if they do not necessarily have information regarding specific balance billing amounts. The Departments are therefore of the view that the inclusion of billed charges in the Allowed Amount File will not substantially increase the burdens of the final rules. Nonetheless, the Departments are aware that adding billed charges will also increase both the size and complexity of the Allowed Amounts File. The Departments do not intend to increase the burden of developing and maintaining these files unless the inclusion of the additional data element is essential for providing meaningful pricing information to consumers. Because it is the Departments' view that this data element will increase transparency of actual prices paid by participants, beneficiaries, enrollees, and payers, the Departments are finalizing the Allowed Amounts File with the modification to add billed charges as an additional data point required to be disclosed through the file.

The final rules define billed charges as total charges for an item or service billed to a plan or issuer by a provider. Plans and issuers are required to publicly disclose billed charges associated with each unique allowed amount that would be required under the final rules. The final rules further clarify that plans and issuers must report each unique combination of allowed amounts and billed charges for each out-of-network provider, and their associated Place of Service Code, provider NPI, and provider TIN. For example, an out-of-network provider (under a single NPI, TIN, and Place of Service Code) submits 25 claims (or any other number of claims to meet the 20 unique claim threshold requirement discussed in more detail later in this preamble) to a plan or issuer for the service Y. The 25 claims have three[179] different billed charges ($100, $150 and $200) and two different allowed amounts ($50 and $150) for item Y. The plan or issuer should have one entry that represents each unique combination of billed charges and allowed amounts submitted by the out-of-network provider. Therefore, in this example, the Departments would expect the plan or issuer to represent in the Allowed Amounts File no fewer than three unique entries, and no more than six unique entries for item Y from this out-of-network provider. For example:

- Entry A has a billed charge of $100 and an associated allowed amount of $50;
- Entry B has a billed charge of $150 and an associated allowed amount of $50;
- Entry C has a billed charge of $200 and an associated allowed amount of $50;
- Entry D has a billed charge of $100 and an associated allowed amount of $150;
- Entry E has a billed charge of $150 and an associate allowed amount of $150;
- Entry F has a billed charge of $200 and an associated allowed amount of $150.

The Departments do not expect to see 25 different entries, unless they represented 25 distinct combinations of billed charges and associated allowed amounts from the out-out network provider for Item Y.

In the Allowed Amount File, the file structure is envisioned as a parent/child data relationship, where certain data elements are included under or belong to other data elements, as a child to a parent. In the Allowed Amount File, the billed charge data element would serve as a child to the parent allowed amount element. Therefore, under each unique allowed amount for a particular item or service from a particular provider, the amount of each provider-billed charge is listed as a unique dollar amount.

One commenter requested the Departments clarify what is meant by "allowed amounts for covered items or services furnished by particular out-of-network providers," questioning whether through inclusion of the word "particular" the Departments intended to reference specialized out-of-network providers upon which plans and issuers might place coverage limitations. The Departments clarify that inclusion of the word "particular" as a modifier of "out-of-network providers" was not intended to be a reference to specialized out-of-network providers upon which plans and issuers might place coverage limitations. Rather, use of the word "particular" indicates that Allowed Amount Files must include the historical allowed amounts for covered items and services furnished to each out-of-network provider to whom such payments were made during the reference period. The Departments clarify that under the final rules, and as contemplated in the proposed rules, plans and issuers are expected to include historical allowed amounts for every covered item or service furnished by each out-of-network provider so long as the unique claims threshold for the out-of-network provider is met.

[179] The Departments note that it is possible for a provider to have different allowed amounts for the same item or service covered by the same out-of-network provider because the plan or issuer does not have a contractual relationship with that out-of-network provider, by definition. For similar reasons, it is also possible for the billed charged submitted by the same out-of-network provider to for the same item or service to be variable.

The Departments further clarify that plans and issuers are only required to include in the Allowed Amount File those covered items and services furnished by an out-of-network provider for which the plan or issuer has adjudicated claims and determined it will pay an allowed amount. If the plan or issuer has not adjudicated claims and determined it will pay an allowed amount for items or services furnished by an out-of-network provider, the plan or issuer is not required to include those allowed amounts or billed charges in the Allowed Amount File.

In response to the comment that the information in the files would not address the scenario where a participant, beneficiary, or enrollee receives out-of-network care in an in-network facility, the Departments clarify that the expectation is that this information would be captured in the Allowed Amounts File. If a participant, beneficiary, or enrollee receives out-of-network care, even if the facility is in the participant's, beneficiary's, or enrollee's network, the provider will generate a claim and send a billed charge to the payer that will establish an allowed amount for the claim; the Departments expect this allowed amount to appear in the Allowed Amounts File in this scenario. As noted elsewhere in this preamble, the Departments will provide technical implementation guidance (as well as individualized technical assistance, as needed) to ensure that plans and issuers are able to make public the disclosures required through the final rules.

The Departments do not agree with the commenter who asserted that, because some small health plans will not have a sufficient number of any one procedure from a particular provider to make the file meaningful, the Allowed Amount File requirement should be withdrawn. The relevant commenter did not provide a number of claims that it believed would make the file meaningful. In contrast, the Departments are of the view that the files will be meaningful to the public regarding all covered items and services from a particular provider regardless of the specific numbers of claims at issue, even if a particular provider bills relatively few claims to a particular plan or issuer. As discussed elsewhere in this preamble, for privacy and security reasons, the Departments are requiring disclosure for all covered items and services from a particular provider that meets the unique claims threshold established by the final rules. If a small health plan does not have sufficient claims for a covered item or service to meet the unique claims threshold for a particular provider, then that health plan is not permitted to publicly disclose information for that particular item or service paid to the particular provider. The Departments are of the view that most health plans and issuers will meet the unique claims threshold for a large proportion of items, services, and providers to make the files sufficiently meaningful to justify this requirement.

In the preamble to the proposed rules, the Departments noted that providing this information could raise health privacy concerns. The Departments are committed to protecting PHI and other sensitive information. To address these privacy concerns, as discussed in this preamble, the Departments proposed that plans and issuers would not be required to provide out-of-network allowed amount data in relation to a particular provider and a particular item or service when compliance would require a plan or issuer to report out-of-network allowed amounts to a particular provider in connection with fewer than 10 different claims for payment. The Departments also noted that disclosure of such information would not be required if compliance would violate applicable health information privacy laws. In addition to proposing this exemption, the Departments proposed to require plans and issuers to include only unique out-of-network allowed amounts to mask the total episodes of care for a particular provider and item or service. In the proposed rules, the Departments expressed the view that these mitigation strategies, in addition to flexibilities proposed to allow the aggregation of reported data (as described later in this preamble), were sufficient to protect patients from identification based on information in the Allowed Amount File. The Departments solicited comment on whether additional privacy protections would be required.

The Departments specifically requested comment on whether a higher minimum claims threshold, such as a threshold of 20 claims, would better mitigate privacy concerns and minimize complexity in complying with federal or state privacy laws without compromising the integrity of the compiled information. The Departments also sought comment on additional approaches that could decrease the potential for aggregated health information that would be disclosed under the proposed rules to be identified, especially with respect to smaller group health plans.

In response, some commenters expressed concerns about maintaining HIPAA protections on the Allowed Amount File due to the small number of claims associated with specific services for out-of-network providers. Several commenters stated the threshold of 10 unique claims to require public disclosure of unique historical allowed amounts would be too low to protect consumers' PHI. One commenter requested that the Departments clarify how they arrived at the 10 claims threshold. Some commenters recommended different minimum thresholds. Some commenters recommended a minimum threshold of 50 claims. On the other hand, other commenters did not support increasing the threshold, noting that the files do not contain identifiable data and so would not pose a risk. One commenter stated that the files should be released including the lowest number of claims necessary to achieve the goal of protecting participant, beneficiary, and enrollee privacy and recommended keeping the proposed threshold of 10 claims. Another commenter requested that the Departments not make the threshold any higher, and even consider lowering the cutoff to five claims, to maintain access to price transparency data for rural Americans.

Based upon comments received the final rules adopt a 20 unique claim threshold. The Departments are of the view that the 20 unique claim threshold balances the concerns expressed by commenters who suggested the Departments increase the threshold to 50 claims with the concerns of commenters who expressed the opinion that the proposed 10 claim threshold (or an even lower threshold) would be sufficient to ensure the files include a meaningful amount of data. The Departments are of the view that 20 unique claims are sufficient to balance the privacy concerns against the needs for transparency through the Allowed Amounts File. This 20 unique claim thresh-

old is more stringent than CMS' cell size suppression policy, which requires cells containing values of 1 through 10 to be suppressed in CMS data sets.[180] Increasing the unique claim threshold from 10 to 20 claims will not significantly reduce the amount of data that are required to be made public through the Allowed Amount File. However, if the Departments were to increase the unique claim threshold to 50 claims, as suggested by some commenters, the Departments are concerned that this could significantly reduce the amount of data that are required to be made public through the Allowed Amount File, which could undermine the goal of price transparency.

The Departments are of the view that increasing the unique claim threshold from 10 to 20 claims will better balance the policy goal of maximum transparency with the need to protect participants, beneficiaries, and enrollees from the possibility of being re-identified through the data included in the Allowed Amount File. In addition to this strategy, the Departments expect that the flexibility discussed later in this preamble under the special rule to permit aggregation of reported data will help protect participants, beneficiaries, and enrollees from identification based on information in the Allowed Amount File. Finally, the Departments reiterate that the disclosure of the information is not required if disclosure would violate applicable health information privacy laws. The Departments note that this exception does not mean that these disclosures are not required where a law that would otherwise prohibit the disclosure permits disclosure if required by law.

Prescription Drug File

The Departments finalize negotiated rates for prescription drugs as the third content element in the Prescription Drug File. The Departments received several comments related to whether negotiated rates for prescription drugs should be disclosed through the machine-readable files, and if so, which price or prices related to prescription drugs should be required to be included. Many commenters provided general support for the public release of negotiated rates for prescription drugs. One commenter asserted that releasing negotiated rates for prescription drugs would result in lower costs for health plans and consumers, which could lead to a reduction in manufacturer discounts of upwards of three percent.

Several commenters did not support disclosure of negotiated rates for prescription drug prices through the machine-readable files. Commenters recommended that the In-network Rate File should not include prescription drugs for several reasons. These reasons include: the complexity of prescription drug pricing (prices are determined by a formula that is determined at the point-of-sale and can change on a daily basis; the information would not be relevant to consumer decision-making; and the existence of established drug pricing tools that provide support for consumer decision-making. Some commenters stated that the unique nature of prescription drug pricing would make the release of negotiated rates difficult and further noted that the rates negotiated between PBMs and pharmacies are considered confidential. Another commenter stated that the Departments should only require disclosure of prescription drug prices when the information disclosed is directly related to the cost a plan participant, beneficiary, or enrollee would need to pay out of pocket so as not to undermine group health plans' and health insurance issuers' ability to negotiate lower drug costs. Some commenters claimed that plans and issuers have no control over prescription drug costs and may not be able to provide this information. Instead, commenters asserted that information related to prescription drug costs should come from PBMs or prescription drug manufacturers.

In 2018, retail prescription drug spending represented approximately nine percent ($335 billion) of overall health spending.[181] In 2017 large group health plans and issuers accounted for the largest share of prescription drug spending amongst other payers, despite generally having a younger and healthier population than public payers.[182] The Departments maintain that plans and issuers have an essential role,[183] and vested interest in controlling prescription drug spending. Moreover, as prescription spending continues to rise,[184] so does the trend of prescription rebates.[185] According to surveyed health plan and PBM personnel, PBMs passed through 78 percent of manufacturer rebates to health plans in 2012 and 91 percent in 2016.[186] And while some plans and issuers may use these rebates to dampen premium increases,[187] there remains an unclear prescription drug supply chain that masks the true costs of prescription drugs. The Departments are of the view that it would not advance the goals of the final rules to exclude a category of items and services that comprises such a significant proportion of health care spending.

The Departments agree that prescription drug pricing is complex but are of the view that complexity is not a valid reason for inaction. There are many different players in the prescription drug supply chain that may have some control over costs, including plans and issuers, manufacturers, wholesalers, pharmacies, and

[180] The CMS Cell Size Suppression Policy is outlined on the CMS website at the following location: https://www.cms.gov/Research-Statistics-Data-and-Systems/Files-for-Order/Data-Disclosures-Data-Agreements/DUA_-_NewLDS.

[181] "National Health Expenditures 2018 Highlights." Centers for Medicare & Medicaid Services. Available at: https://www.cms.gov/files/document/highlights.pdf.

[182] Cubanski, J., and Rae, M. "How Does Prescription Drug Spending and Use Compare Across Large Employer Plans, Medicare Part D, and Medicaid?" Kaiser Family Foundation. May 20, 2019. Available at: https://www.kff.org/medicare/issue-brief/how-does-prescription-drug-spending-and-use-compare-across-large-employer-plans-medicare-part-d-and-medicaid/.

[183] "How are prescription drug prices determined?" American Medical Association. April 9, 2019. Available at: https://www.ama-assn.org/delivering-care/public-health/how-are-prescription-drug-prices-determined.

[184] "National Health Expenditure Projections 2019-28." Office of the Actuary. Centers for Medicare & Medicaid Services. March 24, 2020. Available at: https://www.cms.gov/files/document/national-health-expenditure-projections-2019-28.pdf.

[185] According to the Academy of Managed Care Pharmacy, a prescription drug rebate is a monetary amount returned to a payer from a prescription drug manufacturer based on pharmaceutical use by a covered person or purchases by a provider. "AMCP Guide to Pharmaceutical Payment Methods, 2013 Update." Available at: https://www.amcp.org/sites/default/files/2019-03/Full-Pharmaceutical-Guide-%283.0%29.pdf; *see also* "The Prescription Drug Landscape, Explore." PEW Charitable Trusts. March 8, 2019. Available at: https://www.pewtrusts.org/en/research-and-analysis/reports/2019/03/08/the-prescription-drug-landscape-explored.

[186] *Id.*

[187] *Id.*

PBMs.[188] As commenters stated, it is often the case that PBMs negotiate the price of a prescription drug for a plan or issuer based on a contract the plan or issuer maintains with the PBM; however, it is ultimately the plan or issuer who is responsible for deciding how the costs of prescription drugs are passed along to a participant, beneficiary, or enrollee. The Departments, therefore, are of the view that plans and issuers are aware of the negotiated rate for a prescription drug for which their participants, beneficiaries, or enrollees may have cost-sharing liability, or can be informed of this negotiated rate by their contracted PBM.

The Departments do not agree that prescription drug pricing information, such as negotiated rates, will confuse consumers. As discussed elsewhere in this preamble, the Departments recognize that the information included in the machine-readable files may not be easy for an average consumer to navigate and expect that third-party developers will use this information to make tools available that make this information more useful for the average consumer.

The Departments agree with commenters who acknowledged the existence of many tools that provide prescription drug prices. However, the Departments are of the view that existing prescription drug pricing tools are insufficient as they lack competitive pricing information across all PBMs, and health plans and issuers.[189] Once prescription drug pricing is made more fully available, health care providers will have greater opportunity to factor pricing information into their prescribing decisions. Many health care providers benefit financially when they can reduce costs and improve their patients' medication adherence.[190] This benefit to providers can also have a significant impact on overall health care spending.

For these reasons, and those discussed more fully below, the Departments are finalizing, with modifications from the proposed rules, requirements to disclose pricing information for prescription drugs through a machine-readable file. However, reflecting the unique attributes of prescription drug pricing, the final rules respond to comments by adopting requirements that are more detailed than what was included in the proposed rules, including the inclusion of a third machine-readable file for prescription drug pricing information.

The final rules require plans and issuers to produce a third machine-readable file for reporting prescription drug pricing information, the Prescription Drug File, whereas the proposed rules would have required plans and issuers to include negotiated rates for covered prescription drugs in the In-network Rate File. The Departments have made this change to ensure that prescription drug pricing information is produced in a manner that is most useful to the public. As noted earlier in this preamble, there are upwards of 100,000 NDCs for prescription drugs. Divorcing negotiated rates for prescription drugs from negotiated rates for other items and services allows the pricing information for medical items and services to be discernible from pricing information for prescription drugs. Further, a PBM may administer pharmacy benefits for a plan or issuer in addition to any other services it may provide to a plan or issuer. Therefore, keeping prescription drugs pricing data separate from pricing data for other items and services is generally better aligned with plan and issuer operations and will reduce the burden associated with combining data from different sources. As discussed in the Information Collection Requests (ICR) section of this preamble, the Departments estimate that the Prescription Drugs File requirement will not add significantly to the development and maintenance costs of the machine-readable files because the cost and burdens related to prescription drugs will largely be transferred from the In-network Rate File to the Prescription Drug File. Additionally, the Departments anticipate that removal of prescription drugs from the In-network Rate Files will significantly reduce the size of those files, which could reduce the costs associated with maintenance and storage of each individual file. The Departments are of the view that removing prescription drugs from the In-network Rate File and requiring this information to be included in a separate Prescription Drug File is consistent with the Departments' goal of separating fundamentally different types of data into distinct files. Because, as many commenters observed, prescription drug prices are unique, the Departments are of the view that this information would be more appropriately represented through a third machine-readable file. Furthermore, the updated machine-readable file structure will support consumers, researchers, and third-party developers in reviewing, ingesting, aggregating, and analyzing the data.

The Disclosure of Prescription Drugs Pricing Information

Under the proposed rules, group health plans and health insurance issuers would be required to publicly disclose negotiated rates in the In-network Rate file. The Departments defined negotiated rates in the proposed rule as the amount a group health plan or health insurance issuer, or a third party on behalf of a group health plan or health insurance issuer, has contractually agreed to pay an in-network provider for covered items and services, pursuant to the terms of an agreement between the provider and the group health plan or health insurance issuer, or a third party on behalf of a group health plan or health insurance issuer. As discussed in the Definitions section of this preamble, the final rules adopt this definition as proposed, with modifications to provide additional clarity.

In the preamble to the proposed rules, the Departments acknowledged that cost-sharing liability for prescription drugs is often based on an amount other than the negotiated rate, such as manufacturer list prices or undiscounted list prices such as AWP or WAC. The Departments further acknowledged that, because of the application of rebates and other discounts, the inclusion of just the negotiated rate for prescription drugs could mislead consum-

[188] "How are prescription drug costs really determined?" Biotechnology Innovation Organization. Available at: https://www.drugcostfacts.org/prescription-drug-costs.

[189] Galewitz, P. "Doctors Slow To Adopt Tech Tools That Might Save Patients Money On Drugs." NPR. July 5, 2019. Available at: https://www.npr.org/sections/health-shots/2019/07/05/738283044/doctors-slow-to-adopt-tech-tools-that-might-save-patients-money-on-drugs.

[190] *Id.*

ers because the rate paid by the plan could ultimately be lower than the price paid by the consumer at the point-of-sale, as it is the Departments' understanding that these rebates and other discounts typically are not passed on to the consumers at the point of sale. The Departments expressed the concern that including only the negotiated rate for prescription drugs used to determine cost-sharing liability could perpetuate the lack of transparency surrounding prescription drug pricing. To this end, the Departments solicited comment on which pricing information related to prescription drugs should be disclosed.[191]

Despite the Departments' concerns regarding negotiated rates for prescription drugs outlined in the preamble to the proposed rules, commenters responded that negotiated rates, in addition to other information, are an important data point necessary to achieving useful transparency into coverage and out-of-pocket costs for prescription drugs. Several commenters recommended that the machine-readable file include both the negotiated price and the undiscounted "list" price, upon which coinsurance and deductibles are often based, in order to promote competition. Other commenters suggested that plans and issuers should disclose to enrollees when they do not pass through manufacturer rebates and discounts at the point-of-sale or factor these amounts into enrollee cost sharing. Another commenter recommended the Departments consider requiring a "net price" for prescription drugs rather than the negotiated rates. This commenter stated that, it is vital that this "negotiated rate" also include the "net price" (which accounts for all price concessions, including direct and indirect remuneration fees (DIR) and/or similar policies/terminology, such as "true up" practices under employer-sponsored and private plans to accurately estimate participant, beneficiary, and enrollee cost-sharing liability for prescription drugs). One commenter noted that if the public disclosure did not include information related to rebates, the file could be misleading and could lead to a continuing overemphasis on prescription drug list prices without recognition of the role played by rebates.

Another commenter recommended that the Departments allow plans and issuers to report the most appropriate available price type based on the plan's benefit design. This commenter suggested that plans should also be required to identify the price reported, such as AWP or WAC or the contracted pharmacy reimbursement amount (for example, the Part D negotiated price).

The Departments have closely reviewed the comments to determine the prescription drug pricing information plans and issuers should provide in the Prescription Drug File in order to achieve the goals of transparency. Based on this review, the final rules are adopting as content element three for the Prescription Drug File a requirement for plans and issuers to publicly disclose two amounts for prescription drugs in the Prescription Drug File: the negotiated rate and the historical net price.

Prescription Drug Negotiated Rate Disclosure

As evidenced by the comments and the Departments' independent research, there is wide variability in how negotiated rates are assigned for prescription drugs. For instance, some commenters noted that negotiated rates for prescription drugs include rebates, price concessions, and other "true-ups, while others likened the negotiated rates to the undiscounted list price used for determining cost-sharing liability. Therefore, plans and issuers may use varying types of prices when reimbursing providers for prescription drugs. For example, it is the Departments' understanding that for generic prescription drugs, the Maximum Allowable Cost (MAC)—an amount the plan or issuer uses as the maximum amount they will pay for a particular prescription drug product—may be the amount that plans and issuers use to pay providers for a prescription drug. Plans and issuers may reimburse providers for other prescription drugs using a UCR amount or an amount based on the undiscounted list price, such as AWP or WAC. It is the Departments' understanding that contracts negotiated between plans and issuers (or their contracted PBM) and providers generally do not include specific negotiated rates for prescription drugs, but instead include formulas that determine the type of price that will be used to reimburse providers for a particular prescription drug product. The negotiated rate may differ by drug or class of drug in the contract as the lesser of several types of prices based on one of the benchmarks described above—that is, WAC, AWP, MAC, or UCR. Because prices for prescription drugs can fluctuate on a daily basis, the price that is used to reimburse the provider can also fluctuate based on application of the contract terms.

In addition to better appreciating the wide variability in how negotiated rates are assigned, the Departments also now understand based on comments and independent research, that, contrary to the Departments' understanding as explained in the preamble to the proposed rule, no matter what benchmark or formula is used to determine the negotiated rate, the negotiated rate is frequently also the rate upon which cost-sharing liability is based for prescription drugs.

Based on the circumstances described above, the Departments therefore agree with commenters that a certain amount of flexibility is required for plans and issuers as it relates to the benchmarks and inputs required for the disclosure of negotiated rates for prescription drugs. To allow for flexibility, as proposed, the final rules do not assign a benchmark or necessary inputs to the definition of negotiated rates. The final rules include a broad definition

[191] The Departments note that this discussion in the preamble to the proposed rules occurred in the context of the third content element (negotiated rates) for the internet-based self-service tool. However, as negotiated rates were a proposed content element for the machine-readable files, the Departments are of the view that the comments received regarding negotiated rates in the context of the internet-based self-service tool are equally applicable to the prescription drug disclosures plans and issuers are being required to make through the machine-readable files. The definition of "negotiated rate" for prescription drugs applies to both the internet-based self-service tool and machine-readable file provisions. Regarding the machine-readable files, the Departments proposed that plans and issuers be required to include in-network negotiated rates and out-of-network allowed amounts for all covered items and services. In the Departments' view, the use of the same term regarding both requirements underscores the relevance of these comments to all disclosure requirements applicable to items and services, including those applicable to prescription drugs. Furthermore, several commenters did not clearly separate their comments regarding the internet-based self-service tool and the machine-readable files and provided broad comments that applied to all relevant sections of the proposed rules.

for negotiated rates to mean the amount a group health plan or health insurance issuer has contractually agreed to pay an in-network provider, including an in-network pharmacy or other prescription drug dispenser, for covered items and services, whether directly or indirectly, including through a TPA or PBM.

As noted above, the negotiated rate can be one of several different rates and can fluctuate on a daily basis depending on the terms of the contract between plans or issuers (or the PBM for the plan or issuer) and the provider, which includes pharmacies and other prescription drug dispensers. Therefore, the Departments clarify that, where a plan or issuer uses a formula as described above to determine the rate that will be used to reimburse providers for a prescription drug, the negotiated rate that should be included in the Prescription Drug File should be the rate that would be used by the plan or issuer to reimburse providers on the date that the file is extracted.

Notably, the final rules do not finalize a requirement to include the manufacturer list price, as contemplated in the proposed rules. The manufacturer list price is a manufacturer-specified metric for drug prices that is commonly used by both federal and commercial health care programs as a benchmark for negotiated rates. The manufacturer list price in this context is often the WAC, which is defined in statute as,

> [T]he manufacturer's list price for the drug or biological to wholesalers or direct purchasers in the United States, not including prompt pay or other discounts, rebates or reductions in price, for the most recent month for which the information is available, as reported in wholesale price guides or other publications of pricing data with respect to a drug or biological.[192]

Like negotiated rates, the list price does not include discounts, dispensing fees, rebates, or other retrospective pricing adjustments. The manufacturer list price is not plan- or issuer-specific. If the Departments were to require plans and issuers to include the manufacturer list price in the Prescription Drug File, the information included in the files would be the same or similar across all plans and issuers. Further, manufacturer list price information is already aggregated, available through several companies, and could be incorporated into third party applications to be made accessible to consumers. WAC prices for drugs and biologics are collected and published by several companies, including First Databank and Medi-Span. Additionally, CMS publishes a monthly National Average Drug Acquisition Cost (NADAC), which provides a national benchmark for the prescription drug prices paid by retail pharmacies.[193] Because information on manufacturer list prices would be largely redundant across plans and issuers, and because this information is publicly available through other existing resources, the Departments concluded this information would be of limited value for the public.

The Departments do not intend to increase the burden of developing and maintaining the machine-readable files unless the inclusion of the additional data element is essential to provide meaningful, transparent pricing information to the public. Inclusion of the manufacturer list price would not significantly advance transparency as this information is already available publicly, and it would increase the burden of developing the Prescription Drug File. The Departments expect that third-party developers will access and incorporate publicly available databases, such as those including manufacturer list pricing information, where that information is relevant to providing meaningful information to consumers.

The Departments are of the view that it is important for transparency for negotiated rates to be included in the Prescription Drug File. Consumers, both insured and uninsured, can use this information to better understand the cost of prescription drugs and to advocate for less expensive alternatives. The Departments are also of the view that making the negotiated rate public in a manner that is highly visible to consumers, researchers, innovators and regulators could potentially place pressure on manufacturers to lower their list prices, which could, in turn, lower negotiated rates upon which consumer cost-sharing liability is based.

Nonetheless, as stated in this preamble and in the preamble to the proposed rules, requiring disclosure of only the negotiated rate for prescription drugs could perpetuate the lack of transparency surrounding prescription drug pricing. As commenters noted, the negotiated rate is not generally tied to the amount a plan or issuer will ultimately pay for the prescription drug or prescription drug service due to the use of post-point-of-sale rebates, discounts, and other price concessions that reduce the price that plans and issuers pay for prescription drugs. To address this issue and to introduce greater transparency surrounding prescription drug pricing, in response to comments, the Departments are also finalizing a requirement that plans and issuers must publicly disclose historical net prices, as discussed in detail below.

Prescription Drug Historical Net Price Disclosure

For purposes of the final rules, historical net price means the retrospective average amount a plan or issuer paid for a prescription drug, inclusive of any reasonably allocated rebates, discounts, chargebacks, fees, and any additional price concessions received by the plan or issuer with respect to the prescription drug. Net price is the price for a prescription drug after discounts are deducted, and is paid at different points in the prescription drug distribution chain (for example, the plan or issuer to the pharmacy, the pharmacy to a wholesaler, and the wholesaler to the manufacturer).[194] For the purposes of the final rules, the Departments are concerned with the price ultimately paid by a plan or issuer to a drug manufacturer.[195] Essentially, rebates, discounts, chargebacks, fees, and

[192] 42 U.S.C. 1395w-3a(c)(6).

[193] "National Average Drug Acquisition Cost." Centers for Medicare & Medicaid Services. September 15, 2020. Available at: https://data.medicaid.gov/Drug-Pricing-and-Payment/NADAC-National-Average-Drug-Acquisition-Cost-/a4y5-998d.

[194] "AMCP Guide to Pharmaceutical Payment Methods, 2013 Update" Academy of Managed Care Pharmacy. 2013. Available at: https://www.amcp.org/sites/default/files/2019-03/Full-Pharmaceutical-Guide-%283.0%29.pdf.

[195] The Departments note that each plan or issuer (or the PBM acting under contract with the plan or issuer) may utilize a different combination of price concessions.

other additional price concessions are adjustments made after the point-of-sale that affect the total price paid by the plan or issuer (or through a contract with the PBM) to the manufacturer for a prescription drug product. As a general matter, a price concession is a discount or rebate available to a purchaser of a product or service, wherein the discount or rebate is conditioned upon the purchaser complying with the contractual terms of the rebate or discount offer.[196] More specifically, a rebate is an amount that the prescription drug manufacturer returns to a payer based on utilization by consumers enrolled through a plan or issuer or based on purchases by a provider.[197] A chargeback is a type of discount process through a prescription drug wholesaler where manufactures reimburse wholesalers who offer drugs to purchasers at discounted prices, and the discount negotiation occurs between the manufacturer and the purchaser.[198] Finally, fees include any payment adjustments, incentives, or other discounts that are not included in the negotiated price for a drug (for example, prompt pay discounts, pharmacy network fees, performance-based fees, and incentive fees).[199] The Departments note that manufacturers also may offer additional price concessions to certain providers or directly to consumers in the form of coupons. The final rules only require disclosure of reasonably allocated rebates, discounts, chargebacks, fees, and any additional price concessions received by the plan or issuer (or the PBM under contract with the plan or issuer).

As noted earlier, several commenters commented on the nature of the prescription drug pricing information that should be captured to achieve the goals of price transparency. Some commenters noted the net price would be important to price transparency efforts because it would put consumers on notice when the net price is less than their cost-sharing amount and it would capture the actual prices of prescription drugs after the application of price concessions, which would provide transparency regarding actual prescription drug costs. The Departments agree with these commenters that disclosure of information about the net price for prescription drugs (and therefore rebates and other price concessions that are included in the net price) is necessary to achieve the goals of the final rules.

Therefore, the final rules adopt a requirement to make public a historical net price, as defined by the final rules. Furthermore, rather than require disclosure of the actual net price, the final rules establish and adopt a definition of historical net price that balances the need for transparency against concerns expressed by other commenters that release of net prices could affect issuers and PBMs' ability to negotiate drug prices, including rebates and other price concessions. Specifically, the final rules define historical net price as the retrospective average amount a plan or issuer paid an in-network provider, including any in-network pharmacy or other prescription drug dispenser, for a prescription drug, inclusive of any reasonably allocated rebates, discounts, chargebacks, fees, and any additional price concessions received by the plan or issuer with respect to the prescription drug or prescription drug service. The Departments note that for the purposes of the final rules, the definition of historical net price only includes those price concessions received by the plan or issuer (or under the contract between the PBM and the plan or issuer). Because of timing delays related to application of rebates, discounts, chargebacks, fees, and other price concessions, plans and issuers are required to provide historical or retrospective data, rather than prospective or current pricing data regarding the net price of prescription drugs. In the case prescription drug net prices, historical data will provide valuable information for stakeholders, as the actual prices plans and issuers ultimately pay for prescription drugs cannot be known until after the application of time-delayed rebates, discounts, chargebacks, fees, and other price concessions. As discussed later in this section, plans and issuers will be required to include historical net prices for a 90-day period beginning 180 days before the date a particular Prescription Drug File is published. The final rules also require the historical net price, as defined earlier in this section, to be disclosed through the Prescription Drug File.

As discussed earlier in this preamble, the Departments are aware that an estimated allocation of rebates, discounts, chargebacks, fees, and any other additional price concessions may be necessary to represent the historical net price. Product-specific and non-product specific rebates, discounts, chargebacks, fees, and other price concessions must be allocated by dollar value if the total amount of the price concession is known to the plan or issuer at the time of file publication. It is the Departments' understanding that most discounts, such as those related to market sharing and rebates based on volume, are calculated within time periods as short as one to three months. Therefore, the Departments expect the total amounts for these types of discounts, rebates, and other price concessions will be known at the time of file publication. Where the total amount of a price concession is known at the time of file publication, plans and issuers must allocate the price concession by the total dollar amount.

The Departments also understand that some product-specific and non-product specific price concessions are based upon outcomes- or value-based payment arrangements that calculate rebates over a longer period of time—usually six months to more than three years. Because these price concessions will not be known at the time of file publication, the Departments are requiring plans and issuers to estimate the historical net price using a reasonable allocation and good faith estimate of the total concession amount. Therefore, if the total amount of the price concession is not known to the plan or issuer at the time of file publication, then rebates, discounts, chargebacks, fees, and other price concessions should be reasonably allocated using an estimate of the average price con-

[196] "AMCP Guide to Pharmaceutical Payment Methods, 2013 Update. Academy of Managed Care Pharmacy. 2013. Available at: https://www.amcp.org/sites/default/files/2019-03/Full-Pharmaceutical-Guide-%283.0%29.pdf.

[197] *Id.*

[198] *Id.*

[199] "Final Medicare Part D DIR Reporting Requirements for 2017." Centers for Medicare & Medicaid Services. Available at: https://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/HPMS/HPMS-Memos-Archive-Weekly-Items/SysHPMS-Memo-2018-May-30th.

cessions based on the rebates, discounts, chargebacks, fees, and other price concessions received over a time period prior to the current reporting period and of equal duration to the current reporting period.

Rebates may reflect discounts negotiated with drug manufacturers that lower drug prices for the plan or issuer. Rebates may not directly benefit participants, beneficiaries, or enrollees, however, as the decision of whether and how to share savings from rebates is at the discretion of the plan or issuer. Nonetheless, there is evidence that rebates are positively correlated with increased manufacturer list prices for prescription drugs, which is typically the basis for a consumer's cost-sharing liability.[200] A recent analysis found that, on average, from 2015 to 2018, a $1 increase in rebates was associated with a $1.17 increase in manufacturer list prices.[201] Therefore, due to the positive correlation between rebates and manufacturer list prices, a policy that results in a reduction to rebates may result in a reduction in the manufacturer list price (and also overall prescription drug prices). A policy that requires plans and issuers to make public historical net prices could expose the extent of rebates and other price concessions, and this transparency in historical net price could cause a reduction in the use of rebates and other price concessions, and, therefore, a reduction in the manufacturer list price.[202] The resulting reductions in manufacturer list price could lead to lowered out-of-pocket costs for both uninsured consumers who must pay the manufacturer list price and insured consumers with deductibles and coinsurance. Because negotiated rates for prescription drugs are largely based upon the manufacturer list price, the reduction in the manufacturer list price will likely be reflected in the negotiated rate. Further, because negotiated rates are used to determine cost-sharing liability for prescription drugs, a reduction in such rates will likely result in lower consumer costs through a reduction to deductibles and coinsurance.

The Departments are of the view that requiring both the negotiated rate and the historical net price, as defined by the final rules, will produce sufficient transparency regarding prescription drug pricing information to support consumer health care purchasing decisions and provide other stakeholders insight into actual prescription drug pricing. Inclusion of both the negotiated rate and historical net price addresses the Departments' concern, expressed in the preamble to the proposed rules, that merely requiring disclosure of the rate that is used to determine an individual's cost-sharing liability (that is, as clarified in the final rules, the negotiated rate) could perpetuate the lack of transparency in prescription drug pricing.

Additionally, in the preamble to the proposed rules, the Departments specifically solicited comment on whether and how the public disclosure requirements should account for rebates, discounts, and dispensing fees to ensure individuals have access to meaningful cost-sharing liability estimates for prescription drugs.[203] Upon review of the comments, the Departments are of the view that public disclosure of the historical net price, which takes into account rebates, discounts, dispensing fees, and other price concessions, in addition to the negotiated rate, upon which cost sharing is based, provides the appropriate combination of pricing information to achieve the goals of transparency and ensure that individuals have access to meaningful prescription drug pricing information. First, the negotiated rate will help support consumer health care purchasing decisions. Second, the historical net price will support the public in gaining enhanced knowledge of actual drug prices. Enhanced knowledge of actual drug historical net prices could also support consumer health care purchasing decisions, as consumers could use the information to determine whether their out-of-pocket costs are commensurate with the rebates, discounts, and other price concessions received by their plan or issuer. The historical net price will also make consumers and other stakeholders aware of situations where cost-sharing liability for a prescription drug exceeds the amount their plan or issuer ultimately paid for the prescription drug. In these situations, participants, beneficiaries, and enrollees will be able to make an informed decision regarding whether to utilize their plan or coverage when purchasing the prescription drug. Furthermore, plans and issuers could be incentivized to pass through a larger or more significant share of the rebates and other discounts that they receive from drug manufacturers if those discounts are effectively disclosed via historical net price information.

The Departments acknowledge that there are potential adverse consequences of requiring plans and issuers to make public rebates and other price concessions, directly or indirectly, through the historical net price. For instance, stakeholders such as PBMs and prescription drug manufacturers could attempt to find ways to obscure rebates and other price concessions such that they would not be required to be publicly disclosed under the final rules. However, the Departments are of the view that such attempts would likely be discouraged by the nature of the disclosures themselves and would otherwise be unsuccessful if attempted. A benefit of requiring the widespread public disclosure of pricing information for prescription drugs is that the transparency data itself can be used to identify where plans and issuers (or third parties acting on their behalf) may be attempting to circumnavigate disclosure requirements. Researchers and other entities who aggregate and analyze the data will be able to compare pricing data across plans and issuers. This can help identify plans and issuers whose data is an outlier and identify them for further scrutiny by regulators. The current lack of transparency in prescription drug pricing does not allow this type of oversight and monitoring. While it is possible that stakeholders will act in ways that conflict with the intent of the public disclosures, it is also very likely that transparency itself will help state and local regulators to identify these anti-competitive practices. Indeed, it is possible that the public disclosures could help to uncover other un-

[200] Sood, N., et al. "The Association Between Drug Rebates and List Prices." USC Schaeffer Center for Health Policy and Economics. February 11, 2020. Available at: https://healthpolicy.usc.edu/research/the-association-between-drug-rebates-and-list-prices/.

[201] *Id.*

[202] *Id.*

[203] 84 FR 65464, 65472 (Nov. 27, 2019).

known anti-competitive business practices that exist today. For these reasons, the Departments are of the view that the benefits of public disclosure of prescription drug pricing information outweigh the potential risk that certain stakeholders may seek to take advantage of the disclosure requirements in ways that would increase prescription drug costs.

A commenter observed that if the Departments were to include the net price, it would be important to clarify that that the information is not necessarily predictive of future transactions because information about rebates is not known with certainty before a drug is dispensed. The Departments recognize that prospective net prices for prescription drugs could be complicated to estimate accurately due to the nature of prescription drug pricing. Nonetheless, the Departments are of the view that the historical net price will be a sufficiently accurate guide for potential prescription drug prices and will fulfill the objectives of the final rules.

The final rules adopt a requirement to include in the Prescription Drug File the historical net price over a 90-day reporting period for each NDC for dates of service within 180 days of the Prescription Drug File publication date. This approach will ensure that data is composed of the historical net price for relatively recent claims (rather than older claims from multiple time periods) and will avoid the conflation of payments from different periods of time. The Departments are of the view that historical net prices from defined periods of time will enable users to make meaningful comparisons across plans and coverages. Additionally, the Departments chose this reporting reference period to be consistent with the period proposed and being finalized through the final rules for reporting of allowed amounts through the Allowed Amounts File. The Departments are of the view that consistency across machine-readable file requirements, where applicable, will reduce potential confusion among file users as well as reduce burdens for plans and issuers. The Departments are of the view that the 180-day lookback period (which is expected to capture many of the market-share and volume rebates and other price concessions) and requirement to make a reasonable allocation will balance the need to be transparent in current prices with the delayed timing of the application of certain rebates and other price concessions.

To reasonably allocate any particular non-product specific or product-specific rebate, discount, chargeback, fee, or other additional price concession by dollar value of the drug where the totals amount is fully known at the time of file publication, plans and issuers should divide the rebate or discount amount by the total dollar value of drugs on which the rebate is calculated, and then apply that percentage to all applicable drugs. For example, if a rebate amount of $20,000 is received during the 3-month file reference period in connection with $100,000 in sales on two drugs during the same period, the rebate is allocated as a 20 percent discount to the prices of those two drugs. Sales for Drug A totaled $60,000 and sales for Drug B totaled $40,000. A rebate of $12,000 ($60,000 multiple by 20 percent) is allocated to Drug A, resulting in a historical net price populated in the Prescription Drug File of $48,000. Similarly, a rebate of $8,000 is allocated to Drug B, resulting in a historical net price populated in the Prescription drug file of $32,000. The Departments are aware that this allocation methodology will not always perfectly allocate the rebate amounts because of the complexities of rebate calculation, or because of timing issues. However, the Departments are of the view that this simplified approach balances the goal of providing actionable drug pricing information to the public while limiting the burdens on plans and issuers in producing the information.

To reasonably allocate any particular non-product specific or product-specific rebate, discount, chargeback, fee, or other additional price concession where the total amounts are not fully known at the time of file publication, plans and issuers must make a good faith, reasonable estimate of the price concession using an historical adjustment amount. To make this estimate, plans and issuers shall determine the average value of price concessions for the relevant product over a time period prior to the current reporting period and of equal duration to the current reporting period and use that amount to apply an estimated adjustment amount in the current reporting period. For example, Plan X has $100,000 in total sales for 20,000 units—averaging $5 per unit—of Drug A during the current reporting period, which is January 1, 2020, through March 31, 2020. However, Plan X will not know the total amount of product-specific rebate to expect for sales of Drug A for at least another six months. To address this timing issue, Plan X can apply a reasonable estimate to allocate an adjustment to the current reporting period. For instance, Plan X can look back to the total rebates received for the product during a comparable time period. In this example, Plan X reviews its historical data and determines the rebates received for Drug A, from the period between January 1, 2019, and March 31, 2019, totaled $10,000 for sales of 30,000 units totaling $160,000. The average price per unit was $5.33 and the average discount per unit was $0.33 resulting in an average final net price of $5 for Drug A. Plan X then applies this historical rebate percentage to the current reporting period for Drug A. Plan X subtracts $6,250 ($100,000 total sales for the current reporting period multiplied by the estimated 6.25 percent historical rebate percentage) from the $100,000 total sales for a total net price of $93,750 and an average net price for Drug A, rounded to the nearest hundredth, of $4.69. Plan X reports in the Prescription Drug File an average historical net price for Drug A of $4.69 for the current reporting period.

In the discussion of the Allowed Amounts File in the preamble to the proposed rules, the Departments noted that providing the Allowed Amounts information could raise health privacy concerns. The Departments are of the view that similar concerns could be raised regarding the historical net price information in the Prescription Drug File. For example, there may be instances—such as in a small group plan or with respect to an NDC for a rare chronic condition—where, through deduction, disclosure of historical net price information may enable users to identify the participant, beneficiary, or enrollee who received a particular prescription drug because a very small number of claims are used to derive the historical net price of a particular NDC at a particular pharmacy or other prescription drug dispenser. Additionally, as noted in relation to the Allowed Amount File, there may also be instances when the historical net

price public disclosure requirement would be inconsistent with federal or state laws governing health information that are more stringent than HIPAA regarding the use, disclosure, and security of health data that was produced pursuant to a legal requirement, such that plans and issuers would be required to further de-identify data. For example, some of the claims for payment used to derive the historical net price could relate to services provided for substance use disorders, which could implicate disclosure limitations under 42 CFR part 2 governing the confidentiality of patient records related to treating a substance use disorder. The Departments are committed to protecting PHI. To address privacy concerns, the final rules adopt an approach consistent with the out-of-network Allowed Amount File. The final rules do not require plans and issuers to provide historical net price data in relation to a particular pharmacy or other prescription drug dispenser and a particular NDC when compliance would require a plan or issuer to report an historical net price for a particular pharmacy or other prescription drug dispenser calculated with fewer than 20 different claims for payment. Furthermore, the Departments note that disclosure of historical net prices will not be required if compliance would violate applicable health information privacy laws. The Departments are of the view that these mitigation strategies, in addition to the historical net price being an average of amounts paid to a particular provider for a particular NDC during the reference period, are sufficient to protect patients from identification based on information in the Prescription Drug File. The Departments note that the low volume exemption applies only to the requirement to include the historical net price and does not affect the requirement to include the negotiated rates in the Prescription Drug File.

Regarding prescription drugs, the Departments received a comment that requested discounts under section 340B of the PHS Act be included in the applicable machine-readable file, noting that providing this information is important to ensure consumers can access those savings. However, this commenter acknowledged that health plans often do not have access to information about when a section 340B discount is paid and so recommended the Departments develop and implement a process to help health plans identify this information.

Discounts under the section 340B Drug Pricing Program are only available to eligible providers (known as covered entities as outlined in section 340B of the PHS Act) and regulations under section 340B of the PHS Act are outside of the scope of the final rules.

2. Required Method and Format for Disclosing Information to the Public

As explained in section II.C.1.c of this preamble, the final rules adopt the requirement that plans and issuers produce the In-network Rate File, the Allowed Amount File, and the Prescription Drug File. The Departments are finalizing a requirement that the In-network Rates, Allowed Amounts, and Prescription Drug Files must be disclosed as machine-readable files. The final rules define "machine-readable file" to mean a digital representation of data or information in a file that can be imported or read by a computer system for further processing without human intervention, while ensuring no semantic meaning is lost. The requirement ensures that the machine-readable file can be imported or read by a computer system without those processes resulting in alterations to the ways data and commands are presented in the machine-readable file. The Departments proposed to require each machine-readable file to use a non-proprietary, open format to be identified by the Departments in technical implementation guidance (for example, JavaScript Object Notation (JSON), Extensible Markup Language (XML), or Comma Separate Value(s) (CSV)). A portable document format (PDF) file, for example, would not meet this definition due to its proprietary nature.

Contemporaneous with the proposed rules, the Departments published a PRA package (OMB control number: 0938-1372 (Transparency in Coverage (CMS-10715)) that further described the specific data elements that would be disclosed in the proposed machine-readable files. Updated cost and burden estimates related to the collection requirements are discussed in the ICR section of this preamble and are included in in the corresponding PRA package, including changes to costs and burdens and additional collection instruments as a result of modifications to the proposed rule made through the final rules.

The Departments proposed requiring group health plans and health insurance issuers to publish their negotiated rates and historical allowed amount data in two machine-readable files, one including required negotiated rate data with in-network providers, and a second including required out-of-network allowed amount data. The Departments proposed requiring plans and issuers to publish the data in two separate machine-readable files to account for the dissimilarity between the negotiated rates paid to in-network providers under contract and the more variable allowed amounts paid to out-of-network providers. The Departments solicited comment on whether building and updating one file could be less burdensome for plans and issuers than maintaining multiple files, and whether having the data in a single file could facilitate use by third-party developers. The Departments were particularly interested in comments regarding whether a single file for disclosure of all the required information would likely be extremely large, making it less than optimal for anticipated users, such as software application developers and health care researchers.

Some commenters supported keeping the In-network Rates File and out-of-network Allowed Amount File separate. One commenter noted the structure would allow quick development of data aggregation efforts and consumer-friendly tools. Additionally, the commenter stated that keeping the files separate would support file ingestion. Another commenter stated that each file would contain fundamentally different data, and the costs associated with storing and maintaining a large combined file would be very large.

The Departments agree that the information being required to be publicly disclosed through the machine-readable files related to negotiated rates and allowed amounts is sufficiently distinct to justify separating the information into separate files. In particular, the out-of-network allowed amounts information must be derived from historical claims data, which is fundamentally different in kind from

simply listing applicable rates for each service. Furthermore, the Departments also agree with comments indicating that splitting the files would help reduce the maintenance and storage burdens of the files. Throughout this preamble, the Departments have stressed the importance of ensuring the public disclosures required through the final rules are accessible, especially to internet-based and mobile application developers, to support development of innovative consumer-facing tools, as well as to other entities, such as researchers, and regulators, to support efforts to better understand and support the competitiveness of health care markets.

The requirement to publish more than one machine-readable file which will facilitate the disclosure of data that is different in character, scope, and other factors, which will help facilitate data ingestion for users of the machine-readable files, including third-party developers, researchers, regulators, and other interested parties. This approach will also help facilitate file ingestion, data aggregation, and data analysis by researchers whose projects could lead to important market insights that could inform efforts to further address the wide variation in health pricing, and by regulators who would be able to leverage the data in their oversight activities.

As discussed earlier in this preamble, the final rules adopt a third Prescription Drug File in recognition of the unique pricing attributes of prescription drug products. Prices related to prescription drug products that plans and issuers would have been required to include in the In-network Rate File under the proposed rules will now be required to be publicly disclosed through the third Prescription Drug File. As discussed earlier in this preamble, the Departments estimate that requiring a third file for prescription drugs will not add significantly to the burdens and costs of developing and maintaining the machine-readable files calculated in relation to the final rules because costs and burdens calculated for prescription drugs as included in the In-network Rate File will be transferred to the Prescription Drug File. Additionally, the Departments anticipate that removal of prescription drugs from the In-network Rate File will significantly reduce the size of that file, which could reduce the costs associated with maintenance and storage for the In-network Rate File. The Departments clarify that not all prescription drug pricing information required to be disclosed through the final rules is required to be included in the Prescription Drug File. Rather, the Prescription Drug File is required to include prescription drug pricing information for in-network providers, including pharmacies and other prescription drug dispensers, while the Allowed Amount File is required to include prescription drug pricing information for out-of-network providers, including pharmacies and other prescription drug dispensers. The Departments also clarify that the In-network Rate file may also contain prescription drug information to the extent the prescription drug is a part of a bundled payment arrangement.

Some commenters argued that the method and format for providing information to the public is not feasible. One commenter did not support the policy that the machine-readable files should be provided in a public use file format, claiming the files would be millions of rows long and very difficult to review. Another commenter expressed concern that the volume of data would make it impossible to post all of the information in two files and further stated that there is no single set of codes that describe every item or service, so it would be impossible to post this data without very specific, standard definitions. Given the lack of standard definitions, this commenter argued that there is no systematic way to compile and display the information requested, so claim compilation would have to be done manually. The commenter further stated that, even if there were standard definitions, it would be impossible to provide them in "plain language."

Based on consultations with industry and IT development professionals, the Departments do not agree with commenters who stated that development of the machine-readable files would not be feasible as envisioned by the proposed rules. The Departments are aware that these files could be very large and could be difficult for laypersons to navigate. However, the Departments are of the view that the files' primary benefit to health care consumers will be the availability of web-based tools and mobile applications developed for consumer use by third-party developers, aggregation and analysis conducted by researchers, and oversight efforts by regulators. The required machine-readable files will be optimal for ingestion, data aggregation, and data analysis, all of which are functions performed by third-party internet-based developers, researchers, and regulators who use large data sets in a manner that will lead to benefits for consumers. Additionally, notwithstanding that the Departments have designed these transparency requirements so that it is not necessary that individual consumers use or ingest the data in the machine-readable files, the Departments are of the view that many individual health care consumers do possess the necessary expertise to access and navigate the files. The final rules also impose a requirement to include plain language to identify each item and service included in each file. This requirement will help ensure consumers, third party application developers, researchers, regulators, and other interested parties are able to easily understand the information.

The Departments have determined that the potential benefits for consumers of requiring the disclosure of required data through machine-readable files outweigh the potential for consumer confusion at the individual consumer level. Additionally, the Departments expect that third party application developers, researchers, regulators, and other file users will have the expertise to aggregate, standardize, and interpret the pricing information included in the file and translate the pricing information into products, research, and market oversight and reforms that will ultimately benefit consumers.

The Departments also do not agree that the volume of data would make the machine-readable files too large to post publicly, regardless of whether the data is posted in two or three files. The Departments' rough estimate of file size, based, in part, upon numbers provided by commenters, suggests a file size of approximately 5 gigabytes.[204] CMS currently makes available for download on its website some

[204] As a reference point, a typical commercial two-hour Blu-ray film is approximately 15-25 gigabytes. "White Paper Blue-ray Disc Format General." Blue-ray Disc Association. 2018. Available at http://www.blu-raydisc.com/Assets/Downloadablefile/White_Paper_General_5th_20180216.pdf.

large public use file (PUF) data sets that are several gigabytes. For example, the Part D Prescriber PUF, [205] available on the CMS website, is over three gigabytes in size. The Departments acknowledge that because of the large file size, file users will likely need to use database or statistical software to download the machine-readable files as importing into Microsoft Excel would result in incomplete loading of data. However, this approach is similar to that used for some of the larger PUF data sets available on the CMS website, including the Part D Prescriber PUF, which must be opened using specialty software.

Assuming that plans' and issuers' negotiated rates are in a digitized format, even if the negotiated rates are not stored in a single database, this information can be systematically compiled and maintained by the plan or issuer. In recognition that there is no single set of billing codes for non-prescription drug services, the Departments are providing flexibility in the final rules by not prescribing which code or set of codes plans and issuers must use to publicly disclose their data. Rather, the Departments are requiring that plans and issuers associate each in-network applicable rate or out-of-network allowed amount with a CPT, HCPCS code, DRG, or other common payer identifier. In the case of prescription drugs, the Departments are requiring plans and issuers to associate each negotiated rate and historical net price with an NDC. The Departments' expectation is that the type of billing code plans and issuers use to populate the machine-readable files will be consistent with the billing codes that plans and issuers use in their operations when actually determining provider reimbursement and cost-sharing liability.

The Departments further note that nothing prevents plans and issuers from including in the files a mixture of billing code types so long as the billing codes included in the file are reflective of the plan's or issuer's operations. To facilitate identification of the billing code type, there will be an indicator in the file format described by the technical implementation guidance that will allow plans and issuers to specify the particular type of billing code entered for each data entry in the machine-readable files. The final rules also require that plans and issuers include plain language descriptions for each billing code. The Departments note that in the case of items and services that are associated with common billing codes (such as the HCPCS codes), plans and issuers are permitted to use the codes' associated short text description.

The final rules further clarify that, in the case of NDCs for prescription drugs, the plain language description must be the proprietary and nonproprietary name assigned to the NDC by the FDA. The Departments have made this change to align with the change to require only the NDC billing code to be used for prescription drugs. Requiring the proprietary and nonproprietary name assigned to the NDC by the FDA further standardized the product identifiers for prescription drugs and will facilitate comparisons across prescription drug pricing information for plans and issuers.

For all other items and services, as the Departments explicitly stated in the proposed rules and elsewhere in this preamble, plans and issuers can meet the "plain language" description requirements by using their chosen code's short text description. However, the Departments note that including the short text description for each code is a minimum requirement and nothing in the final rules prevents plans and issuers from providing a more consumer-friendly plain language description for each covered item or service. Plans and issuers may be incentivized to provide more consumer-friendly information in machine-readable files because it may permit them to include disclaimer or clarifying language in the files, where applicable. Furthermore, if a plan or issuer uses plain language descriptions for billing codes in its operations that are more consumer-friendly than the established short text descriptions, the Departments expect plans and issuers to include in the machine-readable files the plain language descriptions they use in their operations.

The Departments received comments that supported the Departments' development of specific technical standards for the files to which plans and issuers must adhere. One commenter recommended the Departments provide guidance to plan sponsors who are able to provide some, but not all, of the file data elements. Another commenter stated that the proposed rules do not make clear how to report items and serviced provided through capitated and bundled payment arrangements in the files; noting that this information is necessary for consumers to measure provider value. One commenter responded positively to the Departments' provision of technical implementation guidance for the files, but requested a robust public comment solicitation far in advance of the applicability date for the rules.

The Departments are of the view that providing specific technical direction in separate technical implementation guidance, rather than in the final rules, will better enable the Departments to respond to technical issues and developments, as well as compliance questions related to novel or rare payment arrangements. Therefore, as proposed, the Departments are developing technical implementation guidance for plans and issuers to assist them in developing the machine-readable files.

The technical implementation guidance will be available online through GitHub, a website and cloud-based service that helps developers store and manage their code, as well as to track and control changes to their code. The GitHub space offers the Departments the opportunity to collaborate with industry, including regulated entities, and third-party developers to ensure the file format is adapted for reporting of the required public disclosure data for various plan and contracting models. For example, the Departments have updated the schematics of the file formats in response to comments received about and bundled payments and capitated payment arrangements, as well as other alternative contracting models. Plans and issuers will be able to access the GitHub schemas at any time and collaborate with the Departments in real-time.

The Departments' goal in using GitHub is to facilitate this collaborative effort all allow plans and issuers to meet the public disclosure requirements of the final rules while addressing their unique IT system, issuer, and plan attributes. To the extent a

[205] The Part D Prescriber Public Use File (PUF) is available on the CMS website at the following location: https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Medicare-Provider-Charge-Data/PartD2017.

plan or issuer's unique attributes (for example, IT system, plan benefit design, or reimbursement model) are not addressed sufficiently through the technical implementation guidance, the Departments intend to provide targeted technical assistance to ensure all plans and issuers are able to meet the public disclosure requirements under the final rules. The technical implementation guidance will provide instructions on how to obtain this technical assistance should the need arise.

The technical implementation guidance hosted on GitHub will include a repository set of schemas describing the data formats (encoded as JSON, XML, and CSV) for all three machine-readable files: the In-network Rate File, the Allowed Amount File, and the Prescription Drug File. The technical implementation guidance will be available as part of the PRA package developed for the ICRs included in the final rules. As part of the PRA process, stakeholders have an additional opportunity to submit comments related to the PRA for 30 days following the publication of the final rules.

In the proposed rules, the Departments requested comment on whether the final rules should adopt a single non-proprietary format for the machine-readable files, specifically JSON files. The Departments understand that this format generally is easily downloadable, and it could simplify the ability of file users to access the data.

The Departments received one comment in support of requiring JSON as the standardized file format for the required machine-readable files. However, the Departments' internal technical experts agreed that the speed of technology developments weighs heavily in favor of maintaining flexibility to adopt a suitable file format as a non-substantive, operational requirement that will be identified in the relevant implementation guidance for the required machine-readable files. Additionally, this flexibility will allow the Departments to adapt the file technical specifications for new and emerging technologies. Therefore, the Departments decline to require in regulation a more specific file format for the machine-readable files.

The Departments reiterate that, as finalized, all machine-readable files must conform to a non-proprietary, open-standards format that is platform-independent and made available to the public without restrictions that would impede the re-use of the information. Therefore, because a PDF file format is proprietary, it would not be an acceptable file format in which to produce the files. A plan or issuer's file will be acceptable so long as it includes all required data elements required for the respective file (that is, all applicable rates in the In-network Rate File, allowed amounts and billed charges in the Allowed Amounts File, and negotiated rates and historical net process in the Prescription Drug File) and is formatted in a manner consistent with the technical implementation guidance the Departments are developing.

The final rules therefore adopt, with modification, the required method and format for disclosure of information through the machine-readable files. The Departments note several non-substantive modifications to the regulatory text, which are being adopted in the final rules to clarify and streamline the text. To further highlight the file technical implementation guidance, the regulation text of the final rules has been modified non-substantively to specify that the machine-readable files must be made available in a form and manner specified in guidance issued by the Departments. In the proposed rules, the regulation text stated more broadly that the machine-readable files must be made available in a form and manner determined by the Departments. Additionally, the proposed rule included two sentences that simply restated what must be publicly disclosed through the two proposed machine-readable files.[206] The Departments have removed these sentences from this this section of the regulatory text because they duplicate language contained in the previous sections of the regulatory text, do not add any additional value to this section of the regulatory text, and could cause confusion.

3. Required Accessibility Standards for Disclosure of Information to the Public

The Departments proposed to require a plan or issuer to make available on an internet website the required machine-readable files, and that the files must be accessible free of charge, without having to establish a user account, password, or other credentials, and without having to submit any personal identifying information such as a name, email address, or telephone number. The Departments also proposed to allow plans and issuers flexibility to publish the files in the locations of their choosing based upon their superior knowledge of their website traffic and the places on their website where the machine-readable files would be readily accessible by the intended users. The Departments are finalizing these requirements as proposed. The Departments also considered requiring plans and issuers to submit the internet addresses for the machine-readable files to CMS, and having CMS make the information available to the public. A central location could allow the public to access the information in one centralized location, reducing confusion and increasing accessibility. However, the Departments opted to propose flexible rules allowing plans and issuers to publish the files in the locations they have chosen based upon their determinations regarding where the files will be most easily accessible by the intended users. The Departments also considered that requiring plans and issuers to notify CMS of the internet address for their machine-readable files would increase the burdens on plans and issuers. The Departments requested comment on whether the proposed requirement to allow issuers to display the files in the location of their choice is superior to requiring plans and issuers to report the internet-based addresses of their files to CMS for public display. The Departments were specifically interested in whether the burden associated with reporting file locations to CMS would be outweighed by the risk that members of the public would be unable to easily locate plans' and issuers' machine-readable files.

Several commenters supported the Departments' proposal to make the machine-readable files easily and publicly available. One commenter supported making the files available free of charge and stated that individuals should not be required to register a user account, pass-

[206] *See* 84 FR 65464, 65519 (Nov. 27, 2019).

word, or enter other credentials, or to submit PII to access the files. Several commenters suggested alternative methods or more stringent requirements for making public the information required to be disclosed through the machine-readable files. One commenter expressed a preference for CMS to maintain a centralized location on the CMS website from which the public can access links to the files. The commenter noted that if the Departments elected not to maintain a centralized database, the Departments should require plans and issuers to prominently display a link to the files in the main menu of the homepage on their respective websites. Similarly, another commenter asserted that the final rules should require issuers to report the location of their files and provide a data dictionary to facilitate oversight and enforcement of plans and issuers.

Other commenters suggested the Departments create a centralized database to house the data required to be disclosed through the machine-readable files. One commenter recommended the information required to be disclosed through the files be loaded into a publicly available searchable database that anyone can access prior to receiving a medical service. Similarly, another commenter recommended that HHS aggregate the data to create a centralized database. By contrast, another commenter recommended the Departments should not create a central location for negotiated rate information and historical data, making the argument that the private sector is best suited to deliver this information to consumers.

As proposed, the machine-readable files must be made publicly available and accessible to any person free of charge and without conditions, such as establishment of a user account, password, or other credentials, or submission of PII to access the file. Additionally, the proposed rules specified that the files must be made available in the form and manner specified by the Departments. While the Departments considered comments related to the manner of the public file disclosures (such as prominent display on a plan or issuer's homepage), the Departments are also mindful of the need to provide flexibility to plans and issuers so that they are able to house the files in a location that meets their unique technical specifications. At this time, the Departments are of the view that reporting of the links to the file locations is not necessary to achieve the goals of the final rules. However, the Departments note that nothing in the final rules prevents a federal or state regulatory body, such as a state Department of Insurance (DOI), from collecting this information from issuers subject to their jurisdiction.

The Departments are aware and understand commenters' interest in HHS aggregating and centralizing all of the data required to be publicly disclosed through the machine-readable files. However, the Departments are of the view that HHS is not best suited for this role. As noted throughout this preamble, the Departments expect making negotiated rate and allowed amount information available through the machine-readable files will spur third-party internet-based developers to innovate, resulting in consumer-facing tools. The Departments anticipate that these consumer-facing tools developed by third parties could act as centralized databases, aggregating the pricing information for many plans and issuers. The Departments are of the view that the private sector is better suited to developing internet-based tools using this information than the Departments, and further, that the competition spurred by several different third parties operating in this space could benefit consumers seeking to find the third-party tool that is best suited to their individual consumer needs.

The final rules adopt, as proposed, the accessibility requirements for the machine-readable files. The final rules clarify that the accessibility requirements apply to all three machine-readable files finalized within the final rules: the In-network Rate File (referred to in the proposed rules as the Negotiated Rate File), the Allowed Amount File, and the Prescription Drug File.

4. Required Timing of Updates of Information to be Disclosed to the Public

The proposed rules would have required group health plans and health insurance issuers to update the information required to be included in each machine-readable file monthly. The Departments also proposed to require plans and issuers to clearly indicate the date of the last update made to the In-network Rate Files and Allowed Amount Files in accordance with guidance issued by the Departments.

The Departments recognized in the proposed rules that information in In-network Rate Files (referred to in the proposed rules as the Negotiated Rate Files) could change frequently and considered whether to require plans and issuers to update their In-network Rate Files more often than monthly to ensure that consumers have access to the most up-to-date negotiated rate information. Accordingly, the Departments sought comment on whether the final rules should require plans' and issuers' In-network Rate Files to be updated more frequently. The Departments also sought comment on an alternate proposal that would require plans and issuers to update negotiated rate information within 10 calendar days after the effective date of new rates with any in-network provider, and on whether the update timelines for negotiated rate information and historical out-of-network payment data should be the same.

For the reasons discussed elsewhere in this section of this preamble, the final rules adopt, as proposed, the requirement for a plan or issuer to update the information required to be included in each machine-readable file monthly. The final rules clarify that this requirement to update the machine-readable files monthly applies to all three machine-readable files being finalized through the final rules: the In-network Rate File, the Allowed Amount File, and the Prescription Drug File.

Several commenters stated that the requirement to update the In-network Rate Files and Allowed Amount Files monthly is operationally burdensome and the benefits of this requirement are limited because the information will not change significantly on a monthly basis. Some commenters recommended the Departments change the required frequency of updates to every six months, while others suggested that the final rules require updates to the In-network Rate File less frequently than monthly (for example, quarterly or semi-annually), but recommended that the Allowed Amount File should be updated monthly. Another commenter recommended a phased-in approach where the files would be updated twice a year in the

first year of implementation and quarterly thereafter. In contrast, one commenter recommended the files be updated in real-time as soon as updates to rates are made.

Based on consultation with government-affiliated IT experts and the design of the file schemas, the Departments are of the view that building the first machine-readable file will facilitate the automation of the process to build future files. In other words, the ability to produce subsequent files should be streamlined after completing initial development. Therefore, the Departments do not find persuasive the contention that requiring file updates monthly will significantly increase the overall costs and burdens related to producing the files. The Departments, however, do not agree that the files should be updated in real-time as soon as updates are made. With the monthly update requirement, the Departments are seeking to balance the need to ensure the data is current and accurate for consumers with minimizing burdens on plans and issuers.

As noted in the proposed rules, the Departments acknowledge there will be some costs with making updates to the files, including costs to ensure the quality of data and costs associated with posting the information on a public website. The Departments are of the view that requiring plans and issuers to update the files on a monthly basis will sufficiently limit the burden while ensuring that the most current data generally available. However, requiring updates to the files more or less frequently would not adequately balance these interests. Requiring updates to the files more frequently (such as on a daily basis), would add potentially unnecessary burdens for plans and issuers. Requiring updates to the files less frequently would potentially result in consumers relying on outdated information for health care purchasing decisions. While negotiated rates, in particular, may not change frequently for any one contract with a provider or group of providers, the Departments understand that payer-provider contracts are updated on a rolling basis and throughout the year. Therefore, updates throughout the year are needed in order to ensure that the information disclosed remains up-to-date.

The final rules also require that the Prescription Drug File be updated on a monthly basis. The Departments understand the complexities of prescription drug pricing and are aware that drug prices can fluctuate as frequently as daily. However, the Departments have determined that aligning the frequency of updates of all machine-readable files will mitigate the burden associated with maintaining the files for plans and issuers, and will best balance the need for disclosing current and accurate information against that burden. The Departments are aware that the number of pricing updates in the monthly Prescription Drug File will likely be more than the number of monthly pricing updates for medical services in the In-network Rate File. However, the Departments are of the view that if plans and issuers can update their pharmacy claims processing systems in real-time to account for fluctuating prices and adjudicate claims for prescription drugs, then the burden to pull current pricing information into the Prescription Drug File should be manageable.

The Departments will monitor the implementation of the machine-readable file requirements and consider updates in future rulemaking if it is determined that monthly updates are not adequately balancing the need for accurate and current information against the burdens for plans and issuers.

5. Special Rules to Prevent Unnecessary Duplication and Allow for Aggregation

Similar to the proposed cost-sharing information disclosure requirements for participants, beneficiaries, and enrollees, the Departments proposed a special rule to streamline the publication of data that would be included in the proposed machine-readable files. This special rule has three components: one for insured group health plans where a health insurance issuer offering coverage in connection with the plan has agreed to provide the required information, another for plans and issuers that contract with third parties to provide the information on their behalf, and a special rule allowing aggregation of out-of-network allowed amount data.

a. Insured group health plans

The Departments proposed that, to the extent coverage under a group health plan consists of group health insurance coverage, the plan would satisfy the proposed machine-readable file requirements if the issuer offering the coverage were required to provide the information pursuant to a written agreement between the plan and issuer. Accordingly, if a plan sponsor and an issuer enter into a written agreement under which the issuer agrees to provide the information required under the proposed rules, and the issuer fails to provide full or timely information, then the issuer, but not the plan, has violated the final rule's disclosure requirements. This special rule would only apply, however, to insured group health arrangements where the contractually-obligated issuer is independently subject to the final rules.

The Departments received comments expressing strong support of the special rule to streamline public disclosure and avoid unnecessary duplication of disclosures for insured group health insurance coverage. These commenters recommended the policy be retained in the final rules. Accordingly, the final rules retain this special rule as proposed.

b. Use of Third Parties to Satisfy Public Disclosure Requirements

The Departments recognize that self-insured group health plans may rely on written agreements with other parties, such as service providers, to obtain the necessary data to comply with the final rules' disclosure requirements. Furthermore, it is the Departments' understanding that most health care coverage claims in the U.S. are processed through health care clearinghouses and that these entities maintain and standardize health care information, including information regarding negotiated rates and out-of-network allowed amounts.[207] As a result, the Departments noted in the proposed rules that a plan or issuer may reduce the bur-

[207] The Departments are adopting the definition of health care clearinghouse under 45 CFR 160.103 for purposes of these rules. Under that definition, health care clearinghouse means a public or private entity that performs one of two functions that involve the receiving and processing of health information data from a non-standard format to a standard format or non-standard data elements to standard data elements and vice versa.

den associated with making negotiated rates and out-of-network allowed amounts available in machine-readable files by entering a business associate agreement and contracting with a health care claims clearinghouse or other HIPAA-compliant entity to disclose this data on its behalf.[208] Accordingly, the Departments proposed to permit a plan or issuer to satisfy the public disclosure requirement of the proposed rules by entering into a written agreement under which another party (such as a TPA or health care claims clearinghouse) will make public the required information in compliance with this section. However, if a plan or issuer chooses to enter into such an agreement and the party with which it contracts fails to provide full or timely information, the plan or issuer will have violated the final rules' disclosure requirements.

Generally, commenters supported the use of clearinghouses or TPAs to store all of the information that must be disclosed under the proposed rules. One commenter suggested that all HIPAA-compliant third parties, not just clearinghouses, be allowed to satisfy the public disclosure requirements. Some commenters raised concerns related to using clearinghouses noting that the feasibility of using clearinghouses is dependent on the clearinghouse receiving all of the necessary data from health insurance issuers and providers who possess the data. The commenter strongly recommended the final rules require entities that possess the data to share the information in a timely manner with the relevant clearinghouses. The commenter also noted the costs charged by clearinghouses associated with data storage and noted that the prices must be reasonable and not discriminatory (for example, against smaller plans).

Several commenters recommended the Departments' special rule include protection for plan sponsors if they fail to meet the public disclosure requirements due to an inability, while acting in good faith, to obtain the data from a third-party service provider or when a contracted third-party withholds information or fails to submit information in a timely manner. One of these commenters also requested the Departments establish a policy that liability for failure to comply rests with a contracted third party in the event a plan sponsor can show that, acting in good faith, it is unable to comply with the disclosure requirements due to withholding of information by the third party.

This special rule, as finalized, continues to permit a plan or issuer to satisfy the public disclosure requirements of 26 CFR 54.9815-2715A3(b), 29 CFR 2590.715-2715A3(b), and, 45 CFR 147.212(b) of the final rules by entering into a written agreement under which another party (such as a TPA or health care claims clearinghouse) will make public the required information in compliance with this section. The final rules identify TPAs and health care claims clearinghouses as examples of the types of parties a plan or issuer may contract with, but these are not the only types of entities that may enter into such arrangements and the Departments expect that they will comply with any applicable privacy protection requirements, including applicable privacy protections under HIPAA.

Plans and issuers are not required to enter into such agreements in order to comply with the public disclosure requirements of the final rules. As the Departments noted in the preamble to the proposed rules, if a plan or issuer chooses to enter into such an agreement it is ultimately the responsibility of the plan or issuer to ensure that the third party provides the information required by the final rules. As noted earlier in this section, the special rule for insured plans is only available to plans that contract with an entity that is an issuer separately subject to final rules. This requirement ensures that the Departments retain a mechanism to enforce the final rules. Accordingly, this special rule relating to the use of third parties to satisfy these requirements continues to provide that the plan or issuer would violate the requirements of the final rules if the third party fails to provide full or timely information.

Another commenter recommended the Departments create a special rule or "safe harbor" for plans that are unable to disclose negotiated rate information due to antitrust laws, which prevent the plan from accessing information about its partners' contracts when engaged in a partnership alliance agreement. The commenter described a partnership alliance as shared partner networks in other geographic areas in order to meet the needs of multistate employer groups.

As discussed earlier in this preamble, the Departments acknowledge that the Sherman Antitrust Act prohibits any contract, combination, or conspiracy in restraint of trade or commerce.[209] Specifically, the law prohibits any "person" from entering into any such contract, trust, or similar arrangement.[210] Nothing under the proposed or final rules creates, compels, or endorses agreements or conspiracies between or among persons to form illegal arrangements or trusts in restraint of trade or commerce. Antitrust law does not proscribe or limit action by the federal government, to improve competition and lower costs to consumers, even if these actions may involve disclosures that, if made by private parties under a collusive agreement, might invite antitrust scrutiny.[211] Because the Departments are of the view that antitrust law will not prevent plans and issuers from making the public disclosures required under the final rules, there is no need for the Departments to create a special rule for plans that are unable to disclose negotiated rate information due to antitrust laws.

One commenter expressed a concern that multiemployer plans generally do not have access to the rate information needed to provide the cost-sharing disclosures required under the proposed rules, yet plans could be subject to significant penalties for failure to comply. The Departments note that insured multiemployer plans would qualify for the special rule for insured plans under which an issuer providing coverage for a plan enters into an agreement to provide the required information, which is being finalized through the final rules. If a multiemployer plan sponsor enters into a written agreement with an issuer under which the issuer agrees to provide the information required under the final

[208] 45 CFR 164.502(a)(3) and 164.504(e)(2).
[209] 15 U.S.C. 1.
[210] *Id*.
[211] For example, *see* 84 FR 65464, 65464-65 (Nov. 27, 2019).

rules, and the issuer fails to provide full or timely information, then the issuer, but not the plan, has violated the transparency disclosure requirements and may be subject to enforcement mechanisms applicable to plans under the PHS Act.[212] Therefore, insured multiemployer plans that contract with an issuer to provide the information required under the final rules would not be subject to enforcement actions under this mechanism; rather, the issuers with whom they have contracted will be subject to enforcement action under the final rules for failure to meet the transparency disclosure requirements.

Under the second special rule, multiemployer plans may also contract with a TPA or other third party (for example, a clearinghouse) to meet the transparency disclosure requirements under the final rules. However, this commenter is correct that if a plan or issuer chooses to enter into such an agreement, and the party with which it contracts fails to provide full or timely information, the plan or issuer would violate the transparency disclosure requirements.

The notion that accountability for compliance rests with a plan or issuer when the issuer or plan enlists a contractor or vendor for a business function is not inconsistent with other applicable regulations.[213] While claims processing is the main function for which an issuer or plan has contracted in this example, other responsibilities, such as responding to federal audits and report requirements, may fall within the scope of the duties required by contract. The Departments clarify that nothing in the final rules prevents an issuer or plan from ensuring contracts with TPAs or other third parties include clear terms specifying functions required to meet the disclosure requirements of the final rules, as well as establish service level agreements and performance metrics to hold the entities with whom the issuer or plan decides to contract accountable.

Because multiemployer plans may be able to take advantage of the special rules established under the proposed rules, the Departments do not view additional special considerations necessary to address the ability of such plans to comply with the transparency requirements of the final rules.

c. Aggregation for Allowed Amount Files

In order to further mitigate privacy concerns and to eliminate unnecessary duplication, the Departments proposed to permit plans and issuers to satisfy the public disclosure requirements of the proposed rules by making available out-of-network allowed amount data that has been aggregated to include information from more than one plan or policy. As previously discussed, a plan or issuer may satisfy the disclosure requirement by disclosing out-of-network allowed amounts. Accordingly, under such circumstances, the proposed rules would have permitted plans and issuers to aggregate out-of-network allowed amounts for more than one plan or insurance policy or contract.

To the extent a plan or issuer provided aggregated out-of-network allowed amount information, the Departments proposed to apply the minimum claims threshold to the aggregated claims data set, but not at the plan or issuer level. Based on commenters' requests for clarification, the Departments have determined that the proposed approach to apply the minimum claims threshold to the full aggregated claims data set could undermine the goal of the minimum claims threshold. The out-of-network Allowed Amount File must include a unique plan identifier for each plan or coverage included in the file under 26 CFR 54.9815-2715A3(b)(1)(ii)(A), 29 CFR 2590.715-2715A3(b)(1)(ii)(A), and 42 CFR 147.212(b)(1)(ii)(A). Therefore, even if the data for each plan or coverage were to be aggregated for purposes of determining whether the minimum claims threshold applies to a particular covered item or service, the data in the Allowed Amounts File would be distinguishable at the level of the plan identifier. The Departments are of the view that this could be problematic if all plans or coverage included in an aggregated Allowed Amount File meet the minimum claim threshold for an item or service when combined, but some or all individual plans do not independently meet the minimum claim threshold of 20 claims.

For instance, data for two plans are aggregated in the same Allowed Amount File under this rule. Plan A has 20 claims for Service X, while Plan B only has six claims for Service X. In aggregate, the plans meet the 20-claim threshold with 26 total claims for Service X. However, individually, only Plan A has met the minimum claim threshold. Under the proposal, data for Service X would be required to be included for both Plan A and Plan B, along with both the plan identifiers. The outcome of this requirement would be that Plan B would include data identifiable at the plan level for Service X. The Departments are of the view that allowing Plan B data to be included in the file for Service X would undermine the minimum claim threshold, increasing risk that individual patients' claims histories could be identified. To prevent this outcome, data for each plan or coverage included in an aggregated Allowed Amount File must independently meet the minimum claims threshold for each item or service and for each plan or coverage included in the aggregated Allowed Amount File. To highlight this requirement, the Departments are finalizing this provision of the proposed rules with a minor modification clarifying that the flexibility to aggregate out-of-network allowed amounts for more than one plan or coverage in a single machine-readable file is still subject to the minimum claims threshold applicable to individual plans or coverage as described under paragraph (b)(1)(ii)(C) of the same section.

One commenter requested clarification of a plan's obligation if a third party aggregates the Allowed Amount File. The commenter specifically requested clarification regarding whether the plan or third party would be responsible for posting the file, and whether there will be any special labeling requirements for an aggregated file, including if the file will need to in-

[212] Section 2723 of the PHS Act.

[213] For example, plans remain liable for violations of claims regulations under 26 CFR 54.9815–2719 and 29 CFR 2590.715-2719; and QHPs issuers who contract with downstream or delegated entities must maintain compliance with all applicable standards under 45 CFR 156.340(a).

clude a disclosure that it includes aggregated data.

Nothing in the final rules prevents the Allowed Amount File from being hosted on a third-party website or prevents a plan administrator from contracting with a third party to post the file. The Departments have added text to the final rules to make clear that this flexibility exists and to provide that if a plan chooses not to also host the file separately on its own public website, it must provide a link on its website to the location where the file is publicly available. The Departments will provide additional information on the form and manner, including labeling, through the file technical implementation guidance.

III. Overview of the Final Rule Regarding Issuer Use of Premium Revenue under the Medical Loss Ratio Program: Reporting and Rebate Requirements – The Department of Health and Human Services

As stated in the preamble to the proposed rules, consumers with health insurance often lack incentives to seek care from lower-cost providers, for example when consumers' out-of-pocket costs are limited to a set copayment amount regardless of the costs incurred by the issuer. Innovative benefit designs can be used to increase consumer engagement in health care purchasing decisions. HHS proposed to allow issuers that empower and incentivize consumers through the introduction of new or different plans that include provisions encouraging consumers to shop for services from lower-cost, higher-value providers, and that share the resulting savings with consumers, to take credit for such "shared savings" payments in their MLR calculations. HHS believes this approach preserves the statutorily-required value consumers receive for coverage under the MLR program, while encouraging issuers to offer new or different plan designs that support competition and consumer engagement in health care.

Formula for Calculating an Issuer's Medical Loss Ratio (45 CFR 158.221)

Section 2718(b) of the PHS Act requires a health insurance issuer offering group or individual health insurance coverage (including grandfathered health insurance plans) to provide rebates to enrollees if the issuer's MLR falls below specified thresholds (generally, 80 percent in the individual and small group markets and 85 percent in the large group market). Section 2718(b) of the PHS Act generally defines MLR as the percentage of premium revenue (after certain adjustments) an issuer expended on reimbursement for clinical services provided to enrollees and on activities that improve health care quality. Consistent with section 2718(c) of the PHS Act, the standardized methodologies for calculating an issuer's MLR must be designed to take into account the special circumstances of smaller plans, different types of plans, and newer plans.

Several states have considered or adopted legislation over the last few years to promote health care cost transparency and encourage issuers to design and make available plans that "share" savings with enrollees who shop for health care services and choose to obtain care from lower-cost, higher-value providers.[214] In addition, at least five states and a number of self-insured group health plans have incorporated such "shared savings" provisions into all or some of their health plans.[215] Under some plan designs, the savings are calculated as a percentage of the difference between the rate charged by the provider chosen by the consumer for a medical procedure and the average negotiated rate for that procedure across all providers in the issuer's network. Under other plan designs, the "shared savings" are provided as a flat dollar amount according to a schedule that places providers in one or more tiers based on the rate charged by each provider for a specified medical procedure. Under various plan designs, the "shared savings" may be provided in form of a gift card, a reduction in cost sharing, or a premium credit. HHS is of the view that such unique plan designs would motivate consumers to make more informed choices by providing consumers with tangible incentives to shop for care at the best price. As explained elsewhere in the preamble to the proposed rules, there is ample evidence that increased transparency in health care costs would lead to increased competition among providers.[216] HHS is of the view that allowing flexibility for issuers to include savings they share with enrollees in the numerator of the MLR would increase issuers' willingness to undertake the investment necessary to develop and administer plan features that may have the effect of increasing health care cost transparency, which in turn could lead to reduced health care costs.

HHS has in the past exercised its authority under section 2718(c) of the PHS Act to take into account the special circumstances of different types of plans by providing adjustments to increase the MLR numerator for "mini-med" and "expatriate" plans,[217] student health insurance plans,[218] as well as for QHPs that incurred Exchange implementation costs[219] and certain non-grandfathered plans (that is,

[214] 24-A Maine Rev. Stat. Ann. Sec. 4318-A (adopted Jun. 19, 2017); Neb. Rev. Stat. Sec. 44-1401 et seq. (adopted Apr. 23, 2018); Utah Code Ann. Sec. 31A-22-647 (adopted Mar. 19, 2018); AZ SB 1471 (2018); N.H. HB 1784-FN (2018); MA H2184 (2017).

[215] *See* the State of Kansas' SmartShopper program for state employees enrolled with BCBSKS, available at: https://healthbenefitsprogram.ks.gov/docs/default-source/site-documents/sehp/vendor-documents/bcbs/smartshopper_state_of_kansas_steps.pdf?sfvrsn=cfa4e44_8; the state of Kentucky employee member handbook for Livingwell CDHP's SmartShopper program, available at: https://personnel.ky.gov/KEHP/2020%20LivingWell%20CDHP%20Medical%20Benefit%20Booklet.pdf and https://www.smartshopper.com/legacy?utm_expid=.WJ_v45PuTXuo1k6ioPp4tA.1&utm; the State of Massachusetts employee member handbook for Fallon Health Select Care's SmartShopper program, available at: https://www.mass.gov/doc/fallon-select-care-handbook-fy21/download; the State of New Hampshire employee medical benefit, the Site of Service and Vitals SmartShopper Programs, available at: https://das.nh.gov/riskmanagement/active/medical-benefits/cost-savings-programs.aspx#vitals-smartshopper; Utah Public Employees Health Program Cost Tools, available at: https://www.pehp.org/save.

[216] Austin, D. A., and Gravelle, J. G. "Congressional Research Service Report for Congress: Does Price Transparency Improve Market Efficiency? Implications of Empirical Evidence in Other Markets for the Healthcare Sector." Congressional Research Service. July 24, 2007."Available at: https://fas.org/sgp/crs/secrecy/RL34101.pdf.

[217] *See* 45 CFR 158.221(b)(3) for "mini-med" plans and 45 CFR 158.221(b)(4) for "expatriate" plans; *see also* the Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements Under the Patient Protections and Affordable Care Act; Interim Final Rule; 75 FR 74864, 74872 (Dec. 1, 2010).

[218] *See* 45 CFR 158.221(b)(5); *see also* the Student Health Insurance Coverage; Final Rule, 77 FR 16453, 16458-16459 (Mar. 21, 2012).

[219] *See* 45 CFR 158.221(b)(7); *see also* the Exchange and Insurance Market Standards for 2015 and Beyond; Final Rule; 79 FR 30240, 30320 (May 27, 2014).

"grandmothered" plans).[220] This authority has also been exercised to recognize the special circumstances of new plans[221] and smaller plans.[222] Consistent with this approach, HHS proposed to exercise its authority to account for the special circumstances of new and different types of plans that provide "shared savings" to consumers who choose lower-cost, higher-value providers by adding a new paragraph 45 CFR 158.221(b)(9) to allow such "shared savings" payments to be included in the MLR numerator. HHS made this proposal so that issuers would not be required to pay MLR rebates based on a plan design that would provide a benefit to consumers that is not currently captured in any existing MLR revenue or expense category. HHS proposed that the amendment to 45 CFR 158.221 would become effective beginning with the 2020 MLR reporting year (for reports filed by July 31, 2021). HHS invited comments on this proposal.

After considering the public comments, HHS is finalizing the amendment to 45 CFR 158.221(b) as proposed.

The majority of comments on the proposed amendments to the MLR program rules supported the proposal to add a new paragraph to 45 CFR 158.221(b). Supporters noted that allowing issuers to include "shared savings" payments in their MLR calculation aligns issuer and enrollee incentives, aligns with MLR's purposes, is innovative, provides enrollees with value, increases consumer engagement and empowerment, and will promote better enrollee decision-making and reduce total health care costs. Several supportive commenters also noted that the proposal may encourage more issuers to offer such "shared savings" programs, as allowing "shared savings" payments to be included in the MLR numerator will remove any existing barriers to such programs and facilitate the use of innovative benefit designs that increase consumer engagement in health care purchasing decisions, while disallowing this approach punishes issuers that offer innovative "shared savings" programs and disincentivizes issuers from adopting such programs. Several commenters stated that there is evidence that patients are more likely to shop for care when information on prices is coupled with incentives, and that such shopping can generate significant savings for issuers and lead health care providers to lower their prices in order to remain competitive in the marketplace.[223]

HHS agrees with the comments in support of the proposal and is finalizing this amendment as proposed to provide additional flexibility to states and issuers and encourage the economic effects the commenters highlighted.

Some commenters requested clarification regarding certain aspects of the "shared savings" plans. Several commenters requested that HHS develop uniform standards and a definition for "shared savings," which according to commenters would, among other things, help prevent fraud and abuse; and that HHS clarify the criteria for low-cost, high-value providers. One commenter asked HHS to provide sub-regulatory guidance to specify in what form the savings can be shared, how issuers will report their "shared savings," how double-counting can be prevented, and whether "shared savings" payments are taxable income. Other commenters suggested that HHS provide maximum flexibility for issuers and states to innovate and develop "shared savings" programs they determine are best suited for their populations.

While HHS appreciates these suggestions and is also concerned with preventing fraud and abuse, HHS is of the view that state legislators and regulators are currently in a better position than HHS to work with the issuers in their states to define the "shared savings" programs that they support, issue standards and criteria for the programs for their respective constituents, and decide in what form the savings can be made. These considerations include the operational details of any "shared savings" program, such as creating standards and definitions, developing acceptable payment methods, and addressing fraud concerns. HHS notes that several issuers have already developed and implemented such programs and that a few states have done the same. The amendment being finalized in this rulemaking is specific to the recognition of "shared savings" payments in issuer MLR calculations and is intended to encourage more state and issuer innovation with these types of programs. Accordingly, HHS will provide technical guidance in the MLR Annual Reporting Form Instructions to clarify the reporting of "shared savings" payments specifically for MLR purposes. With respect to the comment regarding how double-counting can be prevented, HHS notes that 45 CFR 158.170 prevents double-counting by requiring each expense to be reported in only one category or to be pro-rated between categories for MLR purposes. Finally, whether "shared savings" payments to enrollees are taxable will vary based on certain specific facts and circumstances. Some forms of "shared savings" may be taxable; however, HHS defers to the Department of the Treasury to address the taxability of such payments as necessary.

Opponents of the proposal stated that it fails to ensure that the savings are actually used for health care or quality improvement activities (QIA), that HHS is subverting the statutory scheme by allowing issuers to spend less on enrollees' care and quality initiatives without returning the premium dollars saved to all enrollees, and that the proposal would allow issuers to further boost profits and diminish the MLR standards and issuer accountability. Some opponents of the proposal argued that

[220] *See* 45 CFR 158.221(b)(6); *see also* 79 FR 30240, 30320 (May 27, 2014). *See* 45 CFR 158.221(b)(6); *see also* 79 FR 30240, 30320 (May 27, 2014); *see also* 45 CFR 158.221(b)(6); *see also* 79 FR 30240, 30320 (May 27, 2014). "Grandmothered" plans is a term for certain non-grandfathered coverage in the small group and individual health insurance markets. Since 2014, CMS has permitted, subject to applicable State authorities, health insurance issuers to continue certain coverage that could not otherwise remain in place without significant changes to comply with PPACA. Such health insurance coverage would not be treated as out of compliance with sections 2701-2707 and 2709 of the PHS Act and section 1312(c) of PPACA (group health plans must still comply with section 2704 and 270505 of the PHS Act). *See* Extended Non-Enforcement of Affordable Care Act-Compliance With Respect to Certain Policies, available at https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Limited-Non-Enforcement-Policy-Extension-Through-CY2020.pdf and https://www.cms.gov/files/document/extension-limited-non-enforcement-policy-through-calendar-year-2021.pdf.

[221] *See* 45 CFR 158.121; *see also* 75 FR 74864, 74872-74873 (Dec. 01, 2010) and the HHS Notice of Benefit and Payment Parameters for 2018 Final Rule; 81 FR 94058, 94153-94154 (Dec. 22, 2016).

[222] *See* 45 CFR 158.230 and 158.232; *see also* 75 FR 74864, 74880 (Dec. 01, 2010).

[223] For example, one commenter shared that since 2015, its "shared savings" program issued over 149,000 incentive reward payments, generating over $85 million in savings. *See* https://beta.regulations.gov/document/CMS-2019-0163-14320.

since any plan type can offer "shared savings," adding a "shared savings" payment component to a policy does not make it a "different" type of plan and it should not be treated as such. Others were concerned that the proposal would incentivize issuers to artificially drive down negotiated rates with providers and that these savings may not make their way back to enrollees. One commenter opposed extending "shared savings" programs to self-insured ERISA plans. Another commenter pointed out that the National Association of Insurance Commissioners (NAIC) did not mention the proposal in its comments and the MLR statute provides that the NAIC shall establish the definitions and methodologies for MLRs.

HHS agrees that "shared savings" are neither an incurred claim nor a QIA. Instead, in support of this amendment to 45 CFR 158.221(b), HHS is relying on the statutory directive under section 2718(c) of the PHS Act that the MLR standardized methodologies shall be designed to take into account the special circumstances of different types of plans and newer plans, such as plans that offer "shared savings" payments to enrollees that seek care from lower-cost, higher-value providers. HHS believes that any issuer that includes in its plan design(s) a "shared savings" component is offering a "different" type of plan and a "newer" plan, as a "shared savings" program is a new and unique feature. HHS notes that the amendment finalized in these rules helps provide policyholders with value for their premium dollars, as intended by section 2718 of the PHS Act. HHS disagrees that the amendment somehow subverts the statutory scheme as issuers that implement these programs are sharing the savings and returning dollars to enrollees who participate in these programs, and issuers must still otherwise meet the applicable MLR threshold or provide a rebate to enrollees. For the same reasons, HHS does not share certain commenters' view that the amendment weakens the MLR standards and enables issuers to improperly boost profits, as the amendment simply allows issuers to account for the portion of the "shared savings" that is passed to participating enrollees and that consequently does not increase issuers' profits. With respect to comments regarding the impact on provider negotiated rates and enrollee access to savings, HHS is unsure how the amendment would incentivize issuers to artificially drive down negotiated rates with providers. However, if as a result of this amendment, provider rates decrease, such a result would in fact benefit enrollees. In addition, because only actual payments made to enrollees can be included in an issuer's MLR calculation under the amendment, issuers will benefit for MLR calculation and reporting purposes only if the savings are actually shared with enrollees. With respect to the comment regarding self-insured ERISA plans, HHS notes that this amendment does not apply to or impact, either self-funded ERISA plans, or self-funded non-ERISA plans, as these plans are not subject to the MLR reporting and rebate requirements under section 2718 of the PHS Act. Last, with respect to comments regarding the NAIC recommendations to HHS, section 2718(c) of the PHS Act directed the NAIC, subject to certification by the Secretary, to establish uniform definitions and standardized methodologies to guide MLR reporting and calculations. The NAIC met its statutory obligation when it provided recommendations to HHS in 2010 in the form of a model regulation.[224] The NAIC's recommendations informed the Secretary's decisions about the federal definitions and methodologies for calculating MLRs.[225] In this rulemaking, HHS is taking further action to recognize the special circumstances of the different and newer plans that include "shared savings" programs with the addition of new paragraph (b)(9) to 45 CFR 158.221.

Some commenters expressed concerns that "shared savings" programs in general could actually compromise the quality of care by driving consumer choices based on cost without regard for quality, and that these programs could encumber and curtail medically necessary clinical services in serving the financial interest of the payer. Some commenters requested that HHS only allow "shared savings" where there is evidence that the participating enrollees actually receive better care at reduced costs. One commenter stated that the proposal fails to define higher-value, which varies based on each enrollee's circumstances. One commenter questioned the feasibility of measuring whether reward systems generate actual savings.

HHS disagrees that programs that reward enrollees for critically examining their options and pursuing cost-effective care interfere with the provision of medically necessary clinical services. However, HHS agrees that quality as well as cost should be determinants of what qualifies for inclusion in any given issuer's "shared savings" program. That is why the amendment to 45 CFR 158.221 includes both a cost and quality component; it permits issuers to include in the MLR numerator "shared savings" payment made to enrollees choosing to obtain care from a lower-cost and higher-value provider. However, HHS did not propose and is not finalizing elements or criteria issuers must address or otherwise include in their respective "shared savings" programs. The amendment finalized in this rulemaking is specific to recognizing "shared savings" payments in issuer MLR calculations. As detailed above, HHS believes state legislators and regulators are currently in the best position to work with issuers in their states to develop standards and criteria for "shared savings" programs for their respective constituents. HHS further believes that issuers are in the best position to perform the necessary provider credentialing activities that will ensure that network providers that are included in their "shared savings" programs are high-value, high-quality providers. Since higher-value can vary by enrollee demographics and provider type, issuers must determine what this means for their enrollees and providers and maintain all documents and other evidence necessary to support that

[224] "Regulation for Uniform Definitions and Standardized Methodologies for Calculation of the Medical Loss Ratio for Plan Years 2011, 2012, and 2013 per section 2718(b) of the Public Health Service Act," MDL-190. Available at: https://www.naic.org/store/free/MDL-190.pdf?4.

[225] *See* the Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements Under the Patient Protection and Affordable Care Act; Interim Final Rule, 75 FR 74864 (Dec. 1, 2010); *see also* 45 CFR Part 158.

determination consistent with the maintenance of records requirements contained in 45 CFR 158.502. Issuers are sophisticated entities that understand that if their enrollees obtain lower-quality care, their costs over the long-term will increase rather than decrease as their enrollees will likely need additional and possibly corrective medical care. HHS therefore believes that issuers' incentives are aligned with those of their enrollees when it comes to designing "shared savings" programs.

HHS received a few comments urging that issuers be allowed to include some or all of the costs of implementing the requirements of these price transparency rules as a QIA in the numerator of the MLR calculation. A few commenters urged HHS to allow issuers to include some or all of the costs of creating the cost estimator tool required by the price transparency aspects of the proposed rules.

Price transparency implementation costs do not constitute an improvement to the quality of health care and thus do not qualify as QIA and cannot be included in the numerator of the MLR calculation.

Lastly, several commenters expressed support for or opposition to the MLR reporting and rebate requirements in general. HHS appreciates these comments but notes that they are outside the scope of the amendments to the MLR program rules contained in the proposed rule.

IV. Applicability

A. *In General*

1. Entities Subject to the Final Rules

The Departments proposed requiring group health plans, including self-insured plans, and health insurance issuers of individual and group health insurance coverage to disclose pricing information, with certain exceptions as discussed in more detail in this preamble. The Departments are of the view that consumers across the private health insurance market will benefit from the availability of pricing information that is sufficient to support informed health care decisions. Although the Departments considered making the requirements applicable to a more limited segment of the private health insurance market, the Departments are of the view that consumers across the market should receive and benefit from the same access to standardized, meaningful pricing information and estimates. Moreover, applied broadly, these changes have a greater potential to reform health care markets.

Additionally, the preamble to the proposed rules discussed how pricing information related to items and services that are subject to capitation arrangements under a specific plan or contract could meet transparency standards by disclosing only the consumer's anticipated liability. The Departments sought comment on whether there are certain reimbursement or payment models (such as ACOs or staff model HMOs) that should be partially or fully exempt from these requirements or should otherwise be treated differently. Further, the Departments sought comment on how consumers may become better informed about their cost-sharing requirements under these reimbursement or payment models.

The Departments also considered limiting applicability to issuers of individual health insurance coverage and insured group health insurance coverage, but concluded that limiting applicability would be inconsistent with section 2715A of the PHS Act. The Departments are concerned that a more limited approach might encourage plans and issuers to simply shift costs to sectors of the market where the final rules would not apply and where consumers have diminished access to pricing information. Additionally, the Departments are concerned that a more limited approach may distort the health care market by creating perverse incentives for plans and issuers to avoid participating in certain markets that require compliance with these requirements.

The Departments are aware that certain plans and health coverage are not subject to the transparency provisions under section 2715A of the PHS Act and, therefore, are not be subject to the final rules. This includes grandfathered health plans, excepted benefits, health care sharing ministries, and short-term, limited-duration insurance (STLDI).

Grandfathered health plans are health plans that were in existence as of March 23, 2010, the date of enactment of PPACA, and that are only subject to certain provisions of PPACA, as long as they maintain their status as grandfathered health plans under the applicable rules.[226] Under section 1251 of PPACA, section 2715A of the PHS Act does not apply to grandfathered health plans. Therefore, the proposed rules would not have applied to grandfathered health plans (as defined in 26 CFR 54.9815-1251, 29 CFR 2590.715-1251, and 45 CFR 147.140).

In accordance with sections 2722 and 2763 of the PHS Act, section 732 of ERISA, and section 9831 of the Code, the requirements of title XXVII of the PHS Act, part 7 of ERISA, and chapter 100 of the Code do not apply to any group health plan (or group health insurance coverage offered in connection with a group health plan) or individual health insurance coverage in relation to its provision of excepted benefits. Excepted benefits are described in section 2791 of the PHS Act, section 733 of ERISA, and section 9832 of the Code. Section 2715A of the PHS Act is contained in title XXVII of the PHS Act, and, therefore, the proposed rules would not have applied to a plan or coverage consisting solely of excepted benefits.

The Departments also proposed that the rules would not apply to STLDI. Under section 2791(b)(5) of the PHS Act, STLDI is excluded from the definition of individual health insurance coverage and is therefore exempt from section 2715A of the PHS Act.[227] Therefore, the proposed rules would not have applied to STLDI coverage.

The Departments also proposed that the rules would not apply to health reimbursement arrangements, or other account-based plans, as defined in 26 CFR 54.9815-2711(d)(6)(i), 29 CFR 2590.715-2711(d)(6)(i), and 45 CFR 147.126(d)(6)(i), that simply make reimbursements subject to a maximum fixed dollar amount for a period, with the result that cost-sharing

[226] 26 CFR 54.9815-1251, 29 CFR 2590.715-1251, and 45 CFR 147.140.
[227] *See* 26 CFR 54.9801-2, 29 CFR 2590.701-2, and 45 CFR 144.103.

concepts are not applicable to those arrangements.

In contrast, the Departments proposed that the final rules would apply to grandmothered plans, meaning certain non-grandfathered health insurance coverage in the individual and small group markets with respect to which CMS has announced it will not take enforcement action even though the coverage is out of compliance with certain specified market requirements.[228] The Departments sought comment on whether grandmothered plans may face special challenges in complying with these transparency reporting provisions and whether the proposed rules should apply to grandmothered plans.

The final rules adopt these provisions as proposed. The final rules apply these requirements to group health plans, and health insurance issuers offering non-grandfathered group or individual health insurance coverage, with certain exceptions. Thus, the final rules apply to grandmothered plans. The Departments are finalizing, as proposed, that these requirements will not apply to certain plans and coverages that are not subject to the transparency provisions under section 2715A of the PHS Act, including grandfathered health plans, excepted benefits, and STLDI. Additionally, the final rules will not apply to health reimbursement arrangements, or other account-based plans, as defined in 26 CFR 54.9815-2711(d)(6)(i), 29 CFR 2590.715-2711(d)(6)(i), and 45 CFR 147.126(d)(6)(i), as these account-based arrangements simply make certain dollar amounts available, with the result that cost-sharing and price setting concepts are not applicable to those arrangements.

The majority of commenters supported applying these requirements to issuers of individual health insurance coverage and group health insurance coverage, as well as group health plans. Commenters supported allowing consumers across the market to access important pricing information. Some commenters suggested additional plans and coverages that should be required to comply with these requirements, as discussed later in this preamble. The Departments did not receive comments regarding application of the final rules to grandmothered plans.

One commenter stated that the proposed rules would create an uneven playing field that would unfairly advantage plans and issuers offering stand-alone dental or vision coverage over plans that incorporate such benefits into major medical coverage. For example, the commenter stated that a plan offering essential health benefits would have to include in a machine-readable file negotiated rates for pediatric dental services. However, a plan offering stand-alone dental coverage would not have to publish pricing information. For these reasons, the commenter recommended that vision, dental, and hearing benefits, if offered as part of a plan or coverage subject to the transparency requirements, should be excluded from information disclosed through the internet-based self-service tool and machine-readable files.

In response to this comment, the Departments note that section 2721(b), (c)(1) through (3) of the PHS Act provides an exemption from title XXVII of the PHS Act for "any individual coverage or any group health plan (and group health insurance coverage offered in connection with a group health plan) *in relation to its provision of excepted benefits*." (*See also* section 732 (b), (c) of ERISA, and section 9831(b), (c) of the Code) (emphasis added).[229] To the extent that a plan or issuer provides a participant, beneficiary, or enrollee with the opportunity to opt out of limited scope dental or vision benefits, those benefits are considered as not an integral part of the plan and, accordingly, are considered excepted benefits.[230] Therefore, under the final rules, plans and issuers that offer excepted benefits, such as limited scope dental or vision benefits, along with their major medical coverage are not required to disclose the information required by the final rules regarding their provision of those excepted benefits. Accordingly, the final rules do not create an uneven playing field that would unfairly advantage plans and issuers offering stand-alone dental or vision coverage over plans that incorporate such benefits into major medical coverage.

The Departments received a mix of comments regarding whether the final rules should apply to alternative contracting and alternative payment model structures, such as ACOs or HMOs. One commenter recommended a narrower scope for ACOs and other capitated payment arrangements, including only requiring transparency tools to display amounts that are not service dependent (for example, flat copayments), as well as accumulator information about deductibles and out-of-pocket maximums. As discussed elsewhere in this preamble, some commenters expressed concern regarding how the final rules would apply to reference-based pricing models, direct primary care, bundled or capitated payment arrangements, and value-based insurance design. Additionally, some commenters expressed concern regarding how the final rules would apply to plans with rental networks and quality-adjusted and risk-adjusted contracts (under which prices can only be calculated after the fact). These commenters recommended that these kinds of arrangements be exempt from the final rules' requirements.

On the other hand, other commenters suggested that there is no justification for excluding plans that reimburse their providers based on capitation from the requirements of the final rules as this would result in an incomplete data set, and issuers of risk adjustment-covered plans already assign values to services to administer benefits with deductibles and co-insurance, for risk adjustment purposes under 45 CFR 153.710(c), and for internal reporting. One commenter recommended that the final rules should apply to ACOs and other capitated arrangements and that these arrangements should be required to disclose their underlying financial incentive arrangements, not just consumer's anticipated liability. The commenter also noted that any exemptions may incentivize plans to move to these pricing models, which the commenter characterized as opaque and potentially consumer-unfriendly. Several commenters agreed that

[228] Pate, R. "Insurance Standards Bulletin Series." Centers for Medicare & Medicaid Services. January 31, 2020. Available at: https://www.cms.gov/files/document/extension-limited-non-enforcement-policy-through-calendar-year-2021.pdf.

[229] *See also* section 2763 of the PHS Act.

[230] 26 CFR 54.9831-1(c)(3)(ii), 29 CFR 2590.732(c)(3)(ii), and 45 CFR 146.145(b)(3)(ii).

pricing information related to items and services subject to capitation arrangements could meet transparency standards only through the disclosure of the consumer's anticipated liability.

Some commenters raised the concern that the proposed rules would have a particularly negative impact on smaller entities that are less likely to have the financial reserves and technological resources to build and maintain systems to operationalize disclosure requirements. Some commenters requested that the final rules be optional or that smaller plans and TPAs be exempted from the requirements. For example, a few commenters recommended providing an exception to the price transparency requirement for small issuers, TPAs, and plans with revenue below the $41.5 million small entity threshold or with 100,000 commercial participants, beneficiaries, and enrollees or fewer. They suggested that an exception to the final rules would allow small issuers to adopt elements of the requirements of most relevance to their participants, beneficiaries, and enrollees while not forcing them to create a much more expensive option that may be of limited appeal.

In considering these concerns, the Departments weighed the competing goals of ensuring that consumers have access to pricing information, the burden on plans, including self-insured plans, and issuers of individual health insurance coverage and group health insurance coverage, and encouraging innovative plan design. As finalized, all issuers of non-grandfathered individual and group health insurance coverage and self-insured plans (that are not account-based plans), are required to comply with the final rules. Finalizing these rules to be applicable to plans as proposed is the most straightforward approach as it is impossible to define and predict all possible modifications, plans, or models. Furthermore, doing so mitigates creating incentives to adopt certain plan designs over others. The Departments believe that this is not likely to stifle innovation. Rather, the Departments are of the view that this approach creates a level playing field for non-grandfathered individual and group health insurance coverage and self-insured plans (that are not account-based plans) to create innovative plan designs and increase consumers' access to pricing information that is sufficient to support informed health care decisions. The Departments are of the view that exempting plan designs, such as alternative contracting and alternative payment model structures, would create an opportunity for plans and issuers to avoid sharing important pricing information with consumers. The Departments maintain the view that consumers across the market should come to expect and receive the same access to standardized, meaningful pricing information and estimates for all plans affected by the final rules. In addition, as detailed earlier in this preamble, issuers of risk adjustment-covered plans that include capitation arrangements are required under the final rules to submit a derived amount, potentially using the same internal methodology the issuer uses to assign a price value to the item or service for purposes of submitting risk adjustment data under 45 CFR 153.710(c).

A few commenters supported exempting grandfathered health plans, HRAs or other account-based plans, excepted benefits, and STLDI from the proposed rules. However, a majority of commenters were concerned that the final rules, as proposed, would not apply to plans or arrangements that may have the highest potential cost-sharing obligations, such as STLDI and health care sharing ministries. These commenters were concerned that STLDI plans often have dollar limits on covered benefits, limits on prescription drug coverage and covered doctor visits, and excluded benefits, which often means consumers enrolled in these plans can face higher cost-sharing liability when seeking medical care than patients covered by individual health insurance coverage, as defined under section 2791(b)(5) of the PHS Act. They stated that it is even more important for these patients to have access to their cost-sharing liability under the final rules before receiving care or even signing up for a STLDI plan, so they are aware of their coverage limits and are prepared to receive bills from the hospital and other health care providers for amounts that exceed their coverage. One commenter stated that whether such plans are considered "individual health insurance" is not relevant for such a determination, as the proposed rules would not apply to just individual health insurance, but would also apply to group coverage and grandmothered plans.

The Departments appreciate the concerns raised by commenters regarding these plans. However, the final rules adopt these policies as proposed. As noted earlier in this section of this preamble, certain types of coverage and arrangements such as STLDI, excepted benefits and health care sharing ministries, are not subject to the transparency provisions under section 2715A of the PHS Act and, therefore, are not subject to the final rules. However, the Departments encourage all plans that are not subject to the final rules to work to increase the transparency and availability of pricing information, to enable consumers to make informed health care decisions.

One commenter sought clarification of the liability of individual employers concerning Multiple Employer Welfare Arrangements (MEWAs) and Taft-Hartley plans. Section 715 of ERISA incorporates section 2715A of the PHS Act into part 7 of ERISA. Generally, employers are only responsible for ensuring compliance with the requirements of ERISA for a Taft-Hartley plan (also known as a multi-employer plan), if they are a member of the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan, or are otherwise a fiduciary of the plan. For MEWAs that are employee welfare benefit plans, the bona fide group or association that sponsors the MEWA assumes and retains responsibility for operating and administering the MEWA, including ensuring compliance with Part 7 of ERISA. In cases where the MEWA itself is not a plan, each employer that provides benefits through a MEWA and, therefore, maintains its own plan, is separately responsible for compliance with ERISA requirements, and thus with the requirements of the final rules.

Some commenters recommended adding additional plans and coverages to the list of health coverage not subject to these transparency requirements. One commenter recommended adding expatriate health plans because the Expatriate Health Coverage Clarification Act of 2014 exempts expatriate health plans from most of the provisions of PPACA, including sections 1311(e)(3) of PPACA and section 2715A of the PHS Act, both of which the

Departments cite in asserting statutory authority to propose these transparency requirements. Another commenter recommended that Denominational Health Plans be specifically exempted from the final rules. This commenter noted that Denominational Health Plans can only offer coverage to a limited segment of the population —eligible employees in the denomination —based on church requirements, beliefs, and polity. Therefore, most of the individuals to which this information would be disclosed would not be eligible to enroll in these plans even if they wished to do so. Other commenters recommended extending the final rules to health coverage to which 2715A of the PHS Act does not apply. For example, a commenter recommended that the Departments add Medicaid Managed Care Organization plans and Medicare-Medicaid Plans to the list of health plans not subject to the transparency requirements. The commenter noted that the combination of Medicaid payment rates and low cost-sharing requirements limit the usefulness of this information in the Medicaid context.

The Departments are finalizing the final rules as proposed and, therefore, all plans subject to section 2715A of the PHS Act must comply with these requirements. The Departments agree with commenters that sections 1311(e)(3) of PPACA and 2715A of the PHS Act do not apply to expatriate health plans[231] and, therefore, such plans are not subject to the requirements in the final rules. Furthermore, the Departments' authority for the final rules derive from section 2715A of the PHS Act, which only applies to group health plans and health insurance issuers offering group or individual health insurance coverage, and not Medicaid Managed Care Organization plans, Medicare-Medicaid Plans, and Denominational Health Plans.

Interaction of Final Rules with 45 CFR 156.220

The Departments recognize that health insurance issuers offering group or individual health insurance coverage as QHPs through an Exchange are already subject to reporting requirements under 45 CFR 156.220 that implement the transparency in coverage requirements of section 1311(e)(3) of PPACA. Pursuant to 45 CFR 156.220, issuers of QHPs offered through an individual market Exchange or a Small Business Health Options (SHOP) Exchange, including stand-alone dental plans, must submit specific information about their plans' coverage to the appropriate Exchange, HHS, and the state insurance commissioner, as well as make the information available to the public in plain language.

The Departments acknowledge the similar purposes served by 45 CFR 156.220 and the final rules. The Departments, however, note the final rules do not alter requirements under section 45 CFR 156.220. Accordingly, QHP issuers must comply with both rules' requirements. If necessary and to the extent appropriate, HHS may issue future guidance to address QHP issuers' compliance with both section 45 CFR 156.220 and the final rules.

2. Applicability Dates

Except as otherwise provided for in the proposed MLR requirements,[232] the Departments proposed that all the proposed requirements would become applicable for plan years (or in the individual market, policy years) beginning on or after one year after the finalization of the final rules. The Departments requested feedback about this proposed timing. In particular, the Departments were interested in information regarding the time necessary to develop cost estimation tools and machine-readable files. The Departments are finalizing a modified applicability timeline for the machine-readable files at 26 CFR 54.9815-2715A3, 29 CFR 2590.715-54.9815-2715A3, and 45 CFR part 147.212. The requirements to publish the machine-readable files will become effective for plan years (or in the individual market, for policy years) beginning on or after January 1, 2022. The Departments, in response to comments, are finalizing an applicability date that is generally one-year later than the proposed applicability date for complying with the internet-based self-service tool requirements. Specifically, plans and issuers will be allowed to phase in the requirements at 26 CFR 54.9815-22715A2, 29 CFR 2590.715-2715A2, and 45 CFR part 147.211 regarding the items and services included in the internet-based self-service tool. Plans and issuers will be required to provide pricing information for a minimum of 500 items and services identified by the Departments beginning with plan years (or in the individual market, policy years) on or after January 1, 2023. Plans and issuers will be required to provide the pricing information through the internet-based self-service tool for all items and services by plan years (or in the individual market, policy years) beginning on or after January 1, 2024.

The Departments are finalizing applicability dates that do not tie applicability timelines to the beginning of plan years (or in the individual market policy years) that begin one year after the effective date of the rules, as proposed. Because most plan and policy years begin on January 1st, the Departments are of the view that this change in the applicability date likely will not shorten the amount of time plans and issuers have to comply with the machine-readable file requirements, as it has been the Departments' intent, including under the proposed rules, to require calendar year plans and policies to come into compliance with the final rules by January 1, 2022. The changed timeline is therefore unlikely to lead to increased burdens or costs. The Departments are finalizing a 3-year applicability timeline for the internet-based self-service tool requirements. Under the proposed rules, plans and issuers would have had to comply with all relevant proposed requirements beginning with plan or policy years beginning on or after January 1, 2023. Under the final rules, full compliance with all requirements associated with the internet-based self-service tool will not be required until plan or policy years beginning on or after January 1, 2024. For these reasons, the final rule's applicability dates for the self-service tool

[231] 42 U.S.C. 18014.

[232] As noted above, HHS proposed and finalized that the amendment to the MLR regulation will become effective beginning with the 2020 MLR reporting year (for reports filed by July 31, 2021).

requirements are also unlikely to lead to increased burdens or costs.

Many commenters submitted comments regarding the proposed applicability date of the proposed rules. The majority of commenters strongly recommended delaying the proposed applicability date for the internet-based self-service tool and machine-readable file requirements of the rules for at least one year and up to five years from publication of the final rules.

Commenters recommended delaying the applicability date of the final rules because complying with the requirements will require negotiations with administrative service providers, and the design, building, and testing of websites. Other commenters cited the challenges in accessing some of the required information from third parties and the technical challenges plans will likely face as additional reasons to delay the applicability dates of these requirements. Additionally, commenters noted that the proposed rules would require disclosure of large volumes of data, which will have to be coordinated among various parties and for which systems will need to be put into place to ensure timely, accurate disclosure. Some commenters noted that a delay would be needed due to complex operational and compliance issues related to contracting with TPAs, ownership of data, and building and operating new IT systems.

Commenters also cited vendor supply/demand challenges; extensive technology design, development, and deployment work; amending agreements with third parties; financing required to meet the requirements of the final rules; and time needed to test the tools for consumer use as reasons to delay the applicability date. One commenter noted that their current price estimator tools took considerable time and resources to develop, and large portions of a tool's underlying logic or feature set may not be compatible with the approach envisioned in the proposed rules. Moreover, testing, evaluating, and resolving these types of issues will require significant investment in IT development, numerous iterations of quality assurance and consumer testing, extensive education and training for plan staff, and development of new consumer-facing materials, among other challenges. Another commenter recommended that employers/plan sponsors should not have to comply with the final rules until the first day of the first plan year that is two years after the date on which the rules are published. Similarly, commenters requested a lengthy phase-in period to give employers, third parties, issuers, and health care providers time to modify their contractual agreements to provide all of the data the proposed rules would require to be disclosed.

A few commenters stated the Departments severely underestimated the time needed to implement the machine-readable files. The commenter noted that the timeline to implement the machine-readable files is very short, which could compromise the integrity of the files and lead to unintended consequences for consumers. Another commenter noted that, if not eliminated, the requirement to make machine-readable files available should be applicable no earlier than plan or policy years beginning three years after the date the rules are finalized.

As discussed in the economic impact analysis, the Departments are of the view that developing the machine-readable files should be straightforward for most plans and issuers and that plans and issuers will incur limited additional administrative burdens or costs after the one-time initial file development. The development activities needed to establish the machine-readable files involve gathering, formatting, and making publicly available already existing data that plans and issuers use in their everyday operations. Plans and issuers need to keep this information current for operational purposes, and the additional costs and burdens of ensuring that the machine-readable files are updated monthly is expected to decrease in subsequent years and ultimately become minimal, as the Departments expect plans and issuers to automate the updating and verification processes in the years following initial development.

The Departments are of the view that providing for a phased-in approach with regard to the number of items and services required for the internet-based self-service tool will provide more time for plans and issuers to plan for any increased costs, work with various vendors, perform user testing, and build appropriate technology to handle the disclosure of data through the internet-based self-service tool. Therefore, the final rules require plans and issuers to include in the internet-based self-service tool (and by request, through the paper method) 500 items and services identified by the Departments for plan years (in the individual market, for policy years) beginning on or after January 1, 2023, and all items and services for plan years (in the individual market, for policy years) beginning on or after January 1, 2024. The Departments are of the view that providing more time to implement the internet-based self-service tool while generally maintaining the timeline for the machine-readable files, strikes the appropriate balance between minimizing burdens for issuers and maximizing price transparency for the public. Providing information to the public through the machine-readable files sooner will also accelerate researchers' and third-party developers' access to pricing information and potentially provide additional resources and incentives for plans to build out their own consumer-tools.

Many commenters also encouraged the Departments to allow for a phased-in approach for the internet-based self-service tool and machine-readable files. Some commenters suggested finalizing a rule that allows for a phased-in approach for different group health plans and health insurance issuers of individual and group health insurance coverage to come into compliance with the final rules. Some commenters recommended finalizing a rule that allows for a phased-in approach by allowing smaller entities an extended implementation timeframe (*that is*, an additional 3 to 5 years) due to the disproportionate IT burden that will be placed on these smaller entities. Additionally, commenters were concerned that the rules may create a competitive advantage for larger issuers and TPAs.

A few commenters recommended that the rules be implemented in a more gradual fashion by requiring a price transparency tool that covers a narrower data set initially, for example, one that includes only the most common shoppable services. These commenters asserted that, over time, this scope could be broadened to be fully inclusive, but an initial narrow focus could increase the chance that patients have critical, actionable information as soon as possible.

Other commenters recommended a phased approach that would focus first on the functionality providing the most value to consumers to establish a baseline standard of price transparency across plans, while allowing time for the industry to solve more difficult technical challenges. Another commenter recommended allowing employers that have highly customized benefit structures additional time to implement the internet-based self-service tool. One commenter recommended allowing for a transition period for issuers and plans to use their current tools to meet the requirements.

A few commenters recommended including quality metrics. These commenters noted that requiring quality information in the disclosures would take additional time. In particular, one commenter was concerned that in the absence of quality data, price transparency could actually increase spending. The commenter therefore recommended delaying the implementation of the final rules until quality information, such as information related to patient satisfaction and experience, adherence to clinical standards and evidence-based medicine, and patient safety and clinical outcomes, could be incorporated. Another commenter stated that, if pharmacy quality information could be included, the Departments would need to provide for several years to transform existing consensus-based processes to identify appropriate quality metrics to include health plans serving different populations. Another commenter urged the Departments to perform a study on the effects of price transparency and the potential consequences on consumers seeking care to better understand how best to integrate quality information alongside prices to allow consumers to evaluate the services that best respond to their individual needs.

As the Departments explain in section II.C.1 of this preamble, government and private sector actors are working to develop and implement reliable and reasonable quality measures that can be applied to produce quality rating information that consumers may access and consider alongside pricing. As commenters acknowledged, delaying the final rules for the purpose of requiring the integration of quality information with price information would require several additional years. While the Departments appreciate the value of quality information to informed health care decision-making, the Departments are of the view that price transparency in health coverage must not be delayed for years when some quality information is already available or under development. Indeed, the Departments expect that the ready availability of pricing information will create greater consumer interest in quality information and other data relevant to health care decision-making, and that the market will respond to provide such information through innovative resources such as online tools and mobile applications. The Departments anticipate that innovators will seek ways to best present and integrate pricing and quality data. However, the Departments also will consider what next steps are appropriate and feasible within the Departments' current authorities, including the possibility of conducting a study to evaluate how to best integrate quality information alongside prices. For these reasons and those noted earlier in this preamble, the Departments decline to require plans and issuers to include quality information in the disclosures required by the final rules.

The Departments are finalizing the applicability dates of the final rules as described earlier in this preamble. The Departments are of the view that the additional time and flexibility regarding the internet-based self-service tool will help address the concerns commenters raised regarding smaller entities' ability to comply with these requirements.

B. *Enforcement and Good Faith Special Applicability*

The preamble to the proposed rules did not discuss how the proposed rules would be enforced. State regulators, in their comments to the proposed rules, sought greater clarity on how the proposed rules' requirements would be enforced as specifically applied to health issuers in the individual and group markets. Section 1311(e)(3) is located in title I of PPACA and, under section 1321(c)(2) of PPACA is subject to the enforcement scheme set forth in section 2723 of the PHS Act. Similarly, section 2715A of the PHS Act is subject to the enforcement scheme set forth in section 2723 of the PHS Act. Therefore, states will generally be the primary enforcers of the requirements imposed upon health insurance issuers by the final rules.[233] The Departments expect to work closely with state regulators to design effective processes and partnerships for enforcing the final rules.

The proposed rules included a special applicability provision to address circumstances in which a group health plan or health insurance issuer, acting in good faith, makes an error or omission in its disclosures. Specifically, a plan or issuer would not fail to comply with the proposed rules solely because it, acting in good faith and with reasonable diligence, made an error or omission in a disclosure, provided that the plan or issuer corrects the information as soon as practicable. Additionally, to the extent such an error or omission was due to good faith reliance on information from another entity, the proposed rules included a special applicability provision under which, to the extent compliance would require a plan or issuer to obtain information from any other entity, the plan or issuer would not fail to comply with this section because it relied in good faith on information from the other entity, unless the plan or issuer knew, or reasonably should have known, that the information was incomplete or inaccurate. Under the proposed rules, if a plan or issuer had knowledge that such information was incomplete or inaccurate, the plan or issuer would be required to correct the information as soon as practicable.

Furthermore, the proposed rules also included a special applicability provision to account for circumstances in which a plan or issuer fails to make the required disclosures available due to its internet website being temporarily inaccessible. Accordingly, the proposed rules provid-

[233] DOL has jurisdiction to enforce the final rules as they apply to group health plans subject to ERISA. Treasury has jurisdiction over certain church plans. HHS has jurisdiction over non-federal governmental plans and over health insurance issuers where the HHS Secretary determines that a state has failed to substantially enforce the requirements. OPM has jurisdiction over the Federal Employees Health Benefits Plans.

ed that a plan or issuer would not fail to comply with this section solely because, despite acting in good faith and with reasonable diligence, its internet website is temporarily inaccessible, provided that the plan or issuer makes the information available as soon as practicable.

The Departments solicited comments regarding whether, in addition to these special applicability provisions, additional measures should be taken to ensure that plans and issuers that have taken reasonable steps to ensure the accuracy of required information disclosures are not exposed to liability by virtue of providing such information as required by the proposed rules.

In general, commenters supported the good faith special applicability provisions (also referred to as "safe harbors") and recommended certain clarifications. One commenter requested clarification regarding how the Departments would determine whether a plan or issuer acted in "good faith" and with "reasonable diligence." Another commenter requested additional guidance on what it would mean to "correct" information, and specifically whether this requirement would apply on a prospective or retrospective basis. Another commenter recommended the Departments allow health plans 30 days to update accumulated amounts in the internet-based self-service tool.

The Departments are finalizing the "good faith" safe harbor as proposed. While "good faith" is not explicitly defined in the final rules, it is an established legal and business term that is generally understood to involve honesty in fact and the observance of reasonable commercial standards of fair dealing, according to the Uniform Commercial Code.[234] Efforts to correct omitted or erroneous information should proceed promptly after the plan or issuer is informed of the error. At a minimum, correcting information should include replacing the incorrect information, and may include notifying those affected of the error and the correction, using digital or written communications to notify affected participants, beneficiaries, and enrollees, and posting a notice on the internet website of the expected time before the error will be corrected.

The Departments received few comments on the good faith special applicability provision to account for circumstances in which a plan or issuer fails to make the required disclosures available due to its internet website being temporarily inaccessible. One commenter recommended that the website inaccessibility safe harbor be expanded to cover situations in which the internet-based self-service tool or machine-readable files are temporarily inaccessible, including because the internet website is inaccessible. This clarification would cover other technical issues, for example, that may affect only these resources, even though the remainder of the issuer's or plan's website is accessible.

Several commenters recommended that the Departments expand the "safe harbor" to account for additional circumstances. Commenters recommended that a safe harbor be created for plans that do not have direct access to negotiated in-network rates and allowed amounts, or information regarding reference based re-pricing in real time, and that may be unable to obtain some of the required information despite good faith efforts. For example, commenters recommended exempting employers, plan sponsors, and self-insured plans that rely on TPAs from liability if they have made good faith efforts to obtain the required data but have failed to do so. Commenters also recommended exempting plan sponsors that have been unable to procure third-party vendors from liability if these plans sponsors have acted in good faith. One commenter recommended that the Departments finalize a good faith special applicability provision to protect health plans and issuers that provide cost estimates that meet the requirements of the final rules if the estimates do not match the amounts actually paid by participants, beneficiaries, or enrollees. This commenter also requested that this safe harbor be extended to the cost-sharing estimate requirements.

Commenters also recommended that the Departments consider a safe harbor provision for covered entities that clearly provides that issuers and plans are not responsible for the downstream privacy and security of PHI shared by a participant, beneficiary, or enrollee with a third-party application consistent with the recent guidance issued by the HHS OCR.[235] Another commenter recommended the creation of additional safe harbor provisions to allow and encourage health care organizations to share threat information about security risks and incidents linked to third-party applications.

One commenter noted that disclosure of pricing information through the machine-readable files and cost-sharing tool raises concerns for plan sponsors about the potential for increased litigation under ERISA based on the release of payer-specific negotiated rates. The commenter encouraged DOL to effectively and expressly address this issue so that any disclosure requirement is crafted in a way that does not increase fiduciary liability for employer plan sponsors. The commenter recommended that DOL consider proposing a "safe harbor" to protect employers from downstream litigation risk related to the public disclosure of negotiated rates and disclosure of negotiated rates through the cost-sharing tool. Such a "safe harbor" could provide that so long as an employer can demonstrate it "considered" negotiated rates as part of its decision-making process in selecting an administrative service organization (ASO) for its plan, so that it would not be deemed to have acted imprudently as a fiduciary for purposes of ERISA with respect to the selection of the ASO by virtue of the negotiated rates. While the Departments appreciate this comment regarding increased litigation under ERISA, this request is beyond the scope of this rulemaking.

Finally, several commenters requested a deemed compliance standard for employers or plans that already offer transparency tools designed to assist participants with cost estimates and obtaining up-to-date cost-sharing information or for plans and issuers that voluntarily submit their data to multi-payer claims databases. Other commenters noted that some existing state laws require plans to provide the

[234] "Uniform Commercial Code. General Definitions." Cornell Law School Legal Information Institute. Available at: https://www.law.cornell.edu/ucc/1/1-201#Goodfaith.

[235] "HHS FAQ." United States Department of Health and Human Services. Available at: https://www.hhs.gov/hipaa/for-professionals/faq/3009/does-a-hipaa-covered-entity-bear-liability.html.

ability for enrollees to look up their out-of-pocket costs for several hundred procedures online or by phone. These commenters recommended—to reduce burden on issuer implementation and avoid duplication of effort—that health plans that comply with existing state laws requiring treatment cost-estimator functionality be deemed in compliance with any similar federal requirements. Another commenter recommended this safe harbor be extended to the machine-readable files.

The Departments understand that states have been at the forefront of transparency initiatives and some have required disclosure of pricing information for years. However, it is important to note that states do not have authority to require such disclosures by plans subject to ERISA, which compose a significant portion of the private market.[236] As a result, a significant portion of consumers do not have access to information on their plans, even in states that have implemented transparency requirements. The Departments are also aware that many plans and issuers have moved in the direction of increased price transparency. Despite these price transparency efforts, the Departments understand that there continues to be a lack of easily accessible pricing information for consumers to use when shopping for health care services. The final rules are meant, in part, to address this lack of easily accessible pricing information, and represent a critical part of the 'Departments' overall strategy for reforming health care markets by promoting transparency, competition, and choice.

The Departments will take these additional safe harbor recommendations into consideration for future rulemaking. The Departments are not including in the final rules any safe harbor rule that would substitute the offering of existing tools or compliance with existing state transparency laws. The Departments have concluded that additional price transparency efforts are necessary to empower consumers, promote competition in the health care industry, and reduce the overall rate of growth in health care spending. The additional safe harbors recommended by commenters would not allow for the consistent baselines and standards that the Departments seek to establish with the final rules. As noted above, one of the goals of the final rules is to empower plans and issuers in the commercial health care market to innovate and compete in an industry where innovation and competition currently appear to be limited. By requiring public disclosure of pricing data a year after the effective date of the rules, the final rules will encourage issuers, TPAs, and third-party developers and innovators to create or enhance their shopping tools, including the self-service tools also required by these final rules. The development of these tools in turn will create additional consumerism, which will lead to lower prices throughout the health care market. This impact is only achievable, however if all applicable plans and issuers are held to the same standards and timelines. Furthermore, limiting the applicability of the final rules would undermine the Departments' overall strategy for reforming health care markets by promoting transparency, competition, and choice across the health care industry.

The Departments are of the view that, ultimately, plans and issuers are responsible for complying with the requirements outlined in the final rules. The Departments understand that plans may have to make adjustments to their contracts and as such, the Departments have factored that into the burden estimates and timing requirements for implementation explained elsewhere in the final rules. As plans and issuers are responsible for complying with the requirements outlined in the final rules, they should carefully examine the capacity of any partners they may contract with to provide the required information. Finally, as discussed earlier in this preamble, the Departments recognize the privacy concerns raised by commenters, but are of the view that the final rules, which include an exemption for providers with fewer than 20 different claims for payment and do not require any disclosure of PII or PHI through an API, and the continuing obligation of plans and issuers to comply with applicable privacy requirements, do not raise sufficient privacy concerns to require an additional privacy-related safe harbor.

V. Economic Impact Analysis and Paperwork Burden

A. Summary/ Statement of Need

This regulatory action is taken, in part, in light of Executive Order 13877 directing the Departments to issue an ANPRM, soliciting comments consistent with applicable law, requiring providers, health insurance issuers, and self-insured group health plans to provide or facilitate access to information about expected out-of-pocket costs for items or services to patients before they receive care. As discussed previously in this preamble, in response to Executive Order 13877, the Departments published the proposed rules entitled "Transparency in Coverage." Despite the growing number of initiatives and the growing consumer demand for, and awareness of, the need for pricing information, there continues to be a gap in easily accessible pricing information for consumers to use to shop for health care items and services. The final rules add new requirements to 26 CFR part 54, 29 CFR part 2590, and 45 CFR part 147 aimed at addressing this gap, and are a critical part of the Administration's overall strategy for reforming health care markets by promoting transparency and competition, creating choice in the health care industry, and enabling consumers to make informed choices about their health care. As discussed later in the RIA, the Departments acknowledge that more than 90 percent of plans, issuers, and TPAs currently provide some form of internet-based self-service tool to their consumers. However, as stated in section I.B of the final rules, the Departments understand that utility and accuracy among existing issuer cost estimator tools varies widely. Based on issuer demonstrations of their tools given to the Departments, some estimators reflect a combined range of possible costs; others give estimates based off historical pricing or claims data from various sources, while others are restricted in the types of proce-

[236] Panis, C. W. A., and Brien, M. J. "Self-Insured Health Benefit Plans 2019: Based on Filings through Statistical Year 2016." Deloitte. January 7, 2019. Available at: https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/annual-report-on-self-insured-group-health-plans-2019-appendix-b.pdf.

dures they include. Moreover, some existing issuer tools do not take into account a participant's, beneficiary's, or enrollee's accumulators.[237] The Departments are of the view that it is important to establish a minimum set of standards of what is acceptable so that consumers can take advantage of the information market-wide. Consistency will give consumers confidence that the information presented by these tools will not change arbitrarily. Reliability assures consumers that information in these tools accurately reflects plans' and issuers' best estimates of costs. The availability of these tools across all markets will ensure that no participant, beneficiary, or enrollee is denied access to the benefits of this rule and the Departments are of the view that this consistency is vital for success and utilization. As discussed previously in section I.B, state transparency requirements are generally not applicable to self-insured group health plans, and as a result, a significant portion of consumers may not have access to information on their plans and their health care costs. The Departments encourage additional functionality and innovation to be built around the requirements of the final rules, but believe a baseline is required to give the participant, beneficiary, or enrollee some confidence that no matter which plans tool they used, it would at least offer the same basic information. By requiring group health plans and health insurance issuers to disclose to participants, beneficiaries, or enrollees such individual's cost-sharing information for covered items or services furnished by a particular provider, the final rules provide them sufficient information to determine their potential out-of-pocket costs related to needed care and encourages them to consider price when making decisions about their health care.

B. Overall Impact

The Departments have examined the impact of the final rules as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96-354), section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995, Pub. L. 104-4), Executive Order 13132 on Federalism (August 4, 1999), the Congressional Review Act (5 U.S.C. 804(2)), and Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. A regulatory impact analysis (RIA) must be prepared for rules with economically significant effects ($100 million or more in any 1 year).

Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action that is likely to result in a rule: (1) having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting 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) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. An RIA must be prepared for major rules with economically significant effects ($100 million or more in any 1 year), and a "significant" regulatory action is subject to review by the Office of Management and Budget (OMB). The Departments have concluded that the final rules are likely to have economic impacts of $100 million or more in at least 1 year, and, therefore, meet the definition of "economically significant rule" under Executive Order 12866. Therefore, the Departments have provided an assessment of the potential costs, benefits, and transfers associated with the final rules. OMB reviewed this regulation in accordance with the provisions of Executive Order 12866.

Two commenters suggested that the proposed rules failed to comply with Executive Order 12866. Executive Order 12866 defines rules likely to have an economic impact in excess of $100 million as "significant" and requires that the agencies conduct an assessment of potential costs. The commenters suggested that the economic impact analysis and cost assessment the agencies provided for the proposed rules were short of the concrete, well-founded analysis required of the economic analysis directed by Executive Order 12866 that must accompany a proposed rulemaking as far-reaching, and potentially costly, as the proposed rules. One commenter suggested that the proposed rules were inconsistent with both Executive Order 12866 and Executive Order 13563, both of which direct agencies to carefully consider alternatives to regulations an agency has deemed necessary, and to select the least burdensome approach available. The commenter maintained that the agencies did not adequately consider alternatives and are proposing an unnecessarily and excessively burdensome approach.

After consideration and discussion of the comments related to proposed cost estimates received in response to the proposed rules, the Departments chose to reevaluate the cost estimates associated with the provisions in the final rules. The Departments also consulted with internal and external IT professionals to gain a better insight into what individuals and tasks would be needed to design, develop,

[237] *See also* "Are healthcare's cost estimate tools making matters worse for patients?" Becker's Hospital CFO Report. Available at https://www.beckershospitalreview.com/finance/are-healthcare-s-cost-estimate-tools-making-matters-worse-for-patients.html (citing Gordon, E. "Patients Want To Price-Shop For Care, But Online Tools Unreliable." NPR. November 30, 2015. Available at https://www.npr.org/sections/health-shots/2015/11/30/453087857/patients-want-to-price-shop-for-care-but-online-tools-unreliable) ("Some estimators reflect a combined range of possible costs, while others are based off historical pricing or claims data from various sources. Many online estimate tools are restricted in the types of procedures they include . . . .").

and deploy the internet-based self-service tool and the three machine-readable files required by the final rules. Based on this consultation and additional research, the Departments have chosen to increase the cost estimates to account for the updated understanding of the costs posed by the final rules, as well as the additional requirements included in the final rules. The Departments further discuss changes to the final cost estimates later in this preamble and in the associated ICR sections.

The final rules will enable participants, beneficiaries, and enrollees to obtain information about their potential cost-sharing liability for covered items and services that they might receive from a particular provider by requiring plans and issuers to disclose cost-sharing information as described at 26 CFR 54.9815-2715A2, 29 CFR 2590.715-2715A2, and 45 CFR 147.211. As discussed earlier in section I.B. of the final rules, there has been a shift in the health care market from copayments to coinsurance. Coupled with increases in plans and coverages with high deductibles, generally requiring sizeable out-of-pocket expenditures prior to receiving coverage under the terms of the plan or policy, participants, beneficiaries, and enrollees are now shouldering a greater portion of their health care costs than before. For example, over the period from 2008 to 2018, the average health care costs incurred by families covered by large employers – including premium contributions and out-of-pocket spending on health care services – have increased 67 percent from $4,617 to $7,726 annually. Over the same period, the average out-of-pocket costs alone have increased from $1,779 to $3,020 annually.[238] The Departments are of the view that disclosure of pricing information is crucial for participants, beneficiaries, or enrollees to engage in informed health care decision-making and believe that with greater price transparency and access to more accurate and actionable pricing information, participants, beneficiaries, and enrollees will be able to consider the value of an item or service when making decisions related to their health care.

In addition, as described at 26 CFR 54.9815-2715A1, 26 CFR 54.9815-2715A2, 26 CFR 54.9815-2715A3, 29 CFR 2590.715-2715A1, 29 CFR 2590.715-2715A2, 29 CFR 2590.715-2715A3, and 45 CFR 147.210, 147.211 and 147.212, the final rules require group health plans and health insurance issuers to make public in-network rates, including amounts in underlying fee schedules, negotiated rates, and derived amounts for in-network providers; historical allowed amounts paid to out-of-network providers and billed charges for all covered items and services; and negotiated rates and historical net prices for prescription drugs. The Departments are of the view that these requirements, through providing greater transparency and access to pricing information, will provide consistency and confidence across all internet-based self-service tools. Access to data provided by the three machine-readable files will ensure that all consumers have the pricing information they need in a readily accessible format, which could inform their choices, in addition to potentially impacting cost disparities and improvements to the overall functioning of the health care market. The Departments are of the view that greater price transparency and the availability of price information to the public will empower the 26.1 million uninsured consumers[239] to make more informed health care decisions and allow consumers who wish to shop among plans and coverage options to better understand the potential cost of their care. Public availability of this information will also allow third-party IT developers to provide consumers with more accurate information on provider, plan, and issuer value, as well as prescription drug pricing information, ensuring that such information is available to consumers where and when it is needed. Furthermore, providing the in-network rates along with out-of-pocket costs will also show what future costs could be for a participant, beneficiary, or enrollee for the same service, depending on the progress of his or her deductible. This information will help consumers make informed decisions related to their health care needs now and in the future.

The Departments received many comments regarding the underlying economic principles of the proposed rules. Many commenters were concerned the rules as proposed could disrupt contract negotiations between providers and health plans and result in providers acting in anticompetitive ways (such as collusion, consolidation, or price fixing), resulting in increased rates (a so-called "race to the top"). Some of these commenters were particularly concerned with the potential of the Departments' proposals to spur anticompetitive behavior in highly concentrated markets. Several of these commenters cited the FTC's concerns about the potential negative impacts of price transparency on competition in the health insurance markets, including the possibility that providers (or sellers) will coordinate their behavior or bid less aggressively, leading to higher prices. Commenters also cited similar concerns expressed by the Department of Justice (DOJ) and the Congressional Budget Office (CBO) about the unintended consequences of releasing competitive proprietary information such as the in-network rates of plans and issuers. Commenters further stated increased costs would negatively impact consumer choice and reduce the affordability of health insurance coverage of low- and middle-income consumers. One commenter expressed concern that plans and issuers could also coordinate to reduce provider payment levels below market competitive rates, which could negatively impact patient access to quality care. In contrast, one commenter suggested that concerns about potential collusion among providers are unfounded as local markets are currently populated by a limited number of providers who tend to have

[238] Rae, M., Copeland, R., and Cox, C. "Tracking the rise in premium contributions and cost-sharing for families with large employer coverage." Peterson-KFF. August 14, 2019. Available at: https://www.healthsystemtracker.org/brief/tracking-the-rise-in-premium-contributions-and-cost-sharing-for-families-with-large-employer-coverage/?utm_campaign=KFF-2019-Health-Costs&utm_medium=email&_hsenc=p2ANqtz-_72_RHB9Twe8BpbqOg28rdlGqxq_SBgV6rB-kbC4PuYMItIOSxHQLmh_D3OH4GOnUKZXa8&utm_source=hs_email&hsCtaTracking=04848753-3235-436e-a0de-ae8238ad00ad%7Cc1097ae0-0521-4e9a-8e45-e5a87f67af4a.

[239] "Income, Poverty and Health Insurance Coverage in the United States: 2019." United States Census Bureau. September 15, 2020. Available at: https://www.census.gov/newsroom/press-releases/2020/income-poverty.html.

knowledge of each other's rates and consumers currently receive pricing information through EOBs. The commenter also expressed the opinion that the argument put forth by issuers that in-network rates are trade secrets is self-serving and benefits them at the expense of consumers and the public.

One issuer stated that its experience in state markets where health care price transparency was implemented (Massachusetts, New Hampshire, and Maine) do not provide evidence that transparency efforts produce reduced health care prices and that state price transparency efforts negatively affected issuers' ability to negotiate lower rates. However, another commenter cited a study of the New Hampshire transparency initiative that found "a significant reduction in negotiated prices."[240]

Some commenters suggested that the Departments should ensure that strong protections are in place to prevent price fixing or unsustainably low reimbursement for care before requiring public disclosure of in-network and out-of-network rates. For example, to address concerns about price fixing, one commenter suggested working closely with the FTC and other appropriate federal and state authorities to monitor health care provider markets for any incidence of collusion, potentially leading to the prosecution of entities for violations that raise costs for patients and plan sponsors.

By contrast, several commenters expressed the view that the public disclosure of payer-specific in-network rates and transparency would promote competition in the health insurance markets and will drive down costs, which could result in lower, more reasonable health care prices. One commenter cited a paper that reviewed outcomes after the implementation of price transparency efforts and found evidence for behavioral changes that could place pressure on providers to lower rates.[241] Specifically, the paper found evidence of shopping activity among consumers, especially younger consumers, evidence of development activity by third-party application developers using this information, and evidence that employers will use the data to negotiate better rates. Another commenter noted that employers and health plans would be able to leverage the information to negotiate rates that are more reasonable and encourage patients to access higher-value providers.

As noted previously in sections I.B and I.C of this preamble, the Departments are of the view that greater price transparency and the public disclosure of pricing information is necessary to enable consumers to use and understand pricing data in a manner that will increase competition, improve markets, reduce disparities in health care prices, and potentially lower health care costs. The Departments continue to be of the view that effective downward pressure on health care pricing cannot be fully achieved without increased price transparency and the public disclosure of pricing information. As discussed in section E.3 of this preamble, the federal government maintains laws and processes to investigate reports of collusive or other anticompetitive practices.

Section 1311(e)(3) of PPACA and section 2715A of the PHS Act, as well the authority vested in the Departments, grant participants, beneficiaries, enrollees, and the public the right to know the prices of health care items and services, which will enable them make informed health care purchasing decisions. Without access to price information, consumers are unable to accurately assess and choose the least costly care and coverage options among all available options, and choice cannot be meaningful without adequate information about those choices. Currently, insured participants, beneficiaries, or enrollees, as well as uninsured consumers, do not have access to adequate and accessible pricing information related to care and coverage. The potential benefit of consumer access to this information is enormous. Furthermore, the Departments are aware of consumer demand for this information. According to a May 2019 poll conducted by the Harvard Center for American Political Studies, 88 percent of U.S. registered voters (out of a sample of 1,295) stated they would support an initiative by the government to mandate issuers, hospitals, doctors and other providers to disclose the cost of their services and discounted or negotiated rates between these groups.[242] Furthermore, 65 percent of these individuals would favor these initiatives even if in the short term they lead to an increase in prices by some providers.[243] The vast majority of comments the Departments received in response to the proposed rules were from individuals who expressed general support for the transparency proposals and expressed frustration at the lack of information available about health care pricing and a desire to have access to this information.

As noted in the preamble to the proposed rules and earlier in this preamble, the belief that greater price transparency will reduce health care costs by encouraging providers to offer more competitive rates is consistent with the predictions of standard economic theory and a number of empirical studies regarding price transparency in other markets. The Departments agree, however, that the health care market presents unique challenges. The Departments reviewed a study that notes certain special characteristics of the health care market, including that: (1) diseases and treatments affect each patient differently, making health care difficult to standardize and making price dispersion difficult to monitor; (2) patients cannot always know what they want or need, and physicians effectively must serve as their agents (for example, by recommending specialists and determining whether a

[240] Brown Z. Y. "Equilibrium Effects of Health Care Price Information." 101 Review of Economics & Stat. 699 (2019). Available at: http://www-personal.umich.edu/~zachb/zbrown_eqm_effects_price_transparency.pdf.

[241] Blase, B. "Transparent Prices Will Help Consumers and Employers Reduce Health Spending." Texas Public Policy Foundation. September 27, 2019. Available at: https://galen.org/assets/Blase_Transparency_Paper_092719.pdf.

[242] "The CAPS Harris Poll." Harvard Center for American Political Studies, 45. May 2019. Available at: https://harvardharrispoll.com/wp-content/uploads/2019/06/HHP_May19_vF.pdf?utm_source=hs_email&utm_medium=email&_hsenc=p2ANqtz--NgSdTYggGUP4tWyR2IEQ7i8TCg1s3DcHuQyhErIgkX3KFUi3SFgl9OZKm4-JUOOi9tmMQ.

[243] *Id.* at 46.

patient is admitted to a hospital); and (3) patients are typically in a poor position to choose a hospital because they do not have sufficient information about hospital quality and costs.[244] This study suggests that these special characteristics of the health care market, among other relevant factors, make it difficult to draw conclusions based on empirical evidence gathered from other markets. Nevertheless, the same study concluded that despite these complications, greater price transparency, such as access to posted prices, might lead to more efficient outcomes and lower prices.

Another study evaluated hospital discharge information following the publication of prices.[245] Hospital utilization increased for hospitals that priced below the mean market price, while hospital utilization decreased for hospitals that priced above the mean market price.

In a recent study of the New Hampshire price transparency tool, researchers found that health care price transparency could shift care to lower-cost providers and save consumers and payers money.[246] The study specifically focused on X-rays, CT scans, and MRI scans; it determined that the transparency tool reduced the costs of medical imaging procedures by five percent for patients and four percent for issuers; and estimated savings of $7.9 million for patients and $36 million for issuers over a 5-year period.

In another example, in Kentucky, public employees were provided with a price transparency tool that allowed them to shop for health care services and share in any cost-savings realized by seeking lower-cost care.[247] Over a 3-year period, 42 percent of eligible employees used the program to research information about prices and rewards.[248] The study found that 57 percent of those that used the transparency tool chose at least one cost-effective provider, saving state taxpayers $13.2 million and resulting in $1.9 million in cash benefits paid to public employees for seeking lower cost care.[249]

The Departments recognize the transparency efforts in New Hampshire and Kentucky are not necessarily generalizable nationwide and provide only some empirical data to support the overarching goal of these final rules that transparency in health care can lead to savings for consumers and issuers by putting downward pressure on prices. The Departments are of the view that consumers equipped with information about the cost of their medical options prior to receiving care will allow them to be able to make more informed decisions that will put additional downward pressure on health care costs. While the often-unequal relationship between patients and providers can sometimes mean that patients are not always best equipped to determine their care, there are many health care purchasing decisions that could and should take into account a patient's financial concerns. For instance, physician providers may also be able to provide health care transparency information when referring patients to specialists for in- or out-of-network care, such as for elective procedures. The pricing information, combined with the physician's advice, could help health care consumers evaluate options along the cost and quality spectrums and help guide them to high-value options. The Departments are of the view that health care pricing transparency may increase the impact of economic market forces on the health care markets, despite the health care market's unique characteristics. The Departments anticipate that once issuers, plans, and providers are aware that consumers can engage with the markets in an informed manner, they may adjust their costs to potentially be more competitive in their pricing of items and services.

1. Impact Estimates of the Transparency in Coverage Provisions and Accounting Table

The final rules set forth requirements for group health plans and health insurance issuers to disclose to a participant, beneficiary, or enrollee, his or her cost-sharing information for covered items or services from a particular provider or providers. The final rules also include requirements for plans and issuers to disclose in-network rates (including negotiated rates, amounts in underlying fee schedules and derived amounts) for in-network providers, historical allowed amounts and billed charges for covered items and services provided by out-of-network providers, and negotiated rates and historical net prices for prescription drugs through machine-readable files posted on a public internet website. In accordance with OMB Circular A-4, Table 2 depicts an accounting statement summarizing the Departments' assessment of the benefits, costs, and transfers associated with this regulatory action.

The Departments are unable to quantify all benefits and costs of the final rules. The effects in Table 2 reflect non-quantified impacts and estimated direct monetary costs and transfers resulting from the provisions of the final rules for plans, issuers, beneficiaries, participants, enrollees, and state and the federal governments.

[244] Austin, A. D., and Gravelle, J. G. "Congressional Research Service Report to Congress: Does Price Transparency Improve Market Efficiency? Implications of Empirical Evidence in Other Markets for the Healthcare Sector." Congressional Research Service. July 24, 2007. Available at: https://fas.org/sgp/crs/secrecy/RL34101.pdf.

[245] Kim, M. "The effect of hospital price transparency in health care markets." University of Pennsylvania. 2011. Available at: https://repository.upenn.edu/dissertations/AAI3475926.

[246] Brown, Z. Y. "Equilibrium Effects of Health Care Price Information." 100 Rev. Econ. & Stat. 1. (2018). Available at: http://www-personal.umich.edu/~zachb/zbrown_eqm_effects_price_transparency.pdf.

[247] Rhoads, J. "Right to Shop For Public Employees: How health care incentives are saving money in Kentucky." The Dartmouth Institute for Health Policy and Clinical Practice. March 8, 2019. Available at: https://thefga.org/wp-content/uploads/2019/03/RTS-Kentucky-HealthCareIncentivesSavingMoney-DRAFT8.pdf.

[248] *Id*.

[249] *Id*.

TABLE 2: Accounting Table

Intended Outcomes:

- Provides consumers with a tool to determine their estimated out-of-pocket costs, potentially becoming more informed on the cost of their health care, which could result in lower overall costs if consumers choose lower-cost providers or items and services.
- Potential increase in timely payments by consumers of medical bills as a result of knowing their estimated overall costs prior to receiving services and having the ability to budget for expected health care needs.
- Potential profit gains by third-party mobile application developers by selling and exchanging consumer health data and potential benefits to consumers through the development of mobile applications that may be more user-friendly and improve consumer access to cost information, potentially resulting in reductions in out-of-pocket costs.
- Potentially enable consumers shopping for coverage to understand the in-network rates for providers and the negotiated rates and historical net prices for prescription drugs in different group and individual health plans available to them and choose a plan that could minimize their out-of-pocket costs.
- States could potentially use the In-network Rate and Prescription Drugs Files to determine if premium rates are set appropriately.
- Potential reduction in cross-subsidization, which could result in lower prices as prices become more transparent.
- Public posting of in-network rates (including negotiated rates, amounts in underlying fee schedules, and derived amounts), negotiated rates, and historical net prices for prescription drugs could facilitate the review of anti-trust violations and potential collusion.
- Potential for the disclosure of in-network rates to apply pressure on providers to bill less aggressively.
- Strengthening of stakeholders' ability to support consumers.

Benefits

- Potential societal resource savings (non-quantified efficiency portion of any overall reduction in consumer health care expenditures).
- Potential to reduce the cost of surprise billing to consumers.

Costs:	Low Estimate	High Estimate	Year Dollar	Discount Rate	Period Covered
Annualized Monetized ($/year)	$4,080.2 million	$5,472.4 million	2020	7 percent	2021-2025
	$4,047.7 million	$5,392.9 million	2020	3 percent	2021-2025

Quantitative:

- Cost to plans, issuers and TPAs to plan, develop, and build the required internet-based self-service tool and machine-readable files, to provide in-network rates for in-network providers and out-of-network allowed amounts, and negotiated rates and historical net prices for prescription drugs, maintain appropriate security standards and update and maintain the machine-readable files per the final rules.
- Increase operating costs to plans and issuers as a result of training staff to use the internet-based self-service tool, responding to consumer inquiries, and delivering consumer's cost-sharing information and required notices.
- Cost to plans and issuers to review all the requirements in the final rules.

Non-Quantified:

- Potential cost incurred by plans and issuers that wish to develop a mobile accessible version of their internet-based self-service tool.
- Potential exposure of consumers to identity theft as a result of breaches and theft of PII.
- Potential increase in cyber security costs by plans and issuers to prevent data breaches and potential loss of PII.
- Potential increase in out-of-pocket costs for consumers if providers or prescription drug manufacturers increase prices for items and services or plans and issuers shift those costs to consumers in the form of increased cost sharing other than increased deductibles.
- Potential costs to states to review and enforce provisions of the final rules.
- Potential increase in consumer costs if reductions in cross-subsidization are for uncompensated care, as this could require providers finding a new way to pay for those uncompensated care costs.
- Potential increase in health care costs if consumers confuse cost with quality and value of service.
- Potential costs to inform and educate consumers on the availability and functionality of an internet-based self-service tool.
- Potential consumer confusion related to low health care literacy and the potential complexity of internet-based self-service tools.
- Potential cost to plans and issuers to conduct quality control reviews of the information in the in-network rate, out-of-network allowed amounts, and prescription drug machine-readable files.

- Potential costs to plans, issuers, and TPAs if they are required to renegotiate contracts in order to remove gag clauses in order to meet the requirements of the final rules.
- Potential costs to plans, issuers, and TPAs if they incur use cases per user CPT licensure charges.
- Potential increase in costs to consumers and issuers if providers or prescription drug manufacturers engage in anticompetitive behaviors.
- Potential state and federal costs associated with any changes in prescription drug prices resulting from the prescription drug machine-readable file release that may impact state Medicaid, CHIP, and Basic Health Plan programs and federal health care programs.

Transfers:	Estimate	Year Dollar	Discount Rate	Period Covered
Federal Annualized Monetized ($/year)	$425.2 million	2020	7 percent	2021-2025
	$423.0 million	2020	3 percent	2021-2025
Other Annualized Monetized ($/year)	$274 million	2020	7 percent	2021-2025
	$274 million	2020	3 percent	2021-2025

Quantitative:

- Transfers from the federal government to consumers in the form of increased premium tax credits by approximately $1,047 million in 2022, $623 million in 2023, $216 million in 2024, and $218 million in 2025 as a result of estimated premium increases by issuers in the individual market to comply with the final rules.
- Transfer from consumers to issuers in the form of reduced MLR rebate payments in the individual and group markets by approximately $120 million per year by allowing issuers to take credit for "shared savings" payments in issuers' MLR calculations.
- Transfers from providers to consumers and issuers of approximately $154 million per year as a result of lower medical costs for issuers and consumers by allowing issuers to share with consumers the savings that result from consumers shopping for care from lower-cost providers.

Non-Quantified:

- Potential transfer from providers to consumers facing collections to reduce the overall amounts owed to providers if they are able to use competitor pricing as a negotiating tool.
- Potential transfer from providers to consumers if there is an overall decrease in health care costs due to providers reducing prices to compete for customers.
- Potential transfer from issuers to consumers if there is an overall decrease in prescription drug costs due to potential reductions in prescription drug prices.
- Potential transfer from consumers to issuers or prescription drug manufacturers if drug manufacturers increase prescription drug prices.
- Potential transfer from consumers to providers if there is an increase in health care costs if providers and services increase their in-network rates to match those of competitors.
- Potential transfer from issuers to consumers if premiums decrease and potential transfer from consumers to issuers if premiums increase.
- Potential transfer from issuers to consumers and the federal government in the form of decreased premiums and premium tax credits as a result of issuers adopting provisions encouraging consumers to shop for services from lower-cost providers and sharing the resulting savings with consumers.
- Potential Transfers from the federal government to drug manufacturers, PBMs, and retail pharmacies for any change in prescription drug costs, which could impact prices paid by federal health care programs should prescription drug costs increase.
- Potential Transfers from drug manufacturers, PBMs, and retail pharmacies to the federal government to for any change in prescription drug costs, which could impact prices paid by federal health care programs should prescription drug costs decrease.

Table 2 provides the anticipated benefits and costs (quantitative and non-quantified) to plans and issuers to disclose cost-sharing information as described at 26 CFR 54.9815-2715A2, 29 CFR 2590.715-2715A2, 45 CFR 147.211, and at 26 CFR 54.9815-2715A3, 29 CFR 2590.715-2715A3, 45 CFR 147. 212, and make public in-network rates, amounts in underlying fee schedules, or derived amounts of in-network providers, out-of-network allowed amounts paid for covered items and services, and negotiated rates and historical net prices for prescription drugs. The following information describes the benefits and costs – qualitative and non-quantified – to plans and issuers separately for these three requirements. Some commenters stated that the Departments attempted analysis of the economic impact of the proposed rules was wholly inadequate and demonstrated that the Departments had not performed the basic fact-gathering and analysis that agencies are expected to undertake before undertaking notice-and-comment rulemaking. These comments stated that the material the Departments presented under section VII, "Economic Impact Analysis and Paperwork Burden" was a patchwork of speculation and assumptions without any grounding in empirical data or analysis. The commenters further stated: the Departments listed 10 specific cost elements that they did not attempt to quantify; failed to include any consideration of regulatory familiarization costs; omitted consideration of training costs for both government employees who will be charged with enforcing the regulation and for the staff of regulated issuers and plan sponsors who will be responsible for compliance; and failed to account for the impact of the litigation burden on regulated issuers, plan sponsors, and the public judicial system. Another commenter suggested that the Departments failed to conduct an adequate cost-benefit analysis because they failed to consider and quantify regulatory alternatives, failed to quantify potentially knowable costs, and failed to quantify benefits or offer additional evidence supporting such benefits. Similarly, another commenter stated that the Departments' analysis was lacking in any quantitative assessment of benefits and did not credibly demonstrate that quantification of benefits might be difficult.

The Departments consulted with various stakeholders in an effort to develop the economic analysis associated with the final rules, including the estimated costs. Additionally, the Departments requested comment on the estimates presented in the proposed rules to obtain more information and input with respect to the unquantified costs and benefits. The Departments received a number of comments related to the cost estimates, which are discussed later in the RIA and ICR sections. However, the Departments did not receive any comments providing actionable information as it relates to a number of the unquantifiable aspects of the proposed rules.

As previously discussed in sections II.B.2.C and V.B.1 in this preamble, the Departments received comments related to the lack of estimated costs associated with the renegotiation of provider contracts, litigation expenses, and the removal of gag clauses. However, none of the comments received provided any information that would aid the Departments in estimating such costs. The Departments recognize that there are numerous aspects associated with the final rules that they are unable to estimate due to an overall lack of knowledge and information with regard to the actions that issuers, providers, or TPAs may be required to take to meet the requirements of the final rules. As discussed in sections V.C and D, the Departments have sought to provide estimates to account for the regulatory familiarization costs and other estimates related to the alternatives considered in the development of the final rules. For the final rules, the Departments have updated the regulatory review costs to include familiarization costs for each state DOI (including the District of Columbia), issuers, and TPAs.

2. Requirements for Disclosing Cost-sharing information to Participant, Beneficiaries, or Enrollees under 26 CFR 54.9815-2715A2, 29 CFR 2590.715-2715A2, and 45 CFR 147.211

Costs

Under 26 CFR 54.9815-2715A2(b), 29 CFR 2590.715-2715A2(b), and 45 CFR 147.211(b) of the final rules group health plans and health insurance issuers must disclose required cost-sharing information in accordance with prescribed method and format requirements upon the request of a participant, beneficiary, or enrollee. The required cost-sharing information includes seven content elements, which are described in paragraph (b)(1) of the regulations and discussed earlier in section II.B.1 in this preamble. The quantitative costs associated with this requirement are detailed in the section VI.A.2 –of the ICR later in this preamble.

In addition to the costs described later in the corresponding ICR, the Departments recognize there may be other costs associated with this requirement that are difficult to quantify given the lack of information and data. For example, while the Departments are of the view that the overall effect of the final rules will lower health care costs, the Departments recognize that price transparency may have the opposite effect because in some markets where pricing is very transparent, price ranges can narrow in response to greater transparency, and costs can increase.[250] In section II.B.2.C in this preamble, the Departments addressed comments related to the potential for unintended consequences related to the public disclosures required through the In-network Rate. The Departments note that the current lack of pricing information means that health care consumers are generally not able to include price in their health care purchasing decisions. The Departments are of the view that making pricing information available will begin to ameliorate distortions resulting from consumer decision-making not taking costs sufficiently into account. Additionally, the Departments recognize

[250] Kutscher, B. "Report: Consumers demand price transparency, but at what cost?" Modern Healthcare. June 2015. Available at: https://www.modernhealthcare.com/article/20150623/NEWS/150629957/consumers-demand-price-transparency-but-at-what-cost.

that states may incur additional costs to enforce the requirements in the final rules.

As described in section VI, the Departments assume most self-insured group health plans will work with a TPA to meet the requirements of the final rules. The Departments estimated costs in the high-range estimate by assuming that all issuers and TPAs (for self-insured group health plans) will need to develop and build their internet-based self-service tool.

As described in section VI.A.1 of the ICR, the Departments assume most self-insured group health plans will work with a TPA to meet the requirements of the final rules. The Departments estimated cost in the high-end estimate by assuming that all issuers and TPAs (for self-insured group health plans) will need to develop and build their internet-based self-service tools from scratch. However, the Departments also provide a low-end estimate by assuming that over 90 percent of plans, issuers, or TPAs currently provide an internet-based self-service tool and will only be required to modify an existing internet-based self-service tool which may already meet some (if not all) the requirements in the final rules.[251] The Departments recognize that some plans, issuers, or TPAs might also voluntarily elect to develop or enhance a mobile application, if one is already available or in some stage of planning and implementation, which will result in additional costs. Additionally, TPAs generally work with multiple self-insured group health plans, and as a result, the costs for each TPA and self-insured group health plan may be lower to the extent they are able to coordinate their efforts and leverage any resulting economies of scale.

Moreover, health care data breach statistics show there has been an upward trend in data breaches over the past 10 years, with 2019 having more reported data breaches than any other year since records first started being published. Between 2009 and 2019 there have been 3,054 health care data breaches involving more than 500 records; resulting in the loss, theft, exposure, or impermissible disclosure of 230,954,151 health care records, equating to more than 69.78 percent of the United States population. Health care data breaches are now being reported at a rate of more than one per day.[252] Based on this information, the Departments recognize the requirements of the final rules provide additional opportunities for health care data breaches. Although privacy and security costs have been imbedded into the development and implementation cost estimates discussed in the section VI.A.1 and further discussed in section II.B.4 of this preamble, the Departments expect that plans and issuers will follow existing applicable state and federal laws regarding persons who may or must be allowed to access and receive the information. The Departments recognize that some plans and issuers may incur additional expenses to ensure a consumers' PHI and PII are secure and protected. Additionally, as consumers accessing the internet-based self-service tool may be required to input personal data to access the consumer-specific pricing information, consumers may be exposed to increased risk and experience identity theft as a result of breaches and theft of PII. As noted previously in section II.B.4 of this preamble, the Departments are finalizing a provision that reminds plans and issuers of their duty to comply with requirements under other applicable state or federal laws, including requirements governing the accessibility, privacy, or security of information, or those governing the ability of properly authorized representatives to access participant, beneficiary, or enrollee information held by plans and issuers.

One commenter stated that since multiemployer plans do not directly control the process of negotiations or the resulting information, these plans do not have access to the information necessary to satisfy the final rules and plans could be subject to significant penalties for failure to comply. Another commenter, that surveyed employers who sponsor self-insured ERISA-covered plans, noted that respondents would likely contract with a TPA to comply with the final rules because employers do not have all the necessary data nor the capability to collect that data. Employers indicated that contracting with a TPA for these requirements would come at a significant compliance cost to them. Commenters noted that they rent networks from issuers and contract with those issuers as TPAs to administer plan benefits. It is the issuer that holds the pricing information for medical services, facilities, and providers, not the self-insured employer. Another commenter stated that the burden incurred by plans, issuers, and TPAs would be crippling for smaller TPAs and health plans, and that burden would ultimately be passed along to employers, and, therefore, to consumers. Another commenter expressed concern that all of the data aggregation and collection required under the regulations—along with the need to contract with a third-party developer to create an on-line cost-sharing liability service tool that is capable of providing customized cost-sharing information to a particular participant, beneficiary, or enrollee—may be overly costly to plans. The commenter further suggested that there may also be significant costs associated with data storage.

The Departments appreciate the comments received in response to the proposed rules and recognize that not all plans will be the source of the material information required to meet the requirements of the final rules, and that many plans will ultimately seek out third-party assistance in the development of their internet-based self-service tool and machine-readable files, thus avoiding any potential penalties for noncompliance. As noted in section II.B.5 of this preamble, multiemployer plans may contract with a TPA or other third party (for example, a clearinghouse) to meet the requirements under the final rules. The Departments note that it is possible that obtaining third-party assistance to meet the requirements of the final rules could result in additional costs. The Departments expect, however, that TPA, or other third party, assistance will help alleviate some of the cost concerns expressed by commenters as a result of economies of

[251] Sharma, A., Manning, R., and Mozenter, Z. "Estimating the Burden of the Proposed Transparency in Coverage Rule." Bates White Economic Consulting. January 22, 2020. Available at: https://www.bateswhite.com/media/publication/183_Estimating%20Burden%20of%20Proposed%20TCR.pdf. In order to determine our estimates in determining the low-range cost estimate, the Departments estimated that only 90 percent of plans, issuers, and TPAs provided an online tool that would meet the assumptions used in developing the estimated costs.

[252] "Healthcare Data Breach Statistics." HIPAA Journal. Available at: https://www.hipaajournal.com/healthcare-data-breach-statistics/.

scale. As noted above, commenters noted that many self-insured ERISA plans rent networks from issuers and contract with issuers as TPAs to administer plan benefits. By leveraging their relationships with their issuer-TPA, self-funded plans may be able to reduce their overall costs by using any tools developed by those issuers. The Departments also recognize that in order to meet the requirements of the final rules, some smaller TPAs and issuers could face disproportionate increases in costs. However, the Departments anticipate that a number of TPAs and issuer-TPAs will seek to coordinate their efforts and take advantage of any resulting economies of scale to reduce their overall costs, and that this approach can be leveraged in order to reduce concerns related to the development of both the internet-based self-service tool as well as the required machine-readable files. The Departments recognize that issuers and TPAs will incur potential costs associated with data storage and providing access to the internet-based self-service tool. These costs can be generally broken down into two sections: bandwidth pricing and disc space. Bandwidth Pricing accounts for the amount of traffic going to a site, the size of the information that is transferred from the server to the user's browser, and the speed in which that happens. Provided that 99 percent of websites do not exceed 5 gigabytes of bandwidth per month,[253] this means if an issuer's or TPA's self-service tool, hosted on Microsoft's cloud product, would be free or minimal if beyond five gigabytes.[254] Disk Space Pricing accounts for the size of the hard drives necessary to host a website. Assuming that each issuer or TPA would need an estimated 351 gigabytes of storage this would translate to approximately $8 per month. Thus, assuming that each issuer or TPA will not require five gigabytes of bandwidth for their internet-based self-service tool, the Departments are of the view that the overall costs to store and provide data through the internet-based self-service tool will be minimal. The Departments recognize that the final rules will impose significant costs on plans, issuers, and TPAs, and that some of these costs may be transferred to consumers in the form of higher premiums or changes in the cost-sharing structure of plans.

Intended Outcomes

Informed Consumers. Through increased price transparency, consumers armed with pricing information will have greater control over their own health care spending, which can foster competition among providers, resulting in less disparity in health care prices or an overall reduction in health care prices. Consumers who use the internet-based self-service tool will be able to access their cost-sharing amount paid to date; their progress toward meeting their accumulators, such as deductibles and out-of-pocket limits; their estimated cost-sharing liability for an identified item or service; negotiated rates for in-network providers for covered items and services, and the out-of-network allowed amounts for covered items and services. Additionally, consumers will know how much health care services will cost for a particular treatment-, and, and if applicable, whether coverage of a specific item or service is subject to a prerequisite. As discussed previously in section II.B.1.a of this preamble, section 2713 of PPACA requires group health plans and health insurance issuers to provide certain recommended preventive items and services without cost-sharing. However, if the same items or services are furnished as non-preventive actions or by an out-of-network provider, the participant, beneficiary, or enrollee may be subject to the cost-sharing terms of his or her plan. If a plan or issuer cannot determine whether the request is for a preventive item or service, the plan or issuer must display the non-preventive cost-sharing liability, along with a note that the item or service may not be subject to cost-sharing if it is billed as a preventive service. Pricing information also gives consumers the ability to plan ahead for any known items and services they may require in the near future. The Departments are of the view that access to this information is essential to enable consumers to make informed decisions regarding specific services or treatments, budget appropriately to pay any out-of-pocket expenses, and determine what impact any change in providers, items, or services will have on the cost of a particular service or treatment.

Several consumers stated that they want the opportunity to shop for the best price when seeking out medical care and expressed that this information is critical when deciding whether to proceed with a test or procedure. Other consumers expressed the desire to shop for items and services and stated that shopping for health care would give them more control over their personal health care decisions and spending. Some consumers felt strongly that they should be able to compare prices to find the best deal for non-life-threatening care. Some other consumers also expressed frustration when describing their own experiences of trying and failing to obtain pricing information before receiving a particular service.

The Departments agree that providing the information required in the final rules will provide consumers with tools and information they can use to determine and evaluate the potential costs associated with their particular health care needs, thus providing them the opportunity to obtain the care they need at a cost they find acceptable.

Consumers may become more cost conscious. The Departments are of the view that with increased price transparency consumers may begin to focus more carefully on the costs of services. Currently, consumers may be aware they have a coinsurance of 20 percent for an item or service, but they may be unaware of what dollar amount they will ultimately be responsible for paying. Knowing that dollar amount may motivate consumers to seek lower-cost providers and services or seek needed care they did not obtain because of uncertainty or concerns about the costs. As discussed in sections I.E.3, II.C, and V.B.2-4 in this preamble, there has been recent evidence in New Hampshire and Kentucky that supports the Departments' view that having access to pricing information, along with currently available information on provider quality and incentives to shop for lower prices, can result in

[253] "How Much Bandwidth and Disk Space Do I Really Need?" Hosting Manual. Available at: https://www.hostingmanual.net/bandwidth-disk-space-need/.
[254] "Bandwidth Pricing Details." Microsoft Azure. Available at: https://azure.microsoft.com/en-us/pricing/details/bandwidth/.

consumers choosing providers with lower costs for items and services, thus potentially lowering overall health care costs.[255] The Departments acknowledge that this may only hold true if cost and cost sharing varies between services and providers. Depending on the degree of cost variation between specific items and services, there could be large variations in the degree to which prices change per item or service resulting in wide variations in health care costs and associated out-of-pocket costs.[256] Cost sharing in some alternative contracting models, such as HMOs and Exclusive Provider Organizations (EPO), generally occurs through fixed copayment amounts regardless which provider furnishes a covered item or service and, therefore, the internet-based self-service tool will provide little incentive for consumers to choose less costly providers in this context.

Timely Payment of Medical Bills. The Departments anticipate that consumers with access to the information provided in response to the final rules will be more likely to pay their medical bills on time. A recent Transunion survey found that 79 percent of respondents said they would be more likely to pay their bills in a timely manner if they had price estimates before obtaining care.[257] In addition, a non-profit hospital network found that the more information they shared with patients, the better prepared those patients were for meeting their responsibilities. The hospital network reported that providing price estimates to patients resulted in increased point of service cash collections from $3 million in 2010 to $6 million in 2011.[258] However, the Departments recognize that consumers may not be aware of any potential balance billing charges, where not prohibited by state law, and other potential costs associated with their health care such as facility fees etc. While these consumers will have a better idea of the costs they will incur when obtaining health care, they will likely be unaware of any additional charges they could incur as a result of obtaining care resulting in higher than expected out-of-pocket costs. Additionally, consumers may not fully be aware of their costs due to potential medical complications that might arise during the course of treatment or while obtaining a specific service.

Increased Competition Among Providers. Studies have found that state price transparency regulations have resulted in hospitals decreasing their charges and a decrease in mean price and price variability for queried procedures. One study found the publication of chargemaster data resulted in a decrease in mean price and price variability for queried procedures.[259] However, another study attributed the reduction in charges to the "reputational costs of perceived overcharging," yet also noted that reductions in charges were associated with decreases in discounts leading to no consumer savings.[260] Another issuer-initiated price transparency program, designed to encourage the selection of high-value providers, provided consumers with price differences among MRI facilities.[261] Those patients provided pricing information saw an 18.7 percent reduction in the cost per test and a decrease in the use of hospital-based facilities.[262] The study also found that price variations between hospital and non-hospital facilities were reduced by 30 percent.[263] As discussed in sections I.B in this preamble, the Departments recognize that requiring hospitals to display payer-specific negotiated charges, discounted cash prices, and de-identified minimum and maximum negotiated charges for as many of the 70 CMS selected shoppable services and additional hospital-selected shoppable services for a combined total of at least 300 shoppable services may play a role in decreasing mean prices and price variability.[264] However, the Departments are of the view that the Hospital Price Transparency final rule does not, in itself, result in reduced prices and price variability as the rule does not result in consumers receiving complete price estimates for health care items and services from both hospitals and issuers. Further, the Hospital Price Transparency final rule does not provide price transparency with respect to items and services provided by other health care providers. Therefore, the Departments are of the view that the requirements of the final rules will provide the additional price transparency necessary to empower a more price-conscious and responsible health care consumer and lead to increased competition among providers as consumers will be aware of and have the ability to compare the out-of-pocket cost of a covered item or service prior to receiving an item or service, which could force higher-cost providers to lower their prices in order to compete for the price sensitive consumer.

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[255] Brown, Z. Y. "Equilibrium Effects of Health Care Price Information." 100 Rev. of Econ. and Stat. 1. July 16, 2018. Available at: http://www-personal.umich.edu/~zachb/zbrown_eqm_effects_price_transparency.pdf; *see also* Rhoads, J. "Right to Shop for Public Employees: How health care incentives are saving money in Kentucky." The Dartmouth Institute for Health Policy and Clinical Practice. March 8, 2019. Available at: https://thefga.org/wp-content/uploads/2019/03/RTS-Kentucky-HealthCareIncentivesSavingMoney-DRAFT8.pdf.

[256] The evidence cited in this RIA yields per-capita annual savings estimates ranging from between $3 and $5 (=$2.8 million + $1.3 million + $7.0 million + $2.3 million two-year savings, across 1.3 million California public employees and their family members, per Boynton and Robinson (2015)), to $6.50 (=$7.9 million + $36 million five-year savings found by Brown (2018), divided across the 1.36 million residents of New Hampshire), to $17 (=$13.2 million three-year savings across 0.26 million beneficiaries, per Rhoads (2019)). If these results were extrapolated to the entire U.S. population, the estimate of rule-induced reductions in annual consumer expenditures could range from $0.98 billion to $5.5 billion, with the median result across the three studies at $2.1 billion. This range has a tendency toward overestimation, in that effects of the Hospital Price Transparency final rule and existing non-federal transparency programs have not been subtracted off.

[257] Kutscher, B. "Report: Consumers demand price transparency, but at what cost?" Modern Healthcare. June 2015. Available at: https://www.modernhealthcare.com/article/20150623/NEWS/150629957/consumers-demand-price-transparency-but-at-what-cost.

[258] "Reimagining Patient Access." Insurancenewsnet. December 29, 2015. Available at: https://insurancenewsnet.com/oarticle/reimagining-patient-access#.

[259] Ward, C., and Reeder, T. "The Evolution and Impact of Hospital Price Transparency in North Carolina." North Carolina Medical Journal. Volume 81. Issue 2. April 2020. Available at: https://www.ncmedicaljournal.com/content/81/2/95.short.

[260] Christensen, H. B., Floyd, E., and Maffett, M. "The Only Prescription is Price Transparency: The Effect of Charge-Price-Transparency Regulation on Healthcare Prices." Management Science. February 21, 2019. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2343367.

[261] Wu, S. J., et al. "Price transparency for MRIs increased use of less costly providers and triggered provider competition." Health Affairs. August 2014. Available at: https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2014.0168.

[262] *Id.*

[263] *Id.*

[264] 84 FR 65524 (Nov. 27, 2019).

3. Requirements for Public Disclosure of In-network Provider Rates for Covered Items and Services, Out-of-network Allowed Amounts and Prescription Drug Pricing Information Through Machine-readable Files under 26 CFR 54.9815-2715A3, 29 CFR 2590.715-2715A3, and 45 CFR 147.212.

Costs

Under 26 CFR 54.9815-2715A3(b), 29 CFR 2590.715-2715A3(b), and 45 CFR 147.212(b) of the final rules, group health plans and health insurance issuers are required to make available to the public, on an internet website, three digital files in a machine-readable format. The first file (the In-network Rate File) must include information regarding all applicable rates, which may include negotiated rates, underlying fee schedules, or derived amounts, to the extent they may be used for purposes of determining provider reimbursement or cost-sharing for in-network providers. The Departments note that prescription drug products may be included in the In-network Rate File only to the extent they are included as part of an alternative payment arrangement, such as a bundled payment arrangement. The second file (the Allowed Amount File) must provide data showing the allowed amounts and billed charges with respect to covered items and services, including prescription drugs, furnished by out-of-network providers over a 90-day period beginning 180 days prior to the publication date of the machine-readable file. The third file (the Prescription Drug File) must include information for negotiated rates and historical net prices for prescription drugs, organized by NDC. Plans and issuers are required to make the information available in accordance with certain method and format requirements described at paragraph (b)(2) and update these files monthly as required under paragraph (b)(3). The quantitative costs associated with meeting these requirements are detailed in section VI.2 of the ICR section.

Some commenters stated that the requirement to use billing codes would be very costly and potentially cost-prohibitive. One commenter indicated this is because use of CPT codes, the most commonly used billing codes, requires licensure by the American Medical Association (AMA). According to the commenter, the AMA charges licensing fees based on use cases per user. Another commenter noted that some self-funded plans rent networks and do not have real-time access to network pricing, and there are fees charged to plans to access the negotiated discounts with the provider network the plan has rented. As a result, the commenter suggested that plans will have to pay the network access fees twice—once the information required under the final rules and a second time when the actual claim is received and processed through an intermediary—to meet the requirements of the final rules.

The Departments understand that the use of CPT codes may represent an additional cost for some plans and issuers. Generally, the Departments anticipate that if a plan or issuer currently has the capability or licensure to record CPT codes on EOBs mailed to consumers, the plans or issuers should also be able to use that CPT code to make the public disclosures required through the final rules without, or with minimal, additional costs. The Departments also have concluded that, as plans and issuers would already include licensing costs for using CPT codes in the cost of doing business, they would not incur additional costs to use the CPT codes to populate the machine-readable files. The Departments acknowledge that some plans and issuers could face instances where they could incur additional costs in order to access the required CPT or network information based on the structure of licensing agreements to which they are currently parties. However, due to an overall lack of specific information and knowledge associated with the number of plans and issuers that currently have such licensing agreements, the structure of those agreements, and the alternatives available to those plans and issuers, the Departments are unable to accurately estimate any associated costs that might be incurred under these circumstances.

One commenter stated that for many employer-sponsored health plans, in-network rates usually belong to a network administrator, not the health plan, and, in the event network administrators were to update their contractual agreements to permit plans to receive and share pricing information, it is likely they will charge fees or request financial concessions from plans, which will increase administrative burdens on group health plans.

The Departments understand that requiring release of this pricing information will affect certain commercial arrangements and expectations that prevail in parts of the health care industry today, which could result in certain one-time and ongoing administrative costs. However, the Departments are of the view that making this information available to consumers and the public will serve consumers' long-term interests in facilitating a consumer-oriented, information-driven, more competitive market. Additionally, as discussed previously in section II.C in this preamble, the Departments are finalizing several special rules to streamline the provision of the public disclosures required through the final rules. These special rules were designed to reduce the overall compliance costs of the disclosures required by the final rules and to support smaller issuers and plans in meeting the requirements of the final rules by permitting certain contractual arrangements and the aggregation of allowed amount data in some circumstances.

The Departments also recognize that a certain amount of data storage will be required to post the machine-readable files on a publicly available internet website. Through the efficiencies of cloud computing and data storage, the cost to host large files dramatically decreased in price in the past several years. Popular services such as Simple Storage Service from Amazon Web Services and Standard Storage from the Google Cloud Platform can host files for roughly $0.026 per gigabyte. The Departments' size estimates of roughly 5 gigabytes for each machine-readable file would incur a monthly data storage cost of approximately $0.39 for all of the machine-readable files.

Non-Quantified Costs for Public Disclosure of In-Network Rates. In addition to the costs described in section VI.A.2, the Departments recognize there may be other costs associated with the requirement to make in-network rates publicly available that are difficult to quantify given the current lack of information and data. While the Departments are of the view that the overall effect of the final rules will be to

provide greater price transparency and potentially lower health care prices, there are instances in very transparent markets where price ranges can narrow and average costs can increase as a result of price transparency.[265] The Departments also recognize that plans and issuers may experience ongoing additional costs (for example, the cost of quality control reviews) to ensure they comply with the requirements of the final rules. In addition, the Departments are aware that information disclosures allowing competitors to determine the rates their competitors are charging may dampen each competitor's incentive to offer a lower price or result in a higher price equilibrium.[266] While plans and issuers with the highest in-network rates may see a decrease in their in-network rates, as their providers respond to consumer and smaller issuers' concerns regarding paying more for the same item and service, plans and issuers with the lowest in-network rates may see their lower cost providers adjust their rates upward. However, most research suggests that when better price information is available, prices for goods sold to consumers fall. For example, in an advertising-related study, researchers found that the act of advertising the price of a good or service is associated with lower prices.[267]

A potential additional non-quantified cost could be the cost to remove gag clauses from contracts between plans, issuers, and providers. Contracts between plans, issuers, and providers often include a gag clause, which prevents plans and issuers from disclosing in-network rates. The Departments recognize that plans, issuers and providers may incur a one-time expense for their attorneys to review and update their provider contracts to remove any relevant gag clauses. Comments received regarding gag clauses and contract negotiations are further discussed in section VI.A.2 later in this preamble.

Another potential cost concerns the final rules' impact on a plan's or issuer's ability or incentive to establish a robust network of providers. A health insurance provider network is a group of providers that have contracted with a plan or issuer to provide care at a specified price the provider must accept as payment in full. Many times, plans and issuers want consumers to use the providers in their network because these providers have met the plan's or issuer's quality standards and agreed to accept an in-network rate for their services in exchange for the patient volume they will receive by being part of the plan's or issuer's network.[268] Some plans and issuers offer a narrow network: these networks operate with a smaller number of providers, meaning a consumer will have fewer choices when it comes to in-network providers, but often offer lower monthly premiums and out-of-pocket costs.[269] The Departments recognize that making in-network rates public may create a disincentive for plans and issuers to establish a contractual relationship with a provider (including in narrow networks) because providers may be unwilling to give a discount to plans and issuers when that discount will be made public. As addressed further in section VI.C later in this preamble, the requirements of the final rules could result in a reduction in revenue for those smaller plans and issuers that are unable to pay higher rates to providers and may require them to narrow their provider networks, which could affect access to care for some consumers. Due to smaller plans' and issuers' potential inability to pay providers with higher rates, smaller plans and issuers may further narrow their networks to include only providers with lower rates, possibly making it more difficult for smaller plans and issuers to fully comply with network adequacy standards described at 45 CFR 156.230 or other applicable state network adequacy requirements.

Some commenters stated that public disclosure of in-network rates could affect the sustainability and affordability of QHPs offered through the Exchanges by placing upward pressure on rates and by placing provider participation in networks at risk. One commenter stated that the potential negative effects on QHPs would especially harm unsubsidized consumers and consumers in rural areas where provider consolidation is most common and could impact overall marketplace stability and the risk pool. Furthermore, commenters asserted that increased premiums for QHPs could result in increased federal spending in the form of higher premium tax credit (PTC) payments, which could substantially increase the federal deficit over 10 years. One commenter stated that the Departments should not finalize the release of in-network rates until they fully evaluate the impact on affordable plan options on the Exchanges and the effects on federal spending.

As discussed later in section V.B.5 of this preamble, the Departments estimate premiums for the fully-insured markets will be $471 billion for 2022, including the individual, small group, and large group markets. The Departments estimate that the cost for 2022 represents approximately 2.4 percent of projected commercial insured premiums for the fully-insured market, 1.4 percent in 2023, 0.5 percent in 2024, and 0.5 percent in 2025. Assuming this level of premium increase in the individual market, PTC outlays are estimated to increase by about $1,047 million in 2022, $623 million in 2023, $216 million in 2024, and $218 million in 2025. Given that the 2021 President's Budget estimates that PTC outlays are expected to be $43.8 billion in 2022, $44.8 billion in 2023, $45.875 billion in 2024, and $48.2 billion in 2025,[270] the Departments expect the estimated increase of $1,047 million in 2022, $623 million in 2023, $216 mil-

[265] Kutscher, B. "Report: Consumers demand price transparency, but at what cost?" Modern Healthcare. June 2015. Available at: https://www.modernhealthcare.com/article/20150623/NEWS/150629957/consumers-demand-price-transparency-but-at-what-cost.

[266] Koslov, T., and Jex, E. "Price transparency or TMI?" United States, Federal Trade Commission. Available at: https://www.ftc.gov/news-events/blogs/competition-matters/2015/07/price-transparency-or-tmi.

[267] Austin, D. A, and Gravelle, J. G. "Does Price Transparency Improve Market Efficiency? Implications of Empirical Evidence in Other Markets for the Health Sector." Congressional Research Service. June 2007. Available at: https://fas.org/sgp/crs/secrecy/RL34101.pdf.

[268] Davis, E. "Health Insurance Provider Network Overview." Verywell Health. August 2019. Available at: https://www.verywellhealth.com/health-insurance-provider-network-1738750.

[269] Anderman, T. "What to Know About Narrow Network Health Insurance Plans." Consumer Reports. November 23, 2018. Available at: https://www.consumerreports.org/health-insurance/what-to-know-about-narrow-network-health-insurance-plans/.

[270] OMB 2021 President's Budget. Available at: https://www.whitehouse.gov/wp-content/uploads/2020/02/budget_fy21.pdf.

lion in 2024, and $218 million in 2025 to have minimal impacts on anticipated enrollment and are not of the view that this increase will result in any widespread negative effects on market stability. Additionally, the Departments have determined that enrollment impacts will be minimal, as estimated premium impacts are relatively small, and rate increases for subsidized enrollees in the individual market will be largely mitigated. Additionally, participants, beneficiaries, and enrollees currently make health insurance coverage decisions based on their particular health and financial situations, and it is not predictable how information provided as a result of the final rules will significantly impact those health insurance coverage decisions. Thus, the Departments do not expect the final rules to significantly increase the selection risk beyond the levels that currently exist. The Departments do acknowledge that the estimated increases in premiums could result in minor harm to unsubsidized consumers as they could be faced with increased premiums that would not be negated by any increases in PTC and this could impact those consumers' decisions related to obtaining health insurance coverage.

The Departments received several comments from issuers, providers, and employers stating that the requirement to publicly disclose in-network rates would threaten the viability of their business models or business models upon which they rely. One commenter stated that the proposal to release in-network rates could affect the viability of individual and small group market health plans sold by small issuers. The commenter further suggested that "safety net" health plans (which serve individuals and families that do not have access to other sources of coverage in markets that other issuers find unprofitable) currently may be able to access more favorable contract terms with providers, and these types of arrangements would be at risk if the in-network rate information were required to be made public. The commenter expressed particular concern that exposure of the rates of safety net hospitals may uniquely disadvantage them in negotiations with plans and issuers because they may have to raise rates on certain services to support safety net activities. Similarly, a hospital system stated that publishing in-network rates would negatively impact its ability to contain costs and threaten its current participation in the networks of nearly all area health plans. Another commenter indicated that providers would leave plans' and issuers' networks if plans' and issuers' attempts to achieve more favorable rates using public in-network rate information proved unsuccessful. Another commenter argued that the policy requiring disclosure of in-network rates could also result in the collapse of the network administrator business model, which would result in significantly increased administrative costs for health plans that would need to contract separately with each participating provider.

The Departments understand that requiring the release of this pricing information will upset certain commercial arrangements and expectations that prevail in parts of the health care industry today, which could result in certain one-time and ongoing administrative costs. However, the Departments have concluded that providing increased price transparency and making this information available to the public will serve the public's long-term interests in facilitating a consumer-oriented, information-driven, more competitive market potentially leading to reduced overall health care costs.

Some commenters suggested that, by using publicized in-network rate information, plans and issuers could also coordinate to reduce provider payment levels below market competitive rates, a so-called "race to the bottom." Some of these commenters stated that this "race to the bottom" could also potentially hurt access to, and quality of, care. For example, one commenter stated that if provider reimbursement rates were set too low, patient access to care would be negatively impacted because providers will not have the resources to invest in technology, training, and equipment.

One commenter suggested that plans and issuers would likely want to re-negotiate rates once they learn local prices and that dominant issuers could use payer specific in-network rate information to deter and punish hospitals that lower their rates or enter into value-based arrangements with the dominant issuer's competitors.

Several commenters stated that required disclosure of in-network rates could result in an increase in health care prices. Others specifically expressed concerns that making payer-specific in-network rates available would disrupt contract negotiations between providers and health plans and result in providers changing their rates in anticompetitive ways ("race to the top") and could promote an environment that could support collusion between providers, resulting in increased prices. Other commenters suggested that required disclosures would lead to the consolidation of providers and even greater consolidation in the commercial health insurance industry, and expressed concerns that disclosures could particularly harm small health plans and TPAs who may have been able to get discounted rates by offering health plans in a limited service area.

One commenter noted that other states' transparency systems used several distinguishable features to mitigate the risks of publicizing rates, but noted that, despite these efforts, the data was still used in contract negotiations.

The Departments recognize that there is the potential for adverse market outcomes as a result of the final rules. As noted previously, the Departments are aware of the potential that plans and issuers could seek to use the public availability of in-network rates or underlying fee schedules in attempts to lower prices in what certain commenters called a "race to the bottom." As noted previously in this section, the Departments recognize the potential for anticompetitive behaviors and increased consolidation that may occur should providers use the in-network rate or fee schedule data to increase their rates or should smaller plans and issuers struggle to comply. The Departments recognize that provider collusion could result in increased prices, and also recognize that this sort of behavior could result in distinct coverage areas or agreements where providers choose not to compete for consumers. As discussed previously in this preamble, the Departments nonetheless have concluded that providing increased price transparency and making this information available to the public will serve the public's long-term interests in facilitating a consumer-oriented, information-driven,

more competitive health care market.[271] Should the market become more competitive, as the Departments anticipate, the reduction in prices may provide more options for those providers that function as "safety-net providers" to expand their networks or enhance the services they currently provide by organizing and delivering a significant level of health care and other related services to uninsured, Medicaid, and other vulnerable populations. The Departments also reason that the likelihood of price and other forms of collusion will be mitigated to some extent by the actions of state and federal regulatory and antitrust enforcement authorities and the enforcement of current market laws and regulations. The Departments are of the view that enforcement actions taken to reduce the likelihood of price collusion will further reduce the chances that issuers will seek to reduce the size of their networks.

Although consumer education is not a requirement of the final rules, plans, issuers and TPAs may face additional costs if they chose to inform and educate their consumers about the options available to them, how to use these tools, increase their general health care knowledge. Providing educational opportunities to participants, beneficiaries, or enrollees could encourage those participants, beneficiaries, or enrollees to seek lower cost services, providing plans, issuers and TPAs the potential to realize a return on the investments incurred to comply with the final rules.

Non-Quantified Cost for Public Disclosure of out-of-network allowed amounts. In addition to the costs described in section VI.A.2 and the previous analysis related to the public disclosure of in-network rates, the Departments recognize that there may be other costs associated with the requirement to make historical payments of out-of-network allowed amounts and billed charges publicly available that are difficult to quantify, given the current lack of information and data.

Furthermore, while plans and issuers must de-identify data (such as claim payment information for a single provider) and ensure certain sensitive data are adequately protected, unauthorized disclosures of PHI and PII may increase as a result of manual preparation and manipulation of the required data. The potential disclosures of PHI and PII may require plans, issuers, and TPAs to obtain additional cyber-security insurance that could lead to additional costs.

Non-Quantified Cost for Public Disclosure of Prescription Drug Pricing Information. In addition to the costs described in section VI.A.2and the previous analysis related to the public disclosure of in-network rates and allowed amounts, the Departments recognize that there are other costs associated with the requirement to make negotiated rates and historical net prices for prescription drugs publicly available that are difficult to quantify, given the current lack of information and data. For example, as a result of the availability of consolidated negotiated rates and historical net prices, drug manufacturers may seek to restructure their rebate and discount programs and could potentially cease providing rebates to plans and issuers, PBMs, or pharmacies, which could then result in less savings being passed on to consumers.

Intended Outcomes

The Departments are of the view that providing greater price transparency by requiring group health plans and health insurance issuers to make information regarding all applicable rates publicly available, which may include negotiated rates, amounts in underlying fee schedules, or derived amounts for in-network provider rates; 90-days of historical allowed amount and billed charges data for out-of-network providers; and prescription drug negotiated rates and historical net prices will ultimately benefit plans and issuers, regulatory authorities, consumers, and the overall health care market.

Group Health Plans and Health Insurance Issuers. Plans and issuers may benefit from these requirements because under the final rules a plan or issuer would have a better understanding of other plans' or issuers' in-network rates. This may allow plans and issuers paying higher rates for the same items or services to negotiate with certain providers to lower their rates, thereby lowering provider reimbursement rates, reducing price variation, and potentially resulting in an overall decrease in health care costs. The Departments acknowledge, however, as noted in the "costs" section (V.B.3) earlier in this preamble, that knowledge of other providers' in-network rates could also drive up rates if a provider discovers they are currently being paid less than other providers by a plan or issuer and, therefore, seek to negotiates higher rates.

In addition, the final rules may result in more plans and issuers using a reference pricing structure. Under this structure, participants, beneficiaries, or enrollees who select a provider charging above the reference price (or contribution limit) must pay the entire difference and these differences do not typically count toward that individual's deductible or out-of-pocket limit. Plans and issuers may want to use a reference pricing structure to pass on any potential additional costs associated with what they can identify as higher-cost providers to the participant, beneficiary, or enrollee. The Departments recognize that reference pricing might not impact every consumer. For example, the California Public Employees' Retirement System (CalPERS) provides exceptions from reference pricing when a member lives more than 50 miles from a facility that offers the service below the price limit. It also exempts the patient if the patient's physician gives a clinical justification for using a high-priced facility or hospital setting. Another example is a business with a self-insured group health plan that exempts laboratory tests for patients with a diagnosis of cancer from its reference pricing program. However, reference pricing has generally been shown to result in price reductions, as opposed to mere slowdowns in the rate of price growth. For example, in the first two years after implementation, reference pricing saved CalPERS $2.8 million for joint replacement surgery, $1.3 million for

[271] Gudiksen K. L., Chang, S. M., and King, J. S. "The Secret of Health Care Prices: Why Transparency Is in the Public Interest." California Health Care Foundation. July 2019. Available at: https://www.chcf.org/wp-content/uploads/2019/06/SecretHealthCarePrices.pdf.

cataract surgery, $7.0 million for colonoscopy, and $2.3 million for arthroscopy.[272]

Regulatory Authorities. In many states, issuers must obtain prior approval for rate changes from the state's DOI. Regulatory authorities such as state DOIs might benefit from the final rules because knowledge of provider in-network rates and out-of-network allowed amounts paid to out-of-network providers could support determinations of whether premium rates, including requests for premium rate increases, are reasonable and justifiable.

Consumers. Access to the in-network rates between plans and issuers and in-network providers, the amount plans and issuers have paid to out-of-network providers, and prescription drug pricing information will allow consumers to understand the impact of their choice of health insurance coverage option and their choices of providers on the cost of a particular service, item, or treatment. Giving consumers access to this information as part of their health care decision-making process may facilitate a greater degree of control over their own health care costs. Furthermore, having access to publicly available out-of-network allowed amounts will provide consumers who are shopping for health insurance coverage the ability to compare the different rates plans and issuers ultimately pay for items and services, including items and services from providers that might be out-of-network. While the Departments are of the view that consumers will benefit from the final rules, the Departments recognize that utilizing the required information will not be practical or reasonable in an emergency situation. Similarly, some consumers may need assistance in understanding complex terms or other associated mechanisms in order to utilize this information.

The Departments recognize that beneficiaries and enrollees in state and federal health care programs (including Medicare, Medicaid, CHIP, Basic Health Program and coverage provided by the Department of Defense and Veterans Administration) will be impacted by spillover effects related to any reductions or increase in prices for individual items and services and prescription drugs as a result of the final rules. For example, Medicare Part B has historically reimbursed physicians for physician-administered drugs using a formula that is based off the average sales price (ASP). To the extent the final rules drive changes in prescription drug prices, that will change the federal reimbursement rates under Medicare Part B and may impact Medicare beneficiaries' out-of-pocket costs for their prescriptions. In addition, by law, Medicaid programs in every state receive the lowest negotiated rate for prescription drugs. To the extent the final rules drive changes in prescription drug prices, this will impact the amount all states, the federal government, and some beneficiaries pay for prescription drugs. Similarly, if providers start increasing (or decreasing) their in-network rates, there could also be spillover effects for Medicare Advantage or Medicaid Managed Care Organizations (MCO), particularly for issuers and plans that use the same network for both private plans, Medicare Advantage Plans and Medicaid MCOs. These changes will impact the amount the federal government, states, and beneficiaries will need to pay for their Medicare and/or Medicaid.

Overall Health Insurance Market. The price transparency required by the final rules may also induce an uninsured person to obtain health insurance coverage. Depending on premium rates, an uninsured individual might select health insurance coverage after learning the actual dollar difference between the usual and customary rates that he or she pays for items and services and the in-network rates and out-of-network allowed amounts under the terms of a plan or issuer's policy. In addition, the final rules might force providers to lower their rates for certain items and services in order to compete for the price sensitive consumer, plan, or issuer. Although the immediate payment impact would be categorized as a transfer, any accompanying health and longevity improvements would be considered benefits (and any accompanying increases in utilization would, thus, be considered additional costs). As discussed in section V.B in this preamble, a study of New Hampshire's HealthCost initiative found that the availability of pricing information resulted in a five percent reduction in costs for medical imaging procedures. The study further found that patients saved approximately $7.5 million dollars on X-Ray, CT, and MRI scans over the five-year study period (dollars are stated in 2010 dollars).[273]

Some commenters suggested that the biggest impact on health care spending and costs would come from self-insured employers who would now be able to access and use in-network rate data to negotiate lower rates on behalf of plan participants; improve their provider networks; make more informed decisions about plan offerings; help steer enrollees to higher-quality, lower-cost providers; and more meaningfully implement value-based payment designs. Other commenters stated that the proposed rules would help create more efficient and value-based health care systems by encouraging issuers to design innovative benefit designs that push patients toward lower-cost care. Another commenter stated that requiring plans and issuers to share publicly their in-network rates and the allowed amounts paid to out-of-network providers had the potential to increase competition among plans and issuers.

The Departments are of the view that the requirements in the final rules will provide providers, plans, and issuers the ability to provide quality health care services at lower costs to participants, beneficiaries, or enrollees through enhanced provider and payer competition.

4. Medical Loss Ratio (45 CFR 158.221)

"Shared savings" programs allow issuers to share with enrollees any savings that result from enrollees shopping for, and receiving care from, lower-cost, higher-value providers. In the final rules, HHS is amending 45 CFR 158.221(b) to allow health insurance issuers that elect to offer "shared savings" programs to take credit for such "shared savings" payments in their MLR calculations. For this impact

[272] Boynton, A., and Robinson, J. "Appropriate Use of Reference Pricing Can Increase Value." Health Affairs Blog. July 7, 2015. Available at: https://www.healthaffairs.org/do/10.1377/hblog20150707.049155/full/.

[273] Brown, Z. Y. "Equilibrium Effects of Health Care Price Information." 100 Rev. Econ. & Stat. 1. (2018). Available at: http://www-personal.umich.edu/~zachb/zbrown_eqm_effects_price_transparency.pdf.

estimate, HHS is assuming that only relatively large issuers (with at least 28,000 enrollees) that have consistently reported investment costs in health IT on the MLR Annual Reporting Form of at least $10.50 per enrollee, which represents issuers with 70 percent of total reported commercial market health IT investment or issuers that operate in states that currently or may soon support "shared savings" plan designs,[274] will initially choose to offer plan designs with a "shared savings" component. HHS assumes that such issuers will share, on average, 50 percent of the savings with enrollees (which will increase the MLR numerator under the final rules), and that issuers whose MLRs were previously below the applicable MLR standards will use their retained portion of the savings to lower enrollees' premiums in future years (which will reduce the MLR denominator). Based on 2017-2019 MLR data, HHS estimates that this will reduce MLR rebate payments from issuers to enrollees by approximately $120 million per year, while facilitating savings that will result from lower medical costs of approximately $154 million per year for issuers and enrollees (some of which will be retained by issuers, shared directly with enrollees, or used by issuers to reduce future premium rates).

5. Summary of Estimated Transfers

The Departments are assuming that because 2021 premium rates are nearly finalized, health insurance issuers will not be able to charge for the expenses incurred to implement the requirements of the final rules in their 2021 rates. Because issuers will not have the opportunity to reflect the 2021 development costs in the 2021 premium rates, some issuers may apply margin to the ongoing expenses as they develop premium rates for 2022 and after. The Departments estimate premiums for the fully-insured markets will be $471 billion for 2022, $494 billion in 2023, $516 billion in 2024, and $539 billion in 2025, which includes the individual, small group, and large group markets.[275] The Departments estimate that the ongoing expense represents approximately 2.4 percent of projected commercial insured premiums for the fully-insured market in 2022, 1.4 percent in 2023, and 0.5 percent in 2024 and 2025 (an average of 1.2 percent per year). Assuming this level of premium increase in the individual market, PTC outlays are estimated to increase by about $1,047 million in 2022, $623 million in 2023, $216 million in 2024, and $218 million in 2025. Given that 2022 PTC outlays are expected to be $44 billion,[276] the Departments expect that the estimated premium impacts will be relatively small, and rate increases for subsidized enrollees in the individual market will largely be mitigated. Therefore, the Departments expect enrollment impacts to be minimal. The Departments note that any impact of the final rules on provider prices has not been estimated as limited evidence has generally shown no predictable impact on provider prices. As a result, the Departments are assuming that the overall impact will be minimal. However, there is a large degree of uncertainty regarding the effect on prices, so actual experience could differ.

The Departments received comments stating that the broader impact to premiums was not considered in the proposed rules. Several commenters stated that increased health care prices could be passed along to consumers, patients, and taxpayers in the form of higher premiums. Some commenters specifically observed that the cost of developing and maintaining the required machine-readable files on a monthly basis would likely be passed on to consumers in the form of higher premiums. Another commenter noted that employers, TPAs, and issuers might incur increased costs relative to the rules regarding potential data breaches, increased liability, and cyber-coverage costs (liability insurance designed to cover financial losses that result from data breaches and other cyber events) that could also impact plan premiums.

Other commenters suggested that use of information in the In-network Rate File could be used by consumers to engage in practices that would lead to adverse selection and potentially higher premiums. One commenter asserted that the proposed rules would allow individuals to enter the insurance pool for specific costly treatments or procedures and then drop coverage or switch coverage at the end of the contract year for a plan with lower premiums, which would result in higher premiums for all consumers because there is no ability for health plans to spread the risk across a reliable and long-term customer base.

By contrast, one commenter observed that premium increases could be mitigated if low- deductible participants, beneficiaries, or enrollees were given information about the cost of the health care they utilize, and that over time price transparency could create lower health care costs.

The Departments recognize that many issuers and TPAs will likely transfer the costs associated with meeting the requirements in the final rules to consumers in the form of increased premiums. However, the Departments do not currently have enough information or evidence to determine the overall effects the final rules will have on premiums and therefore have not estimated how the final rules will impact an individual's premium. The Departments also note that adverse selection risk currently exists in the individual market; individuals already make health care coverage decisions based on their particular health and financial situations. It is not clear how the price information contained in the In-network Rate, Allowed Amount, and Prescription Drug Files will significantly impact an individual's health care coverage decisions. The Departments do not expect the final rules to significantly increase the selection risk beyond the levels that currently exist.

Also, it is questionable how much the final rules will lower health care costs for low deductible participants, beneficiaries, or enrollees because cost-sharing amounts

[274] The states that supported "shared savings" plan designs at the time the estimate was developed and therefore were included in the estimate are Maine, Massachusetts, New Hampshire, and Utah.

[275] 2017 earned premium data was taken from amounts reported for MLR, and trended forward using overall Private Health Insurance trend rates from the NHE projections.

[276] OMB 2021 President's Budget. Available at: https://www.whitehouse.gov/wp-content/uploads/2020/02/budget_fy21.pdf.

are usually much less than the cost of the services, so that the participants, beneficiaries, or enrollee have no economic incentive to seek lower cost services. Additionally, evidence is limited but generally does not show significant differences in insured participant, beneficiary, or enrollee behavior as a result of price transparency.

C. *Regulatory Review Costs*

Affected entities will need to understand the requirements of the final rules before they can comply. Group health plans and health insurance issuers are responsible for ensuring compliance with the final rules. However, as assumed elsewhere, it is expected that issuers and TPAs (for self-insured group health plans) will incur this cost and burden for most group health plans, and only the largest self-insured plans may incur this cost and burden directly. Thus, issuers and TPAs (and possibly some of the largest self-insured plans) will be responsible for providing plans with compliant services. The Departments are currently not aware of any specific number of large self-insured plans that will seek to meet the requirements of the final rules without third-party assistance and are thus unable to accurately account for those plans, however, those plans will incur similar costs and burdens as TPAs and issuers in order to develop the required tools and to review and understand the final rules. Therefore, the cost and burden for the regulatory review is estimated to be incurred by the 1,959 issuers and TPAs. The Departments also are of the view that each state DOI, 50 states plus the District of Columbia, will need to review and understand the final rules in order to be able to provide the appropriate level of oversight and enforcement.

If regulations impose administrative costs on private entities, such as the time needed to read and interpret the final rules, the Departments should estimate the cost associated with regulatory review. Due to the uncertainty involved with accurately quantifying the number of entities that will review and interpret the final rules, the Departments are assuming that the total number of issuers, TPAs, and state DOIs will be required to comply with the final rules.

Nonetheless, the Departments acknowledge that this assumption may understate or overstate the costs of reviewing the final rules. It is possible that not all affected entities will review the final rules in detail, and some entities may seek the assistance of outside counsel to read and interpret them. For these reasons, the Departments are of the view that the number of issuers, TPAs, and DOIs would be a fair estimate of the number of reviewers of the final rules.

Using the wage information from the Bureau of Labor Statistics (BLS)[277] for a Computer and Information Systems Manager (Code 11-3021), a Lawyer (Code 23-1011) and a state Compliance Officer (Code 13-1041).[278] The Departments estimate that the cost for each issuer or TPA to review the final rules will be $285.66 per hour, including overhead and fringe benefits, and each state DOI will incur a cost of approximately $55.58 per hour.[279] Assuming an average reading speed, the Departments estimate that it will take approximately two hours for each staff member to review and interpret the final rules; therefore, the Departments estimate that the cost of reviewing and interpreting the final rules for each issuer and TPA will be approximately $571.32 and $111.16 for each state DOI, including the District of Columbia. Thus, the Departments estimate that the overall cost for the estimated 1,959 issuers and TPAs and each state DOI will be $1,124,885.04 (($571.32 x 1,959 (total number of estimated issuers and TPAs)) + ($111.16 x 51 (total number of DOIs))).

D. *Regulatory Alternatives Considered*

In developing the policies contained in the final rules, the Departments considered alternatives to the final rules. In the following paragraphs, the Departments discuss the key regulatory alternatives the Departments considered.

1. Limiting Cost-sharing Disclosures to Certain Covered Items and Services, and Certain Types of Group Health Plans and Health Insurance Issuers

The final rules require group health plans and health insurance issuers to disclose cost-sharing information for any requested covered item or service. The Departments considered limiting the number of items or services for which plans and issuers would be required to provide cost-sharing information to lessen the costs on these entities. However, limiting disclosures to a specified set of items and services reduces the breadth and availability of useful cost estimates to determine anticipated cost-sharing liability and limits the impact of price transparency efforts by reducing the incentives to lower prices and provide higher-quality care. The Departments assumed that plans (or TPAs on their behalf) and issuers, whether for a limited set of covered items and services or for all covered items and services, would be deriving these data from the same data source. Because the data source would be the same, the Departments assumed that any additional costs to produce the information required for all covered items and services, as opposed to a limited set of covered items and services, would be minimal. The Departments are of the view that this limited additional cost is outweighed by the potentially large benefit to consumers of having access to the required pricing information for the full scope of items and services covered by their plan or issuer. For these reasons, in order to allow consumers to estimate their out-of-pocket costs for all services and items covered under their plan or coverage, and to achieve lower health care costs and reduce spending through increased price transparency, the final rules are requiring cost-sharing information be disclosed for all covered items and services. However, in recognition of commenters' concerns regarding the implementation timetable for the internet-based self-service tool, the final rules include a staggered implementation schedule for the disclosure of

[277] Wage information available at https://www.bls.gov/oes/current/oes_nat.htm.
[278] Wages obtained for State Government, excluding schools and hospitals at https://www.bls.gov/oes/current/naics4_999200.htm.
[279] Adjusted hourly wages are determined by multiplying the mean hourly rate by 100 percent to account for fringe benefits and overhead costs.

cost-sharing information through the internet-based self-service tool.

The Departments also considered implementing a more limited approach by imposing requirements only on individual market plans and fully-insured group coverage. However, the Departments are concerned that this limited approach might encourage plans to simply shift costs to sectors of the market where these requirements would not apply and where consumers would have less access to pricing information. The Departments are of the view that all consumers should be able to access the benefits of greater price transparency and that a broader approach will have the greatest likelihood of controlling the cost of health care industry-wide. Indeed, if the requirements of the final rules were limited to only individual market plans, the Departments estimate only 9,716,000 individuals would receive the intended benefits of the final rules. In contrast, under the final rules, a total of 212,314,000 participants, beneficiaries, and enrollees may receive the intended benefits.[280] The Departments acknowledge that limiting applicability of the requirements of the final rules to the individual market would likely reduce the overall cost estimates identified in section V.B.2, but the overall cost estimates per covered life would likely increase. Further, there is a great deal of overlap in issuers that offer coverage in both the individual and group markets. Issuers offering coverage in both markets would be required to comply with the requirements of the final rules even if the Department limited the applicability to only the individual market. Because TPAs provide administrative functionality for self-insured group health insurance coverage, those non-issuer TPA entities would not incur any costs because they do not have any overlap between the individual and group markets. The Departments are of the view that the benefits of providing consumer pricing information to an estimated total 212,314,000 participants, beneficiaries, and enrollees outweigh the increased costs that a subset of plans, issuers, and TPAs, that are not active participants in the individual market, would incur. The Departments have determined that the benefits of the final rules being widely applicable will not only provide access to health care pricing information to a greater number of individuals, but that any developed economies of scale will have a much greater likelihood of achieving the goal of controlling the cost of health care industry-wide.

As noted in section I.B of this preamble, in the summer and fall of 2018, HHS hosted listening sessions in which attendees stated that existing tools usually use historical claims data, which results in broad, sometimes regional, estimates, rather than accurate and individualized prices. The Departments considered allowing plans and issuers to use rate information from historical claims data to calculate price estimates. The Departments recognize that many plans and issuers use historical claims data to inform and determine cost-sharing estimates, but the Departments are of the view that using pricing information such as negotiated rates will provide for a more accurate and reliable estimate. Providing more accurate estimates of consumer prices will provide more benefit to consumers, allowing them to better estimate their potential out-of-pocket costs and search for items and services they feel are more affordable.

2. Requirement to Make Available Machine-Readable Files of In-Network Rates, Historical Data for Out-of-network Allowed Amount Payments Made to Out-of-network Providers, and Prescription Drug Pricing Information on a Public Website

In proposing the requirement that group health plans and health insurance issuers post in-network rates, historical data for out-of-network allowed amount payments made to out-of-network providers, and negotiated rates and historical net prices for each prescription drug on a publicly accessible website, the Departments considered requiring plans and issuers to submit the internet addresses for the machine-readable files to CMS. CMS would then make the information available to the public from CMS's website. A central location could allow the public to access in-network rate information, out-of-network allowed amounts, and prescription drug information for all plans and issuers in one place, potentially reducing confusion and increasing accessibility. Posting in-network rates, out-of-network allowed amounts, and prescription drug information in a central location might also make it easier to post available quality information alongside price information. However, to provide flexibility and reduce costs, the Departments are of the view that plans and issuers should determine where to post the in-network rate, out-of-network allowed amount, and prescription drug information rather than prescribing the location where the information is to be disclosed. Further, requiring plans and issuers to submit internet addresses for their machine-readable files to CMS would result in additional costs to the extent plans and issuers already post this information in a different location.

3. Frequency of Updates to Machine-Readable Files

In developing 26 CFR 54.9815-2715A3(b)(3), 29 CFR 2590.715-2715A3(b)(3), and 45 CFR 147.212(b)(3) of the final rules, the Departments considered requiring more frequent updates (*i.e.*, within 10 calendar days of new rate finalization) to the in-network rates, out-of-network allowed amounts, and prescription drug information. More frequent updates would provide a number of benefits for patients, providers, and the public at large. Specifically, such a process would ensure that the public has access to the most up-to-date rate information so that consumers can make the most meaningful, informed decisions about their health care utilization. Requiring group health plans, health insurance issuers, and TPAs

[280] "Health Insurance Coverage in the United States: 2019" (Appendix A). United States Census Bureau/ September 15, 2020. Available at: https://www2.census.gov/programs-surveys/demo/tables/p60/271/table1.pdf. The number of covered individuals in the individual market and the total number of covered individuals have been updated from those estimated in the proposed rule. The numbers provided in this final rule are based on more recent data and more accurately reflect the number of covered individuals in the private market (excluding those enrolled in Tricare coverage). The data provided is for 2019, whereas the data presented in the proposed rule was derived from multiple sources for multiple years (2016 and 2019).

(or other entity acting on a plan or issuers behalf) to update the machine-readable files more frequently would result in increased costs for those affected entities, however. With respect to the In-network Rate File, the Departments estimate that requiring updates within 10 calendar days of rate finalization would result in each plan, issuer, or TPA incurring a burden of 4,428 hours, with an associated equivalent cost of $635,112 in the second year after implementation of the final rules and an annual burden of 1,116 hours, with an associated equivalent cost of $162,828 in subsequent years. Based on recent data the Departments estimate a total 1,959 entities – 1,754 issuers[281] and 205 TPAs[282] – will be responsible for implementing the final rules. For all 1,959 issuers and TPAs, the total burden, in the second year of implementation of the final rules, would be 8,674,452 hours, with an associated equivalent cost of $1,244,184,408 and an annual ongoing burden of 2,186,244 hours, with an associated ongoing annual costs of $318,980,052 in subsequent years. As discussed in section VI.A.2, requiring a less frequent 30 calendar day update will reduce the burden, in year two, for each entity to 1,476 hours with an associated equivalent cost of $211,704. The burden and associated costs, in subsequent years, will be reduced to 372 hours, with an associated cost of $54,276. For all 1,959 issuers and TPAs, the total burden, in year two, is reduced to 2,891,484 hours, with and associated equivalent cost of $414,728,136. For subsequent years, the total burden is reduced to 728,748 hours, with an associated equivalent cost of $106,326,684. With respect to the Allowed Amount File, the Departments estimate that requiring updates within 10 calendar days of rate finalization would result in each plan, issuer, or TPA incurring a burden of 1,908 hours, with an associated equivalent cost of $290,628 in the second year and an annual ongoing burden of 468 hours, with an associated equivalent cost of $61,452 in subsequent years. For all 1,959 issuers and TPAs, the total burden, in year two, would be 3,737,772 hours with and associated equivalent cost of $569,340,252. For subsequent years, the total ongoing burden would be 916,812 hours, with an associated equivalent cost of $120,384,468. As further discussed in section VI.A.2, requiring a less frequent update will reduce the year two burden for each issuer and TPA to 636 hours, with an associated equivalent cost of $96,876. For subsequent years, the total ongoing burden will be reduced to 156 hours, with an associated equivalent cost of $20,848. For all 1,959 issuers and TPAs, the total burden for year two is reduced to 1,245,924 hours, with an associated equivalent cost of $189,780,084. For subsequent years, the total ongoing burden will be reduced to 305,604 hours, with an associated equivalent cost of $40,128,156. With respect to the Prescription Drug File, the Departments estimate that requiring updates within 10 calendar days of rate finalization would result in each plan, issuer, or TPA incurring a burden of 2,700 hours, with an associated equivalent cost of $416,664 in the second year and an annual ongoing burden of 1,116 hours, with an associated equivalent cost of $162,828 in subsequent years. For all 1,959 issuers and TPAs, the total burden, in year two, would be 5,289,300 hours with and associated equivalent cost of $816,244,776. For subsequent years, the total ongoing burden would 2,186,244 hours, with an associated equivalent cost of $318,980,052. As discussed in section VI.A.2, requiring a less frequent update will reduce the year two burden for each issuer and TPA to 900 hours, with an associated equivalent cost of $138,888. For subsequent years, the total ongoing burden will be reduced to 372 hours, with an associated equivalent cost of $54,276. For all 1,959 issuers and TPAs, the total burden for year two is reduced to 1,763,100 hours, with an associated equivalent cost of $272,081,592. For subsequent years, the total ongoing annual burden will be reduced to 728,748 hours, with an associated equivalent cost of $106,326,684. By requiring monthly updates to the machine-readable files, rather than updates every 10 calendar days, the Departments have chosen to strike a balance between placing a significant burden on issuers (and their service providers) and assuring the availability of accurate information.

4. File Format Requirements

In 26 CFR 54.9815-2715A3(b)(2), 29 CFR 2590.715-2715A3(b)(2), and 45 CFR 147.212(b)(2), the final rules require group health plans and health insurance issuers to post information in three machine-readable files. A machine-readable file is defined as a digital representation of data or information in a file that can be imported or read by a computer system for further processing without human intervention, while ensuring no semantic meaning is lost. The final rules require each machine-readable file to use a non-proprietary, open format. The Departments considered requiring issuers and TPAs to post in-network rates, allowed amounts paid for out-of-network services, and prescription drug information using a specific file format, namely JSON. However, the Departments are of the view that being overly prescriptive regarding the file type will impose an unnecessary costs on issuers and TPAs despite the advantages of JSON, namely that JSON files are downloadable and readable for many health care consumers, and the potential for JSON to simplify the ability of price transparency tool developers to access the data. Therefore, the Departments are requiring that issuers and TPAs post the in-network rate, allowed amount, and prescription drug pricing information in three distinct machine-readable files using a non-proprietary, open format. The Departments will provide additional guidance regarding the file format in future technical implementation guidance.

In addition, the Departments considered requiring plans and issuers to provide the specific out-of-network allowed amount methodology needed for consumers to determine out-of-pocket liability for services by providers not considered in-network by the plan or issuer, rather than historical data on paid out-of-network claims. However, the Depart-

[281] 2018 MLR Data Trends.

[282] Non-issuer TPAs based on data derived from the 2016 Benefit Year reinsurance program contributions.

ments understand providing a formula or methodology for calculating a provider's out-of-network allowed amount does not provide the data users need in an easy-to-use machine-readable format. The Departments determined that providing monthly data files on allowed amounts by plans and issuers over a 90-day period for items and services provided by out-of-network providers will enable users to more readily determine what costs a plan or issuer may pay toward items or services obtained out-of-network. Because a plan or issuer does not have a contract with an out-of-network provider that establishes negotiated rates, the plan or issuer cannot anticipate what that provider's charges will be for any given item or service; therefore, the Departments, as discussed previously in this preamble, are requiring the inclusion of billed charges in the Allowed Amounts File.

Providing data on the billed charge in connection with each unique allowed amount on the out-of-network Allowed Amount File will provide consumer with information related to what their plan or issuer will likely contribute to the costs of items or services obtained from out-of-network providers and the billed charges associated with those item or services. This information will provide the consumer with a reasonably accurate estimate of the amount of additional liability a consumer could be required to pay for a particular item or service received from an out-of-network provider. Out-of-network allowed amount and billed charges data will provide increased price transparency for consumers, and the costs related to producing these data are not considered to be significantly higher than that associated with producing the methodology for determining allowed amounts for payments to out-of-network providers. Given these circumstances, the final rules are requiring that payers provide allowed amount data for out-of-network covered items or services furnished by a particular out-of-network provider during the 90-day time period that begins 180 days prior to the publication date of the Allowed Amount File, and billed charges rather than requiring plans and issuers to report their methodology or formula for calculating the allowed amounts for out-of-network items and services.

5. Requiring Disclosure of Cost-sharing information to Participants, Beneficiaries, and Enrollees and Publicly-posted Machine-readable Files with In-network Rates, Out-of-network Allowed Amounts, and Prescription drug pricing information.

The Departments considered whether it would be duplicative to require group health plans and health insurance issuers to disclose cost-sharing information through an internet-based self-service tool or in paper form to participants, beneficiaries, or enrollees so that they may obtain an estimate of their cost-sharing liability for covered items and services and publicly-posted machine-readable files containing data on in-network rates, out-of-network allowed amounts, and prescription drug pricing information. The requirement to disclose cost-sharing information to participants, beneficiaries, or enrollees in the final rules require plans and issuers to provide consumer-specific information on potential cost-sharing liability to enrolled consumers, complete with information about their deductibles, copays, and coinsurance. However, cost-sharing information for these plans and coverage would not be available or applicable to consumers who are uninsured or shopping for plans pre-enrollment. Data disclosed to participants, beneficiaries, or enrollees would also not be available to third parties who are interested in creating internet-based self-service tools to assist both uninsured and insured consumers with shopping for the most affordable items or services. Limiting access to data to a subset of consumers would not promote the transparency goals of the final rules and would reduce the potential for the final rules to drive down health care costs by increasing competition.

As discussed in more detail in section VI.A.1 in this preamble, the Departments have estimated the high-end three-year average annual cost to develop only the internet-based self-service tool, including the initial tool build and maintenance, customer service training, customer assistance, and mailing costs. The Departments estimate the three-year average total burden per issuer, or TPA will be approximately 23,338 hours, with an associated equivalent average annual cost of approximately $3,262,262. For all 1,959 issuers and TPAs, the Departments estimate the total three-year average annual burden will be 45,718,171 hours with an associated equivalent total average annual cost of approximately $6,390,770,952.

Additionally, the Departments estimated that for implementation of the required internet-based self-service tool in conjunction with the out-of-network allowed amount, in-network and prescription drug machine-readable files, the Departments estimate that the annual high-end three-year average annual costs and burden for each issuer or TPA will be approximately 28,958 hours, with an associated equivalent cost of approximately $4,040,142. For all 1,959 issuers and TPAs, the Departments estimate the total three-year average annual burden and cost to be 56,727,751 hours with an associated equivalent total average annual cost of approximately $7,914,635,260.

In contrast, and as discussed in more detail in section VI.A.1, the Departments estimate that the low-end three-year average burden and cost to develop and maintain only the internet-based self-service tool, including the initial tool build and maintenance, customer service training, customer assistance, and mailing costs. The Departments estimate the total three-year average cost and burden per issuer or TPA will be approximately 15,475 hours, with an associated equivalent average annual cost of approximately $2,150,169. For all 1,959 issuers and TPAs, the Departments estimate the total three-year average annual burden to be 30,315,730 hours with an associated equivalent total average annual cost of approximately $4,212,181,157.

Finally, the Departments estimated that for implementation of the required internet-based self-service tool in conjunction with the out-of-network allowed amount, in-network rate, and prescription drug machine-readable files, the Departments estimate that the three-year average annual low-end cost and burden for each issuer or TPA will be approximately 21,095 hours, with an associated equivalent average annual cost of approximately $2,928,048. For all 1,959 issuers and TPAs, the Departments estimate the total three-year average annual low-end burden and cost will be 41,325,310 hours with an associated equiv-

alent total average annual cost of approximately $5,736,045,465. While the Departments recognize that requiring disclosures through all mechanisms will increase the costs for issuers and TPAs required to comply with the final rules, the Departments are of the view that the additional costs associated with greater price transparency are outweighed by the benefits that will accrue to the broader group of consumers (such as the uninsured and individuals shopping for coverage) and other individuals who would benefit directly from the additional information provided through the machine-readable files. Additionally, the Departments are of the view that the final rules have the potential to reduce the cost of surprise billing to consumers. The Departments further believe that the final rules will, with the disclosure of in-network rates, potentially apply pressure on providers to bill less aggressively. Consumer advocacy groups could also use the wide price dispersion of the same CPT level service or NDC level drug by the same providers with different negotiated rates, depending upon issuer or TPA contract, to further place downward pressure on health care costs. In addition, as noted earlier in section II.C.1-2 of this preamble, researchers and third-party developers will also be able to use the data included in the machine-readable files in a way that could create even more benefits to consumers, including those consumers not currently enrolled in a particular plan or coverage. For these reasons, the Departments have concluded that, in addition to requiring plans and issuers to disclose cost-sharing information to participants, beneficiaries, or enrollees through an internet-based self-service tool, requiring plans and issuers to publicly disclose information regarding in-network rates, out-of-network allowed amounts, and prescription drug pricing will further the goals of price transparency and create benefits for all potentially affected stakeholders.

6. Requiring an Internet-Based Self-Service Tool and Machine-Readable Files in Lieu of an API

The Departments considered whether to require group health plans and health insurance issuers to make the information required by the final rules available through a standards-based API, instead of through the proposed internet-based self-service tool and machine-readable files. Access to pricing information through an API could have a number of benefits for consumers, providers, and the public at large. This information could ensure the public has access to the most up-to-date rate information. Providing real-time access to pricing information through a standards-based API could allow third-party innovators to incorporate the information into applications used by consumers or combined with electronic medical records for point-of-care decision-making and referral opportunities by clinicians for their patients. Additionally, being able to access this data through a standards-based API would allow consumers to use the application of their choice to obtain personalized, actionable health care price estimates, rather than being required to use one developed by their plan or issuer (or a service provider), although those consumers may be required to pay for access to those applications.

While there are many benefits to a standards-based API, it is the Departments' view that both an internet-based tool and machine-readable files are the first iterative steps towards developing price transparency standards-based APIs. It is the Departments' view that standards-based API would be a natural next technological step. The Departments also recognize that the majority of issuers have an existing internet-based tool that could be enhanced to meet the disclosure requirements in the final rules. The burden associated with updating existing tools to standardize data attributes is going to be less than building a standards-based API. Looking at the average cost over a 3-year period for the API for all 1,959 issuers and TPAs, the Departments estimate an average annual cost that would significantly exceed the estimated annual cost of implementing the internet-based self-service tool and machine-readable files. The Departments recognize that the development of an API may be streamlined by leveraging existing APIs currently used by plans, issuers, or TPAs for their own applications. Additionally, any requirements for an API would build on the requirements finalized in CMS's Interoperability & Patient Access final rule[283] requiring certain entities, such as Federally-facilitated Exchange QHP issuers and companies that participate in both Medicare and the individual or group market, to provide certain data through a standards-based API. Building on the Interoperability & Patient Access final rule could result in significantly lower costs for issuers and TPAs as it relates to the development and implementation of a standards-based API. Nonetheless, while the Interoperability & Patient Access final rule focuses on the disclosure of information regarding post care and clinical data, the rules finalized here require plans and issuers to provide information related to a participant's, beneficiary's, or enrollee's individual's cost-sharing, allowed amounts for covered items and services from out-of-network providers, and negotiated rates and historical net prices for each prescription drug prior to seeking or obtaining care. The Departments are therefore of the view that plans, issuers, and TPAs would incur significant and distinct costs if required to us a standards-based API to comply with the final rules.

Although not estimated here, the Departments expect any associated maintenance costs would also decline in succeeding years as plans, issuers, and TPAs gain additional efficiencies or undertake similar procedures to maintain any currently used internal APIs. Nonetheless, weighing the costs of providing the required information using an internet-based self-service tool and machine-readable files against the potential costs of using a standards-based API, particularly given the timeframes required by the final rules, the Departments are of the view that, at least in the short-term, requiring an internet-based self-service tool and machine-readable files is the more sensible approach.

Even though the Departments are of the view that an internet-based self-service tool and machine-readable files are appropriate in the short-term, as discussed earlier in this preamble, the Departments recognize that a standards-based API format in the long-term may be more beneficial to the public, as it would provide

[283] 85 FR 25510 (May 1, 2020).

access to the most up-to-date rate information; would allow health care consumers to use the application of their choice to obtain personalized, actionable health care service price estimates; and would allow third-party developers to use the collected data to develop internet-based self-service tools. Therefore, the Departments are considering future rulemaking to further expand access to pricing information through standards-based APIs, including individuals' access to estimates about their own cost-sharing liability and information about in-network rates, historical payment data for out-of-network allowed amounts, and negotiated rates and historical net prices for prescription drugs.

VI. Collection of Information Requirements.

The final rules contain ICRs that are subject to review by OMB. A description of these provisions is given in the following paragraphs with an estimate of the annual burden, summarized in Table 24.

To fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that the Departments solicit comment on the following issues:

• the need for the information collection and its usefulness in carrying out the proper functions of each of the Departments.

• the accuracy of the Departments' estimate of the information collection burden.

• the quality, utility, and clarity of the information to be collected.

• recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

The Departments solicited comment on each of the required issues under section 3506(c)(2)(A) of the PRA for the following information collection requirements.

A. *Wage Estimates*

To derive wage estimates, the Departments generally use data from the BLS to derive average labor costs (including a 100 percent increase for fringe benefits and overhead) for estimating the burden associated with ICRs.[284] One commenter noted that the markup rates for labor, fringe benefits, and overhead are underestimated at 100 percent, while the conventional standard is 200 percent to 300 percent. The commenter further stated that if the Departments were to update the burden estimates with the conventional standard for overhead markup, the total of annual quantified costs would increase to over $500 million per year.

The Departments acknowledge that there are various methodologies used to determine and estimate fringe benefits and other overhead costs; however, the commenter did not provide any source recognizing or supporting their assertion that the conventional standard is to use 200 percent to 300 percent increases. The Departments agree that if a higher percentage were used to estimate hourly wages and overhead, then the estimated costs for the final rules could potentially be significantly higher. However, the Departments note that the use of 100 percent is necessarily a rough adjustment, both because fringe benefits and overhead costs vary significantly across employers, and because methods of estimating these costs vary widely across studies. The Departments are of the view that doubling the hourly wage to estimate total cost is a reasonably acceptable estimation method.

The Departments recognize that the maturity of technology will vary from organization to organization. An independent study by Bates White Economic Consulting (Bates White), commissioned by one commenter, developed an assessment of the costs of the proposed rules by interviewing a mix of 18 large and small health insurance issuers covering about 78 million lives. They reported various degrees of existing tools' compliance with the requirements of the proposed rules. The Departments reevaluated its initial burden estimates developed for the proposed rules based on feedback from commenters and the Bates Whites study. Because the Departments could not make an estimate for any specific issuer, an independent government cost estimate (IGCE) was conducted for each of the machine-readable files and the internet-based self-service tool to aid the Departments in conducting the burden and cost estimates for the final rules. The goals of an IGCE are to aid the government acquisition process in determining a project's cost estimates based on project requirements or objectives that are typically found in a performance work statement or statement of work. IGCEs are developed by the government without contractor influence and are based on market research. The estimated skill sets required to build both the internet based self-service tool and machine-readable files can be found in TABLE 3 below. The Departments based the IGCE cost estimates on the rule's requirements and each IGCE has baseline assumptions that are built into the final estimate.

The IGCE assumptions for the internet-based self-service tool included things such as research, engineering development, and design and were not based on any existing tools. There was an assumption that product development would be done in the cloud to take advantage of economies of scale or with on-premise infrastructure that allows for the development of "infrastructure as code." The IGCE assumptions for the machine-readable files included that all items and services for a specific plan have a negotiated price, that all price numbers are digitized, that pricing information is stored in many locations (not in a single database), that pricing information is accessible through internal systems, that building the first machine-readable file will facilitate automation for building future machine-readable files, and that there is an ability to run queries against claims data.

Based on comments discussed later sections VI.A.1-2, the Departments have chosen to use the Contract Awarded Labor Category (CALC)[285] database tool, managed by the General Services Administration (GSA), to derive the hourly rates for the burden and cost estimates in

[284] May 2018 Bureau of Labor Statistics, Occupational Employment Statistics, National Occupational Employment and Wage Estimates. Available at: https://www.bls.gov/oes/current/oes_stru.htm.

[285] CALC information and wage rates are available at: https://calc.gsa.gov/about/.

the final rules. The CALC tool was built to assist acquisition professionals with market research and price analysis for labor categories on multiple U.S. GSA & Veterans Administration (VA) contracts. Wages obtained from the CALC database are fully burdened to account for fringe benefits and overhead costs. The Departments chose to use wages derived from the CALC database because, even though the BLS data set is valuable to economists, researchers, and others that would be interested in larger, more macro-trends in parts of the economy, the CALC data set is meant to help market research based on existing government contracts in determining how much a project/product will cost based on the required skill sets needed. The CALC data set also factors in the fully-burdened hourly rates (base pay + benefits) into wages whereas BLS rates do not. CALC occupations and wages provide the Departments with data that aligns more with, and provides more detail related to, the occupations required for the implementation of the requirements in the final rules. As discussed earlier, after consideration and discussion of comments, the Departments chose to further reevaluate the cost and burden estimates. Based on the Departments consultation with internal and external IT professionals and additional research, the Departments have chosen to increase our overall costs and burden estimates to account for our updated understanding of the burdens associated with the final rules and the additional requirements included in the final rules. The Departments further discuss changes to the final cost and burden estimates in the corresponding ICR sections.

While the following estimates for the internet-based self-service tool assume that entities are either iterating on an existing tool or building a brand new tool from the ground up, the Departments are of the view that it is highly likely that third-party developers will take this opportunity to build white-label products that meet the requirements of the final rules and that they will reduce costs through economies of scale by doing so. As such, the Departments' cost estimates may have some tendency towards over-estimation.

TABLE 3: Hourly Wages Used in Burden Estimates.

CALC Occupation Title	Mean Hourly Wage ($/hour)
Project Manager/Team Lead	$153.00
Scrum Master	$105.00
Technical Architect/Sr. Developer	$149.00
Application Developer, Senior	$143.00
Business Analyst	$120.00
UX Researcher/Service Designer	$154.00
Designer	$116.00
DevOps Engineer	$181.00
Customer Service Representative	$40.00
Web Database/Application Developer IV	$152.00
Service Designer/Researcher	$114.00

1. ICR Regarding Requirements for Disclosures to Participants, Beneficiaries, or Enrollees (26 CFR 54.9815-2715A2, 29 CFR 2590.715-2715A2, and 45 CFR 147.211)

The Departments add 26 CFR 54.9815-2715A2(b), 29 CFR 2590.715-2715A2(b), and 45 CFR 147.211(b), requiring group health plans and health insurance issuers of individual and group health insurance coverage to disclose, upon request, to a participant, beneficiary, or enrollee, such individual's cost-sharing information for items; negotiated rates and underlying fee schedule rates for in-network providers; and allowed amounts for covered items and services from out-of-network providers. As discussed previously in section II.B.1 of this preamble, in paragraphs 26 CFR 54.9815-2715A2(b)(1)(i), 29 CFR 2590.715-2715A2(b)(1)(i), and 45 CFR 147.211 (b)(1)(i) through (vii) the final rules require plans and issuers to make this information available through an internet-based self-service tool on an internet website and, if requested, in paper form or other format agreed upon between the plan, issuer, or TPA and participant, beneficiary, or enrollee.

The final rules require plans and issuers to disclose, upon request, certain information relevant to a determination of a participant's, beneficiary's, or enrollee's cost-sharing liability for a particular health care item or service from a particular provider, to the extent relevant to the individual's cost-sharing liability for the item or service, in accordance with seven content elements: the individual-specific estimated cost-sharing liability; the individual-specific accumulated amounts; the in-network rate; the out-of-network allowed amount for a covered item or service, if applicable; the items and services content list when the information is for items and services subject to a bundled payment arrangement; a notice of prerequisites to coverage (such as prior authorization); and a disclosure notice. However, as discussed earlier in this section II.B.1

of this preamble, in instances where items or services, generally considered preventive, are furnished as non-preventive items or services, the participant, beneficiary, or enrollee may be subject to the cost-sharing terms of his or her plan. If a plan or issuer cannot determine whether the request is for a preventive item or service, the plan or issuer must display the non-preventive cost-sharing liability, along with a note that the item or service may not be subject to cost-sharing if it is billed as a preventive service. The final rules also require the disclosure notice to include several statements, written in plain language, which include disclaimers relevant to the limitations of the cost-sharing information disclosed, including: a statement that out-of-network providers may balance bill participants, beneficiaries, or enrollees, a statement that the actual charges may differ from those for which a cost-sharing liability estimate is given, and a statement that the estimated cost-sharing liability for a covered item is not a guarantee that coverage will be provided for those items and services. In addition, plans and issuers will be permitted to add other disclaimers they determine appropriate so long as such information is not in conflict with the disclosure requirements of the final rules. The Departments have developed model language that plans and issuers will be able to use to satisfy the requirement to provide the notice statements described earlier in section II.B.1 of this preamble.

As discussed in section II.B.1 of this preamble, the final rules require plans and issuers to make available the information described in 26 CFR 54.9815-2715A2(b), 29 CFR 2590.715-2715A2(b), and 45 CFR 147.211(b) of the final rules through an internet-based self-service tool. The information is required to be provided in plain-language through real-time responses. Plans and issuers will be required to allow participants, beneficiaries, or enrollees to search for cost-sharing information for covered items and services by billing code, or by descriptive term, per the user's request, in connection with a specific in-network provider, or for all in-network providers. In addition, the internet-based self-service tool must allow users to input information necessary to determine the out-of-network allowed amount for a covered item or service provided by an out-of-network provider (such as zip code). The internet-based self-service tool is required to have the capability to refine and reorder results by the geographic proximity of in-network providers, and the estimated amount of cost-sharing liability to the beneficiary, participant, or enrollee.

As discussed in sections II.B.1 and 2 earlier in this preamble, the final rules require plans and issuers to furnish upon request, in paper form, the information required to be disclosed under 26 CFR 54.9815-2715A2(b)(1), 29 CFR 2590.715-2715A2(b)(1), and 45 CFR 147.211(b)(1) of the final rules to a participant, beneficiary, or enrollee. As discussed in sections II.B.1 and 2 in this preamble, a paper disclosure is required to be furnished according to the consumer's filtering and sorting preferences and mailed to the participant, beneficiary, or enrollee within two business days of receiving the request. Plans or issuers may, upon request, provide the required information through other methods, such as over the phone, through face-to-face encounters, by facsimile, or by email.

The Departments assume fully-insured group health plans will rely on issuers to develop and maintain the internet-based self-service tool and provide any requested disclosures in paper form. While the Departments recognize that some self-insured plans might independently develop and maintain the internet-based self-service tool, at this time the Departments assume that self-insured plans will rely on TPAs (including issuers providing administrative services and non-issuer TPAs) to develop the required internet-based self-service tool. The Departments make this assumption because the Departments understand that most self-insured group health plans rely on TPAs for performing most administrative duties, such as enrollment and claims processing. For those self-insured plans that choose to develop their own internet-based self-service tools, the Departments assume that they will incur a similar cost and burden as estimated for issuers and TPAs, as discussed in section VI.A.1 later in this preamble. In addition, 26 CFR 54.9815-2715A2(b)(3), 29 CFR 2590.715-2715A2(b)(3), and 45 CFR 147.211(b)(3) of the final rules provide for a special rule to prevent unnecessary duplication of the disclosures with respect to health insurance coverage, which provides that a plan may satisfy the disclosure requirements if the issuer offering the coverage is required to provide the information pursuant to a written agreement between the plan and issuer. Thus, the Departments have used issuers and TPAs as the unit of analysis for the purposes of estimating required changes to IT infrastructure and administrative costs and burdens. The Departments estimate approximately 1,754 issuers and 205 TPAs will be affected by the final rules.

The Departments acknowledge that the costs described in these ICRs may vary depending on the number of lives covered, the number of providers and items and services for which cost-sharing information must be disclosed, and the fact that some plans and issuers already have robust tools that can be easily adapted to meet the requirements of the final rules. In addition, plans and issuers may be able to license existing cost estimator tools offered by third-party vendors, obviating the need to establish and maintain their own internet-based self- service tools. The Departments assume that any related vendor licensing fees would be dependent upon complexity, volume, and frequency of use, but assume that such fees would be lower than an overall initial build and associated maintenance costs. Nonetheless, for purposes of the estimates in these ICRs, the Departments assume all 1,959 issuers and TPAs will be affected by the final rules. The Departments also developed the following estimates based on the mean average size, by covered lives, of issuers or TPAs. As noted later in this section, the Departments sought comment on the inputs and assumptions that were used to develop these cost and burden estimates, particularly regarding existing efficiencies that would reduce the cost and burden estimates.

High range estimate for Internet-based self-service tool from start-up to operational functionality.

The Departments estimate that the one-time costs and burden each issuer or TPA will incur to complete the one-time technical build; including activities such as planning, assessment, budgeting, contracting, building and systems test-

ing, incorporating any necessary security measures, incorporating disclaimer and model notice language, or development of the model and disclaimer notice materials for those that choose to make alterations. The Departments assume that this one-time cost and burden will be incurred in 2022 to develop and build the internet-based self-service tool and provide information for the 500 required items and services, and additional one-time costs will be incurred in 2023 in order to fully meet the requirements of the final rules. As mentioned earlier in section V.A.2 of this preamble, the Departments acknowledge that a number of issuers and TPAs have previously developed some level of internet-based self-service tool similar to, and containing some functionality related to, the requirements in the final rules. The Departments thus seek to estimate a burden and cost range (high-end and low-end) associated with the final rules for those issuers and TPAs. In order to develop the high-end hourly burden and cost estimates, the Departments assume that all issuers and TPAs will need to develop and build their internet-based self-service tool from start-up to operational functionality. The Departments estimate that for each issuer or TPA it will take a Project Manager/Team Lead 4,160 hours (at $153 per hour), a Scrum Master 4,160 hours (at $105 per hour), a Technical Architect/Sr. Developer 4,160 hours (at $149 per hour), an Application Developer, Senior 4,160 hours (at $143 per hour), a Business Analyst 4,160 hours (at $120 per hour), a UX Researcher/Service Designer 4,160 hours (at $154 per hour), a Designer 4,160 hours (at $116 per hour), a DevOps Engineer 4,160 hours (at $181 per hour), and a Web Database/Application Developer IV 4,160 hours to complete this task. The Departments estimate the total burden per issuer or TPA will be approximately 37,440 hours, with an equivalent cost of approximately $5,295,680. For all 1,959 issuers and TPAs, the total first year one-time total burden is estimated to be 73,344,960 hours, with an equivalent total cost of approximately $10,374,237,120. The Departments' estimates are higher-bound estimates that do not consider potential cost savings that could be realized should issuers and TPAs buy or lease an internet-based self-service tool from a third-party vendor or other issuer. However, the Departments are of the view that issuers or TPAs that choose to buy or rent an internet-based self-service tool from another entity could incur significantly less costs and burdens.

TABLE 4A: Total High-End First Year Estimated One-time Cost and Hour Burden for Internet-based Self-service Tool for Each Issuer or TPA.

CALC Occupation	Burden Hours per Respondent	Labor Cost per Hour	Total Cost per Respondent
Project Manager/Team Lead	4,160	$153.00	$636,480.00
Scrum Master	4,160	$105.00	$436,800.00
Technical Architect/Sr. Developer	4,160	$149.00	$619,840.00
Application Developer, Senior	4,160	$143.00	$594,880.00
Business Analyst	4,160	$120.00	$499,200.00
UX Researcher/Service Designer	4,160	$154.00	$640,640.00
Designer	4,160	$116.00	$482,560.00
DevOps Engineer	4,160	$181.00	$752,960.00
Web Database/Application Developer IV	4,160	$152.00	$632,320.00
Total per respondent	37,440		$5,295,680.00

TABLE 4B: Total High-End First Year Estimated One-time Cost and Hour Burden for Internet-based Self-service Tool for All Issuers and TPAs.

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
1,959	1,959	37,440.0	73,344,960	$10,374,237,120

Several commenters stated that the Departments grossly underestimated the cost burden of implementation on plans and issuers. One commenter stated that surveyed issuers estimated an average cost of $6.2 million to build, develop or modify, implement, test, and launch an internet-based self-service tool. This is 28 times greater than the Departments' proposed estimate for an issuer that needs to build a new tool and 112 times greater than the Departments' estimate for an issuer that has an existing tool. Furthermore, this commenter noted that surveyed issuers estimated average annu-

al maintenance costs of $1.4 million per issuer—over 100 times greater than those anticipated by the Departments. Surveyed issuers also estimated set-up costs that averaged about $5.53 million (ranging from $1,000,000 to $15,000,000) compared to the Departments' proposed estimate of $221,029. This is more than 25 times what the Departments estimated as the cost for a full build of the internet-based self-service tool. Although most of the issuers surveyed had an existing internet-based self-service tool meeting many of the required elements of the final rules, several issuers expressed significant concern about the cost and feasibility of complying with the requirements of the proposed rules. Specifically, the issuers surveyed expressed concerns noting that the requirements may necessitate a complete rebuild of their consumer tool. The surveyed issuers further indicated that the proposed rules would be costlier than implementing real-time claims adjudication, in which the claim for the medical service is adjudicated at the time the service is provided. They stated that they would need to effectively adjudicate the claim before it actually happens – to provide estimates for every conceivable type of medical item or service while integrating this information with various benefits. The surveyed issuers also noted that condensing all of the detail required in the final rules into a user-friendly format for use by enrollees would be a considerable and possibly even infeasible challenge. They further stated that the Departments' assumption that issuers with an existing internet-based self-service tool would face a lower hour burdens and costs to comply with the proposed rules was incorrect.

The Departments have considered the comments submitted in response to the cost and burden estimates related to the internet-based self-service tool. In response, the Departments have adjusted the costs and burden estimates to better reflect and align with the values submitted by commenters. In addition, the Departments have developed the estimates above, and in other ICR sections, using CALC wage rates as discussed in section VI.A of this preamble.

Low range estimate for internet-based self-service tool requiring partial build.

The Departments recognize that a significant number of issuers and TPAs may already have some form of internet-based self-service tool that allows for comparison shopping of different plans and that a large number of issuers and TPAs may currently provide participants, beneficiaries, or enrollees with the ability to obtain some estimated out-of-pocket costs.[286] For those issuers and TPAs that currently have some level of functional internet-based self-service tool that would meet some (or all) of the requirements of the final rules, the Departments recognize that these entities may incur lower burdens and costs overall, as the Departments are of the view that these entities may require an overall lower level of effort and capital expenditure to meet the requirements of the final rules. Thus, the Departments have estimated a low-end burden and cost to comply with the final rules. Assuming that over 90 percent of issuers and TPAs currently provide an internet-based self-service tool and will only be required to make changes to their current system in order to meet the requirements in the final rules, the Departments estimate that 175 issuers and 21 TPAs will be required to develop an internet-based self-service tool from start-up to operational functionality. The Departments also estimate that each of those 196 entities will incur a first-year one-time cost and burden of approximately 37,440 hours, with an equivalent cost of approximately $5,295,680 (as discussed previously in this ICR). For those 196 entities, the total first year one-time burden is estimated to be 7,334,496 hours with an equivalent total cost of approximately $1,037,423,712.

TABLE 5A: Low-Range First Year One-time Cost and Hour Burden for Internet-based Self-service Tool for Issuers and TPAs Requiring a Complete Build.

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
196	196	37,440	7,334,496	$1,037,423,712.00

The Departments estimate that those issuers and TPAs that will only be required to make changes to their existing systems will already have operational capabilities that meet approximately 70 percent of the requirements in the final rules and will only incur costs and burdens related to changes needed to fully meet the requirements of the final rules. Based on this assumption, the Departments estimate that 1,579 issuers and 184 TPAs will incur a first-year one-time hour burden of 11,232 hours, with an associated cost of $1,588,704.00 to fully satisfy the initial requirements of the final rules. For all 1,763 issuers and TPAs, the Departments estimates the total first year one-time burden will be 19,803,139 hours, with an equivalent total cost of approximately $2,801,044,022.40. The Departments recognize that issuers and TPAs may currently have some form of internet-based self-service tool that may provide greater functionality that could meet a greater proportion of the requirements in the final rules. In those cases, issuers and TPAs could see lower costs and burdens. The Departments also

[286] *See* AHIP release dated August 2, 2019. "AHIP Issues Statement on Proposed Rule Requiring Disclosure of Negotiated Prices." America's Health Insurance Providers. August 2, 2019. Available at: https://www.ahip.org/ahip-issues-statement-on-proposed-rule-requiring-disclosure-of-negotiated-prices/; *see also* Higgins, A., Brainard, N., and Veselovskiy, G. "Characterizing Health Plan Price Estimator Tools: Findings from a National Survey." 22 Am. J. Managed Care 126. 2016. Available at: https://ajmc.s3.amazonaws.com/_media/_pdf/AJMC_02_2016_Higgins%20(final).pdf.

recognize that there are likely a number of issuers and TPAs that currently provide some form of internet-based self-service tool that would require more development to meet the requirements of the final rules. In those instances, those issuers and TPAs could incur greater costs and burdens. The Departments' estimates are higher-bound estimates that do not consider potential cost savings that could be realized should issuers and TPAs buy or lease an internet-based self-service tool from a third-party vendor or other issuer. However, the Departments are of the view that issuers or TPAs that choose to buy or rent an internet-based self-service tool from another entity could incur significantly less costs and burdens.

TABLE 5B: Low-End First Year One-time Cost and Hour Burden for Internet-based Self-service Tool for Issuers and TPAs Requiring Only a Partial Build.

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
1,763	1,763	11,232	19,803,139	$2,801,044,022.40

TABLE 5C: Total Low-End First Year One-time Cost and Hour Burden for Internet-based Self-service Tool for all Issuers and TPAs.

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
1,959	1,959	13,853	27,137,635	$3,838,467,734.40

In addition to the range of year one one-time costs and burdens estimated in Tables 4B, 5B, and 5C, issuers and TPAs will incur additional costs in the second year of implementation in order to include all items and services in their internet-based self-service tools and fully meet the requirements of the final rules. The Departments estimate that for each issuer and TPA it will take a Project Manager/Team Lead 3,120 hours (at $153 per hour), a Scrum Master 3,120 hours (at $105 per hour), a Technical Architect/Sr. Developer 3,120 hours (at $149 per hour), an Application Developer, Senior 4,160 hours (at $143 per hour), a Business Analyst 2,080 hours (at $120 per hour), a UX Researcher/Service Designer 2,080 hours (at $154 per hour), a Designer 1,560 hours (at $116 per hour), a Web Database/Application Developer IV (at $154.00 per hour) 3,120 hours (at $152.00 per hour), and a DevOps Engineer 2,080 hours (at $181 per hour) to perform these tasks. The total second year burden for each issuer or TPA will be 24,440 hours, with an equivalent cost of approximately $3,466,320. For all 1,959 issuers and TPAs, the total second year implementation burden is estimated to be 47,877,960 hours with an equivalent total cost of approximately $6,611,791,831 The Departments consider this to be an upper-bound estimate and expect maintenance costs to decline in succeeding years as issuers and TPAs gain efficiencies and experience in updating and managing their internet-based self-service tools.

TABLE 6A: Estimated Year Two Implementation Cost and Hour Burden for Internet-based Self-service Tool for Each Issuer or TPA.

Occupation	Burden Hours per Respondent	Labor Cost per Hour	Total Cost per Respondent
Project Manager/Team Lead	3,120	$153.00	$477,360.00
Scrum Master	3,120	$105.00	$327,600.00
Technical Architect/Sr. Developer	3,120	$149.00	$464,880.00
Application Developer, Senior	4,160	$143.00	$594,880.00
Business Analyst	2,080	$120.00	$249,600.00
UX Researcher/Service Designer	2,080	$154.00	$320,320.00
Designer	1,560	$116.00	$180,960.00
DevOps Engineer	2,080	$181.00	$376,480.00
Web Database/Application Developer IV	3,120	$152.00	
Total per Respondent	24,440		$3,466,320.00

TABLE 6B: Estimated Year Two Implementation Cost and Hour Burden for Internet-based Self-service Tool for All Issuers and TPAs.

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
1,959	1,959	24,440.0	47,877,960	$6,611,791,830.97

In addition to the range of one-time costs and burdens estimated in Tables 4B, 5B, 5C, 6A, and 6B, issuers and TPAs will incur annual costs such as those related to ensuring cost estimation accuracy, providing quality assurance, conducting website maintenance and making updates, and enhancing or updating any needed security measures. The Departments estimate that for each issuer and TPA, it will take a Project Manager/Team Lead 1,040 hours (at $153 per hour), a Scrum Master 1,300 hours (at $105 per hour), an Application Developer, Senior 1,560 hours (at $143 per hour), a Business Analyst (at $120.00 per hour) 520 hours, a Designer (at $116.00 per hour) 1,040 hours, a DevOps Engineer (at $181.00 per hour) 520 hours, a Web Database/Application Developer IV (at $152.00 per hour) 1,560 hours, and a UX Researcher/Service Designer 520 hours (at $154 per hour) to perform these tasks. The total annual burden for each issuer or TPA will be 8,060 hours, with an equivalent cost of approximately $1,113,060. For all 1,959 issuers and TPAs, the total annual maintenance burden is estimated to be 15,789,540 hours, with an equivalent associated total cost of approximately $2,180,484,540.00. The Departments recognize that issuers and TPAs will likely have varying levels of IT capabilities and experience in maintaining and internet-based tool and could incur higher or lower costs and burdens depending on those capabilities. The Departments expect maintenance costs to decline in succeeding years as issuers and TPAs gain efficiencies and experience in updating and managing their internet-based self-service tool.

TABLE 7A: Estimated Annual Cost and Hour Burden for Maintenance of Internet-based Self-service Tool for Each Issuer or TPA.

Occupation	Burden Hours per Respondent	Labor Cost per Hour	Total Cost per Respondent
Project Manager/Team Lead	1,040	$153.00	$159,120.00
Scrum Master	1,300	$105.00	$136,500.00
Application Developer, Senior	1,560	$143.00	$223,080.00
Business Analyst	520	$120.00	$62,400.00
Designer	1,040	$116.00	$120,640.00
DevOps Engineer	520	$181.00	$94,120.00
Web Database/Application Developer IV	1,560	$152.00	$237,120.00
UX Researcher/Service Designer	520	$154.00	$80,080.00
Total per Respondent	8,060		$1,113,060.00

TABLE 7B: Estimated Annual Cost and Hour Burden for Maintenance of Internet-based Self-service Tool for All Issuers and TPAs

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
1,959	1,959	8,060.0	15,789,540	$2,180,484,540.00

As noted previously in this ICR section, commenters stated that the Departments grossly underestimated the cost burden of implementation on plans and issuers. Additionally, commenters stated that the Departments had underestimated the maintenance costs associated with the internet-based self-service tool. Issuers estimated the annual maintenance costs to be on average, about $3.78 million per issuer or TPA (ranging from $375,000 to $10,000,000). As noted previously in this ICR section, based on comments received, the Departments have adjusted the costs and burden estimates to better reflect and align with the values submitted by commenters. The Departments estimate the high-end three-year average total hour burden, for all issuers and TPAs to develop, build, and maintain an internet-based self-service tool will be 45,670,820 hours

annually, with an average annual total equivalent cost of $6,388,837,830.

The Departments acknowledge that the costs described earlier in this section may vary depending on the number of covered lives and the number of providers and items and services incorporated into the internet-based self-service tool. Recognizing that many issuers and TPAs currently have some form of internet-based self-service tool in operation that meets some aspects of the requirements of the final rules, the Departments estimate the low-end average three-year annual total burden, for all issuers and TPAs to develop, build, and maintain an internet-based self-service tool will be 30,268,378 hours annually, with an average annual total equivalent cost of $4,210,248,035. The Departments recognize that plans, issuers, and TPAs may be able to license existing internet-based self-service tools offered by vendors, obviating the need to establish, upgrade, and maintain their own internet-based self-service tools, and that vendor licensing fees, dependent upon complexity, volume, and frequency of use, could be lower than the burden and costs estimated here.

TABLE 8: Estimated High-End Three Year Average Annual Hour Burden and Costs for All Issuers and TPAs to Develop and Maintain the Internet-based Self-service Tool.

Year	Estimated Number of Health Insurance Issuers and TPAs	Responses	Burden per Respondent (hours)	Total Annual Burden (hours)	Total Estimated Labor Cost
2022	1,959	1,959	37,440.0	73,344,960	$10,374,237,120
2023	1,959	1,959	24,440.0	47,877,960	$6,611,791,830.97
2024	1,959	1,959	8,060.0	15,789,540	$2,180,484,540.00
3 year Average	1,959	1,959	23,313	45,670,820	$6,388,837,830.32

TABLE 9: Estimated Low-End Three Year Average Annual Hour Burden and Costs for All Issuers and TPAs to Develop and Maintain the Internet-based Self-service Tool.

Year	Estimated Number of Health Insurance Issuers and TPAs	Responses	Burden per Respondent (hours)	Total Annual Burden (hours)	Total Estimated Labor Cost
2022	1,959	1,959	13,853	27,137,635	$3,838,467,734.40
2023	1,959	1,959	24,440	47,877,960	$6,611,791,830.97
2024	1,959	1,959	8,060	15,789,540	$2,180,484,540.00
3 year Average	1,959	1,959	15,451	30,268,378	$4,210,248,035.12

In addition to the one-time and annual maintenance costs estimated in Table 8 and Table 9, issuers and TPAs will also incur an annual burden and costs associated with customer service representative training, consumer assistance and education, and administrative and distribution costs related to the disclosures required in the final rules. The Departments estimate that, to understand and navigate the internet-based self-service tool and provide the appropriate assistance to consumers, each customer service representative will require approximately two hours (at $40 per hour) of annual consumer assistance training at an associated cost of $80 per hour. The Departments estimate that each issuer and TPA will train, on average, 10 customer service representatives annually, resulting in a total annual burden of 20 hours, with an associated total cost of $800. For all 1,959 issuers and TPAs, the total annual burden is estimated to be 39,180 hours, with an equivalent total annual cost of approximately $1,567,200. The Departments recognize that some issuers or TPAs may require varying levels of training to acquaint their customer service representatives with the functionalities of their internet-based self-service tool depending on the degree of changes required to comply with the final rules, in which case some issuers could incur higher costs and burdens to appropriately train personnel.

TABLE 10A: Estimated Annual Cost and Hour Burden per Issuer or TPA to Train Customer Service Representatives to Provide Assistance to Consumers Related to the Internet-based Self-service Tool.

Occupation	Burden Hours per Respondent	Labor Cost per Hour	Total Cost per Respondent
Customer Service Representatives	2	$40.00	$80.00
Total per Respondent	2		$80.00

TABLE 10B: Estimated Annual Cost and Hour Burden for All Issuers and TPAs to Train Customer Service Representatives to Provide Assistance to Consumers Related to the Internet-based Self-service Tool.

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
1,959	1,959	20	39,180	$1,567,200.00

The Departments assume that the greatest proportion of beneficiaries, participants, or enrollees that will request disclosure of cost-sharing information in paper form will do so because they do not have access to the internet. However, the Departments acknowledge that some consumers with access to the internet will contact a plan or issuer for assistance with using the internet-based self-service tool and may request to receive cost-sharing information in paper form.

Recent studies have found that approximately 20 million households do not have an internet subscription.[287] Further, approximately 19 million Americans (6 percent of the population) lack access to fixed broadband services that meet threshold levels.[288] Additionally, a recent Pew Research Center analysis found that 10 percent of U.S. adults do not use the internet, citing the following major factors: difficulty of use, age, cost of internet services, and lack of computer ownership.[289] Additional research indicates that an increasing number, 17 percent, of individuals and households are now considered "smartphone only" and that 37 percent of U.S. adults mostly use smartphones to access the internet and that many adults are forgoing the use of traditional broadband services.[290] Further research indicates that younger individuals and households, including approximately 93 percent of households with householders aged 15 to 34, are more likely to have smartphones compared to those aged over 65.[291] The Departments are of the view that the population most likely to use the internet-based self-service tool would generally consist of younger individuals, who are more comfortable using technology and are more likely to have internet access via broadband or smartphone technologies.

The Departments note that there are 212.3 million beneficiaries, participants, or enrollees enrolled in group health plans or with health insurance issuers required to comply with the requirements of the final rules for at least part of the year.[292] On average, it is estimated that each issuer or TPA would annually administer the benefits for 108,379 beneficiaries, participants, or enrollees.

A recent study noted that only one to 12 percent of consumers that have been offered internet-based or mobile application-based price transparency tools use them.[293] Taking that into account, and assuming that six percent of covered individuals lack access to fixed broadband services, the Departments estimate that on average six percent of participants, beneficiaries, or enrollees will seek customer support (a mid-range percentage of individuals that currently use available cost estimator tools) and that an estimated one percent of those participants, beneficiaries, or enrollees will request any pertinent information be disclosed to them in in a non-internet manner – resulting in an estimated 0.06 percent of participants, beneficiaries, or enrollees requesting information. As discussed in section V.D.1 of this preamble, the Departments have adjusted the estimates related to customer service and mailed requests in order to account for more recent data related to

[287] "2017 American Community Survey Single-Year Estimates." United States Census Bureau. September 13, 2018. Available at: https://www.census.gov/newsroom/press-kits/2018/acs-1year.html.

[288] "Eight Broadband Progress Report." United States Federal Communications Commission. December 14, 2018. Available at: https://www.fcc.gov/reports-research/reports/broadband-progress-reports/eighth-broadband-progress-report. In addition to the estimated 19 million Americans that lack access, they further estimate that "in areas where broadband is available, approximately 100 million Americans still do not subscribe."

[289] Anderson, M. et al. "10% of Americans don't use the internet. Who are they?" Pew Research Center. April 22, 2019. Available at: https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/.

[290] Anderson, M. "Mobile Technology and Home Broadband 2019." Pew Research Center. June 13, 2019. Available at: https://www.pewinternet.org/2019/06/13/mobile-technology-and-home-broadband-2019/ (finding that overall 17 percent of Americans are now "smartphone only" internet users, up from 8 percent in 2013. They study also shows that 45 percent of non-broadband users cite their smartphones as a reason for not subscribing to high-speed internet).

[291] Ryan, C. "Computer and Internet Use in the United States: 2016." American Community Survey Reports: United States Census Bureau. August 2018. Available at: https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf.

[292] *Id.* at 283.

[293] Mehrotra, A., Chernew, M., and Sinaiko, A. "Health Policy Report: Promises and Reality of Price Transparency." April 5, 2018. 14 N. Eng. J. Med. 378. Available at: https://www.nejm.org/doi/full/10.1056/NEJMhpr1715229.

the number of participants, beneficiaries, and enrollees. The Departments estimate that each issuer or TPA, on average, will require a customer service representative to interact with a beneficiary, participant, or enrollee approximately 65 times per year on matters related to cost-sharing information disclosures required by the final rules. The Departments estimate that each customer service representative will spend, on average, 15 minutes (at $40 per hour) for each interaction, resulting in a cost of approximately $10 per interaction. The Departments estimate that each issuer or TPA will incur an annual burden of 16 hours, with an associated equivalent cost of approximately $650; resulting in a total annual burden of 31,847 hours, with an associated cost of approximately $1,273,884 for all issuers and TPAs.

The Departments assume that all beneficiaries, participants, or enrollees that contact a customer service representative will request non-internet disclosure of the internet-based self-service tool information. Of these, the Departments estimate that 54 percent of the requested information would be transmitted via email or facsimile at negligible cost to the issuer or TPA and that 46 percent will request the information be provided by mail. The Departments estimate that, on average, each issuer or TPA will send approximately 30 disclosures by mail annually. Based on these assumptions, the Departments estimate that the total number of annual disclosures sent by mail for all issuers and TPAs will be 58,599. The Departments recognize that the numbers of per issuer and TPA mailings may represent a low-end estimate and the number of requests may vary amongst each issuer or TPA depending on the demographics of their beneficiaries, participants, or enrollees. The Departments are of the view that although more individuals will contact customer support for cost information the vast majority of those individuals will likely obtain this information over the phone or have it emailed rather than have it mailed to them.

The Departments assume, on average, the length of the printed disclosure will be approximately nine single-sided pages in length, assuming two pages of information (similar to that provided in an EOB) for three providers (for a total of six pages) and an additional three pages related to the required notice statements, with a printing cost of $0.05 per page. Therefore, including postage costs of $0.55 per mailing, the Departments estimate that each issuer or TPA will incur a material and printing costs of approximately $1.00 ($0.45 printing plus $0.55 postage costs) per mailed request. Based on these assumptions, the Departments estimate that each issuer or TPA will incur an annual printing and mailing cost of approximately $30, resulting in a total annual printing and mailing cost of approximately $58,599 for all issuers and TPAs.

TABLE 11A: Estimated Annual Cost and Hour Burden per Response per Issuer or TPA to Accept and Fulfill Requests for a Mailed Disclosures.

Occupation	Burden Hours per Respondent	Labor Cost per Hour	Total Cost per Respondent
Customer Service Representatives	0.25	$40.00	$10
Total per Respondent	0.25		$10

TABLE 11B: Estimated Annual Cost and Hour Burden for All Issuers and TPAs to Accept and Fulfill Requests for Mailed Disclosures.

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Labor Cost of Reporting	Printing and Materials Cost	Total Cost
1,959	1132,509	16	31,847	$1,273,884.00	$58,598.66	$1,332,482.66

The Departments solicited comment on the overall estimated costs and burdens related to this collection of information request. The Departments also sought comment on the technical and labor requirements or costs that may be required to meet the requirements of the proposed rules: for example, what costs may be associated with any potential consolidation of information needed for the internet-based self-service tool functionality. The Departments sought comment on the estimated number of issuers and TPAs currently in the group and individual markets and the number of self-insured group health plans that might seek to independently develop an internet-based self-service tool, the percentage of consumers who might use the internet-based self-service tool, and the percentage of consumers who might contact their plan, issuer, or TPA requesting information via a non-internet disclosure method. The Departments sought comment on any other existing efficiencies that could be leveraged to minimize the burden on plans, issuers, and TPAs, as well as how many or what percentage of plans, issuers, and TPAs might leverage such efficiencies. The Departments sought comment on the proposed model notice and any additional information that stakeholders thought should be included, removed, or expanded upon and its overall adaptability.

All comments received with regard the topics above have been noted and ad-

dressed in their corresponding ICR sections.

In conjunction with the final rules, CMS is seeking approval for this information collection (OMB control number: 0938-1372 (Transparency in Coverage (CMS-10715)). CMS is requiring the following information collections to include the following burden. DOL and the Department of the Treasury will submit their burden estimates upon approval.

2. ICRs Regarding Requirements for Public Disclosure of In-network Rates, Historical Allowed Amount Data for Covered Items and Services from Out-of-Network Providers and Prescription Drug Pricing Information under 26 CFR 54.9815-2715A3, 29 CFR 2590.715-2715A3, and 45 CFR 147.212.

The Departments are adding 26 CFR 54.9815-2715A3(b), 29 CFR 2590.715-2715A3(b), and 45 CFR 147.212(b) to the final rules requiring group health plans and health insurance issuers to make public in-network rates for covered items and services, out-of-network allowed amounts for covered items or services, and negotiated rates and historical net prices for each prescription drug NDC through three machine-readable files that must conform to guidance issued by the Departments. The list of required data elements that must be included for each file for each covered item or service are discussed in section II.C previously in this preamble and enumerated under paragraph (b)(1)(i) for the In-network Rate File, paragraph (b)(1)(ii) for the Allowed Amount File, and paragraph (b)(1)(iii) for the Prescription Drug File of the final rules. Under paragraphs (b)(2) and (3) of the final rules, the machine-readable files must be posted on a public internet site accessible to any person free of charge and without conditions and must be updated monthly.

For the In-network Rate File, the final rules require the negotiated rates, underlying fee schedules, or derived amounts under a plan or coverage regarding each covered item or service be furnished for in-network providers. As discussed in section II.C earlier in this preamble, the Departments expect plans and issuers to make public the negotiated rate, fee schedule, or derived amount that is used to adjudicate claims for the purpose of reconciling a provider's payment to determine a participant's, beneficiary's, or enrollee's cost-sharing liability. As discussed in the previous ICR section, the Departments assume fully-insured group health plans will rely on issuers and most self-insured group health plans will rely on issuers or TPAs to develop and update the machine-readable files. The Departments recognize that there may be some self-insured plans that wish to individually comply with the final rules and will thus incur a similar burden and cost as described in the following paragraphs.

Many commenters stated the costs associated with the technical build and maintenance of the machine-readable files will be significant, and many commenters strongly suggested that the costs and burden of implementing the files would be significantly higher than those estimated in the proposed rules. Some commenters stated that the final rules would unreasonably burden issuers with administrative costs and could be especially burdensome for small issuers and self-insured plans. One commenter noted that a significant amount of burden would be placed on out-of-network providers to provide information regarding costs to plans and issuers. Another commenter, a hospital association, stated that the proposed rules would be an administrative burden for hospitals as they would require a massive investment by hospitals to provide data to comply and that these resources would be diverted from patient care support.

The Departments recognize that the requirements in the final rules could result in instances where small issuers and self-insured plans face a disproportionate burden due to their size; however, as noted earlier in this preamble, the Departments expect that small issuers, plans, and TPAs will combine their efforts and seek to take advantage of any resulting economies of scale.

An independent study by Bates White Economic Consulting (Bates White), commissioned by one commenter, developed an assessment of the costs of the proposed rules by interviewing a mix of 18 large and small health insurance issuers covering about 78 million lives; Bates White assessed the average issuer cost to implement the In-network Rate File as $2,139,167 with a range from $85,000 to $10,000,000. Bates White reported that commercial issuers estimated an average cost of $2.1 million per issuer to develop and implement the In-network Rates File. Per the study, issuers view the In-network Rate File as about 20 times costlier to implement than the Departments' proposed estimate. In addition, Bates White assessed the average annual issuer cost to maintain the In-network Rate Files would be $467,000 with a range from $15,000 to $1,000,000. Another commenter noted that commercial issuers estimated annual costs of $600,000 per issuer to maintain the In-network Rate File. Issuers viewed the In-network Rate File as about 13 times costlier to maintain than the Departments' proposed estimate.

In another attempt to quantify this burden, one commenter emphasized that the potential universe of prices that would need to be disclosed on the files is enormous and could be in the hundreds of billions (more than 94,000 codes multiplied by the number of unique practitioners, which in the large issuer's system alone could exceed 2 million).

One commenter noted that the effort to comply would involve an immense amount of data aggregation, de-identification, and application development work, and these tasks would be especially difficult for small issuers and self-insured plans who are more likely to rely on "rented" networks. The commenter stated that to comply with the final rules, issuers would need a team with data expertise and knowledge of plan design and medical service billing to aggregate data, build re-pricing engines, and assure accuracy.

Due to the belief that the burden estimate in the proposed rules and related PRA grossly underestimated the burden of implementation on plans and issuers, one commenter suggested the Departments should retract the PRA and work with stakeholders to develop a less burdensome transparency solution. Other commenters stated the burden estimates included in the proposed rules violate the spirit and express provision of the PRA.

The Departments recognize the concerns and issues noted by commenters. As noted in section VI.A in this preamble, the Departments have reviewed comments related to the costs and burdens

associated with the requirements of the final rules and devised updated estimates using CALC derived wage rates. The Departments note that the conclusions of the Bates White study referenced earlier in this preamble were based on interviews with issuers in which issuers described the steps they viewed as necessary to establish the required internet-based self-service tool and the machine-readable files, and provided related costs estimates associated with the estimated initial set-up of the internet-based self-service tool and machine-readable files. These estimates, however, did not provide the level of detail necessary for the Departments to assess how those initial cost estimates differ from the Departments' estimates.

The Bates White study also recognized the difficulty associated with assessing issuer estimates reported from issuer study participants. The study recognized that issuers interviewed varied widely in size, had different levels of experience, and had engaged in different levels of analysis of the impacts in the proposed rules. The study further noted the differences in the extent to which issuers evaluated the costs and feasibility of complying with the proposed rules. The study also recognized that issuers interviewed made different assumptions about the degree of support from vendors or trade associations that may have affected issuers' perception of the administrative and operational costs of implementation, and that issuers did not provide details of the varied operational and implementation costs and activities underlying their stated estimates for complying with the proposed rules. Specifically, the study provided no insight regarding the labor categories, wages, or hourly burdens that were considered to produce these cost estimates. Accordingly, the Bates White study did not provide details sufficient to allow those estimates to be compared to the Departments' estimates in the proposed rules.

Given the limited utility of information offered by the Bates White study, the Departments took additional steps to ensure the reasonableness and accuracy of the cost estimates associated with compliance with the final rules. In developing the updated estimates, the Departments took into account the potential aggregation of data and the potential likelihood that the data required to meet the requirements of the final rules would need to be obtained from multiple sources. The Departments recognize that the size and complexity of the machine-readable files will result in data files that are large. However, the Departments do not anticipate that data storage would impose a significant burden for issuers or TPAs due to the relatively inexpensive costs associated with storage methods such as cloud storage.

The Departments estimate a one-time first year burden and cost to issuers and TPAs to make appropriate changes to IT systems and processes, to develop, implement and operate the In-network Rate File in order to meet the requirements of the final rules. The Departments estimate that each health or TPA will require a Project Manager/Team Lead 364 hours (at $153 per hour), a Scrum Master 1,404 hours (at $105 per hour), a Technical Architect/ Sr. Developer 2,080 hours (at $149 per hour), an Application Developer, Senior 1,716 hours (at $143 per hour), a Business Analyst 1,404 hours (at $120 per hour), a Service Designer/Researcher 520 hours (at $114 per hour) and a DevOps Engineer 260 hours (at $181 per hour) to complete this task. The total one-time first year burden for each issuer or TPA is estimated to be approximately 7,748 hours, with an equivalent associated cost of approximately $1,033,240. For all 1,959 issuers and TPAs, the Departments estimate the total one-time first year burden will be 15,178,332 hours with an associated cost of approximately $2,024,117,160. The Departments emphasize that these are upper bound estimates that are meant to be sufficient to cover substantial, complex activities that may be necessary for some plans, issuers, or TPAs to comply with the final rules due to the manner in which their current systems are designed. Such activities may include such significant activities as the design and implementation of databases that will support the production of the In-network Rate Files.

TABLE 12A: Estimated One-Time Year One Cost and Hour Burden per Issuer or TPA for the In-network Rate File.

Occupation	Burden Hours per Respondent	Labor Cost per Hour	Total Cost per Respondent
Project Manager/Team Lead	364	$153.00	$55,692.00
Scrum Master	1,404	$105.00	$147,420.00
Technical Architect/Sr. Developer	2,080	$149.00	$309,920.00
Application Developer, Senior	1,716	$143.00	$245,388.00
Business Analyst	1,404	$120.00	$168,480.00
Service Designer/Researcher	520	$114.00	$59,280.00
DevOps Engineer	260	$181.00	$47,060.00
Total per Respondent	7,748		$1,033,240.00

TABLE 12B: Estimated One-Time Year One Cost and Hour Burden for All Issuers and TPAs for the In-network Rate File.

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
1,959	1,959	7,748	15,178,332	$2,024,117,160.00

In addition to the one-time year one costs estimated in Tables 12A and 12B, issuers or TPAs will incur an additional year two burden and cost to update the In-network Rate File monthly as required in the final rules. The Departments estimate that for each month each issuer or TPA it will require a Project Manager/Team Lead 22 hours (at $153 per hour), a Scrum Master 22 hours (at $105 per hour), a Technical Architect/Sr. Developer 22 hours (at $149 per hour), an Application Developer, Senior 22 hours (at $143 per hour), a Business Analyst 13 hours (at $120 per hour) and a DevOps Engineer 22 hours (at $181 per hour) to make the required updates and needed adjustments to the In-network Rate File. The Departments estimate that each issuer or TPA will incur a monthly year two burden of 123 hours, with an associated monthly cost of approximately $17,642 to adjust and update the In-network Rate File. Each issuer or TPA will need to update the In-network Rate File 12 times during a given year, resulting in a year two burden of 1,476 hours, with an associated equivalent cost of approximately $211,704. The Departments estimate the total year two burden for all 1,959 issuers and TPAs will be 2,891,484 hours, with an associated equivalent cost of approximately $414,728,136. The Departments consider this estimate to be an upper-bound estimate and expect ongoing update costs to decline in succeeding years as issuers and TPAs gain efficiencies and experience in updating and managing the In-network Rate File.

TABLE 13A: Estimated Monthly Year Two Cost and Hour Burden per Issuer or TPA for the In-network Rate File.

Occupation	Burden Hours per Respondent	Labor Cost per Hour	Total Cost per Respondent
Project Manager/Team Lead	22	$153.00	$3,366.00
Scrum Master	22	$105.00	$2,310.00
Technical Architect/Sr. Developer	22	$149.00	$3,278.00
Application Developer, Senior	22	$143.00	$3,146.00
Business Analyst	13	$120.00	$1,560.00
DevOps Engineer	22	$181.00	$3,982.00
Total per Respondent	123		$17,642.00

TABLE 13B: Estimated Year Two Cost and Hour Burden for All Issuers and TPAs for the In-network Rate File.

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
1,959	23,508	1,476	2,891,484	$414,728,136.00

In addition to the one-time year one and monthly year two costs estimated Tables 12A, 12B, 13A, and 13B, in subsequent years, issuers and TPAs will incur an ongoing monthly burden and cost to update and maintain the In-network Rate File on a monthly basis as required by the final rules. The Departments estimate that for each issuer or TPA it will require a Project Manager/Team Lead 9 hours (at $153 per hour) and an Application Developer, Senior 22 hours (at $143 per hour) to make the required updates to the In-network Rate File. The Departments estimate that each issuer or TPA will incur a monthly burden of 31 hours, with an associated cost of approximately $4,523 to update the In-network Rate File. Each issuer or TPA will need to update the In-network Rate File 12 times during a given year, resulting in an ongoing annual hour burden of 372 hours, with an associated equivalent cost of approximately $54,276. The Departments estimate the total annual burden for all 1,959 issuers and TPAs will be 728,748 hours, with an associated equivalent cost of approximately $106,326,684. The Departments consider this estimate to be an upper-bound estimate and expect ongoing update costs to decline in succeeding years as issuers and TPAs gain efficiencies and experience in updating and managing the In-network Rate File.

TABLE 14A: Estimated Monthly Ongoing Cost and Hour Burden per Issuer or TPA for the In-network Rate File.

Occupation	Burden Hours per Respondent	Labor Cost per Hour	Total Cost per Respondent
Project Manager/Team Lead	9	$153.00	$1,377.00
Application Developer, Senior	22	$143.00	$3,146.00
Total per Respondent	31		$4,523.00

TABLE 14B-: Estimated Annual Ongoing Cost and Hour Burden for All Issuers and TPAs for the In-network Rate File.

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
1,959	23,508	372	728,748	$106,326,684.00

The Departments estimate the total one-time year one burden for all issuers and TPAs will be 15,178,332 hours, with an associated equivalent cost of approximately $2,024,117,160 to develop and build the In-network Rate File in a machine-readable format. In year two, the Departments estimate the burden and costs to update and maintain the In-network Rate file for all issuers and TPAs will be 2,891,484 hours, with an associated equivalent cost of approximately $414,728,136. In subsequent years, the Departments estimate the total annual burden to maintain and update the In-network Rate File will be 728,748 hours, with an annual associated equivalent cost of approximately $106,326,684. The Departments estimate the three-year average annual total burden, for all issuers and TPAs, will be 6,266,188 hours, with an average annual associated equivalent total cost of $848,390,660.

TABLE 15: Estimated Three Year Average Annual Hour Burden and Costs for All Issuers and TPAs to Develop and Maintain the In-network Rate File.

Year	Estimated Number of Health Insurance Issuers and TPAs	Responses	Burden per Respondent (hours)	Total Annual Burden (hours)	Total Estimated Labor Cost
2021	1,959	1,959	7,748	15,178,332	$2,024,117,160.00
2022	1,959	23,508	1,476	2,891,484	$414,728,136.00
2023	1,959	23,508	372	728,748	$106,326,684.00
3 year Average	1,959	16,325	3,199	6,266,188	$848,390,660.00

As mentioned in sections V.B in this preamble, the Departments understand that plans and issuers may include gag clauses in their provider contracting agreements, which prevent disclosure of in-network rates. The Departments sought comment on whether such agreements would need to be renegotiated to remove such clauses, and, if so, sought comment regarding any costs and burden associated with this action.

One commenter stated the Departments have not sufficiently accounted for costs associated with updating legal agreements (with physicians, hospitals, drug manufacturers, and device manufacturers, for example), updating and integrating data from multiple systems, and establishing processes for making updates to files in the ordinary course of business. Another commenter observed the Departments have not adequately accounted for the time, resources, and cost burdens of renegotiating contracts to remove gag clauses or confidentiality clauses, which prevent disclosure of in-network rates. One commenter provided examples of these costs: printing and paper, mailing, attorney drafting initial amendments and review of non-standard language requests, costs for employees charged with negotiation and administration, and costs paid to vendors.

Due to the potential complexities and time involved in contract negotiations, the Departments recognize that should contracts require renegotiation, all associated parties will face additional costs and burdens. However, the Departments do not have insight into these complexities or knowledge of how these contracts are structured, and they are thus not able to quantify the costs and burdens associated with these tasks. Also, as addressed earlier in this preamble, it is not uncommon for new or modified regulatory requirements or new statutory provisions to alter private contract arrangements. The Departments note that the possibility of new or modified regulatory requirements or new statutory provisions altering such contracts often is contemplated in the contracts themselves; for example, drafters may include contract language indicating that terms may be altered by changes in law or regulation. Such language would obviate the need for updates outsides of the regular contracting schedule and any associated costs and burden.

For the Allowed Amount File, the final rules require plans and issuers to make available a machine-readable file showing the unique out-of-network allowed amounts and billed charges for covered items or services furnished by out-of-network providers during the 90-day time period that begins 180 days before the publication date of the file. As discussed earlier in this preamble, to the extent that a group health plan or health insurance issuer has paid multiple bills for an item or service to a particular out-of-network provider at the same allowed amount, the final rules will only require a plan or issuer to list the allowed amount once. Additionally, if the plan or issuer would only display allowed amounts in connection with 20 or fewer claims for a covered item or service for payment to a provider during any relevant

90-day period, the plan or issuer will not be required to report those unique allowed amounts.

As previously noted, an independent study by Bates White, commissioned by one commenter, assessed the average issuer cost to implement the Allowed Amount File as $1,071,167 with a range from $42,000 to $5,000,000 and estimated the cost to implement the Allowed Amount File as about 9 times costlier to implement than the Departments' proposed estimate. This commenter also argued that the average annual issuer cost to maintain the Allowed Amount File would be $643,000 with a range from $12,000 to $1,500,000. Another commenter argued that the cost to maintain the Allowed Amount File would be about 44 times costlier than the Departments' proposed estimate.

As noted above regarding the In-network Rate File cost and burdens, the Departments have devised updated estimates for the Allowed Amounts File using CALC derived wage rates. In developing the updated estimates, the Departments took into account the potential aggregation of data and the potential likelihood that the data required to meet the requirements of the final rules would need to be obtained from multiple sources.

The Departments estimate a one-time year one burden and cost to issuers and TPAs to make appropriate changes to IT systems and processes, to develop, implement, and operate the Allowed Amount File in order to meet the requirements of the final rules. The Departments estimate that each issuer or TPA will require a Scrum Master 520 hours (at $105 per hour), a Technical Architect/Sr. Developer 780 hours (at $149 per hour), an Application Developer, Senior 2,080 hours (at $143 per hour), a Business Analyst 520 hours (at $120 per hour), and a DevOps Engineer 260 hours (at $181 per hour) to complete this task. The Departments estimate the total one-time first year burden for each issuer or TPA will be approximately 4,160 hours, with an equivalent associated cost of approximately $577,720. For all 1,959 issuers and TPAs, the Departments estimate the total one-time year one burden will be 8,149,440 hours, with an equivalent associated cost of approximately $1,131,753,480.

TABLE 16A: Estimated One-Time Year One Cost and Hour Burden per Issuer or TPA for the Allowed Amount File

Occupation	Burden Hours per Respondent	Labor Cost per Hour	Total Cost per Respondent
Scrum Master	520	$105.00	$54,600.00
Technical Architect/Sr. Developer	780	$149.00	$116,220.00
Application Developer, Senior	2,080	$143.00	$297,440.00
Business Analyst	520	$120.00	$62,400.00
DevOps Engineer	260	$181.00	$47,060.00
Total per Respondent	4,160		$577,720.00

TABLE 16B: Estimated One-Time Year One Cost and Hour Burden for All Issuers and TPAs for the Allowed Amount File.

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
1,959	1,959	4,160	8,149,440	$1,131,753,480.00

In addition to the one-time year one costs estimated in Tables 16A and 16B, issuers and TPAs will incur additional monthly burdens and costs in year two to update the Allowed Amount File. The Departments estimate that, in year two, each issuer or TPA will require a Scrum Master 9 hours (at $105 per hour), an Application Developer, Senior 22 hours (at $143 per hour), and a DevOps Engineer 22 hour (at $181) to make the required monthly Allowed Amount File updates. The Departments estimate that each issuer or TPA will incur a monthly burden of 53 hours, with an equivalent associated cost of approximately $8,073 to update the Allowed Amount File. The Departments estimate that each issuer or TPA will need to update the Allowed Amount File 12 times during a given year, resulting in a year two annual burden of approximately 636 hours, with an equivalent associated cost of approximately $96,876. The Departments estimate the total year two burden for all 1,959 issuers and TPAs will be 1,245,924 hours, with an equivalent associated cost of approximately $189,780,084. The Departments consider this estimate to be an upper-bound estimate and expect ongoing Allowed Amount File update costs to decline in succeeding years as issuers and TPAs gain efficiencies and experience in updating and managing the Allowed Amount File.

TABLE 17A: Estimated Year Two Monthly Cost and Hour Burden per Issuer or TPA for the Allowed Amount File.

Occupation	Burden Hours per Respondent	Labor Cost per Hour	Total Cost per Respondent
Scrum Master	9	$105.00	$945.00
Application Developer, Senior	22	$143.00	$3,146.00
DevOps Engineer	22	$181.00	$3,982.00
Total per Respondent	53		$8,073.00

TABLE 17B: Estimated Year Two Cost and Hour Burden for All Issuers and TPAs for the Allowed Amount File.

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
1,959	23,508	636	1,245,924	$189,780,084.00

In addition to the one-time year one, monthly and total year two costs estimated in Tables 16A, 16B, 17A and 17B, in subsequent years, issuers and TPAs will incur additional ongoing monthly burdens and costs to update the required Allowed Amount File. The Departments estimate that for each issuer or TPA it will require a Scrum Master 4 hours (at $105 per hour), and an Application Developer, Senior 9 hours (at $143 per hour) to make the required monthly Allowed Amount File updates. The Departments estimate that each issuer or TPA will incur a monthly burden of 13 hours, with an equivalent associated cost of approximately $1,707 to update the Allowed Amount File. The Departments estimate that each issuer or TPA will need to update the Allowed Amount File 12 times during a given year, resulting in an ongoing annual burden of approximately 156 hours, with an equivalent associated cost of approximately $20,484. The Departments estimate the total burden for all 1,959 issuers and TPAs will be 305,604 hours, with an equivalent associated cost of approximately $40,128,156. The Departments consider this estimate to be an upper-bound estimate and expect ongoing Allowed Amount File update costs to decline in succeeding years as issuers and TPAs gain efficiencies and experience in updating and managing the Allowed Amount File.

TABLE 18A: Estimated Monthly Ongoing Cost and Hour Burden per Issuer or TPA for the Allowed Amount File.

Occupation	Burden Hours per Respondent	Labor Cost per Hour	Total Cost per Respondent
Scrum Master	4	$105.00	$420.00
Application Developer, Senior	9	$143.00	$1,287.00
Total per Respondent	13		$1,707.00

TABLE 18B: Estimated Annual Ongoing Cost and Hour Burden for All Issuers and TPAs for the Allowed Amount File.

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
1,959	23,508	156	305,604	$40,128,156.00

The Departments estimate the one-time year one burden for all issuers and TPAs will be 8,149,440 hours, with an equivalent associated cost of approximately $1,131,753,480 to develop and build the Allowed Amount File to meet the requirements of the final rules. In year two, the Departments estimate the total annual burden of 1,245,924 hours to maintain and update the Allowed Amount File, with an equivalent associated cost of approximately $189,780,084. In subsequent years, the Departments estimate the total annual burden to maintain and update the Allowed Amount File will be 305,604 hours, with an annual equivalent associated cost of approximately $40,128,156. The Departments estimate the three-year average annual total burden for all issuers and TPAs will be 3,233,656 hours, with an average annual total equivalent associated cost of approximately $453,887,240.

TABLE 19: Estimated Three Year Average Annual Hour Burden and Costs for All Issuers and TPAs to Develop and Maintain the Allowed Amount File.

Year	Estimated Number of Issuers and TPAs	Responses	Burden per Respondent (hours)	Total Annual Burden (hours)	Total Estimated Labor Cost
2021	1,959	1,959	4,160	8,149,440	$1,131,753,480.00
2022	1,959	23,508	636	1,245,924	$189,780,084.00
2023	1,959	23,508	156	305,604	$40,128,156.00
3 year Average	1,959	16,325	1,651	3,233,656	$453,887,240.00

The Departments sought comment for this collection of information request related to all aspects of the estimated burdens and costs. Specifically, the Departments sought comments related to any technical or operational difficulties associated with maintaining current and up-to-date provider network information or any out-of-network allowed amounts for covered items and services. The Departments also sought comments related to the technical and labor requirements or costs that may be required to meet the requirements in the final rules; specifically, any factors that could minimize the frequency of updates that issuers or TPAs would be required to make to the Allowed Amount File.

The Departments also solicited comments for this collection of information request related to all aspects of the estimated burdens and costs. Specifically, the Departments sought comments related to any technical or operational difficulties associated with collecting data and maintaining any out-of-network allowed amounts for covered items and services, including, any difficulties associated with the adjudication of paid claims and incorporating covered items or services furnished by a particular out-of-network provider during the 90-day time period that begins 180 days prior to the publication date of the Allowed Amount File. The Departments also sought comments related to the technical and labor requirements or costs that may be required to meet the requirements in the proposed rules: specifically, any factors that could minimize the burdens and costs associated with updates that issuers or TPAs would be required to make to the Allowed Amount File.

As addressed in section II.C in this preamble, the use of a HIPAA-compliant clearinghouse is permitted, but not required, in order to make the required information public. Plans and issuers are permitted to use HIPAA-compliant clearinghouses to meet the disclosure requirements and the Departments anticipate they may do so if this method is more efficient and cost-effective.

The Departments acknowledge that as many as 95 percent of group health plans and health insurance issuers may already contract with claims clearinghouses that currently collect some or all of the information required to be disclosed under the final rules and might be able to meet the requirements in the final rules easily, potentially obviating the need for the plan, issuer, or TPA to invest in IT system development. The Departments assume that these plans, issuers, and TPAs will still incur burdens and costs, albeit reduced, related to oversight and quality assurance regarding any associated clearinghouse activities. The Departments sought comments on existing efficiencies, such as the use of clearinghouses that could be leveraged by plans, issuers, and TPAs related to the development and updating of the required machine-readable files and how many issuers, TPAs, or self-insured plans may already contract with clearinghouses that collect the information required. Comments received are discussed earlier in the Use of Third Parties to Satisfy Public Disclosure Requirements section of this preamble.

For the Prescription Drug File, the Departments estimate one-time first-year burdens and costs to issuers and TPAs to make appropriate changes to IT systems and processes to develop, implement, and operate the Prescription Drug File in order to meet the requirements in the final rules. The Departments estimate that each issuer or TPA will require a Project Manager/Team Lead 260 hours (at $153 per hour), a Scrum Master 260 hours (at $105 per hour), an Application Developer, Senior 520 hours (at $143 per hour), a Business Analyst 520 hours (at $120 per hour), and a DevOps Engineer 260 hours (at $181 per hour) to complete this task. The total one-time first year burden for each issuer or TPA is estimated to be approximately 1,820 hours, with an equivalent associated cost of approximately $250,900. For all 1,959 issuers and TPAs, the Departments estimate the total one-time first year burden will be 3,565,380 hours, with an associated estimated cost of approximately $491,513,100. The Departments emphasize that these are upper bound estimates that are meant to be sufficient to cover substantial, complex activities that may be necessary for some plans and issuers to comply with the final rules due to the manner in which their current systems are designed. Such activities may include such significant activity as the design and implementation of databases that will support the production of the Prescription Drug File.

TABLE 20A: Estimated One-Time Year One Cost and Hour Burden per Issuer or TPA for the Prescription Drug File.

Occupation	Burden Hours per Respondent	Labor Cost per Hour	Total Cost per Respondent
Project Manager/Team Lead	260	$153.00	$39,780.00
Scrum Master	260	$105.00	$27,300.00
Application Developer, Senior	520	$143.00	$74,360.00
Business Analyst	520	$120.00	$62,400.00
DevOps Engineer	260	$181.00	$47,060.00
Total per Respondent	1,820		$250,900.00

TABLE 20B: Estimated One-Time Year One Cost and Hour Burden for All Issuers and TPAs for the Prescription Drug File.

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
1,959	1,959	1,820	3,565,380	$491,513,100.00

In addition to the one-time year one costs estimated in Tables 20A and 20B, issuers and TPAs will incur additional year two burdens and costs to update the required Prescription Drug File monthly. The Departments estimate that for each month, each issuer or TPA will require a Project Manager/Team Lead 22 hours (at $153 per hour), an Application Developer, Senior 22 hours (at $143 per hour), a Business Analyst 9 hours (at $120 per hour) and a DevOps Engineer 22 hours (at $181 per hour) to make the required updates and needed adjustments to the Prescription Drug File. The Departments estimate that each issuer or TPA will incur a monthly, year two, burden of 75 hours, with an associated monthly cost of approximately $11,574 to update the Prescription Drug File. Each issuer or TPA will need to update the Prescription Drug File 12 times during a given year, resulting in a year two burden of 900 hours, with an associated equivalent cost of approximately $138,888. The Departments estimate the total year two burden for all 1,959 issuers and TPAs will be 1,763,100 hours, with an associated equivalent cost of approximately $272,081,592. The Departments consider this estimate to be an upper-bound estimate and expect ongoing update costs to decline in succeeding years as issuers and TPAs gain efficiencies and experience in updating and managing the Prescription Drug File.

TABLE 21A: Estimated Monthly Year Two Cost and Hour Burden per Issuer or TPA for the Prescription Drug File.

Occupation	Burden Hours per Respondent	Labor Cost per Hour	Total Cost per Respondent
Project Manager/Team Lead	22	$153.00	$3,366.00
Application Developer, Senior	22	$143.00	$3,146.00
Business Analyst	9	$120.00	$1,080.00
DevOps Engineer	22	$181.00	$3,982.00
Total per Respondent	75		$11,574.00

TABLE 21B: Estimated Year Two Cost and Hour Burden for All Issuers and TPAs for the Prescription Drug File.

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
1,959	23,508	900	1,763,100	$272,081,592.00

In addition to the one-time year one and monthly year two costs estimated in Tables 20A, 20B, 21A and 21B, in subsequent years, issuers and TPAs will incur ongoing monthly burdens and costs to update and maintain the Prescription Drug File on a monthly basis. The Departments estimate that each issuer or TPA will require a Scrum Master 9 hours (at $153 per hour) and an Application Developer, Senior 22 hours (at $143 per hour) to make the required updates to the Prescription Drug File. The Departments estimate that each issuer or TPA will incur a monthly burden of 31 hours, with an associated cost of approximately $4,523, to update the Prescription Drug File. An issuer or TPA will need to update the Prescription Drug File 12 times during a given year, resulting in an ongoing annual burden of 372 hours, with an associated equivalent cost of approximately $54,276. The Departments estimate the total annual burden for all 1,959 issuers and TPAs will be 728,748 hours, with an associated equivalent cost of approximately $106,326,680. The Departments consider this estimate to be an upper-bound estimate and expect ongoing update costs to decline in succeeding years as issuers and TPAs gain efficiencies and experience in updating and managing Prescription Drug File.

TABLE 22A: Estimated Monthly Ongoing Cost and Hour Burden per Issuer or TPA for the Prescription Drug File.

Occupation	Burden Hours per Respondent	Labor Cost per Hour	Total Cost per Respondent
Scrum Master	9	$153.00	$1,377.00
Application Developer, Senior	22	$143.00	$3,146.00
Total per Respondent	31		$4,523.00

TABLE 22B: Estimated Annual Ongoing Cost and Hour Burden for All Issuers and TPAs for the Prescription Drug File

Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
1,959	23,508	372	728,748	$106,326,684.00

The Departments estimate the total one-time year one burden for all issuers and TPAs will be 3,565,380 hours, with an associated equivalent cost of approximately $491,513,100 to develop and build the Prescription Drug File in a machine-readable format. In year two, the Departments estimate the burden and costs to update and maintain the Prescription Drug File, on a monthly basis, for all issuers and TPAs to be 1,763,100 hours, with an associated equivalent cost of approximately $272,081,592. In subsequent years, the Departments estimate the total annual burden of 728,748 hours to maintain and update the Prescription Drug File, with an annual associated equivalent cost of approximately $106,326,684. The Departments estimate the three-year average annual total burden, for all issuers and TPAs, will be 2,019,076 hours with an average annual associated equivalent total cost of $289,973,792.

TABLE 23: Estimated Three Year Average Annual Hour Burden and Costs for All Issuers and TPAs to Develop and Maintain the Prescription Drug File.

Year	Estimated Number of Issuers and TPAs	Responses	Burden per Respondent (hours)	Total Annual Burden (hours)	Total Estimated Labor Cost
2021	1,959	1,959	1,820	3,565,380	$491,513,100.00
2022	1,959	23,508	900	1,763,100	$272,081,592.00
2023	1,959	23,508	372	728,748	$106,326,684.00
3 year Average	1,959	16,325	1,031	2,019,076	$289,973,792.00

Due to comments received in response to the proposed rules, the Departments have made changes to the final rules and the ICR sections discussed above. The Departments seek comment regarding the changes associated with these ICR sections. The Departments also seek comment on the use of the CALC database, as discussed in section VI.A, to determine occupational descriptions and hourly wage rates. The Departments seek comment on the revised costs and burdens discussed in section VI.A.1 as they relate to the required internet-based self-service tool. The Departments also seek com-

ment on model language developed by the Departments, as discussed in section II.B.1.g of this preamble, to meet the requirements of the final rule. The Departments also seek comment on the revised costs and burdens, as discussed in section VI.A.2, related to the requirements for the public disclosure of In-network Rate, Allowed Amount, and Prescription Drug Files. Additionally, the Departments seek comment on the data element changes associated with those collection instruments. For the In-network Rate File, the Departments seek comment regarding the data elements added to the collection instrument; specifically, addition of data elements including the TIN, Place of service code, derived amount, underlying fee schedule rates, payment arrangement indicator, the use of base negotiated rates (for certain reimbursement models), and other data elements discussed in section C.1.c of this preamble. The Departments also seek comment on the Allowed Amount File regarding the addition of data elements including the TIN, NPI, and billed charges associated with allowed amounts. The Departments seek comment on all data elements discussed in section C.1.c of this preamble as they relate to the Prescription Drug File, as well as the estimated costs and burdens estimated above.

In association with amendments made to the final rules, CMS is seeking OMB approval for the information collection requirements associated with OMB control number 0938-1372 (CMS-10715 – Transparency in Coverage). Comments will be solicited through a 60-day Federal Register notice, in accordance with Section 3506(c)(2)(A) of the Paperwork Reduction Act. Data collection requirements associated with the internet-based self-service tool, In-network Rate, Allowed Amount, and Prescription Drug Files will not be effective until OMB approval is sought. The Department of Labor and the Department of the Treasury will submit their burden estimates upon approval.

2. ICRs Regarding Medical Loss Ratio (45 CFR 158.221)

HHS is finalizing its proposal to amend 45 CFR 158.221(b) to allow health insurance issuers offering group or individual health insurance coverage to include in the MLR numerator "shared savings" payments made to enrollees as a result of the enrollee choosing to obtain health care from a lower-cost, higher-value provider. HHS does not anticipate that implementing this provision will require significant changes to the MLR Annual Reporting Form or will significantly change the associated burden. The burden related to this collection is currently approved under OMB Control Number 0938-1164 (Exp. 10/31/2020); Medical Loss Ratio Annual Reports, MLR Notices, and Recordkeeping Requirements (CMS-10418).

3. Summary of Annual Burden Estimates for Requirements

TABLE 24: Estimated Three Year Average Proposed Annual Recordkeeping and Reporting Requirements.

Regulation Section(s)	OMB control number	Number of Respondents	Number of Responses	Burden per Response (hours)	Total Annual Burden (hours)	Labor Cost of Reporting ($)	Mailing Cost ($)	Total Cost ($)
§§ 54.9815-2715A2(b)(2)(i); 2590.715-2715A2(b)(2)(i); and 147.211(b)(2)(i)	0938-1372*	1,959	1,959	23,313	45,670,820	$6,388,837,830.32	$0	$6,388,837,830.32
§§ 54.9815-2715A2(b)(2)(ii); 2590.715-2715A2(b)(2)(ii); and 147.211(b)(2)(ii)	0938-1372	1,306	84,926	11	21,231	$849,256.00	$39,065.78	$888,321.78
§§ 54.9815-2715A3(b)(i); 2590.715-2715A3(b)(i); and 147.212(b)(1)(i)	0938-1372	1,959	16,325	3,199	6,266,188	$848,390,660.00	$0	$848,390,660.00
§§54.9815-2715A3(b)(1)(ii); 2590.715-2715A3(b)(1)(ii); and 147.212(b)(1)(ii)	0938-1372	1,959	16,325	1,651	3,233,656	$453,887,240.00	$0	$453,887,240.00

Regulation Section(s)	OMB control number	Number of Respondents	Number of Responses	Burden per Response (hours)	Total Annual Burden (hours)	Labor Cost of Reporting ($)	Mailing Cost ($)	Total Cost ($)
§§54.9815-2715A3(b)(1)(iii); 2590.715-2715A3(b)(1)(iii); and 147.212(b)(1)(iii)	0938-1372	1,959	16,325	1,031	2,019,076	$289,973,792.00	$0	$289,973,792.00
Total			135,860	29,204	57,210,971	$7,981,938,778.32	$39,065.78	$7,981,977,844.10

* High-end three year estimated values are represented in the table and used to determine the overall estimated 3-year average.

For PRA purposes, the Departments are splitting the burden: CMS will account for 50 percent of the associated costs and burdens and the Departments of Labor and the Department of the Treasury will each account for 25 percent of the associated costs and burdens. The burden for CMS will be 28,605,486 hours, with an equivalent associated cost of approximately $3,990,969,389 and a cost burden of $19,533. For the Departments of Labor and the Treasury, each Department will account for a burden of 14,302,743 hours with an equivalent associated cost of approximately $1,995,484,695 and a cost burden of $9,766.

B. *Regulatory Flexibility Act*

The Regulatory Flexibility Act, (5 U.S.C. 601, *et seq*.), requires agencies to prepare a final regulatory flexibility analysis to describe the impact of proposed rules on small entities, unless the head of the agency can certify that the rule would not have a significant economic impact on a substantial number of small entities. The RFA generally defines a "small entity" as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA), (2) a not-for-profit organization that is not dominant in its field, or (3) a small government jurisdiction with a population of less than 50,000. States and individuals are not included in the definition of "small entity."

HHS uses a change in revenues of more than three to five percent as its measure of significant economic impact on a substantial number of small entities.

The final rules require that group health plans and health insurance issuers disclose to a participant, beneficiary, or enrollee such individual's cost-sharing information for covered items or services from a particular provider or providers; to make public in-network rates, including amounts in underlying fee schedules, negotiated rates, and derived amounts for in-network providers; historical allowed amounts paid to out-of-network providers and billed charges for all covered items and services; and negotiated rates and historical net prices for prescription drugs. The Departments are of the view issuers generally exceed the size thresholds for "small entities" established by the SBA, so the Departments are not of the view that an initial regulatory flexibility analysis is required for such firms. ERISA-covered plans are often small entities, however. While the Departments are of the view that these plans would rely on the larger issuers or TPAs to comply with the final rules, they would still experience increased costs because the costs of complying with these requirements will likely be passed on to them. However, as discussed in more detail later in this section of this preamble, the Departments are not of the view that the additional costs meet the significant impact requirement. In addition, while the requirements of the final rules do not apply to providers, providers may experience a loss in revenue as a result of the demands of price sensitive consumers and plans, and because smaller issuers may be unwilling to continue paying higher rates than larger issuers for the same items and services.

The Departments are of the view that issuers would be classified under the North American Industry Classification System code 524114 (Direct Health and Medical Insurance Carriers). According to SBA size standards, entities with average annual receipts of $41.5 million or less would be considered small entities under North American Industry Classification System codes. Issuers could possibly be classified under code 621491 (HMO Medical Centers) and, if this is the case, the SBA size standard would be $35 million or less.[294] The Departments are of the view that few, if any, insurance companies underwriting comprehensive health insurance policies (in contrast, for example, to travel insurance policies or dental discount policies) fall below these size thresholds. Based on data from MLR annual report submissions for the 2017 MLR reporting year, approximately 90 out of 500 issuers of health insurance coverage nationwide had total premium revenue of $41.5 million or less.[295] This estimate likely overstates the actual number of small health insurance issuers that may be affected, since over 72 percent of these small issuers belong to larger holding groups, and most, if not all, of these small issuers are likely to have non-health lines of business that will result in their revenues exceeding $41.5 million. The Departments are of the view that these same assumptions also

[294] "Table of Small Business Size Standards Matched to North American Industry Classification System Codes." United States Small Business Administration. Available at: https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf.
[295] "Medical Loss Ratio Data and System Resources." CCIIO. Available at https://www.cms.gov/CCIIO/Resources/Data-Resources/mlr.

apply to the TPAs that would be affected by the final rules. The Departments do not expect any of these 90 potentially small entities to experience a change in rebates under the amendments to the MLR provisions of the final rules in 45 CFR part 158. The Departments acknowledge that it may be likely that a number of small entities might enter into contracts with other entities in order to meet the requirements in the final rules, perhaps allowing for the development of economies of scale. Due to the lack of knowledge regarding what small entities may decide to do in order to meet these requirements and any costs they might incur related to contracts, the Departments sought comment on ways that the final rules will impose additional costs and burdens on small entities and how many would be likely to engage in contracts to meet the requirements.

The Departments received a number of comments related to the potential additional costs, burdens, and other effects the final rules could have on small entities. These comments have been noted and addressed in the RIA and ICR sections titled Regarding Requirements for Public Disclosure of In-network Rates, Historical Allowed Amount Data for Covered Items and Services from Out-of-Network Providers and Prescription Drug Pricing Information; Requirements for Disclosing Cost-sharing information to Participant, Beneficiaries, or Enrollees; and the Applicability Date section of this preamble.

For purposes of the RFA, the DOL continues to consider a small entity to be an employee benefit plan with fewer than 100 participants.[296] Furthermore, while some large employers may have small plans, most small plans are maintained by small employers.

Thus, the Departments are of the view that assessing the impact of the final rules on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the SBA (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631, *et seq.*). Therefore, EBSA requested comments on the appropriateness of the size standard used in evaluating the impact of the final rules on small entities. Using the DOL definition of small, about 2,160,743 of the approximately 2,327,339 plans are small entities. Using a threshold approach, if the total costs of the final rules are spread evenly across all 1,754 issuers, 205 TPAs, and 2,327,339 ERISA health plans, without considering size, using the three-year average costs, the per-entity costs could be $3,426.77 ($7,981,977,844.10/2,329,298). If those costs are spread evenly across the estimated 212.3 million beneficiaries, participants, or enrollees[297] enrolled in plans or issuers required to comply with the requirements then the average cost per covered individual would be $37.60 ($7,981,977,844.102/212.3 million). Neither the cost per entity nor the cost per covered individual is a significant impact. Further, the costs estimated in section VI in this preamble may be overstated as it is assumed that all of issuers and TPAs will build the internet-based self-service tool and the machine-readable files, compile the appropriate data, and perform the required updates themselves rather than using common third parties such as clearinghouses, as discussed in section II.C in this preamble. If private health insurance transactions are processed through clearinghouses, with at least the fields required in the machine-readable files, there could be an unaccounted for source of savings, as clearinghouses may already process much of the data that issuers and TPAs would be required to collect under the final rules.

In addition, section 1102(b) of the SSA (42 U.S.C. 1302) requires the Departments to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the SSA, the Departments define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds.

As noted and addressed in section II.B.2.C in this preamble, commenters expressed concerns that exposure of in-network rates could have various unintended consequences on the health care industry, group health plans and health insurance issuers, and providers. Also as discussed in the sections VI.A.2, one commenter stated that the proposed rules would create administrative burdens for hospitals as hospitals would be required to make massive investments to provide the data required under the final rules. The Departments note that the final rules do not explicitly apply to hospitals and do not agree that hospitals will require massive investments to comply with the final rules, as opposed to the potential costs they could incur in order to comply with the Hospital Price Transparency final rule. Furthermore, the Departments recognize that while the requirements of the final rules do not apply to providers, including hospitals, some providers may experience a loss in revenue as a result of the demands of price sensitive consumers. The Departments also recognize that while the requirements in the final rules may result in instances where small rural hospitals face additional costs and burdens due to their size and the market dynamics in their areas, the generally reduced competition amongst rural hospitals, due to the overall lower number of hospitals in these areas, will provide them more leverage when negotiating with issuers. Nonetheless, some rural hospitals may see their costs increase if the lack of competition results in these hospitals being unable to negotiate more favorable terms with plans and issuers. This dynamic could result in some small rural hospitals seeing their revenue decrease as reimbursement rates decline and overall costs increase, though rural hospitals could also see reduced costs and burdens if they are able to successfully negotiate more favorable network contracts. Due to a lack of information and overall knowledge, the Departments are not able to confidently estimate the effects the final rules will have on small rural hospitals; however, the Departments are of the view that the final rules will not have a significant

[296] The basis for this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants.
[297] *Id.* at 272.

impact on the operations of a substantial number of small rural hospitals.

Impact of Regulations on Small Business – Department of the Treasury

Pursuant to section 7805(f) of the Code, the proposed rules that preceded the final rules were submitted to the Chief Counsel for Advocacy of the SBA for comment on their impact on small businesses, and no comments were received.

C. *Unfunded Mandates*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain actions before issuing a final rule that includes any federal mandate that may result in expenditures in any one year by a state, local, or tribal governments, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2020, that threshold is approximately $156 million.

State, local, or tribal governments may incur costs to enforce some of the requirements of the final rules. The final rules include instructions for disclosures that would affect private sector firms (for example, issuers offering health insurance coverage in the individual and group markets, and TPAs providing administrative services to group health plans). The Departments acknowledge that state governments could incur costs associated with enforcement of sections within the final rules and, although the Departments have not been able to quantify all costs, the Departments expect the combined impact on state, local, and tribal governments to be below the threshold. The costs incurred by the private sector have been previously discussed in Collection of Information Requirements sections.

One commenter contended that due to the requirement to make the machine-readable files publicly available, issuers would also be required to post files with complete negotiated payment amount information, and that these files would be very complex, with thousands of procedure codes and many different plans and networks offered by issuers. The commenter further contended that due to the complexity and size of the files significant state resources would be required to review these files in order to ensure their accuracy, completeness, and timeliness. They contended that without funding states will be challenged in maintaining effective enforcement and urged the Departments to consider providing grants to states to cover the cost of enforcing any final rules.

The Departments recognize that due to size and complexity of the machine-readable files required some states will incur increased burdens and costs to review and ensure compliance with the requirements in the final rules. However, at this time, the Departments do not have available funding to provide grants to assist states in their efforts. The Departments will take it under consideration and evaluate the potential necessity to provide grants to assist states in their efforts should a significant need arise. The Departments expect that a number of states with the requisite authority to enforce the provisions of the final rules may defer enforcement to federal regulators because of lack of funds.

D. *Federalism*

Executive Order 13132 establishes certain requirements that an agency must meet when it issues a final rule that imposes substantial direct costs on state and local governments, preempts state law, or otherwise has federalism implications. Federal agencies promulgating regulations that have federalism implications must consult with state and local officials and describe the extent of their consultation and the nature of the concerns of state and local officials in this preamble to the regulation.

In the Departments' view, the final rules may have federalism implications, because they would have direct effects on the states, the relationship between national governments and states, and on the distribution of power and responsibilities among various levels of government relating to the disclosure of health insurance coverage information to the public.

Under the final rules, all group health plans and health insurance issuers, including self-insured, non-federal governmental group health plans as defined in section 2791 of the PHS Act, will be required to develop an internet-based self-service tool to disclose to a participant, beneficiary, or enrollee, the consumer-specific estimated cost-sharing liability for covered items or services from a particular provider and also to provide this information by mail upon request. The final rules also require plans and issuers to disclose provider in-network rates, historical data on out-of-network allowed amounts, and negotiated rates and historical net prices for prescription drugs through digital files in a machine-readable format posted publicly on an internet website. Such federal standards developed under section 2715A of the PHS Act preempt any related state standards that require pricing information to be disclosed to the participant, beneficiary, or enrollee, or otherwise publicly disclosed, to the extent the state disclosure requirements would provide less information to the consumer or the public than what is required under the final rules.

The Departments are of the view that the final rules may have federalism implications based on the required disclosure of pricing information, as the Departments are aware of at least 28 states that have passed some form of price-transparency legislation, such as all-payer claims databases, consumer-facing price comparison tools, and the right to shop programs.[298] Under these state provisions, state requirements vary broadly in terms of the level of disclosure required.[299] Some states list the price for each individual service, whereas some states list the aggregate costs across providers and over time to measure the price associated with an episode of illness. States also differ in terms of the dissemination of the information. For example, California mandates that uninsured patients receive estimated prices

[298] "Transparency of Health Costs; State Actions." National Conference of State Legislatures. March 2017. Available at: https://www.ncsl.org/research/health/transparency-and-disclosure-health-costs.aspx.

[299] Mehrotra, A., Chernew, M., and Sinaiko, A. "Promise and Reality of Price Transparency." 14 N. Engl. J. Med. 378. April 5, 2018. Available at: https://www.nejm.org/doi/full/10.1056/NEJMhpr1715229.

upon request. In contrast, other states use websites or software applications that allow consumers to compare prices across providers. Only seven states have published the pricing information of issuers on consumer-facing public websites.[300] Therefore, the final rules may require a higher level of disclosure by plans and issuers than some state laws.

One commenter asked that the Departments clarify their intentions regarding federal preemption with respect to state laws that conflict with the final rules. Congress passed PPACA to improve the health insurance markets on a nationwide basis. *King. v. Burwell*, 135 S. Ct. 2480, 2496 (2015). Under section 1321(d) of PPACA and section 2724(a) of the PHS Act, nothing in these regulations would preempt state law unless such state law prevents the application of the applicable federal requirement. Based on this legal context, the Departments intend the implementation of the rules to preempt state law to the extent enforcement of state law would prevent the application of PPACA.[301] To the extent the final rules preempt state law, they do so under well-settled law.

In general, through section 514, ERISA supersedes state laws to the extent that they relate to any covered employee benefit plan, and preserves state laws that regulate insurance, banking, or securities. Furthermore, the preemption provisions of section 731 of ERISA and section 2724 of the PHS Act (implemented in 29 CFR 2590.731(a) and 45 CFR 146.143(a)) apply so that the HIPAA requirements (including those of PPACA) are not to be "construed to supersede any provision of state law which establishes, implements, or continues in effect any standard or requirement solely relating to issuers in connection with group health insurance coverage except to the extent that such standard or requirement prevents the application of a 'requirement' of a federal standard." The conference report accompanying HIPAA indicates that this preemption is intended to be the "narrowest" preemption of states laws (See House Conf. Rep. No. 104– 736, at 205, reprinted in 1996 U.S. Code Cong. & Admin. News 2018). States may therefore continue to apply state law requirements to issuers except to the extent that such requirements prevent the application of PPACA requirements that are the subject of this rulemaking. Accordingly, states have significant latitude to impose requirements on issuers that are more restrictive than the federal law.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policy making discretion of the states, the Departments have engaged in efforts to consult with and work cooperatively with affected states, including participating in conference calls with and attending conferences of NAIC, and consulting with state insurance officials on an individual basis. The Departments intend to act in a similar fashion in enforcing PPACA, including the provisions of section 2715A of the PHS Act. While developing the final rules, the Departments attempted to balance the states' interests in regulating issuers with Congress' intent to provide an improved level of price transparency to the public in every state. By doing so, it is the Departments' view that they have complied with the requirements of Executive Order 13132.

Pursuant to the requirements set forth in section 8(a) of Executive Order 13132, and by the signatures affixed to the final rules, the Departments certify that the Department of the Treasury, Employee Benefits Security Administration, and the CMS have complied with the requirements of Executive Order 13132 for the final rules in a meaningful and timely manner.

E. *Congressional Review Act*

The final rules are subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801, *et seq*.), which specifies that before a rule can take effect, the federal agency promulgating the rule shall submit to each House of the Congress and to the Comptroller General a report containing a copy of the rule along with other specified information. Therefore, the final rules have been transmitted to the Congress and the Comptroller General. Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs designated the final rules as "major rules" as that term is defined in 5 U.S.C. 804(2), because it is likely to result in an annual effect on the economy of $100 million or more. In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

F. *Reducing Regulation and Controlling Regulatory Costs*

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017. Section 2(a) of Executive Order 13771 requires an agency, unless prohibited by law, to identify at least two existing regulations to be repealed when the agency publicly proposes for notice and comment, or otherwise issues, a new regulation. In furtherance of this requirement, section 2(c) of Executive Order 13771 requires that the new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.

The final rules are considered an Executive Order 13771 regulatory action. The Departments estimate that these rules will generate $3,489.71 million in costs in 2021, $10,761.15 million in 2022, $6,569 million in 2023, and annual costs of approximately $2,330 million thereafter. Discounted at 7 percent relative to year 2016, over a perpetual time horizon the annualized value of these costs is $2,413.54 million. Details on the estimated costs of the final rules can be found in the preceding analyses.

[300] Evans, M. "One State's Effort to Publicize Hospital Prices Brings Mixed Results." Wall Street Journal. June 26, 2019. Available at: https://www.wsj.com/articles/one-states-effort-to-publicize-hospital-prices-brings-mixed-results-11561555562.

[301] *See* section 1321(d) of PPACA ("Nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title.)

VII. Statutory Authority

The Department of the Treasury regulations are adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.

The Department of Labor regulations are adopted pursuant to the authority contained in 29 U.S.C. 1135, 1185d, and 1191c; and Secretary of Labor's Order 1-2011, 77 FR 1088 (Jan. 9, 2012).

The Department of Health and Human Services regulations are adopted pursuant to the authority contained in sections 1311 of PPACA, 2701 through 2763, 2791, 2792, and 2794 of the PHS Act (42 U.S.C. 300gg through 300gg-63, 300gg-91, 300gg-92, and 300gg-94), as amended.

Sunita Lough
Deputy Commissioner for Services and Enforcement,
Internal Revenue Service.

Approved: October 28, 2020

David J. Kautter
Assistant Secretary of the Treasury (Tax Policy).

Signed at Washington DC, this 30th day of October, 2020

Jeanne Klinefelter Wilson,
Acting Assistant Secretary,
Employee Benefits Security Administration,
Department of Labor

Dated: *October 8, 2020*.

Seema Verma,
Administrator,
Centers for Medicare & Medicaid Services.

Dated: *October 20, 2020*.

Alex M. Azar II,
Secretary,
Department of Health and Human Services.

List of Subjects

26 CFR part 54

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR part 2590

Continuation coverage, Disclosure, Employee benefit plans, Group health plans, Health care, Health insurance, Medical child support, Reporting and recordkeeping requirements.

45 CFR part 147

Health care, Health insurance, Reporting and recordkeeping requirements, State regulation of health insurance.

45 CFR part 158

Administrative practice and procedure, Claims, Health care, Health insurance, Penalties, Reporting and recordkeeping requirements.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Amendments to the Regulations

For the reasons set forth in this preamble, the Department of the Treasury amends 26 CFR part 54 as set forth below:

PART 54—PENSION EXCISE TAXES

Par. 1. The authority citation for part 54 is amended by adding an entry for § 54.9815-2715A in numerical order to read in part as follows:

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

Section 54.9815-2715A1, 54.9815-2715A2, 54.9815-2715A3 are also issued under 26 U.S.C. 9833;

* * * * *

Par. 2. Sections 54.9815-2715A1, 54.9815-2715A2, 54.9815-2715A3 are added to read as follows:

§ 54.9815-2715A1 Transparency in coverage- Definitions.

(a) *Scope and definitions* (1) *Scope.* This section sets forth definitions for the price transparency requirements for group health plans and health insurance issuers offering group health insurance coverage established in this section and §§ 54.9815-2715A2, 54.9815-2715A3.

(2) *Definitions.* For purposes of this section and §§ 54.9815-2715A2, 54.9815-2715A3, the following definitions apply:

(i) *Accumulated amounts* means:

(A) The amount of financial responsibility a participant or beneficiary has incurred at the time a request for cost-sharing information is made, with respect to a deductible or out-of- pocket limit. If an individual is enrolled in other than self-only coverage, these accumulated amounts shall include the financial responsibility a participant or beneficiary has incurred toward meeting his or her individual deductible or out-of-pocket limit, as well as the amount of financial responsibility that all the individuals enrolled under the plan or coverage have incurred, in aggregate, toward meeting the other than self-only deductible or out-of-pocket limit, as applicable. Accumulated amounts include any expense that counts toward a deductible or out-of-pocket limit (such as a copayment or coinsurance), but exclude any expense that does not count toward a deductible or out-of-pocket limit (such as any premium payment, out-of-pocket expense for out-of-network services, or amount for items or services not covered under the group health plan or health insurance coverage); and

(B) To the extent a group health plan or health insurance issuer imposes a cumulative treatment limitation on a particular covered item or service (such as a limit on the number of items, days, units, visits, or hours covered in a defined time period) independent of individual medical necessity determinations, the amount that has accrued toward the limit on the item or service (such as the number of items, days, units, visits, or hours the participant or beneficiary, has used within that time period).

(ii) *Beneficiary* has the meaning given the term under section 3(8) of the Em-

ployee Retirement Income Security Act of 1974 (ERISA).

(iii) *Billed charge* means the total charges for an item or service billed to a group health plan or health insurance issuer by a provider.

(iv) *Billing code* means the code used by a group health plan or health insurance issuer or provider to identify health care items or services for purposes of billing, adjudicating, and paying claims for a covered item or service, including the Current Procedural Terminology (CPT) code, Healthcare Common Procedure Coding System (HCPCS) code, Diagnosis-Related Group (DRG) code, National Drug Code (NDC), or other common payer identifier.

(v) *Bundled payment arrangement* means a payment model under which a provider is paid a single payment for all covered items and services provided to a participant or beneficiary for a specific treatment or procedure.

(vi) *Copayment assistance* means the financial assistance a participant or beneficiary receives from a prescription drug or medical supply manufacturer towards the purchase of a covered item or service.

(vii) *Cost-sharing liability* means the amount a participant or beneficiary is responsible for paying for a covered item or service under the terms of the group health plan or health insurance coverage. Cost-sharing liability generally includes deductibles, coinsurance, and copayments, but does not include premiums, balance billing amounts by out-of-network providers, or the cost of items or services that are not covered under a group health plan or health insurance coverage.

(viii) *Cost-sharing information* means information related to any expenditure required by or on behalf of a participant or beneficiary with respect to health care benefits that are relevant to a determination of the participant's or beneficiary's cost-sharing liability for a particular covered item or service.

(ix) *Covered items or services* means those items or services, including prescription drugs, the costs for which are payable, in whole or in part, under the terms of a group health plan or health insurance coverage.

(x) *Derived amount* means the price that a group health plan or health insurance issuer assigns to an item or service for the purpose of internal accounting, reconciliation with providers, or submitting data in accordance with the requirements of 45 CFR 153.710(c).

(xi) *Historical net price* means the retrospective average amount a group health plan or health insurance issuer paid for a prescription drug, inclusive of any reasonably allocated rebates, discounts, chargebacks, fees, and any additional price concessions received by the plan or issuer with respect to the prescription drug. The allocation shall be determined by dollar value for non-product specific and product-specific rebates, discounts, chargebacks, fees, and other price concessions to the extent that the total amount of any such price concession is known to the group health plan or health insurance issuer at the time of publication of the historical net price in a machine-readable file in accordance with § 54.9815-2715A3. However, to the extent that the total amount of any non-product specific and product-specific rebates, discounts, chargebacks, fees, or other price concessions is not known to the group health plan or health insurance issuer at the time of file publication, then the plan or issuer shall allocate such rebates, discounts, chargebacks, fees, and other price concessions by using a good faith, reasonable estimate of the average price concessions based on the rebates, discounts, chargebacks, fees, and other price concessions received over a time period prior to the current reporting period and of equal duration to the current reporting period, as determined under § 54.9815-2715A3 (b)(1)(iii)(D)(3).

(xii) *In-network provider* means any provider of any item or service with which a group health plan or health insurance issuer, or a third party for the plan or issuer, has a contract setting forth the terms and conditions on which a relevant item or service is provided to a participant or beneficiary.

(xiii) *Items or services* means all encounters, procedures, medical tests, supplies, prescription drugs, durable medical equipment, and fees (including facility fees), provided or assessed in connection with the provision of health care.

(xiv) *Machine-readable file* means a digital representation of data or information in a file that can be imported or read by a computer system for further processing without human intervention, while ensuring no semantic meaning is lost.

(xv) *National Drug Code* means the unique 10- or 11-digit 3-segment number assigned by the Food and Drug Administration, which provides a universal product identifier for drugs in the United States.

(xvi) *Negotiated rate* means the amount a group health plan or health insurance issuer has contractually agreed to pay an in-network provider, including an in-network pharmacy or other prescription drug dispenser, for covered items and services, whether directly or indirectly, including through a third-party administrator or pharmacy benefit manager.

(xvii) *Out-of-network allowed amount* means the maximum amount a group health plan or health insurance issuer will pay for a covered item or service furnished by an out-of-network provider.

(xviii) *Out-of-network provider* means a provider of any item or service that does not have a contract under a participant's or beneficiary's group health plan or health insurance coverage to provide items or services.

(xix) *Out-of-pocket limit* means the maximum amount that a participant or beneficiary is required to pay during a coverage period for his or her share of the costs of covered items and services under his or her group health plan or health insurance coverage, including for self-only and other than self-only coverage, as applicable.

(xx) *Plain language* means written and presented in a manner calculated to be understood by the average participant or beneficiary.

(xxi) *Prerequisite* means concurrent review, prior authorization, and step-therapy or fail-first protocols related to covered items and services that must be satisfied before a group health plan or health insurance issuer will cover the item or service. The term prerequisite does not include medical necessity determinations generally or other forms of medical management techniques.

(xxii) *Underlying fee schedule rate* means the rate for a covered item or service from a particular in-network provider, or providers that a group health plan or health insurance issuer uses to determine a

participant's or beneficiary's cost-sharing liability for the item or service, when that rate is different from the negotiated rate or derived amount.

(b) [Reserved]

§ 54.9815-2715A2 Transparency in coverage - Required disclosures to participants and beneficiaries.

(a) *Scope and definitions.* (1) *Scope.* This section establishes price transparency requirements for group health plans and health insurance issuers offering group health insurance coverage for the timely disclosure of information about costs related to covered items and services under a group plan or health insurance coverage.

(2) *Definitions.* For purposes of this section, the definitions in § 54.9815-2715A1 apply.

(b) *Required disclosures to participants and beneficiaries*. At the request of a participant or beneficiary who is enrolled in a group health plan, the plan must provide to the participant or beneficiary the information required under paragraph (b)(1) of this section, in accordance with the method and format requirements set forth in paragraph (b)(2) of this section.

(1) *Required cost-sharing information.* The information required under this paragraph (b)(1) is the following cost-sharing information, which is accurate at the time the request is made, with respect to a participant's or beneficiary's cost-sharing liability for covered items and services:

(i) An estimate of the participant's or beneficiary's cost-sharing liability for a requested covered item or service furnished by a provider or providers that is calculated based on the information described in paragraphs (b)(1)(ii) through (iv) of this section.

(A) If the request for cost-sharing information relates to items and services that are provided within a bundled payment arrangement, and the bundled payment arrangement includes items or services that have a separate cost-sharing liability, the group health plan or health insurance issuer must provide estimates of the cost-sharing liability for the requested covered item or service, as well as an estimate of the cost-sharing liability for each of the items and services in the bundled payment arrangement that have separate cost-sharing liabilities. While group health plans and health insurance issuers are not required to provide estimates of cost-sharing liability for a bundled payment arrangement where the cost-sharing is imposed separately for each item and service included in the bundled payment arrangement, nothing prohibits plans or issuers from providing estimates for multiple items and services in situations where such estimates could be relevant to participants or beneficiaries, as long as the plan or issuer also discloses information about the relevant items or services individually, as required in paragraph (b)(1)(v) of this section.

(B) For requested items and services that are recommended preventive services under section 2713 of the Public Health Service Act (PHS Act), if the group health plan or health insurance issuer cannot determine whether the request is for preventive or non-preventive purposes, the plan or issuer must display the cost-sharing liability that applies for non-preventive purposes. As an alternative, a group health plan or health insurance issuer may allow a participant or beneficiary to request cost-sharing information for the specific preventive or non-preventive item or service by including terms such as "preventive", "non-preventive" or "diagnostic" as a means to request the most accurate cost-sharing information.

(ii) Accumulated amounts;

(iii) In-network rate, comprised of the following elements, as applicable to the group health plan's or health insurance issuer's payment model:

(A) Negotiated rate, reflected as a dollar amount, for an in-network provider or providers for the requested covered item or service; this rate must be disclosed even if it is not the rate the plan or issuer uses to calculate cost-sharing liability; and

(B) Underlying fee schedule rate, reflected as a dollar amount, for the requested covered item or service, to the extent that it is different from the negotiated rate;

(iv) Out-of-network allowed amount or any other rate that provides a more accurate estimate of an amount a group health plan or health insurance issuer will pay for the requested covered item or service, reflected as a dollar amount, if the request for cost-sharing information is for a covered item or service furnished by an out-of-network provider; provided, however, that in circumstances in which a plan or issuer reimburses an out-of-network provider a percentage of the billed charge for a covered item or service, the out-of-network allowed amount will be that percentage.

(v) If a participant or beneficiary requests information for an item or service subject to a bundled payment arrangement, a list of the items and services included in the bundled payment arrangement for which cost-sharing information is being disclosed.

(vi) If applicable, notification that coverage of a specific item or service is subject to a prerequisite; and,

(vii) A notice that includes the following information in plain language:

(A) A statement that out-of-network providers may bill participants or beneficiaries for the difference between a provider's billed charges and the sum of the amount collected from the group health plan or health insurance issuer and from the participant or beneficiary in the form of a copayment or coinsurance amount (the difference referred to as balance billing), and that the cost-sharing information provided pursuant to this paragraph (b)(1)(i) does not account for these potential additional amounts. This statement is only required if balance billing is permitted under state law;

(B) A statement that the actual charges for a participant's or beneficiary's covered item or service may be different from an estimate of cost-sharing liability provided pursuant to paragraph (b)(1)(i) of this section, depending on the actual items or services the participant or beneficiary receives at the point of care;

(C) A statement that the estimate of cost-sharing liability for a covered item or service is not a guarantee that benefits will be provided for that item or service;

(D) A statement disclosing whether the plan counts copayment assistance and other third-party payments in the calculation of the participant's or beneficiary's deductible and out-of-pocket maximum;

(E) For items and services that are recommended preventive services under section 2713 of the PHS Act, a statement that an in-network item or service may not be subject to cost-sharing if it is billed as a preventive service if the group health plan or health insurance issuer cannot deter-

mine whether the request is for a preventive or non-preventive item or service; and

(F) Any additional information, including other disclaimers, that the group health plan or health insurance issuer determines is appropriate, provided the additional information does not conflict with the information required to be provided by this paragraph (b)(1).

(2) *Required methods and formats for disclosing information to participants and beneficiaries.* The methods and formats for the disclosure required under this paragraph (b) are as follows:

(i) *Internet-based self-service tool*. Information provided under this paragraph (b) must be made available in plain language, without subscription or other fee, through a self-service tool on an internet website that provides real-time responses based on cost-sharing information that is accurate at the time of the request. Group health plans and health insurance issuers must ensure that the self-service tool allows users to:

(A) Search for cost-sharing information for a covered item or service provided by a specific in-network provider or by all in-network providers by inputting:

(*1*) A billing code (such as CPT code 87804) or a descriptive term (such as "rapid flu test"), at the option of the user;

(*2*) The name of the in-network provider, if the user seeks cost-sharing information with respect to a specific in-network provider; and

(*3*) Other factors utilized by the plan or issuer that are relevant for determining the applicable cost-sharing information (such as location of service, facility name, or dosage).

(B) Search for an out-of-network allowed amount, percentage of billed charges, or other rate that provides a reasonably accurate estimate of the amount a group health plan or health insurance issuer will pay for a covered item or service provided by out-of-network providers by inputting:

(*1*) A billing code or descriptive term, at the option of the user; and

(*2*) Other factors utilized by the plan or issuer that are relevant for determining the applicable out-of-network allowed amount or other rate (such as the location in which the covered item or service will be sought or provided).

(C) Refine and reorder search results based on geographic proximity of in-network providers, and the amount of the participant's or beneficiary's estimated cost-sharing liability for the covered item or service, to the extent the search for cost-sharing information for covered items or services returns multiple results.

(ii) *Paper method*. Information provided under this paragraph (b) must be made available in plain language, without a fee, in paper form at the request of the participant or beneficiary. In responding to such a request, the group health plan or health insurance issuer may limit the number of providers with respect to which cost-sharing information for covered items and services is provided to no fewer than 20 providers per request. The group health plan or health insurance issuer is required to:

(A) Disclose the applicable provider-per-request limit to the participant or beneficiary;

(B) Provide the cost-sharing information in paper form pursuant to the individual's request, in accordance with the requirements in paragraphs (b)(2)(i)(A) through (C) of this section; and

(C) Mail the cost-sharing information in paper form no later than 2 business days after an individual's request is received.

(D) To the extent participants or beneficiaries request disclosure other than by paper (for example, by phone or e-mail), plans and issuers may provide the disclosure through another means, provided the participant or beneficiary agrees that disclosure through such means is sufficient to satisfy the request and the request is fulfilled at least as rapidly as required for the paper method.

(3) *Special rule to prevent unnecessary duplication.*

(i) Special rule for insured group health plans. To the extent coverage under a group health plan consists of group health insurance coverage, the plan satisfies the requirements of this paragraph (b) if the plan requires the health insurance issuer offering the coverage to provide the information required by this paragraph (b) in compliance with this section pursuant to a written agreement. Accordingly, if a health insurance issuer and a plan sponsor enter into a written agreement under which the issuer agrees to provide the information required under this paragraph (b) in compliance with this section, and the issuer fails to do so, then the issuer, but not the plan, violates the transparency disclosure requirements of this paragraph (b).

(ii) *Other contractual arrangements*. A group health plan or health insurance issuer may satisfy the requirements under this paragraph (b) by entering into a written agreement under which another party (such as a pharmacy benefit manager or other third-party) provides the information required by this paragraph (b) in compliance with this section. Notwithstanding the preceding sentence, if a group health plan or health insurance issuer chooses to enter into such an agreement and the party with which it contracts fails to provide the information in compliance with this paragraph (b), the plan or issuer violates the transparency disclosure requirements of this paragraph (b).

(c) *Applicability.* (1) The provisions of this section apply for plan years beginning on or after January 1, 2023 with respect to the 500 items and services to be posted on a publicly available website, and with respect to all covered items and services, for plan years beginning on or after January 1, 2024.

(2) As provided under § 54.9815-1251, this section does not apply to grandfathered health plans. This section also does not apply to health reimbursement arrangements or other account-based group health plans as defined in § 54.9815-2711(d)(6) or short-term, limited-duration insurance as defined in § 54.9801-2.

(3) Nothing in this section alters or otherwise affects a group health plan's or health insurance issuer's duty to comply with requirements under other applicable state or federal laws, including those governing the accessibility, privacy, or security of information required to be disclosed under this section, or those governing the ability of properly authorized representatives to access participant or beneficiary information held by plans and issuers.

(4) A group health plan or health insurance issuer will not fail to comply with this section solely because it, acting in good faith and with reasonable diligence, makes an error or omission in a disclosure required under paragraph (b) of this section, provided that the plan or issuer corrects the information as soon as practicable.

(5) A group health plan or health insurance issuer will not fail to comply with this section solely because, despite acting in good faith and with reasonable diligence, its internet website is temporarily inaccessible, provided that the plan or issuer makes the information available as soon as practicable.

(6) To the extent compliance with this section requires a group health plan or health insurance issuer to obtain information from any other entity, the plan or issuer will not fail to comply with this section because it relied in good faith on information from the other entity, unless the plan or issuer knows, or reasonably should have known, that the information is incomplete or inaccurate.

(d) *Severability.* Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

§ 54.9815-2715A3 Transparency in coverage - Requirements for public disclosure.

(a) *Scope and definitions*—(1) *Scope.* This section establishes price transparency requirements for group health plans and health insurance issuers offering group health insurance coverage for the timely disclosure of information about costs related to covered items and services under a group plan or health insurance coverage.

(2) *Definitions.* For purposes of this section, the definitions in **§** 54.9815-2715A1 apply.

(b) *Requirements for public disclosure of in-network provider rates for covered items and services, out-of-network allowed amounts and billed charges for covered items and services, and negotiated rates and historical net prices for covered prescription drugs.* A group health plan or health insurance issuer must make available on an internet website the information required under paragraph (b)(1) of this section in three machine-readable files, in accordance with the method and format requirements described in paragraph (b)(2) of this section, and that are updated as required under paragraph (b)(3) of this section.

(1) *Required information*. Machine-readable files required under this paragraph (b) that are made available to the public by a group health plan or health insurance issuer must include:

(i) An in-network rate machine-readable file that includes the required information under this paragraph (b)(1)(i) for all covered items and services, except for prescription drugs that are subject to a fee-for-service reimbursement arrangement, which must be reported in the prescription drug machine-readable file pursuant to paragraph (b)(1)(iii) of this section. The in-network rate machine-readable file must include:

(A) For each coverage option offered by a group health plan or health insurance issuer, the name and the 14-digit Health Insurance Oversight System (HIOS) identifier, or, if the 14-digit HIOS identifier is not available, the 5-digit HIOS identifier, or if no HIOS identifier is available, the Employer Identification Number (EIN);

(B) A billing code, which in the case of prescription drugs must be an NDC, and a plain language description for each billing code for each covered item or service under each coverage option offered by a plan or issuer; and

(C) All applicable rates, which may include one or more of the following: negotiated rates, underlying fee schedule rates, or derived amounts. If a group health plan or health insurance issuer does not use negotiated rates for provider reimbursement, then the plan or issuer should disclose derived amounts to the extent these amounts are already calculated in the normal course of business. If the group health plan or health insurance issuer uses underlying fee schedule rates for calculating cost sharing, then the plan or issuer should include the underlying fee schedule rates in addition to the negotiated rate or derived amount. Applicable rates, including for both individual items and services and items and services in a bundled payment arrangement, must be:

(*1*) Reflected as dollar amounts, with respect to each covered item or service that is furnished by an in-network provider. If the negotiated rate is subject to change based upon participant or beneficiary-specific characteristics, these dollar amounts should be reflected as the base negotiated rate applicable to the item or service prior to adjustments for participant or beneficiary-specific characteristics;

(*2*) Associated with the National Provider Identifier (NPI), Tax Identification Number (TIN), and Place of Service Code for each in-network provider;

(*3*) Associated with the last date of the contract term or expiration date for each provider-specific applicable rate that applies to each covered item or service; and

(4) Indicated with a notation where a reimbursement arrangement other than a standard fee-for-service model (such as capitation or a bundled payment arrangement) applies.

(ii) An out-of-network allowed amount machine-readable file, including:

(A) For each coverage option offered by a group health plan or health insurance issuer, the name and the 14-digit HIOS identifier, or, if the 14-digit HIOS identifier is not available, the 5-digit HIOS identifier, or, if no HIOS identifier is available, the EIN;

(B) A billing code, which in the case of prescription drugs must be an NDC, and a plain language description for each billing code for each covered item or service under each coverage option offered by a plan or issuer;

(C) Unique out-of-network allowed amounts and billed charges with respect to covered items or services, furnished by out-of-network providers during the 90-day time period that begins 180 days prior to the publication date of the machine-readable file (except that a group health plan or health insurance issuer must omit such data in relation to a particular item or service and provider when compliance with this paragraph (b)(1)(ii)(C) would require the plan or issuer to report payment of out-of-network allowed amounts in connection with fewer than 20 different claims for payments under a single plan or coverage). Consistent with paragraph (c)(3) of this section, nothing in this paragraph (b)(1)(ii)(C) requires the disclosure of information that would violate any applicable health information privacy law. Each unique out-of-network allowed amount must be:

(*1*) Reflected as a dollar amount, with respect to each covered item or service

that is furnished by an out-of-network provider; and

(*2*) Associated with the NPI, TIN, and Place of Service Code for each out-of-network provider.

(iii) A prescription drug machine-readable file, including:

(A) For each coverage option offered by a group health plan or health insurance issuer, the name and the 14-digit HIOS identifier, or, if the 14-digit HIOS identifier is not available, the 5-digit HIOS identifier, or, if no HIOS identifier is available, the EIN;

(B) The NDC and the proprietary and nonproprietary name assigned to the NDC by the Food and Drug Administration (FDA) for each covered item or service that is a prescription drug under each coverage option offered by a plan or issuer;

(C) The negotiated rates which must be:

(*1*) Reflected as a dollar amount, with respect to each NDC that is furnished by an in-network provider, including an in-network pharmacy or other prescription drug dispenser;

(*2*) Associated with the NPI, TIN, and Place of Service Code for each in-network provider, including each in-network pharmacy or other prescription drug dispenser; and

(*3*) Associated with the last date of the contract term for each provider-specific negotiated rate that applies to each NDC; and

(D) Historical net prices that are:

(*1*) Reflected as a dollar amount, with respect to each NDC that is furnished by an in-network provider, including an in-network pharmacy or other prescription drug dispenser;

(*2*) Associated with the NPI, TIN, and Place of Service Code for each in-network provider, including each in-network pharmacy or other prescription drug dispenser; and

(*3*) Associated with the 90-day time period that begins 180 days prior to the publication date of the machine-readable file for each provider-specific historical net price that applies to each NDC (except that a group health plan or health insurance issuer must omit such data in relation to a particular NDC and provider when compliance with this paragraph (b)(1)(iii)(D) would require the plan or issuer to report payment of historical net prices calculated using fewer than 20 different claims for payment). Consistent with paragraph (c)(3) of this section, nothing in this paragraph (b)(1)(iii)(D) requires the disclosure of information that would violate any applicable health information privacy law.

(2) *Required method and format for disclosing information to the public*. The machine-readable files described in this paragraph (b) must be available in a form and manner as specified in guidance issued by the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services. The machine-readable files must be publicly available and accessible to any person free of charge and without conditions, such as establishment of a user account, password, or other credentials, or submission of personally identifiable information to access the file.

(3) *Timing*. A group health plan or health insurance issuer must update the machine-readable files and information required by this paragraph (b) monthly. The group health plan or health insurance issuer must clearly indicate the date that the files were most recently updated.

(4) *Special rules to prevent unnecessary duplication—*

(i) *Special rule for insured group health plans.* To the extent coverage under a group health plan consists of group health insurance coverage, the plan satisfies the requirements of this paragraph (b) if the plan requires the health insurance issuer offering the coverage to provide the information pursuant to a written agreement. Accordingly, if a health insurance issuer and a group health plan sponsor enter into a written agreement under which the issuer agrees to provide the information required under this paragraph (b) in compliance with this section, and the issuer fails to do so, then the issuer, but not the plan, violates the transparency disclosure requirements of this paragraph (b).

(ii) *Other contractual arrangements*. A group health plan or health insurance issuer may satisfy the requirements under this paragraph (b) by entering into a written agreement under which another party (such as a third-party administrator or health care claims clearinghouse) will provide the information required by this paragraph (b) in compliance with this section. Notwithstanding the preceding sentence, if a group health plan or health insurance issuer chooses to enter into such an agreement and the party with which it contracts fails to provide the information in compliance with this paragraph (b), the plan or issuer violates the transparency disclosure requirements of this paragraph (b).

(iii) *Aggregation permitted for out-of-network allowed amounts*. Nothing in this section prohibits a group health plan or health insurance issuer from satisfying the disclosure requirement described in paragraph (b)(1)(ii) of this section by disclosing out-of-network allowed amounts made available by, or otherwise obtained from, an issuer, a service provider, or other party with which the plan or issuer has entered into a written agreement to provide the information, provided the minimum claim threshold described in paragraph (b)(1)(ii)(C) of this section is independently met for each item or service and for each plan or coverage included in an aggregated Allowed Amount File. Under such circumstances, health insurance issuers, service providers, or other parties with which the group health plan or issuer has contracted may aggregate out-of-network allowed amounts for more than one plan or insurance policy or contract. Additionally, nothing in this section prevents the Allowed Amount File from being hosted on a third-party website or prevents a plan administrator or issuer from contracting with a third party to post the file. However, if a plan or issuer chooses not to also host the file separately on its own website, it must provide a link on its own public website to the location where the file is made publicly available.

(c) *Applicability.* (1) The provisions of this section apply for plan years beginning on or after January 1, 2022.

(2) As provided under § 54.9815-1251, this section does not apply to grandfathered health plans. This section also does not apply to health reimbursement arrangements or other account-based group health plans as defined in § 54.9815-2711(d)(6) or short term limited duration insurance as defined in § 54.9801-2.

(3) Nothing in this section alters or otherwise affects a group health plan's or health insurance issuer's duty to comply

with requirements under other applicable state or federal laws, including those governing the accessibility, privacy, or security of information required to be disclosed under this section, or those governing the ability of properly authorized representatives to access participant, or beneficiary information held by plans and issuers.

(4) A group health plan or health insurance issuer will not fail to comply with this section solely because it, acting in good faith and with reasonable diligence, makes an error or omission in a disclosure required under paragraph (b) of this section, provided that the plan or issuer corrects the information as soon as practicable.

(5) A group health plan or health insurance issuer will not fail to comply with this section solely because, despite acting in good faith and with reasonable diligence, its internet website is temporarily inaccessible, provided that the plan or issuer makes the information available as soon as practicable.

(6) To the extent compliance with this section requires a group health plan or health insurance issuer to obtain information from any other entity, the plan or issuer will not fail to comply with this section because it relied in good faith on information from the other entity, unless the plan or issuer knows, or reasonably should have known, that the information is incomplete or inaccurate.

(d) *Severability.* Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

DEPARTMENT OF LABOR

For the reasons set forth in this preamble, the Department of Labor amends 29 CFR 2590 as set forth below:

PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS

3. The authority citation for part 2590 continues to read as follows:

Authority: 29 U.S.C. 1027, 1059, 1135, 1161-1168, 1169, 1181-1183, 1181 note, 1185, 1185a, 1185b, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L. 104-191, 110 Stat. 1936; sec. 401(b), Pub. L. 105-200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110-343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), 124 Stat. 119, as amended by Pub. L. 111-152, 124 Stat. 1029; Secretary of Labor's Order 1-2011, 77 FR 1088 (Jan. 9, 2012).

4. Sections 2590.715-2715A1, 2590.715-2715A2, and 2590.715-2715A3 are added to read as follows:

§ 2590.715-2715A1 Transparency in coverage- Definitions.

(a) *Scope and definitions* (1) *Scope.* This section sets forth definitions for the price transparency requirements for group health plans and health insurance issuers offering group health insurance coverage established in this section and §§ 2590.715-2715A2, and 2590.715-2715A3.

(2) *Definitions.* For purposes of this section and §§ 2590.715-2715A2, and 2590.715-2715A3, the following definitions apply:

(i) *Accumulated amounts* means:

(A) The amount of financial responsibility a participant or beneficiary has incurred at the time a request for cost-sharing information is made, with respect to a deductible or out-of- pocket limit. If an individual is enrolled in other than self-only coverage, these accumulated amounts shall include the financial responsibility a participant or beneficiary has incurred toward meeting his or her individual deductible or out-of-pocket limit, as well as the amount of financial responsibility that all the individuals enrolled under the plan or coverage have incurred, in aggregate, toward meeting the other than self-only deductible or out-of-pocket limit, as applicable. Accumulated amounts include any expense that counts toward a deductible or out-of-pocket limit (such as a copayment or coinsurance), but exclude any expense that does not count toward a deductible or out-of-pocket limit (such as any premium payment, out-of-pocket expense for out-of-network services, or amount for items or services not covered under the group health plan or health insurance coverage); and

(B) To the extent a group health plan or health insurance issuer imposes a cumulative treatment limitation on a particular covered item or service (such as a limit on the number of items, days, units, visits, or hours covered in a defined time period) independent of individual medical necessity determinations, the amount that has accrued toward the limit on the item or service (such as the number of items, days, units, visits, or hours the participant or beneficiary, has used within that time period).

(ii) *Billed charge* means the total charges for an item or service billed to a group health plan or health insurance issuer by a provider.

(iii) *Billing code* means the code used by a group health plan or health insurance issuer or provider to identify health care items or services for purposes of billing, adjudicating, and paying claims for a covered item or service, including the Current Procedural Terminology (CPT) code, Healthcare Common Procedure Coding System (HCPCS) code, Diagnosis-Related Group (DRG) code, National Drug Code (NDC), or other common payer identifier.

(iv) *Bundled payment arrangement* means a payment model under which a provider is paid a single payment for all covered items and services provided to a participant or beneficiary for a specific treatment or procedure.

(v) *Copayment assistance* means the financial assistance a participant or beneficiary receives from a prescription drug or medical supply manufacturer towards the purchase of a covered item or service.

(vi) *Cost-sharing liability* means the amount a participant or beneficiary is responsible for paying for a covered item or service under the terms of the group health plan or health insurance coverage. Cost-sharing liability generally includes deductibles, coinsurance, and copayments, but does not include premiums, balance billing amounts by out-of-network providers, or the cost of items or services that are not covered under a group health plan or health insurance coverage.

(vii) *Cost-sharing information* means information related to any expenditure required by or on behalf of a participant or beneficiary with respect to health care benefits that are relevant to a determina-

tion of the participant's or beneficiary's cost-sharing liability for a particular covered item or service.

(viii) *Covered items or services* means those items or services, including prescription drugs, the costs for which are payable, in whole or in part, under the terms of a group health plan or health insurance coverage.

(ix) *Derived amount* means the price that a group health plan or health insurance issuer assigns to an item or service for the purpose of internal accounting, reconciliation with providers, or submitting data in accordance with the requirements of 45 CFR 153.710(c).

(x) *Historical net price* means the retrospective average amount a group health plan or health insurance issuer paid for a prescription drug, inclusive of any reasonably allocated rebates, discounts, chargebacks, fees, and any additional price concessions received by the plan or issuer with respect to the prescription drug. The allocation shall be determined by dollar value for non-product specific and product-specific rebates, discounts, chargebacks, fees, and other price concessions to the extent that the total amount of any such price concession is known to the group health plan or health insurance issuer at the time of publication of the historical net price in a machine-readable file in accordance with § 2590.715-2715A3. However, to the extent that the total amount of any non-product specific and product-specific rebates, discounts, chargebacks, fees, or other price concessions is not known to the group health plan or health insurance issuer at the time of file publication, then the plan or issuer shall allocate such rebates, discounts, chargebacks, fees, and other price concessions by using a good faith, reasonable estimate of the average price concessions based on the rebates, discounts, chargebacks, fees, and other price concessions received over a time period prior to the current reporting period and of equal duration to the current reporting period, as determined under § 2590.715-2715A3 (b)(1)(iii)(D)(3).

(xi) *In-network provider* means any provider of any item or service with which a group health plan or health insurance issuer, or a third party for the plan or issuer, has a contract setting forth the terms and conditions on which a relevant item or service is provided to a participant or beneficiary.

(xii) *Items or services* means all encounters, procedures, medical tests, supplies, prescription drugs, durable medical equipment, and fees (including facility fees), provided or assessed in connection with the provision of health care.

(xiii) *Machine-readable file* means a digital representation of data or information in a file that can be imported or read by a computer system for further processing without human intervention, while ensuring no semantic meaning is lost.

(xiv) *National Drug Code* means the unique 10- or 11-digit 3-segment number assigned by the Food and Drug Administration, which provides a universal product identifier for drugs in the United States.

(xv) *Negotiated rate* means the amount a group health plan or health insurance issuer has contractually agreed to pay an in-network provider, including an in-network pharmacy or other prescription drug dispenser, for covered items and services, whether directly or indirectly, including through a third-party administrator or pharmacy benefit manager.

(xvi) *Out-of-network allowed amount* means the maximum amount a group health plan or health insurance issuer will pay for a covered item or service furnished by an out-of-network provider.

(xvii) *Out-of-network provider* means a provider of any item or service that does not have a contract under a participant's or beneficiary's group health plan or health insurance coverage to provide items or services.

(xviii) *Out-of-pocket limit* means the maximum amount that a participant or beneficiary is required to pay during a coverage period for his or her share of the costs of covered items and services under his or her group health plan or health insurance coverage, including for self-only and other than self-only coverage, as applicable.

(xix) *Plain language* means written and presented in a manner calculated to be understood by the average participant or beneficiary.

(xx) *Prerequisite* means concurrent review, prior authorization, and step-therapy or fail-first protocols related to covered items and services that must be satisfied before a group health plan or health insurance issuer will cover the item or service. The term prerequisite does not include medical necessity determinations generally or other forms of medical management techniques.

(xxi) *Underlying fee schedule rate* means the rate for a covered item or service from a particular in-network provider, or providers that a group health plan or health insurance issuer uses to determine a participant's or beneficiary's cost-sharing liability for the item or service, when that rate is different from the negotiated rate or derived amount.

(b) [Reserved]

§ 2590.715-2715A2 Transparency in coverage - Required disclosures to participants and beneficiaries.

(a) *Scope and definitions.* (1) *Scope.* This section establishes price transparency requirements for group health plans and health insurance issuers offering group health insurance coverage for the timely disclosure of information about costs related to covered items and services under a group plan or health insurance coverage.

(2) *Definitions.* For purposes of this section, the definitions in § 2590.715-2715A1 apply.

(b) *Required disclosures to participants and beneficiaries*. At the request of a participant or beneficiary who is enrolled in a group health plan, the plan must provide to the participant or beneficiary the information required under paragraph (b)(1) of this section, in accordance with the method and format requirements set forth in paragraph (b)(2) of this section.

(1) *Required cost-sharing information.* The information required under this paragraph (b)(1) is the following cost-sharing information, which is accurate at the time the request is made, with respect to a participant's or beneficiary's cost-sharing liability for covered items and services:

(i) An estimate of the participant's or beneficiary's cost-sharing liability for a requested covered item or service furnished by a provider or providers that is calculated based on the information described in paragraphs (b)(1)(ii) through (iv) of this section.

(A) If the request for cost-sharing information relates to items and services that

are provided within a bundled payment arrangement, and the bundled payment arrangement includes items or services that have a separate cost-sharing liability, the group health plan or health insurance issuer must provide estimates of the cost-sharing liability for the requested covered item or service, as well as an estimate of the cost-sharing liability for each of the items and services in the bundled payment arrangement that have separate cost-sharing liabilities. While group health plans and health insurance issuers are not required to provide estimates of cost-sharing liability for a bundled payment arrangement where the cost-sharing is imposed separately for each item and service included in the bundled payment arrangement, nothing prohibits plans or issuers from providing estimates for multiple items and services in situations where such estimates could be relevant to participants or beneficiaries, as long as the plan or issuer also discloses information about the relevant items or services individually, as required in paragraph (b)(1)(v) of this section.

(B) For requested items and services that are recommended preventive services under section 2713 of the Public Health Service Act (PHS Act), if the group health plan or health insurance issuer cannot determine whether the request is for preventive or non-preventive purposes, the plan or issuer must display the cost-sharing liability that applies for non-preventive purposes. As an alternative, a group health plan or health insurance issuer may allow a participant or beneficiary to request cost-sharing information for the specific preventive or non-preventive item or service by including terms such as "preventive", "non-preventive" or "diagnostic" as a means to request the most accurate cost-sharing information.

(ii) Accumulated amounts;

(iii) In-network rate, comprised of the following elements, as applicable to the group health plan's or health insurance issuer's payment model:

(A) Negotiated rate, reflected as a dollar amount, for an in-network provider or providers for the requested covered item or service; this rate must be disclosed even if it is not the rate the plan or issuer uses to calculate cost-sharing liability; and

(B) Underlying fee schedule rate, reflected as a dollar amount, for the requested covered item or service, to the extent that it is different from the negotiated rate;

(iv) Out-of-network allowed amount or any other rate that provides a more accurate estimate of an amount a group health plan or health insurance issuer will pay for the requested covered item or service, reflected as a dollar amount, if the request for cost-sharing information is for a covered item or service furnished by an out-of-network provider; provided, however, that in circumstances in which a plan or issuer reimburses an out-of-network provider a percentage of the billed charge for a covered item or service, the out-of-network allowed amount will be that percentage.

(v) If a participant or beneficiary requests information for an item or service subject to a bundled payment arrangement, a list of the items and services included in the bundled payment arrangement for which cost-sharing information is being disclosed.

(vi) If applicable, notification that coverage of a specific item or service is subject to a prerequisite; and,

(vii) A notice that includes the following information in plain language:

(A) A statement that out-of-network providers may bill participants or beneficiaries for the difference between a provider's billed charges and the sum of the amount collected from the group health plan or health insurance issuer and from the participant or beneficiary in the form of a copayment or coinsurance amount (the difference referred to as balance billing), and that the cost-sharing information provided pursuant to this paragraph (b)(1)(i) does not account for these potential additional amounts. This statement is only required if balance billing is permitted under state law;

(B) A statement that the actual charges for a participant's or beneficiary's covered item or service may be different from an estimate of cost-sharing liability provided pursuant to paragraph (b)(1)(i) of this section, depending on the actual items or services the participant or beneficiary receives at the point of care;

(C) A statement that the estimate of cost-sharing liability for a covered item or service is not a guarantee that benefits will be provided for that item or service;

(D) A statement disclosing whether the plan counts copayment assistance and other third-party payments in the calculation of the participant's or beneficiary's deductible and out-of-pocket maximum;

(E) For items and services that are recommended preventive services under section 2713 of the PHS Act, a statement that an in-network item or service may not be subject to cost-sharing if it is billed as a preventive service if the group health plan or health insurance issuer cannot determine whether the request is for a preventive or non-preventive item or service; and

(F) Any additional information, including other disclaimers, that the group health plan or health insurance issuer determines is appropriate, provided the additional information does not conflict with the information required to be provided by this paragraph (b)(1).

(2) *Required methods and formats for disclosing information to participants and beneficiaries.* The methods and formats for the disclosure required under this paragraph (b) are as follows:

(i) *Internet-based self-service tool*. Information provided under this paragraph (b) must be made available in plain language, without subscription or other fee, through a self-service tool on an internet website that provides real-time responses based on cost-sharing information that is accurate at the time of the request. Group health plans and health insurance issuers must ensure that the self-service tool allows users to:

(A) Search for cost-sharing information for a covered item or service provided by a specific in-network provider or by all in-network providers by inputting:

(*1*) A billing code (such as CPT code 87804) or a descriptive term (such as "rapid flu test"), at the option of the user;

(*2*) The name of the in-network provider, if the user seeks cost-sharing information with respect to a specific in-network provider; and

(*3*) Other factors utilized by the plan or issuer that are relevant for determining the applicable cost-sharing information (such as location of service, facility name, or dosage).

(B) Search for an out-of-network allowed amount, percentage of billed charges, or other rate that provides a reasonably accurate estimate of the amount a

group health plan or health insurance issuer will pay for a covered item or service provided by out-of-network providers by inputting:

(*1*) A billing code or descriptive term, at the option of the user; and

(*2*) Other factors utilized by the plan or issuer that are relevant for determining the applicable out-of-network allowed amount or other rate (such as the location in which the covered item or service will be sought or provided).

(C) Refine and reorder search results based on geographic proximity of in-network providers, and the amount of the participant's or beneficiary's estimated cost-sharing liability for the covered item or service, to the extent the search for cost-sharing information for covered items or services returns multiple results.

(ii) *Paper method*. Information provided under this paragraph (b) must be made available in plain language, without a fee, in paper form at the request of the participant or beneficiary. In responding to such a request, the group health plan or health insurance issuer may limit the number of providers with respect to which cost-sharing information for covered items and services is provided to no fewer than 20 providers per request. The group health plan or health insurance issuer is required to:

(A) Disclose the applicable provider-per-request limit to the participant or beneficiary;

(B) Provide the cost-sharing information in paper form pursuant to the individual's request, in accordance with the requirements in paragraphs (b)(2)(i)(A) through (C) of this section; and

(C) Mail the cost-sharing information in paper form no later than 2 business days after an individual's request is received.

(D) To the extent participants or beneficiaries request disclosure other than by paper (for example, by phone or e-mail), plans and issuers may provide the disclosure through another means, provided the participant or beneficiary agrees that disclosure through such means is sufficient to satisfy the request and the request is fulfilled at least as rapidly as required for the paper method.

(3) *Special rule to prevent unnecessary duplication.*

(i) Special rule for insured group health plans. To the extent coverage under a group health plan consists of group health insurance coverage, the plan satisfies the requirements of this paragraph (b) if the plan requires the health insurance issuer offering the coverage to provide the information required by this paragraph (b) in compliance with this section pursuant to a written agreement. Accordingly, if a health insurance issuer and a plan sponsor enter into a written agreement under which the issuer agrees to provide the information required under this paragraph (b) in compliance with this section, and the issuer fails to do so, then the issuer, but not the plan, violates the transparency disclosure requirements of this paragraph (b).

(ii) *Other contractual arrangements*. A group health plan or health insurance issuer may satisfy the requirements under this paragraph (b) by entering into a written agreement under which another party (such as a pharmacy benefit manager or other third-party) provides the information required by this paragraph (b) in compliance with this section. Notwithstanding the preceding sentence, if a group health plan or health insurance issuer chooses to enter into such an agreement and the party with which it contracts fails to provide the information in compliance with this paragraph (b), the plan or issuer violates the transparency disclosure requirements of this paragraph (b).

(c) *Applicability.* (1) The provisions of this section apply for plan years beginning on or after January 1, 2023 with respect to the 500 items and services to be posted on a publicly available website, and with respect to all covered items and services, for plan years beginning on or after January 1, 2024.

(2) As provided under § 2590.715-1251, this section does not apply to grandfathered health plans. This section also does not apply to health reimbursement arrangements or other account-based group health plans as defined in § 2590.715-2711(d)(6) or short term limited duration insurance as defined in § 2590.701-2.

(3) Nothing in this section alters or otherwise affects a group health plan's or health insurance issuer's duty to comply with requirements under other applicable state or federal laws, including those governing the accessibility, privacy, or security of information required to be disclosed under this section, or those governing the ability of properly authorized representatives to access participant or beneficiary information held by plans and issuers.

(4) A group health plan or health insurance issuer will not fail to comply with this section solely because it, acting in good faith and with reasonable diligence, makes an error or omission in a disclosure required under paragraph (b) of this section, provided that the plan or issuer corrects the information as soon as practicable.

(5) A group health plan or health insurance issuer will not fail to comply with this section solely because, despite acting in good faith and with reasonable diligence, its internet website is temporarily inaccessible, provided that the plan or issuer makes the information available as soon as practicable.

(6) To the extent compliance with this section requires a group health plan or health insurance issuer to obtain information from any other entity, the plan or issuer will not fail to comply with this section because it relied in good faith on information from the other entity, unless the plan or issuer knows, or reasonably should have known, that the information is incomplete or inaccurate.

(d) *Severability.* Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

§ 2590.715-2715A3 Transparency in coverage- Requirements for public disclosure.

(a) *Scope and definitions* (1) *Scope.* This section establishes price transparency requirements for group health plans and health insurance issuers offering group health insurance coverage for the timely disclosure of information about costs related to covered items and services under a group plan or health insurance coverage.

(2) *Definitions.* For purposes of this section, the definitions in **§** 2590.715-2715A1 apply.

(b) *Requirements for public disclosure of in-network provider rates for covered*

items and services, out-of-network allowed amounts and billed charges for covered items and services, and negotiated rates and historical net prices for covered prescription drugs. A group health plan or health insurance issuer must make available on an internet website the information required under paragraph (b)(1) of this section in three machine-readable files, in accordance with the method and format requirements described in paragraph (b)(2) of this section, and that are updated as required under paragraph (b)(3) of this section.

(1) *Required information*. Machine-readable files required under this paragraph (b) that are made available to the public by a group health plan or health insurance issuer must include:

(i) An in-network rate machine-readable file that includes the required information under this paragraph (b)(1)(i) for all covered items and services, except for prescription drugs that are subject to a fee-for-service reimbursement arrangement, which must be reported in the prescription drug machine-readable file pursuant to paragraph (b)(1)(iii) of this section. The in-network rate machine-readable file must include:

(A) For each coverage option offered by a group health plan or health insurance issuer, the name and the 14-digit Health Insurance Oversight System (HIOS) identifier, or, if the 14-digit HIOS identifier is not available, the 5-digit HIOS identifier, or if no HIOS identifier is available, the Employer Identification Number (EIN);

(B) A billing code, which in the case of prescription drugs must be an NDC, and a plain language description for each billing code for each covered item or service under each coverage option offered by a plan or issuer; and

(C) All applicable rates, which may include one or more of the following: negotiated rates, underlying fee schedule rates, or derived amounts. If a group health plan or health insurance issuer does not use negotiated rates for provider reimbursement, then the plan or issuer should disclose derived amounts to the extent these amounts are already calculated in the normal course of business. If the group health plan or health insurance issuer uses underlying fee schedule rates for calculating cost sharing, then the plan or issuer should include the underlying fee schedule rates in addition to the negotiated rate or derived amount. Applicable rates, including for both individual items and services and items and services in a bundled payment arrangement, must be:

(*1*) Reflected as dollar amounts, with respect to each covered item or service that is furnished by an in-network provider. If the negotiated rate is subject to change based upon participant or beneficiary-specific characteristics, these dollar amounts should be reflected as the base negotiated rate applicable to the item or service prior to adjustments for participant or beneficiary-specific characteristics;

(*2*) Associated with the National Provider Identifier (NPI), Tax Identification Number (TIN), and Place of Service Code for each in-network provider;

(*3*) Associated with the last date of the contract term or expiration date for each provider-specific applicable rate that applies to each covered item or service; and

(4) Indicated with a notation where a reimbursement arrangement other than a standard fee-for-service model (such as capitation or a bundled payment arrangement) applies.

(ii) An out-of-network allowed amount machine-readable file, including:

(A) For each coverage option offered by a group health plan or health insurance issuer, the name and the 14-digit HIOS identifier, or, if the 14-digit HIOS identifier is not available, the 5-digit HIOS identifier, or, if no HIOS identifier is available, the EIN;

(B) A billing code, which in the case of prescription drugs must be an NDC, and a plain language description for each billing code for each covered item or service under each coverage option offered by a plan or issuer;

(C) Unique out-of-network allowed amounts and billed charges with respect to covered items or services furnished by out-of-network providers during the 90-day time period that begins 180 days prior to the publication date of the machine-readable file (except that a group health plan or health insurance issuer must omit such data in relation to a particular item or service and provider when compliance with this paragraph (b)(1)(ii)(C) would require the plan or issuer to report payment of out-of-network allowed amounts in connection with fewer than 20 different claims for payments under a single plan or coverage). Consistent with paragraph (c)(3) of this section, nothing in this paragraph (b)(1)(ii)(C) requires the disclosure of information that would violate any applicable health information privacy law. Each unique out-of-network allowed amount must be:

(*1*) Reflected as a dollar amount, with respect to each covered item or service that is furnished by an out-of-network provider; and

(*2*) Associated with the NPI, TIN, and Place of Service Code for each out-of-network provider.

(iii) A prescription drug machine-readable file, including:

(A) For each coverage option offered by a group health plan or health insurance issuer, the name and the 14-digit HIOS identifier, or, if the 14-digit HIOS identifier is not available, the 5-digit HIOS identifier, or, if no HIOS identifier is available, the EIN;

(B) The NDC, and the proprietary and nonproprietary name assigned to the NDC by the Food and Drug Administration (FDA), for each covered item or service under each coverage option offered by a plan or issuer that is a prescription drug;

(C) The negotiated rates which must be:

(*1*) Reflected as a dollar amount, with respect to each NDC that is furnished by an in-network provider, including an in-network pharmacy or other prescription drug dispenser;

(*2*) Associated with the NPI, TIN, and Place of Service Code for each in-network provider, including each in-network pharmacy or other prescription drug dispenser; and

(*3*) Associated with the last date of the contract term for each provider-specific negotiated rate that applies to each NDC; and

(D) Historical net prices that are:

(*1*) Reflected as a dollar amount, with respect to each NDC that is furnished by an in-network provider, including an in-network pharmacy or other prescription drug dispenser;

(*2*) Associated with the NPI, TIN, and Place of Service Code for each in-network provider, including each in-network phar-

macy or other prescription drug dispenser; and

(*3*) Associated with the 90-day time period that begins 180 days prior to the publication date of the machine-readable file for each provider-specific historical net price that applies to each NDC (except that a group health plan or health insurance issuer must omit such data in relation to a particular NDC and provider when compliance with this paragraph (b)(1)(iii)(D) would require the plan or issuer to report payment of historical net prices calculated using fewer than 20 different claims for payment). Consistent with paragraph (c)(3) of this section, nothing in this paragraph (b)(1)(iii)(D) requires the disclosure of information that would violate any applicable health information privacy law.

(2) *Required method and format for disclosing information to the public*. The machine-readable files described in this paragraph (b) must be available in a form and manner as specified in guidance issued by the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services. The machine-readable files must be publicly available and accessible to any person free of charge and without conditions, such as establishment of a user account, password, or other credentials, or submission of personally identifiable information to access the file.

(3) *Timing*. A group health plan or health insurance issuer must update the machine-readable files and information required by this paragraph (b) monthly. The group health plan or health insurance issuer must clearly indicate the date that the files were most recently updated.

(4) *Special rules to prevent unnecessary duplication—*

(i) *Special rule for insured group health plans.* To the extent coverage under a group health plan consists of group health insurance coverage, the plan satisfies the requirements of this paragraph (b) if the plan requires the health insurance issuer offering the coverage to provide the information pursuant to a written agreement. Accordingly, if a health insurance issuer and a group health plan sponsor enter into a written agreement under which the issuer agrees to provide the information required under this paragraph (b) in compliance with this section, and the issuer fails to do so, then the issuer, but not the plan, violates the transparency disclosure requirements of this paragraph (b).

(ii) *Other contractual arrangements*. A group health plan or health insurance issuer may satisfy the requirements under this paragraph (b) by entering into a written agreement under which another party (such as a third-party administrator or health care claims clearinghouse) will provide the information required by this paragraph (b) in compliance with this section. Notwithstanding the preceding sentence, if a group health plan or health insurance issuer chooses to enter into such an agreement and the party with which it contracts fails to provide the information in compliance with this paragraph (b), the plan or issuer violates the transparency disclosure requirements of this paragraph (b).

(iii) *Aggregation permitted for out-of-network allowed amounts*. Nothing in this section prohibits a group health plan or health insurance issuer from satisfying the disclosure requirement described in paragraph (b)(1)(ii) of this section by disclosing out-of-network allowed amounts made available by, or otherwise obtained from, an issuer, a service provider, or other party with which the plan or issuer has entered into a written agreement to provide the information, provided the minimum claim threshold described in paragraph (b)(1)(ii)(C) of this section is independently met for each item or service and for each plan or coverage included in an aggregated Allowed Amount File. Under such circumstances, health insurance issuers, service providers, or other parties with which the group health plan or issuer has contracted may aggregate out-of-network allowed amounts for more than one plan or insurance policy or contract. Additionally, nothing in this section prevents the Allowed Amount File from being hosted on a third-party website or prevents a plan administrator or issuer from contracting with a third party to post the file. However, if a plan or issuer chooses not to also host the file separately on its own website, it must provide a link on its own public website to the location where the file is made publicly available.

(c) *Applicability.* (1) The provisions of this section apply for plan years beginning on or after January 1, 2022.

(2) As provided under § 2590.715-1251, this section does not apply to grandfathered health plans. This section also does not apply to health reimbursement arrangements or other account-based group health plans as defined in § 2590.715-2711(d)(6) or short term limited duration insurance as defined in § 2590.701-2.

(3) Nothing in this section alters or otherwise affects a group health plan's or health insurance issuer's duty to comply with requirements under other applicable state or federal laws, including those governing the accessibility, privacy, or security of information required to be disclosed under this section, or those governing the ability of properly authorized representatives to access participant, or beneficiary information held by plans and issuers.

(4) A group health plan or health insurance issuer will not fail to comply with this section solely because it, acting in good faith and with reasonable diligence, makes an error or omission in a disclosure required under paragraph (b) of this section, provided that the plan or issuer corrects the information as soon as practicable.

(5) A group health plan or health insurance issuer will not fail to comply with this section solely because, despite acting in good faith and with reasonable diligence, its internet website is temporarily inaccessible, provided that the plan or issuer makes the information available as soon as practicable.

(6) To the extent compliance with this section requires a group health plan or health insurance issuer to obtain information from any other entity, the plan or issuer will not fail to comply with this section because it relied in good faith on information from the other entity, unless the plan or issuer knows, or reasonably should have known, that the information is incomplete or inaccurate.

(d) *Severability.* Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, shall be severable from this section and shall not affect the remainder thereof or the application of the provision

to persons not similarly situated or to dissimilar circumstances.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

For the reasons set forth in this preamble, the Department of Health and Human Services proposes to amend 45 CFR parts 147 and 158 as set forth below:

PART 147—HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS

5. The authority citation for part 147 continues to read as follows:

Authority: 42 U.S.C. 300gg through 300gg-63, 300gg-91, and 300gg-92, as amended.

6. Sections 147.210, 147.211 and 147.212 are added to read as follows:

§ 147.210 Transparency in coverage - Definitions.

(a) *Scope and definitions*—(1) *Scope.* This section sets forth definitions for the price transparency requirements for group health plans and health insurance issuers in the individual and group markets established in this section and §§ 147.211, and 147.212.

(2) *Definitions.* For purposes of this section and §§ 147.211 and 147.212, the following definitions apply:

(i) *Accumulated amounts* means:

(A) The amount of financial responsibility a participant, beneficiary, or enrollee has incurred at the time a request for cost-sharing information is made, with respect to a deductible or out-of-pocket limit. If an individual is enrolled in other than self-only coverage, these accumulated amounts shall include the financial responsibility a participant, beneficiary, or enrollee has incurred toward meeting his or her individual deductible or out-of-pocket limit, as well as the amount of financial responsibility that all the individuals enrolled under the plan or coverage have incurred, in aggregate, toward meeting the other than self-only deductible or out-of-pocket limit, as applicable. Accumulated amounts include any expense that counts toward a deductible or out-of-pocket limit (such as a copayment or coinsurance), but exclude any expense that does not count toward a deductible or out-of-pocket limit (such as any premium payment, out-of-pocket expense for out-of-network services, or amount for items or services not covered under the group health plan or health insurance coverage); and

(B) To the extent a group health plan or health insurance issuer imposes a cumulative treatment limitation on a particular covered item or service (such as a limit on the number of items, days, units, visits, or hours covered in a defined time period) independent of individual medical necessity determinations, the amount that has accrued toward the limit on the item or service (such as the number of items, days, units, visits, or hours the participant, beneficiary, or enrollee has used within that time period).

(ii) *Billed charge* means the total charges for an item or service billed to a group health plan or health insurance issuer by a provider.

(iii) *Billing code* means the code used by a group health plan or health insurance issuer or provider to identify health care items or services for purposes of billing, adjudicating, and paying claims for a covered item or service, including the Current Procedural Terminology (CPT) code, Healthcare Common Procedure Coding System (HCPCS) code, Diagnosis-Related Group (DRG) code, National Drug Code (NDC), or other common payer identifier.

(iv) *Bundled payment arrangement* means a payment model under which a provider is paid a single payment for all covered items and services provided to a participant, beneficiary, or enrollee for a specific treatment or procedure.

(v) *Copayment assistance* means the financial assistance a participant, beneficiary, or enrollee receives from a prescription drug or medical supply manufacturer towards the purchase of a covered item or service.

(vi) *Cost-sharing liability* means the amount a participant, beneficiary, or enrollee is responsible for paying for a covered item or service under the terms of the group health plan or health insurance coverage. Cost-sharing liability generally includes deductibles, coinsurance, and copayments, but does not include premiums, balance billing amounts by out-of-network providers, or the cost of items or services that are not covered under a group health plan or health insurance coverage.

(vii) *Cost-sharing information* means information related to any expenditure required by or on behalf of a participant, beneficiary, or enrollee with respect to health care benefits that are relevant to a determination of the participant's, beneficiary's, or enrollee's cost-sharing liability for a particular covered item or service.

(viii) *Covered items or services* means those items or services, including prescription drugs, the costs for which are payable, in whole or in part, under the terms of a group health plan or health insurance coverage.

(ix) *Derived amount* means the price that a group health plan or health insurance issuer assigns to an item or service for the purpose of internal accounting, reconciliation with providers or submitting data in accordance with the requirements of §153.710(c) of this subchapter.

(x) *Enrollee* means an individual who is covered under an individual health insurance policy as defined under section 2791(b)(5) of the Public Health Service (PHS) Act.

(xi) *Historical net price* means the retrospective average amount a group health plan or health insurance issuer paid for a prescription drug, inclusive of any reasonably allocated rebates, discounts, chargebacks, fees, and any additional price concessions received by the plan or issuer with respect to the prescription drug. The allocation shall be determined by dollar value for non-product specific and product-specific rebates, discounts, chargebacks, fees, and other price concessions to the extent that the total amount of any such price concession is known to the group health plan or health insurance issuer at the time of publication of the historical net price in a machine-readable file in accordance with § 147.212. However, to the extent that the total amount of any non-product specific and product-specific rebates, discounts, chargebacks, fees, or other price concessions is not known to the group health plan or health insurance issuer at the time of file publication, then the plan or issuer shall allocate such rebates, discounts, chargebacks, fees, and

other price concessions by using a good faith, reasonable estimate of the average price concessions based on the rebates, discounts, chargebacks, fees, and other price concessions received over a time period prior to the current reporting period and of equal duration to the current reporting period, as determined under § 147.212(b)(1)(iii)(D)(3).

(xii) *In-network provider* means any provider of any item or service with which a group health plan or health insurance issuer, or a third party for the plan or issuer, has a contract setting forth the terms and conditions on which a relevant item or service is provided to a participant, beneficiary, or enrollee.

(xiii) *Items or services* means all encounters, procedures, medical tests, supplies, prescription drugs, durable medical equipment, and fees (including facility fees), provided or assessed in connection with the provision of health care.

(xiv) *Machine-readable file* means a digital representation of data or information in a file that can be imported or read by a computer system for further processing without human intervention, while ensuring no semantic meaning is lost.

(xv) *National Drug Code* means the unique 10- or 11-digit 3-segment number assigned by the Food and Drug Administration, which provides a universal product identifier for drugs in the United States.

(xvi) *Negotiated rate* means the amount a group health plan or health insurance issuer has contractually agreed to pay an in-network provider, including an in-network pharmacy or other prescription drug dispenser, for covered items and services, whether directly or indirectly, including through a third-party administrator or pharmacy benefit manager.

(xvii) *Out-of-network allowed amount* means the maximum amount a group health plan or health insurance issuer will pay for a covered item or service furnished by an out-of-network provider.

(xviii) *Out-of-network provider* means a provider of any item or service that does not have a contract under a participant's, beneficiary's, or enrollee's group health plan or health insurance coverage to provide items or services.

(xix) *Out-of-pocket limit* means the maximum amount that a participant, beneficiary, or enrollee is required to pay during a coverage period for his or her share of the costs of covered items and services under his or her group health plan or health insurance coverage, including for self-only and other than self-only coverage, as applicable.

(xx) *Plain language* means written and presented in a manner calculated to be understood by the average participant, beneficiary, or enrollee.

(xxi) *Prerequisite* means concurrent review, prior authorization, and step-therapy or fail-first protocols related to covered items and services that must be satisfied before a group health plan or health insurance issuer will cover the item or service. The term prerequisite does not include medical necessity determinations generally or other forms of medical management techniques.

(xxii) *Underlying fee schedule rate* means the rate for a covered item or service from a particular in-network provider, or providers that a group health plan or health insurance issuer uses to determine a participant's, beneficiary's, or enrollee's cost-sharing liability for the item or service, when that rate is different from the negotiated rate or derived amount.

(b) [Reserved]

§ 147.211 Transparency in coverage - Required disclosures to participants, beneficiaries, or enrollees.

(a) *Scope and definitions*. (1) *Scope*. This section establishes price transparency requirements for group health plans and health insurance issuers in the individual and group markets for the timely disclosure of information about costs related to covered items and services under a plan or health insurance coverage.

(2) *Definitions*. For purposes of this section, the definitions in § 147.210 apply.

(b) *Required disclosures to participants, beneficiaries, or enrollees*. At the request of a participant, beneficiary, or enrollee who is enrolled in a group health plan or health insurance issuer offering group or individual health insurance coverage, the plan or issuer must provide to the participant, beneficiary, or enrollee the information required under paragraph (b)(1) of this section, in accordance with the method and format requirements set forth in paragraph (b)(2) of this section.

(1) *Required cost-sharing information.* The information required under this paragraph (b)(1) is the following cost-sharing information, which is accurate at the time the request is made, with respect to a participant's, beneficiary's, or enrollee's cost-sharing liability for covered items and services:

(i) An estimate of the participant's, beneficiary's, or enrollee's cost-sharing liability for a requested covered item or service furnished by a provider or providers, which must reflect any cost-sharing reductions the enrollee would receive, that is calculated based on the information described in paragraphs (b)(1)(ii) through (iv) of this section.

(A) If the request for cost-sharing information relates to items and services that are provided within a bundled payment arrangement, and the bundled payment arrangement includes items or services that have a separate cost-sharing liability, the group health plan or health insurance issuer must provide estimates of the cost-sharing liability for the requested covered item or service, as well as an estimate of the cost-sharing liability for each of the items and services in the bundled payment arrangement that have separate cost-sharing liabilities. While group health plans and health insurance issuers are not required to provide estimates of cost-sharing liability for a bundled payment arrangement where the cost-sharing is imposed separately for each item and service included in the bundled payment arrangement, nothing prohibits plans or issuers from providing estimates for multiple items and services in situations where such estimates could be relevant to participants or beneficiaries, as long as the plan or issuer also discloses information about the relevant items or services individually, as required in paragraph (b)(1)(v) of this section.

(B) For requested items and services that are recommended preventive services under section 2713 of the Public Health Service Act (PHS Act), if the group health plan or health insurance issuer cannot determine whether the request is for preventive or non-preventive purposes, the plan or issuer must display the cost-sharing liability that applies for non-preventive purposes. As an alternative, a group

health plan or health insurance issuer may allow a participant, beneficiary, or enrollee to request cost-sharing information for the specific preventive or non-preventive item or service by including terms such as "preventive", "non-preventive" or "diagnostic" as a means to request the most accurate cost-sharing information.

(ii) Accumulated amounts;

(iii) In-network rate, comprised of the following elements, as applicable to the group health plan's or health insurance issuer's payment model:

(A) Negotiated rate, reflected as a dollar amount, for an in-network provider or providers for the requested covered item or service; this rate must be disclosed even if it is not the rate the plan or issuer uses to calculate cost-sharing liability; and

(B) Underlying fee schedule rate, reflected as a dollar amount, for the requested covered item or service, to the extent that it is different from the negotiated rate;

(iv) Out-of-network allowed amount or any other rate that provides a more accurate estimate of an amount a group health plan or health insurance issuer will pay for the requested covered item or service, reflected as a dollar amount, if the request for cost-sharing information is for a covered item or service furnished by an out-of-network provider; provided, however, that in circumstances in which a plan or issuer reimburses an out-of-network provider a percentage of the billed charge for a covered item or service, the out-of-network allowed amount will be that percentage.

(v) If a participant, beneficiary, or enrollee requests information for an item or service subject to a bundled payment arrangement, a list of the items and services included in the bundled payment arrangement for which cost-sharing information is being disclosed.

(vi) If applicable, notification that coverage of a specific item or service is subject to a prerequisite; and,

(vii) A notice that includes the following information in plain language:

(A) A statement that out-of-network providers may bill participants, beneficiaries, or enrollees for the difference between a provider's billed charges and the sum of the amount collected from the group health plan or health insurance issuer and from the participant, beneficiary, or enrollee in the form of a copayment or coinsurance amount (the difference referred to as balance billing), and that the cost-sharing information provided pursuant to this paragraph (b)(1)(i) does not account for these potential additional amounts. This statement is only required if balance billing is permitted under state law;

(B) A statement that the actual charges for a participant's, beneficiary's, or enrollee's covered item or service may be different from an estimate of cost-sharing liability provided pursuant to paragraph (b)(1)(i) of this section, depending on the actual items or services the participant, beneficiary, or enrollee receives at the point of care;

(C) A statement that the estimate of cost-sharing liability for a covered item or service is not a guarantee that benefits will be provided for that item or service;

(D) A statement disclosing whether the plan counts copayment assistance and other third-party payments in the calculation of the participant's, beneficiary's, or enrollee's deductible and out-of-pocket maximum;

(E) For items and services that are recommended preventive services under section 2713 of the PHS Act, a statement that an in-network item or service may not be subject to cost-sharing if it is billed as a preventive service if the group health plan or health insurance issuer cannot determine whether the request is for a preventive or non-preventive item or service; and

(F) Any additional information, including other disclaimers, that the group health plan or health insurance issuer determines is appropriate, provided the additional information does not conflict with the information required to be provided by this paragraph (b)(1).

(2) *Required methods and formats for disclosing information to participants, beneficiaries, or enrollees.* The methods and formats for the disclosure required under this paragraph (b) are as follows:

(i) *Internet-based self-service tool*. Information provided under this paragraph (b) must be made available in plain language, without subscription or other fee, through a self-service tool on an internet website that provides real-time responses based on cost-sharing information that is accurate at the time of the request. Group health plans and health insurance issuers must ensure that the self-service tool allows users to:

(A) Search for cost-sharing information for a covered item or service provided by a specific in-network provider or by all in-network providers by inputting:

(*1*) A billing code (such as CPT code 87804) or a descriptive term (such as "rapid flu test"), at the option of the user;

(*2*) The name of the in-network provider, if the user seeks cost-sharing information with respect to a specific in-network provider; and

(*3*) Other factors utilized by the plan or issuer that are relevant for determining the applicable cost-sharing information (such as location of service, facility name, or dosage).

(B) Search for an out-of-network allowed amount, percentage of billed charges, or other rate that provides a reasonably accurate estimate of the amount a group health plan or health insurance issuer will pay for a covered item or service provided by out-of-network providers by inputting:

(*1*) A billing code or descriptive term, at the option of the user; and

(*2*) Other factors utilized by the plan or issuer that are relevant for determining the applicable out-of-network allowed amount or other rate (such as the location in which the covered item or service will be sought or provided).

(C) Refine and reorder search results based on geographic proximity of in-network providers, and the amount of the participant's, beneficiary's, or enrollee's estimated cost-sharing liability for the covered item or service, to the extent the search for cost-sharing information for covered items or services returns multiple results.

(ii) *Paper method*. Information provided under this paragraph (b) must be made available in plain language, without a fee, in paper form at the request of the participant, beneficiary, or enrollee. In responding to such a request, the group health plan or health insurance issuer may limit the number of providers with respect to which cost-sharing information for covered items and services is provided to no fewer than 20 providers per request. The group health plan or health insurance issuer is required to:

(A) Disclose the applicable provider-per-request limit to the participant, beneficiary, or enrollee;

(B) Provide the cost-sharing information in paper form pursuant to the individual's request, in accordance with the requirements in paragraphs (b)(2)(i)(A) through (C) of this section; and

(C) Mail the cost-sharing information in paper form no later than 2 business days after an individual's request is received.

(D) To the extent participants, beneficiaries, and enrollees request disclosure other than by paper (for example, by phone or e-mail), plans and issuers may provide the disclosure through another means, provided the participant, beneficiary, or enrollee agrees that disclosure through such means is sufficient to satisfy the request and the request is fulfilled at least as rapidly as required for the paper method.

(3) *Special rule to prevent unnecessary duplication. (i) Special rule for insured group health plans.* To the extent coverage under a group health plan consists of group health insurance coverage, the plan satisfies the requirements of this paragraph (b) if the plan requires the health insurance issuer offering the coverage to provide the information required by this paragraph (b) in compliance with this section pursuant to a written agreement. Accordingly, if a health insurance issuer and a plan sponsor enter into a written agreement under which the issuer agrees to provide the information required under this paragraph (b) in compliance with this section, and the issuer fails to do so, then the issuer, but not the plan, violates the transparency disclosure requirements of this paragraph (b).

(ii) *Other contractual arrangements*. A group health plan or health insurance issuer may satisfy the requirements under this paragraph (b) by entering into a written agreement under which another party (such as a pharmacy benefit manager or other third-party) provides the information required by this paragraph (b) in compliance with this section. Notwithstanding the preceding sentence, if a group health plan or health insurance issuer chooses to enter into such an agreement and the party with which it contracts fails to provide the information in compliance with this paragraph (b), the plan or issuer violates the transparency disclosure requirements of this paragraph (b).

(c) *Applicability.* (1) The provisions of this section apply for plan years (in the individual market, for policy years) beginning on or after January 1, 2023 with respect to the 500 items and services to be posted on a publicly available website, and with respect to all covered items and services, for plan years (in the individual market, for policy years) beginning on or after January 1, 2024.

(2) As provided under §147.140, this section does not apply to grandfathered health plans. This section also does not apply to health reimbursement arrangements or other account-based group health plans as defined in § 147.126(d)(6) or short term limited duration insurance as defined in 45 CFR 144.103.

(3) Nothing in this section alters or otherwise affects a group health plan's or health insurance issuer's duty to comply with requirements under other applicable state or federal laws, including those governing the accessibility, privacy, or security of information required to be disclosed under this section, or those governing the ability of properly authorized representatives to access participant, beneficiary, or enrollee information held by plans and issuers.

(4) A group health plan or health insurance issuer will not fail to comply with this section solely because it, acting in good faith and with reasonable diligence, makes an error or omission in a disclosure required under paragraph (b) of this section, provided that the plan or issuer corrects the information as soon as practicable.

(5) A group health plan or health insurance issuer will not fail to comply with this section solely because, despite acting in good faith and with reasonable diligence, its internet website is temporarily inaccessible, provided that the plan or issuer makes the information available as soon as practicable.

(6) To the extent compliance with this section requires a group health plan or health insurance issuer to obtain information from any other entity, the plan or issuer will not fail to comply with this section because it relied in good faith on information from the other entity, unless the plan or issuer knows, or reasonably should have known, that the information is incomplete or inaccurate.

(d) *Severability.* Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

§ 147.212 Transparency in coverage-Requirements for public disclosure.

(a) *Scope and definitions*—(1) *Scope.* This section establishes price transparency requirements for group health plans and health insurance issuers in the individual and group markets for the timely disclosure of information about costs related to covered items and services under a plan or health insurance coverage.

(2) *Definitions*. For purposes of this section, the definitions in § 147.210 apply.

(b) *Requirements for public disclosure of in-network provider rates for covered items and services, out-of-network allowed amounts and billed charges for covered items and services, and negotiated rates and historical net prices for covered prescription drugs.* A group health plan or health insurance issuer must make available on an internet website the information required under paragraph (b)(1) of this section in three machine-readable files, in accordance with the method and format requirements described in paragraph (b)(2) of this section, and that are updated as required under paragraph (b)(3) of this section.

(1) *Required information*. Machine-readable files required under this paragraph (b) that are made available to the public by a group health plan or health insurance issuer must include:

(i) An in-network rate machine-readable file that includes the required information under this paragraph (b)(1)(i) for all covered items and services, except for prescription drugs that are subject to a fee-for-service reimbursement arrangement, which must be reported in the prescription drug machine-readable file pursuant to paragraph (b)(1)(iii) of this section. The in-network rate machine-readable file must include:

(A) For each coverage option offered by a group health plan or health insurance issuer, the name and the 14-digit Health Insurance Oversight System (HIOS) identifier, or, if the 14-digit HIOS identifier is not available, the 5-digit HIOS identifier, or if no HIOS identifier is available, the Employer Identification Number (EIN);

(B) A billing code, which in the case of prescription drugs must be an NDC, and a plain language description for each billing code for each covered item or service under each coverage option offered by a plan or issuer; and

(C) All applicable rates, which may include one or more of the following: negotiated rates, underlying fee schedule rates, or derived amounts. If a group health plan or health insurance issuer does not use negotiated rates for provider reimbursement, then the plan or issuer should disclose derived amounts to the extent these amounts are already calculated in the normal course of business. If the group health plan or health insurance issuer uses underlying fee schedule rates for calculating cost sharing, then the plan or issuer should include the underlying fee schedule rates in addition to the negotiated rate or derived amount. Applicable rates, including for both individual items and services and items and services in a bundled payment arrangement, must be:

(*1*) Reflected as dollar amounts, with respect to each covered item or service that is furnished by an in-network provider. If the negotiated rate is subject to change based upon participant, beneficiary, or enrollee-specific characteristics, these dollar amounts should be reflected as the base negotiated rate applicable to the item or service prior to adjustments for participant, beneficiary, or enrollee-specific characteristics;

(*2*) Associated with the National Provider Identifier (NPI), Tax Identification Number (TIN), and Place of Service Code for each in-network provider;

(*3*) Associated with the last date of the contract term or expiration date for each provider-specific applicable rate that applies to each covered item or service; and

(4) Indicated with a notation where a reimbursement arrangement other than a standard fee-for-service model (such as capitation or a bundled payment arrangement) applies.

(ii) An out-of-network allowed amount machine-readable file, including:

(A) For each coverage option offered by a group health plan or health insurance issuer, the name and the 14-digit HIOS identifier, or, if the 14-digit HIOS identifier is not available, the 5-digit HIOS identifier, or, if no HIOS identifier is available, the EIN;

(B) A billing code, which in the case of prescription drugs must be an NDC, and a plain language description for each billing code for each covered item or service under each coverage option offered by a plan or issuer;

(C) Unique out-of-network allowed amounts and billed charges with respect to covered items or services furnished by out-of-network providers during the 90-day time period that begins 180 days prior to the publication date of the machine-readable file (except that a group health plan or health insurance issuer must omit such data in relation to a particular item or service and provider when compliance with this paragraph (b)(1)(ii)(C) would require the plan or issuer to report payment of out-of-network allowed amounts in connection with fewer than 20 different claims for payments under a single plan or coverage). Consistent with paragraph (c)(3) of this section, nothing in this paragraph (b)(1)(ii)(C) requires the disclosure of information that would violate any applicable health information privacy law. Each unique out-of-network allowed amount must be:

(*1*) Reflected as a dollar amount, with respect to each covered item or service that is furnished by an out-of-network provider; and

(*2*) Associated with the NPI, TIN, and Place of Service Code for each out-of-network provider.

(iii) A prescription drug machine-readable file, including:

(A) For each coverage option offered by a group health plan or health insurance issuer, the name and the 14-digit HIOS identifier, or, if the 14-digit HIOS identifier is not available, the 5-digit HIOS identifier, or, if no HIOS identifier is available, the EIN;

(B) The NDC, and the proprietary and nonproprietary name assigned to the NDC by the Food and Drug Administration (FDA), for each covered item or service that is a prescription drug under each coverage option offered by a plan or issuer;

(C) The negotiated rates which must be:

(*1*) Reflected as a dollar amount, with respect to each NDC that is furnished by an in-network provider, including an in-network pharmacy or other prescription drug dispenser;

(*2*) Associated with the NPI, TIN, and Place of Service Code for each in-network provider, including each in-network pharmacy or other prescription drug dispenser; and

(*3*) Associated with the last date of the contract term for each provider-specific negotiated rate that applies to each NDC; and

(D) Historical net prices that are:

(*1*) Reflected as a dollar amount, with respect to each NDC that is furnished by an in-network provider, including an in-network pharmacy or other prescription drug dispenser;

(*2*) Associated with the NPI, TIN, and Place of Service Code for each in-network provider, including each in-network pharmacy or other prescription drug dispenser; and

(*3*) Associated with the 90-day time period that begins 180 days prior to the publication date of the machine-readable file for each provider-specific historical net price that applies to each NDC (except that a group health plan or health insurance issuer must omit such data in relation to a particular NDC and provider when compliance with this paragraph (b)(1)(iii)(D) would require the plan or issuer to report payment of historical net prices calculated using fewer than 20 different claims for payment). Consistent with paragraph (b)(3) of this section, nothing in this paragraph (b)(1)(iii)(D) requires the disclosure of information that would violate any applicable health information privacy law.

(2) *Required method and format for disclosing information to the public*. The machine-readable files described in this paragraph (b) must be available in a form and manner as specified in guidance issued by the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services. The machine-readable files must be publicly available and accessible to any person free

of charge and without conditions, such as establishment of a user account, password, or other credentials, or submission of personally identifiable information to access the file.

(3) *Timing*. A group health plan or health insurance issuer must update the machine-readable files and information required by this paragraph (b) monthly. The group health plan or health insurance issuer must clearly indicate the date that the files were most recently updated.

(4) *Special rules to prevent unnecessary duplication*—(i) *Special rule for insured group health plans.* To the extent coverage under a group health plan consists of group health insurance coverage, the plan satisfies the requirements of this paragraph (b) if the plan requires the health insurance issuer offering the coverage to provide the information pursuant to a written agreement. Accordingly, if a health insurance issuer and a group health plan sponsor enter into a written agreement under which the issuer agrees to provide the information required under this paragraph (b) in compliance with this section, and the issuer fails to do so, then the issuer, but not the plan, violates the transparency disclosure requirements of this paragraph (b).

(ii) *Other contractual arrangements*. A group health plan or health insurance issuer may satisfy the requirements under this paragraph (b) by entering into a written agreement under which another party (such as a third-party administrator or health care claims clearinghouse) will provide the information required by this paragraph (b) in compliance with this section. Notwithstanding the preceding sentence, if a group health plan or health insurance issuer chooses to enter into such an agreement and the party with which it contracts fails to provide the information in compliance with this paragraph (b), the plan or issuer violates the transparency disclosure requirements of this paragraph (b).

(iii) *Aggregation permitted for out-of-network allowed amounts*. Nothing in this section prohibits a group health plan or health insurance issuer from satisfying the disclosure requirement described in paragraph (b)(1)(ii) of this section by disclosing out-of-network allowed amounts made available by, or otherwise obtained from, an issuer, a service provider, or other party with which the plan or issuer has entered into a written agreement to provide the information, provided the minimum claim threshold described in paragraph (b)(1)(ii)(C) of this section is independently met for each item or service and for each plan or coverage included in an aggregated Allowed Amount File. Under such circumstances , health insurance issuers, service providers, or other parties with which the group health plan or issuer has contracted may aggregate out-of-network allowed amounts for more than one plan or insurance policy or contract. Additionally, nothing in this section prevents the Allowed Amount File from being hosted on a third-party website or prevents a plan administrator or issuer from contracting with a third party to post the file. However, if a plan or issuer chooses not to also host the file separately on its own website, it must provide a link on its own public website to the location where the file is made publicly available.

(c) *Applicability.* (1) The provisions of this section apply for plan years (in the individual market, for policy years) beginning on or after January 1, 2022.

(2) As provided under § 147.140, this section does not apply to grandfathered health plans. This section also does not apply to health reimbursement arrangements or other account-based group health plans as defined in § 147.126(d)(6) or short term limited duration insurance as defined in § 144.103.

(3) Nothing in this section alters or otherwise affects a group health plan's or health insurance issuer's duty to comply with requirements under other applicable state or federal laws, including those governing the accessibility, privacy, or security of information required to be disclosed under this section, or those governing the ability of properly authorized representatives to access participant, or beneficiary information held by plans and issuers.

(4) A group health plan or health insurance issuer will not fail to comply with this section solely because it, acting in good faith and with reasonable diligence, makes an error or omission in a disclosure required under paragraph (b) of this section, provided that the plan or issuer corrects the information as soon as practicable.

(5) A group health plan or health insurance issuer will not fail to comply with this section solely because, despite acting in good faith and with reasonable diligence, its internet website is temporarily inaccessible, provided that the plan or issuer makes the information available as soon as practicable.

(6) To the extent compliance with this section requires a group health plan or health insurance issuer to obtain information from any other entity, the plan or issuer will not fail to comply with this section because it relied in good faith on information from the other entity, unless the plan or issuer knows, or reasonably should have known, that the information is incomplete or inaccurate.

(d) *Severability.* Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

PART 158—ISSUER USE OF PREMIUM REVENUE: REPORTING AND REBATE REQUIREMENTS

7. The authority citation for part 158 continues to read as follows:

Authority: 42 U.S.C. 300gg-18.

8. Section 158.221 is amended by adding paragraph (b)(9) to read as follows:

§158.221 Formula for calculating an issuer's medical loss ratio.

* * * * *

(b) * * *

(9) Beginning with the 2020 MLR reporting year, an issuer may include in the numerator of the MLR any shared savings payments the issuer has made to an enrollee as a result of the enrollee choosing to obtain health care from a lower-cost, higher-value provider.

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(Filed by the Office of the Federal Register on November 3, 2020, 4:15 p.m., and published in the issue of the Federal Register for November 12, 2020, 85 F.R. 72158)

T.D. 9930

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Updated Life Expectancy and Distribution Period Tables Used for Purposes of Determining Minimum Required Distributions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document sets forth final regulations providing guidance relating to the life expectancy and distribution period tables that are used to calculate required minimum distributions from qualified retirement plans, individual retirement accounts and annuities, and certain other tax-favored employer-provided retirement arrangements. These regulations affect participants, beneficiaries, and plan administrators of these qualified retirement plans and other tax-favored employer-provided retirement arrangements, as well as owners, beneficiaries, trustees and custodians of individual retirement accounts and annuities.

DATES: *Effective Date*: The final regulations contained in this document are effective on November 12, 2020.

Applicability Date: The final regulations in this document apply to distribution calendar years (as defined in §1.401(a)(9)-5, Q&A-1(b)), beginning on or after January 1, 2022.

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SUPPLEMENTARY INFORMATION:

Background

This document includes amendments to the Income Tax Regulations (26 CFR part 1) under section 401(a)(9) of the Internal Revenue Code (Code) regarding the requirement to take required minimum distributions from qualified trusts. These regulations also apply with respect to the corresponding requirements for individual retirement accounts and annuities (IRAs) described in section 408(a) and (b), and eligible deferred compensation plans under section 457, as well as section 403(a) and 403(b) annuity contracts, custodial accounts, and retirement income accounts.

I. *Section 401(a)(9) and Related Statutory Provisions*

Section 401(a)(9) provides rules regarding minimum required distributions from qualified retirement plans. These rules ensure that the assets of a qualified retirement plan, which are afforded favorable tax treatment, are used primarily to provide retirement income to a participant, while allowing distributions to continue after the participant's death over the lifetime of the participant's surviving spouse or the life expectancy of certain designated beneficiaries. Accordingly, section 401(a)(9) provides that a qualified retirement plan must commence benefits to an employee no later than a specified age (or within a specified number of years after the employee's death) and, under the regulations, once benefits commence, the pattern of payment must meet certain standards to ensure that distributions are not unduly deferred.

Section 401(a)(9)(A) provides rules for distributions during the life of the employee. Section 401(a)(9)(A)(ii) provides that the entire interest of an employee in a qualified retirement plan must be distributed, beginning not later than the employee's required beginning date, in accordance with regulations, over the life of the employee or over the lives of the employee and a designated beneficiary (or over a period not extending beyond the life expectancy of the employee and a designated beneficiary).

Section 401(a)(9)(B) provides rules for distributions that are made after the death of the employee. Section 401(a)(9)(B)(i) provides that, if the employee dies after distributions have begun, the employee's interest must be distributed at least as rapidly as under the method used by the employee. Section 401(a)(9)(B)(ii) provides a general rule that the employee's interest must be distributed within 5 years after the death of the employee if the employee dies before distributions have begun. Section 401(a)(9)(B)(iii) provides an exception to this 5-year rule if the employee has appointed a designated beneficiary. Under this exception, the 5-year rule is treated as satisfied if the employee's interest is distributed, in accordance with regulations, over the life or life expectancy of the designated beneficiary, provided that the distributions generally begin no later than 1 year after the date of the employee's death.[1] In addition, under section 401(a)(9)(B)(iv), if the designated beneficiary is the employee's surviving spouse, the beneficiary may wait until the date the employee would have attained age 72 to begin receiving required minimum distributions.

Section 401(a)(9)(C) defines the term *required beginning date* for employees (other than 5-percent owners and IRA owners) as April 1 of the calendar year following the later of the calendar year in which the employee attains age 72 or the calendar year in which the employee retires. For 5-percent owners and IRA owners, the required beginning date is April 1 of the calendar year following the calendar year in which the employee attains age 72, even if the employee has not retired.

Section 401(a)(9)(D) provides that, except in the case of a life annuity, the life expectancy of an employee and the employee's spouse that is used to determine the period over which payments must be made may be re-determined, but not more frequently than annually.

Section 401(a)(9)(E)(i) provides that the term *designated beneficiary* means

[1] However, section 401(a)(9)(H)(ii) provides that, with respect to an eligible retirement plan defined in section 402(c)(8)(B) other than a defined benefit plan, the section 401(a)(9)(B)(iii) exception is only available in the case of an eligible designated beneficiary defined in section 401(a)(9)(E)(ii).

any individual designated as a beneficiary by the employee. Section 401(a)(9)(E)(ii) provides that the term *eligible designated beneficiary* means any designated beneficiary who is (1) the surviving spouse of the employee; (2) a child of the employee who has not reached the age of majority; (3) disabled within the meaning of section 72(m)(7); (4) an individual who is disabled under section 7702B(c)(2) with a disability of indefinite length which is expected to be lengthy in nature; or (5) an individual who is not more than 10 years younger than the employee. For this purpose, section 401(a)(9)(E)(ii) provides that the determination of whether a designated beneficiary is an eligible designated beneficiary is made as the date of the death of the employee.

Section 401(a)(9)(G) provides that any distribution required to satisfy the incidental death benefit requirement of section 401(a) is a required minimum distribution. The incidental death benefit requirement, which is set forth in §1.401-1(b)(1), provides that although a qualified pension or profit-sharing plan may provide for incidental death (or life insurance) benefits, the plan must be established and maintained primarily for the purpose of providing retirement benefits or deferred compensation.

Section 401(a)(9)(H) provides special rules for an eligible retirement plan described in section 402(c)(8)(B) that is not a defined benefit plan. Section 401(a)(9)(H)(i) provides that for such a plan, in the case of a designated beneficiary, section 401(a)(9)(B)(ii) is applied (1) by substituting 10 years for 5 years, and (2) without regard to whether distributions have begun prior to an employee's death. Section 401(a)(9)(H)(ii) provides that the section 401(a)(9)(B)(iii) exception to section 401(a)(9)(B)(ii), as modified, only applies in the case of an eligible designated beneficiary. Section 401(a)(9)(H)(iii) provides that if an eligible designated beneficiary dies prior to the distribution of the employee's entire interest, the remaining interest must be distributed within 10 years after the death of the eligible designated beneficiary.

Under sections 403(b)(10), 408(a)(6), 408(b), and 457(d)(2), requirements similar to the requirements of section 401(a)(9) apply to a number of types of retirement arrangements other than qualified retirement plans. However, pursuant to sections 408A(a) and (c)(5), those rules apply to a Roth IRA only after the death of the IRA owner.[2] Pursuant to sections 403(a)(1) and 404(a)(2), qualified annuity plans also must comply with the requirements of section 401(a)(9).

II. *Regulations under Section 401(a)(9)*

Sections 1.401(a)(9)-1 through 1.401(a)(9)-8 provide rules regarding the application of section 401(a)(9).[3] In the case of a defined contribution plan, §1.401(a)(9)-5 provides generally that an individual's required minimum distribution for a distribution calendar year is determined by dividing the individual's account balance determined under §1.401(a)(9)-5, Q&A-3, by the applicable distribution period. Under §1.401(a)(9)-5, Q&A-1(b), a distribution calendar year is a calendar year for which a minimum distribution is required. For example, if a 5-percent owner participating in a qualified retirement plan will attain age 72 during August of 2023 (so that the individual's required beginning date is April 1, 2024), then the individual's first distribution calendar year will be 2023, and the required minimum distribution for that year will be based on the applicable distribution period for a 72-year-old individual for 2023 (even though it is permitted to be paid at any time from January 1, 2023, through April 1, 2024).

Pursuant to §1.401(a)(9)-5, Q&A-4(a), for required minimum distributions during the employee's lifetime (including the year in which the employee dies), the applicable distribution period for an employee is the distribution period for the employee's age under the Uniform Lifetime Table (which is equal to the joint and last survivor life expectancy for the employee and a hypothetical beneficiary 10 years younger). However, pursuant to §1.401(a)(9)-5, Q&A-4(b), if an employee's sole beneficiary is the employee's surviving spouse and the spouse is more than 10 years younger than the employee, then the applicable distribution period is the joint and last survivor life expectancy of the employee and spouse under the Joint and Last Survivor Table (which is longer than the distribution period that would apply for the employee under the Uniform Lifetime Table).

Pursuant to §1.401(a)(9)-5, Q&A-5, for distribution calendar years after the calendar year of the employee's death, the applicable distribution period generally is the remaining life expectancy of the designated beneficiary, subject to certain exceptions.[4] Two of these exceptions, which apply if the employee dies after the required beginning date, substitute the employee's remaining life expectancy for the beneficiary's remaining life expectancy. These two exceptions apply to an employee who does not have a designated beneficiary or who is younger than the designated beneficiary.[5]

Section 1.401(a)(9)-5, Q&A-5(c)(1) provides that the remaining life expectancy of the designated beneficiary is calculated as the life expectancy under the Single Life Table for the designated beneficiary's age in the calendar year following the calendar year of the employee's death, reduced by 1 for each subsequent year. However, if one of the two exceptions applies (so that the relevant life expectancy is the remaining life expectancy of the employee), then, pursuant to §1.401(a)(9)-5, Q&A-5(c)(3), the remaining life expectancy of the employee is calculated as the life expectancy under the Single Life Table for the employee's age in the calendar year of the employee's death, reduced by 1 for each subsequent year.

A special rule applies to determine the designated beneficiary's remaining life

[2] Note that section 401(a)(9)(H) does not apply to an eligible deferred compensation plan under section 457(b) maintained by an organization that is not an eligible employer described in section 457(e)(1)(A) (because such a plan is not an eligible retirement plan described in section 402(c)(8)(B)).

[3] Sections 1.401(a)(9)-1 through 1.401(a)(9)-8 reflect section 401(a)(9) as in effect in 2003 and have not been updated to reflect statutory changes in 2019 and 2020.

[4] Section 1.401(a)(9)-5, Q&A-5 has not been updated to reflect the enactment of section 401(a)(9)(H) but nonetheless is relevant for the transition rule that is described in the *Effective/Applicability Date* section of this preamble.

[5] Under 401(a)(9)(B)(ii), another exception applies if the employee dies before the required beginning date and has no designated beneficiary. In that case, the employee's entire interest must be distributed by the end of the calendar year that includes the fifth anniversary of the date of the employee's death.

expectancy if the employee's sole beneficiary is the employee's surviving spouse. In that case, pursuant to §1.401(a)(9)-5, Q&A-5(c)(2), the surviving spouse's remaining life expectancy is recalculated each calendar year as the life expectancy under the Single Life Table for the surviving spouse's age in that year. Under §1.401(a)(9)-5, Q&A-5(c)(2), for calendar years after the year of the spouse's death, the distribution period that applies for the spouse's beneficiary is the spouse's remaining life expectancy from the Single Life Table for the spouse's age for the calendar year of the spouse's death, reduced by 1 for each subsequent year.

Consistent with the policy of section 401(a)(9) to limit deferral of retirement income, §1.401(a)(9)-6, Q&A-1(a) provides that, except as otherwise provided in §1.401(a)(9)-6, payments from a defined benefit plan must be non-increasing in order to satisfy section 401(a)(9).[6] Section 1.401(a)(9)-6, Q&A-14(c) provides that, in the case of annuity payments paid from an annuity contract purchased from an insurance company, certain types of increasing payments will not cause an annuity payment stream to fail to satisfy this non-increasing payment requirement. These exceptions apply only if the total future expected payments under the annuity contract (determined in accordance with §1.401(a)(9)-6, Q&A-14(e)(3)), based on the life expectancy tables of §1.401(a)(9)-9, exceed the total value being annuitized (determined in accordance with §1.401(a)(9)-6, Q&A-14(e)(1)).

III. *Life Expectancy and Distribution Period Tables of §1.401(a)(9)-9*

Section 1.401(a)(9)-9, as it appears in 26 CFR part 1 (revised as of April 1, 2020), provides life expectancy and distribution period tables that are used to apply the rules of §1.401(a)(9)-5 and to make the calculations in §1.401(a)(9)-6, Q&A-14. That regulation, referred to in this preamble as formerly applicable §1.401(a)(9)-9, was issued in 2002 (67 FR 18988), and the tables in formerly applicable §1.401(a)(9)-9 were developed using mortality rates for 2003. Those mortality rates were derived by applying mortality improvement through 2003 to the mortality rates from the Annuity 2000 Basic Table (which was the most recent individual annuity mortality table available in 2002).[7] The rates of mortality improvement used for this purpose were the ones that were used in developing the Annuity 2000 Basic Table. The resulting separate mortality rates for males and females were blended using a fixed 50 percent male/50 percent female blend.

The life expectancy tables and mortality rates are also relevant to the application of section 72(t), which imposes an additional income tax on early distributions from qualified retirement plans (including plans qualified under section 401(a) or section 403(a), annuity contracts and other arrangements described in section 403(b), and individual retirement arrangements described in section 408(a) or section 408(b)). Section 72(t)(2)(A)(iv) provides an exception from this additional income tax that applies in the case of a series of substantially equal periodic payments made for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of the employee and the designated beneficiary. Revenue Ruling 2002-62, 2002-2 C.B. 710, provides that the life expectancy tables set forth in §1.401(a)(9)-9 may be used for purposes of determining payments that satisfy the exception under section 72(t)(2)(A)(iv). Rev. Rul. 2002-62 also sets forth a fixed annuitization method of determining payments that satisfy this exception. Under the fixed annuitization method, the annual payment for each year (which is determined only for the first year and not reset for subsequent years) is determined by dividing the account balance by an annuity factor that is the present value of an annuity of $1 per year beginning at the taxpayer's age when the payments commence and continuing for the life of the taxpayer (or the joint lives of the taxpayer and his or her beneficiary). The annuity factor is derived using the mortality table used to develop the life expectancy tables set forth in §1.401(a)(9)-9.

IV. *Executive Order 13847 and Proposed Regulations*

Executive Order 13847, 83 FR 45321, which was signed on August 31, 2018, directs the Secretary of the Treasury to examine the life expectancy and distribution period tables in the regulations on required minimum distributions from retirement plans and determine whether they should be updated to reflect current mortality data and whether such updates should be made annually or on another periodic basis. The purpose of any updates would be to increase the effectiveness of tax-favored retirement programs by allowing retirees to retain sufficient retirement savings in these programs for their later years.

On November 8, 2019, the Department of the Treasury (Treasury Department) and the IRS published proposed regulations (REG-132210-18) under section 401(a)(9) in the **Federal Register** (84 FR 60812) (the proposed regulations) setting out updated life expectancy and distribution tables. A public hearing on the proposed regulations was held on January 13, 2020. Fifty-five written comments were received, and two speakers provided oral comments at the public hearing. After consideration of the comments, the proposed regulations are adopted as revised by this Treasury decision.

Summary of Comments and Explanation of Provisions

I. *Overview*

In accordance with Executive Order 13847, the Treasury Department and the IRS have examined the life expectancy and distribution period tables in formerly applicable §1.401(a)(9)-9 and have reviewed currently available mortality data. As a result of this review, the Treasury Department and the IRS have determined that those tables should be updated to reflect current life expectancies. Accordingly, these regulations update those tables.

The life expectancy tables and applicable distribution period tables in these regulations generally reflect longer life

[6] Pursuant to §1.401(a)(9)-8, Q&A-2(a)(3), the rules of §1.401(a)(9)-6 also apply to an annuity contract purchased under a defined contribution plan.

[7] The Annuity 2000 Basic Table was developed by projecting mortality rates from the 1983 Individual Annuity Mortality Basic Table.

expectancies than the tables in formerly applicable §1.401(a)(9)-9. For example, a 72-year-old IRA owner who applied the Uniform Lifetime Table under formerly applicable §1.401(a)(9)-9 to calculate required minimum distributions used a life expectancy of 25.6 years. Applying the Uniform Lifetime Table set forth in these regulations, a 72-year-old IRA owner will use a life expectancy of 27.4 years to calculate required minimum distributions. As another example, a 75-year-old surviving spouse who is the employee's sole beneficiary and applied the Single Life Table under formerly applicable §1.401(a)(9)-9 to compute required minimum distributions used a life expectancy of 13.4 years. Under these regulations, a 75-year-old surviving spouse will use a life expectancy of 14.8 years. The effect of these changes is to reduce required minimum distributions generally, which will allow participants to retain larger amounts in their retirement plans to account for the possibility they may live longer.

II. *Comments*

The Treasury Department and the IRS received a number of comments about the updated life expectancy and distribution period tables in the proposed regulations, the effective date for the use of the tables, and how often the tables should be updated. All of the comments received were in favor of the updating of the previously applicable tables.

Two commenters observed that, at some older ages, life expectancies in the proposed regulations were shorter than under formerly applicable §1.401(a)(9)-9. The life expectancy and distribution period tables in the proposed regulations were developed based on the mortality rates for purchasers of individual annuities, which are set forth in the experience tables used to develop the 2012 Individual Annuity Mortality Basic Table. These commenters recommended that the final regulations should instead provide life expectancy and distribution period tables developed based on the mortality rates set forth in the 2012 Individual Annuity Reserve Table. Those mortality rates were developed based on the same experience tables as the 2012 Individual Annuity Mortality Basic Table but reflect an adjustment to the mortality rates in the 2012 Individual Annuity Mortality Basic Table to provide a margin for conservatism for establishing life insurance company reserves (and therefore the use of those mortality rates would result in longer life expectancies than the life expectancies in the proposed regulations).[8]

The Treasury Department and the IRS reviewed the underlying data and methodology used to develop the mortality tables reflected in formerly applicable §1.401(a)(9)-9, as well as the 2012 Individual Annuity Mortality Basic Table and the 2012 Individual Annuity Reserve Table. Based on that review, the Treasury Department and the IRS determined that the life expectancies in formerly applicable §1.401(a)(9)-9 were based on an overestimate of the rate of mortality improvement, especially for individuals in their nineties. The Treasury Department and IRS also concluded that using a table based on the mortality experience of purchasers of individual annuities for purposes of determining required minimum distributions already applies longer life expectancies than expected for the general population,[9] so that reflecting the extra conservatism added to the mortality table that is used for purposes of determining insurance company reserves is not appropriate. Therefore, these regulations use mortality rates that are derived from the 2012 Individual Annuity Mortality Basic Table because those rates more accurately reflect empirical life expectancy data.

A number of commenters asked for changes in the minimum distribution rules that were not related to the life expectancy and distribution period tables in the proposed regulations, and many of these changes would require legislation. For example, some commenters asked for a change in the tax treatment of minimum distributions or for the elimination of the application of the minimum distribution requirements in certain circumstances. These comments were not adopted either because the Treasury Department and the IRS do not have the authority to make the changes in the absence of a statutory change or because the changes are otherwise beyond the scope of these regulations.

After the proposed regulations were published, the Setting Every Community Up for Retirement Enhancement Act (SECURE Act) was enacted as Division O of the Further Consolidated Appropriations Act, Pub. L. 116-94. The SECURE Act made two significant changes to section 401(a)(9): (1) it changed the required beginning date for an employee from April 1 of the year following the year the employee attains age 70½ to April 1 of the year following the year the employee attains age 72; and (2) it made adjustments to the required minimum distribution rules that apply after the death of the employee in the case of an eligible retirement plan described in section 402(c)(8)(B) that is not a defined benefit plan. The Treasury Department and the IRS expect to update the regulations under section 401(a)(9) to take into account the amendments to section 401(a)(9) made by the SECURE Act (including new section 401(a)(9)(H))[10] and in doing so will consider any comments on the proposed regulations to the extent that the comments, though beyond the scope of these regulations, are relevant in that context.

A number of commenters also requested that the effective date of the final regulations be delayed to 2022 (instead of 2021). They noted that plan sponsors and IRA providers are currently working to update their systems for the SECURE Act changes to section 401(a)(9) and recommended that the effective date of these regulations be delayed in order to allow administrators sufficient additional time to update systems for these regulations.

[8] The 2012 Individual Annuity Mortality Basic Table, the 2012 Individual Annuity Reserve Table, and methodology used to develop these tables can be found at https://www.actuary.org/sites/default/files/files/publications/Payout_Annuity_Report_09-28-11.pdf

[9] Using a table based on the mortality experience of purchasers of individual annuities generates longer life expectancies than expected for the general population because of anti-selection in that purchasers of individual annuities have chosen to purchase a product that rewards long life (and therefore are expected to have greater longevity than the general population).

[10] No interpretive inferences should be drawn from the references to section 401(a)(9)(H) included in this preamble and the regulations.

As described in the *Effective/Applicability Date* section of this preamble, these regulations will apply to distribution calendar years beginning on or after January 1, 2022.

III. *Updated Life Expectancy and Distribution Period Tables*

The life expectancy and distribution period tables in these regulations have been developed based on mortality rates for 2022. These mortality rates were derived by applying mortality improvement through 2022 to the mortality rates from the experience tables used to develop the 2012 Individual Annuity Mortality Basic Tables (which are the most recent individual annuity mortality tables). As was the case in the proposed regulations, the separate mortality rates for males and females in these experience tables, which were based on the 2000-2004 Payout Annuity Mortality Experience Study,[11] have been projected from the central year of 2002 using the respective mortality improvement rates from the Mortality Improvement Scale MP-2018 for males and females.[12] The mortality table in these regulations was developed by blending the resulting separate mortality rates for males and females using a fixed 50 percent male/50 percent female blend.

The Single Life Table in these regulations sets forth life expectancies for each age, with the life expectancy for an age calculated as the sum of the probabilities of an individual at that age surviving to each future year. The resulting life expectancy is then increased by 11/24[13] to approximate the effect of monthly payments and is subject to a floor of 1.0.

The Uniform Lifetime Table in these regulations sets forth joint and last survivor life expectancies for each age beginning with age 72, based on a hypothetical beneficiary.[14] Pursuant to §1.401(a)(9)-5, Q&A-4(a), the Uniform Lifetime Table is used for determining the distribution period for lifetime distributions to an employee in situations in which the employee's surviving spouse either is not the sole designated beneficiary or is the sole designated beneficiary but is not more than 10 years younger than the employee. The joint and last survivor life expectancy of an employee is taken from the Joint and Last Survivor Table using a hypothetical beneficiary who is assumed to be 10 years younger than the employee.

The Joint and Last Survivor Table sets forth joint and last survivor life expectancies of an employee and the employee's beneficiary for each combination of ages of those individuals. The joint and last survivor life expectancy for an employee and a beneficiary at a combination of ages is calculated as the sum of the probabilities of the employee surviving to each future year, plus the sum of the probabilities of the beneficiary surviving to each future year, minus the sum of the probabilities of both the employee and beneficiary surviving to each future year. The resulting joint and last survivor life expectancy is then increased by 11/24 to approximate the effect of monthly payments and is subject to a floor of 1.0.

The life expectancy tables in formerly applicable §1.401(a)(9)-9 are used in several numerical examples in §1.401(a)(9)-6, Q&A-14(f) that illustrate the availability of the exception described in §1.401(a)(9)-6, Q&A-14(c) (regarding certain increasing payments under insurance company annuity contracts). These regulations do not include revisions to these examples to reflect the life expectancy tables in these regulations. However, it is expected that the examples will be updated as part of the broader update of the regulations under section 401(a)(9) to take into account the SECURE Act.

In the preamble to the proposed regulations, the Treasury Department and the IRS asked for comments about how frequently to update the life expectancy and distribution period tables. A number of commenters cited the need to strike an appropriate balance between the benefit of providing updated tables and the administrative burden of frequent updates and suggested that life expectancy and distribution period tables not be updated annually. The frequency of updates suggested by commenters ranged from 4 to 10 years.

These regulations do not provide for automatic updates to the life expectancy and distribution period tables. The Treasury Department and the IRS currently anticipate that they will review the tables at the earlier of: (1) 10 years or (2) whenever a new study of individual annuity mortality experience is published.

IV. *Effective/Applicability Date*

The life expectancy tables and Uniform Lifetime Table under these regulations apply for distribution calendar years beginning on or after January 1, 2022. Thus, for example, for an IRA owner who attained age 70 ½ in February of 2020 (so that the individual attains age 72 in August of 2021 and the individual's required beginning date is April 1, 2022), these regulations do not apply to the minimum required distribution for the individual's 2021 distribution calendar year (which is due April 1, 2022) but will apply to the minimum required distribution for the individual's 2022 distribution calendar year (which is due December 31, 2022).

These regulations include a transition rule that applies if an employee died before January 1, 2022, and, under the rules of §1.401(a)(9)-5, Q&A-5, the distribution period that applies for calendar years following the calendar year of the employee's death is equal to a single life expectancy calculated as of the calendar year of the employee's death (or if applicable, the year after the employee's death), reduced by 1 for each subsequent year. Under this transition rule, the initial life expectancy used to determine the distribution period

[11] Information about the 2000-2004 Payout Annuity Mortality Experience Study and the experience tables, can be found at https://www.actuary.org/sites/default/files/files/publications/Payout_Annuity_Report_09-28-11.pdf

[12] The Mortality Improvement Scale MP-2018 can be found at https://www.soa.org/experience-studies/2018/mortality-improvement-scale-mp-2018/.

[13] Assuming an equal distribution of deaths throughout the year, if a retiree is scheduled to receive monthly payments on the last day of each month then, in the year of death, on average, the retiree would receive 11/24th of a full year's worth of payments.

[14] The proposed regulations included Uniform Lifetime Table entries beginning with age 70. These regulations do not include Uniform Lifetime Table entries for ages 70 and 71 because section 114 of the SECURE Act changed the minimum age for receiving required minimum distributions from age 70½ to age 72.

is reset by using the new Single Life Table for the age of the relevant individual in the calendar year for which life expectancy was set under §1.401(a)(9)-5, Q&A-5(c). For distribution calendar years beginning on or after January 1, 2022, the distribution period is determined by reducing that initial life expectancy by 1 for each year subsequent to the year for which it was initially set, except as provided under section 401(a)(9)(H).

This transition rule could apply in three situations: (1) The employee died with a non-spousal eligible designated beneficiary (so that the applicable distribution period under §1.401(a)(9)-5, Q&A-5(c)(1), is determined based on the remaining life expectancy of the eligible designated beneficiary for the calendar year following the calendar year of the employee's death); (2) the employee died after the required beginning date without a designated beneficiary (so that the applicable distribution period under §1.401(a)(9)-5, Q&A-5(c)(3), is determined based on the remaining life expectancy of the employee for the year of the employee's death); and (3) the employee, who is younger than the designated beneficiary, died after the required beginning date (so that the applicable distribution period under §1.401(a)(9)-5, Q&A-5(a)(1), is determined based on the remaining life expectancy of the employee for the year of the employee's death).

These regulations illustrate the application of this transition rule with an example involving an employee who died at age 80 in 2019 with a designated beneficiary (who was not the employee's spouse) who was age 75 in the year of the employee's death and who continues to be alive until at least 2022. For 2020, the distribution period that applies for the beneficiary is 12.7 years (the period applicable for a 76-year-old under the Single Life Table in formerly applicable §1.401(a)(9)-9), and for 2021, it is 11.7 years (the original distribution period, reduced by 1 year). For 2022, taking into account the life expectancy tables under these regulations and applying the transition rule, the applicable distribution period would be 12.1 years (the 14.1-year life expectancy for a 76-year-old under the Single Life Table in these regulations, reduced by 2 years).

A similar transition rule applies if an employee's sole beneficiary is the employee's surviving spouse and the spouse died before January 1, 2022. Under the rules of §1.401(a)(9)-5, Q&A-5(c)(2), the distribution period that applies for the spouse's beneficiary is equal to the single life expectancy for the spouse calculated for the calendar year of the spouse's death, reduced by 1 for each subsequent year. Under the transition rule, the initial life expectancy used to determine the distribution period is reset by using the new Single Life Table for the age of the spouse in the calendar year of the spouse's death. For distribution calendar years beginning on or after January 1, 2022, the distribution period is determined by reducing that initial life expectancy by 1 for each year subsequent to the year for which it was initially set. However, this transition rule only applies to the extent consistent with section 401(a)(9)(H).

These transition rules, under which there is a one-time reset for the relevant life expectancy using the Single Life Table under these regulations, are designed to recognize that the general population has longer life expectancies than the life expectancies set forth in the formerly applicable §1.401(a)(9)-9. However, because the reset life expectancy is based on the age for which life expectancy was originally determined (rather than the relevant individual's current age), it is consistent with Congressional intent to limit recalculation of life expectancy to the employee and the employee's spouse.

V. *Use of Revised Tables to Determine Substantially Equal Periodic Payments*

The Treasury Department and the IRS anticipate issuing guidance that would update Rev. Rul. 2002-62. This update would apply the life expectancy, distribution period, and mortality tables set forth in these regulations for purposes of determining substantially equal periodic payments once these regulations become effective.

Special Analyses

These regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

It is hereby certified pursuant to the Regulatory Flexibility Act (5 U.S.C., chapter 6) that these regulations will not have a significant economic impact on a substantial number of small entities. These regulations apply to all employers that sponsor defined contribution plans regardless of size. Although data are not available to estimate the number of small entitles affected, the rule may affect a substantial number. This rule updates life expectancies that are required to be used by statute.

Although the rule may affect a substantial number of small entities, the economic impact of these regulations is not likely to be significant. Small businesses generally comply with the minimum required distribution rules using either third-party administrators or software, creating economies of scale that mitigate the cost of updating life expectancy tables. That software is updated periodically irrespective of a change in life expectancies used to determine minimum required distributions. The portion of the cost of a periodic update that is attributable to the implementation of the life expectancy and distribution period tables in these regulations will be spread over the client base of a service provider that uses software developed in-house and over the group of purchasers of generally-available plan administration software. Because, in either case, the cost of changing software to implement the updated life expectancies is spread over a large group of businesses that maintain retirement plans, it is estimated that the incremental cost for each affected small businesses as a result of the use of updated life expectancies is not significant.

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small entities. No comments were received from the Chief Counsel for the Office of Advocacy of the Small Business Administration.

Drafting Information

The principal authors of these regulations are Arslan Malik and Linda S. F. Marshall, of the Office of the Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the Treasury Department and the IRS participated in the development of the proposed regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1 – INCOME TAX

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 401(m)(9) and 26 U.S.C. 7805.

* * * * *

§ 1.401(a)(9)-5 [Amended]

Par. 2. Section 1.401(a)(9)-5 is amended by:

1. Removing the language "A-1 of § 1.401(a)(9)-9" wherever it appears and adding "§1.401(a)(9)-9(b)" in its place.
2. Removing the language "A-2 of § 1.401(a)(9)-9" wherever it appears and adding "§1.401(a)(9)-9(c)" in its place.
3. Removing the language "A-3 of § 1.401(a)(9)-9" wherever it appears and adding "§1.401(a)(9)-9(d)" in its place.

§1.401(a)(9)-6 [Amended]

Par. 3. Section 1.401(a)(9)-6 is amended by:

1. Removing the language "A-1 of § 1.401(a)(9)-9" wherever it appears and adding "§1.401(a)(9)-9(b)" in its place.
2. Removing the language "A-2 of § 1.401(a)(9)-9" wherever it appears and adding "§1.401(a)(9)-9(c)" in its place.
3. Removing the language "A-3 of in § 1.401(a)(9)-9" wherever it appears and adding "§1.401(a)(9)-9(d)" in its place.

§1.401(a)(9)-8 [Amended]

Par. 4. Section 1.401(a)(9)-8 is amended by removing the language "A-2 of §1.401(a)(9)-9" wherever it appears and adding "§1.401(a)(9)-9(c)" in its place.

Par. 5. Section 1.401(a)(9)-9 is revised to read as follows:

§1.401(a)(9)-9 Life expectancy and distribution period tables.

(a) *In general*. This section specifies the life expectancy and applicable distribution period tables that apply for purposes of determining required minimum distributions under section 401(a)(9). Paragraphs (b), (c), and (d) of this section set forth these tables. Paragraph (e) of this section provides the mortality rates that are used to develop these tables. Paragraph (f) of this section provides applicability date rules.

(b) *Single Life Table*. The following table, referred to as the Single Life Table, sets forth the life expectancy of an individual at each age.

Table 1 to Paragraph (b)

Age	*Life expectancy*
0	84.6
1	83.7
2	82.8
3	81.8
4	80.8
5	79.8
6	78.8
7	77.9
8	76.9
9	75.9
10	74.9
11	73.9
12	72.9
13	71.9
14	70.9
15	69.9
16	69.0
17	68.0

Age	*Life expectancy*
18	67.0
19	66.0
20	65.0
21	64.1
22	63.1
23	62.1
24	61.1
25	60.2
26	59.2
27	58.2
28	57.3
29	56.3
30	55.3
31	54.4
32	53.4
33	52.5
34	51.5
35	50.5
36	49.6
37	48.6
38	47.7
39	46.7
40	45.7
41	44.8
42	43.8
43	42.9
44	41.9
45	41.0
46	40.0
47	39.0
48	38.1
49	37.1
50	36.2
51	35.3
52	34.3
53	33.4
54	32.5
55	31.6
56	30.6
57	29.8
58	28.9
59	28.0
60	27.1
61	26.2

Age	*Life expectancy*
62	25.4
63	24.5
64	23.7
65	22.9
66	22.0
67	21.2
68	20.4
69	19.6
70	18.8
71	18.0
72	17.2
73	16.4
74	15.6
75	14.8
76	14.1
77	13.3
78	12.6
79	11.9
80	11.2
81	10.5
82	9.9
83	9.3
84	8.7
85	8.1
86	7.6
87	7.1
88	6.6
89	6.1
90	5.7
91	5.3
92	4.9
93	4.6
94	4.3
95	4.0
96	3.7
97	3.4
98	3.2
99	3.0
100	2.8
101	2.6
102	2.5
103	2.3
104	2.2
105	2.1

Age	*Life expectancy*
106	2.1
107	2.1
108	2.0
109	2.0
110	2.0
111	2.0
112	2.0
113	1.9
114	1.9
115	1.8
116	1.8
117	1.6
118	1.4
119	1.1
120 +	1.0

(c) *Uniform Lifetime Table*. The following table, referred to as the Uniform Lifetime Table, sets forth the distribution period that applies for lifetime distributions to an employee in situations in which the employee's surviving spouse is not the sole designated beneficiary. This table is also used if the employee's surviving spouse is the sole designated beneficiary but is not more than 10 years younger than the employee.

Table 2 to Paragraph (c)

Age of employee	*Distribution period*
72	27.4
73	26.5
74	25.5
75	24.6
76	23.7
77	22.9
78	22.0
79	21.1
80	20.2
81	19.4
82	18.5
83	17.7
84	16.8
85	16.0
86	15.2
87	14.4
88	13.7
89	12.9
90	12.2
91	11.5
92	10.8

Age of employee	*Distribution period*
93	10.1
94	9.5
95	8.9
96	8.4
97	7.8
98	7.3
99	6.8
100	6.4
101	6.0
102	5.6
103	5.2
104	4.9
105	4.6
106	4.3
107	4.1
108	3.9
109	3.7
110	3.5
111	3.4
112	3.3
113	3.1
114	3.0
115	2.9
116	2.8
117	2.7
118	2.5
119	2.3
120 +	2.0

(d) *Joint and Last Survivor Table*. The following table, referred to as the Joint and Last Survivor Table, is used for determining the joint and last survivor life expectancy of two individuals.

Table 3 to Paragraph (d)

Ages	***0***	***1***	***2***	***3***	***4***	***5***	***6***	***7***	***8***
0	91.9	91.4	91.0	90.5	90.1	89.7	89.4	89.0	88.7
1	91.4	90.9	90.4	90.0	89.5	89.1	88.8	88.4	88.1
2	91.0	90.4	89.9	89.4	89.0	88.5	88.1	87.8	87.4
3	90.5	90.0	89.4	88.9	88.4	88.0	87.6	87.1	86.8
4	90.1	89.5	89.0	88.4	87.9	87.4	87.0	86.6	86.2
5	89.7	89.1	88.6	88.0	87.4	86.9	86.5	86.0	85.6
6	89.4	88.8	88.1	87.6	87.0	86.5	85.9	85.5	85.0
7	89.0	88.4	87.8	87.1	86.6	86.0	85.5	84.9	84.5
8	88.7	88.1	87.4	86.8	86.2	85.6	85.0	84.5	83.9

9	88.4	87.8	87.1	86.4	85.8	85.2	84.6	84.0	83.5
10	88.2	87.5	86.8	86.1	85.4	84.8	84.2	83.6	83.0
11	87.9	87.2	86.5	85.8	85.1	84.4	83.8	83.2	82.6
12	87.7	87.0	86.2	85.5	84.8	84.1	83.4	82.8	82.2
13	87.5	86.7	86.0	85.2	84.5	83.8	83.1	82.4	81.8
14	87.3	86.5	85.7	85.0	84.2	83.5	82.8	82.1	81.4
15	87.1	86.3	85.5	84.7	84.0	83.2	82.5	81.8	81.1
16	86.9	86.1	85.3	84.5	83.7	83.0	82.2	81.5	80.8
17	86.8	86.0	85.1	84.3	83.5	82.7	82.0	81.2	80.5
18	86.6	85.8	85.0	84.1	83.3	82.5	81.7	81.0	80.2
19	86.5	85.7	84.8	84.0	83.1	82.3	81.5	80.7	80.0
20	86.4	85.5	84.7	83.8	83.0	82.2	81.3	80.5	79.8
21	86.2	85.4	84.5	83.7	82.8	82.0	81.2	80.3	79.5
22	86.1	85.3	84.4	83.5	82.7	81.8	81.0	80.2	79.3
23	86.0	85.2	84.3	83.4	82.5	81.7	80.8	80.0	79.2
24	85.9	85.1	84.2	83.3	82.4	81.6	80.7	79.8	79.0
25	85.9	85.0	84.1	83.2	82.3	81.4	80.6	79.7	78.8
26	85.8	84.9	84.0	83.1	82.2	81.3	80.4	79.6	78.7
27	85.7	84.8	83.9	83.0	82.1	81.2	80.3	79.4	78.6
28	85.6	84.7	83.8	82.9	82.0	81.1	80.2	79.3	78.4
29	85.6	84.7	83.8	82.8	81.9	81.0	80.1	79.2	78.3
30	85.5	84.6	83.7	82.8	81.8	80.9	80.0	79.1	78.2
31	85.4	84.6	83.6	82.7	81.8	80.9	79.9	79.0	78.1
32	85.4	84.5	83.6	82.6	81.7	80.8	79.9	78.9	78.0
33	85.3	84.5	83.5	82.6	81.6	80.7	79.8	78.9	77.9
34	85.3	84.4	83.5	82.5	81.6	80.7	79.7	78.8	77.9
35	85.3	84.4	83.4	82.5	81.5	80.6	79.7	78.7	77.8
36	85.2	84.3	83.4	82.4	81.5	80.5	79.6	78.7	77.7
37	85.2	84.3	83.3	82.4	81.4	80.5	79.5	78.6	77.7
38	85.2	84.3	83.3	82.3	81.4	80.4	79.5	78.6	77.6
39	85.1	84.2	83.3	82.3	81.4	80.4	79.5	78.5	77.6
40	85.1	84.2	83.2	82.3	81.3	80.4	79.4	78.5	77.5
41	85.1	84.2	83.2	82.2	81.3	80.3	79.4	78.4	77.5
42	85.0	84.1	83.2	82.2	81.3	80.3	79.3	78.4	77.4
43	85.0	84.1	83.1	82.2	81.2	80.3	79.3	78.3	77.4
44	85.0	84.1	83.1	82.2	81.2	80.2	79.3	78.3	77.3
45	85.0	84.1	83.1	82.1	81.2	80.2	79.2	78.3	77.3
46	84.9	84.0	83.1	82.1	81.1	80.2	79.2	78.2	77.3
47	84.9	84.0	83.1	82.1	81.1	80.2	79.2	78.2	77.3
48	84.9	84.0	83.0	82.1	81.1	80.1	79.2	78.2	77.2
49	84.9	84.0	83.0	82.1	81.1	80.1	79.1	78.2	77.2
50	84.9	84.0	83.0	82.0	81.1	80.1	79.1	78.1	77.2
51	84.8	84.0	83.0	82.0	81.0	80.1	79.1	78.1	77.2
52	84.8	83.9	83.0	82.0	81.0	80.1	79.1	78.1	77.1
53	84.8	83.9	83.0	82.0	81.0	80.0	79.1	78.1	77.1

54	84.8	83.9	82.9	82.0	81.0	80.0	79.0	78.1	77.1
55	84.8	83.9	82.9	82.0	81.0	80.0	79.0	78.1	77.1
56	84.8	83.9	82.9	81.9	81.0	80.0	79.0	78.0	77.1
57	84.8	83.9	82.9	81.9	81.0	80.0	79.0	78.0	77.0
58	84.8	83.9	82.9	81.9	80.9	80.0	79.0	78.0	77.0
59	84.7	83.9	82.9	81.9	80.9	80.0	79.0	78.0	77.0
60	84.7	83.8	82.9	81.9	80.9	79.9	79.0	78.0	77.0
61	84.7	83.8	82.9	81.9	80.9	79.9	79.0	78.0	77.0
62	84.7	83.8	82.9	81.9	80.9	79.9	78.9	78.0	77.0
63	84.7	83.8	82.9	81.9	80.9	79.9	78.9	78.0	77.0
64	84.7	83.8	82.8	81.9	80.9	79.9	78.9	77.9	77.0
65	84.7	83.8	82.8	81.9	80.9	79.9	78.9	77.9	77.0
66	84.7	83.8	82.8	81.9	80.9	79.9	78.9	77.9	76.9
67	84.7	83.8	82.8	81.9	80.9	79.9	78.9	77.9	76.9
68	84.7	83.8	82.8	81.8	80.9	79.9	78.9	77.9	76.9
69	84.7	83.8	82.8	81.8	80.9	79.9	78.9	77.9	76.9
70	84.7	83.8	82.8	81.8	80.9	79.9	78.9	77.9	76.9
71	84.7	83.8	82.8	81.8	80.9	79.9	78.9	77.9	76.9
72	84.7	83.8	82.8	81.8	80.9	79.9	78.9	77.9	76.9
73	84.6	83.8	82.8	81.8	80.8	79.9	78.9	77.9	76.9
74	84.6	83.8	82.8	81.8	80.8	79.9	78.9	77.9	76.9
75	84.6	83.8	82.8	81.8	80.8	79.9	78.9	77.9	76.9
76	84.6	83.8	82.8	81.8	80.8	79.9	78.9	77.9	76.9
77	84.6	83.8	82.8	81.8	80.8	79.8	78.9	77.9	76.9
78	84.6	83.8	82.8	81.8	80.8	79.8	78.9	77.9	76.9
79	84.6	83.8	82.8	81.8	80.8	79.8	78.9	77.9	76.9
80	84.6	83.8	82.8	81.8	80.8	79.8	78.9	77.9	76.9
81	84.6	83.8	82.8	81.8	80.8	79.8	78.9	77.9	76.9
82	84.6	83.8	82.8	81.8	80.8	79.8	78.9	77.9	76.9
83	84.6	83.7	82.8	81.8	80.8	79.8	78.9	77.9	76.9
84	84.6	83.7	82.8	81.8	80.8	79.8	78.9	77.9	76.9
85	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
86	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
87	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
88	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
89	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
90	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
91	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
92	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
93	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
94	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
95	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
96	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
97	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
98	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9

99	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
100	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
101	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
102	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
103	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
104	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
105	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
106	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
107	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
108	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
109	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
110	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
111	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
112	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
113	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
114	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
115	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
116	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
117	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
118	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
119	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
120+	84.6	83.7	82.8	81.8	80.8	79.8	78.8	77.9	76.9
Ages	***9***	***10***	***11***	***12***	***13***	***14***	***15***	***16***	***17***
0	88.4	88.2	87.9	87.7	87.5	87.3	87.1	86.9	86.8
1	87.8	87.5	87.2	87.0	86.7	86.5	86.3	86.1	86.0
2	87.1	86.8	86.5	86.2	86.0	85.7	85.5	85.3	85.1
3	86.4	86.1	85.8	85.5	85.2	85.0	84.7	84.5	84.3
4	85.8	85.4	85.1	84.8	84.5	84.2	84.0	83.7	83.5
5	85.2	84.8	84.4	84.1	83.8	83.5	83.2	83.0	82.7
6	84.6	84.2	83.8	83.4	83.1	82.8	82.5	82.2	82.0
7	84.0	83.6	83.2	82.8	82.4	82.1	81.8	81.5	81.2
8	83.5	83.0	82.6	82.2	81.8	81.4	81.1	80.8	80.5
9	82.9	82.5	82.0	81.6	81.2	80.8	80.4	80.1	79.8
10	82.5	81.9	81.5	81.0	80.6	80.2	79.8	79.4	79.1
11	82.0	81.5	80.9	80.5	80.0	79.6	79.2	78.8	78.4
12	81.6	81.0	80.5	79.9	79.5	79.0	78.6	78.2	77.8
13	81.2	80.6	80.0	79.5	79.0	78.5	78.0	77.6	77.2
14	80.8	80.2	79.6	79.0	78.5	78.0	77.5	77.0	76.6
15	80.4	79.8	79.2	78.6	78.0	77.5	77.0	76.5	76.0
16	80.1	79.4	78.8	78.2	77.6	77.0	76.5	76.0	75.5
17	79.8	79.1	78.4	77.8	77.2	76.6	76.0	75.5	75.0
18	79.5	78.8	78.1	77.4	76.8	76.2	75.6	75.0	74.5
19	79.2	78.5	77.8	77.1	76.4	75.8	75.2	74.6	74.0
20	79.0	78.2	77.5	76.8	76.1	75.4	74.8	74.2	73.6
21	78.8	78.0	77.2	76.5	75.8	75.1	74.4	73.8	73.2

22	78.5	77.8	77.0	76.2	75.5	74.8	74.1	73.4	72.8
23	78.3	77.5	76.8	76.0	75.2	74.5	73.8	73.1	72.5
24	78.2	77.3	76.5	75.8	75.0	74.2	73.5	72.8	72.1
25	78.0	77.2	76.4	75.6	74.8	74.0	73.3	72.5	71.8
26	77.8	77.0	76.2	75.4	74.6	73.8	73.0	72.3	71.5
27	77.7	76.8	76.0	75.2	74.4	73.6	72.8	72.0	71.3
28	77.6	76.7	75.8	75.0	74.2	73.4	72.6	71.8	71.0
29	77.4	76.6	75.7	74.9	74.0	73.2	72.4	71.6	70.8
30	77.3	76.4	75.6	74.7	73.9	73.0	72.2	71.4	70.6
31	77.2	76.3	75.5	74.6	73.7	72.9	72.0	71.2	70.4
32	77.1	76.2	75.3	74.5	73.6	72.7	71.9	71.0	70.2
33	77.0	76.1	75.2	74.3	73.5	72.6	71.7	70.9	70.0
34	77.0	76.0	75.1	74.2	73.3	72.5	71.6	70.7	69.9
35	76.9	76.0	75.0	74.1	73.2	72.4	71.5	70.6	69.7
36	76.8	75.9	75.0	74.0	73.1	72.2	71.4	70.5	69.6
37	76.7	75.8	74.9	74.0	73.1	72.1	71.3	70.4	69.5
38	76.7	75.7	74.8	73.9	73.0	72.1	71.2	70.3	69.4
39	76.6	75.7	74.7	73.8	72.9	72.0	71.1	70.2	69.3
40	76.6	75.6	74.7	73.7	72.8	71.9	71.0	70.1	69.2
41	76.5	75.6	74.6	73.7	72.8	71.8	70.9	70.0	69.1
42	76.5	75.5	74.6	73.6	72.7	71.8	70.8	69.9	69.0
43	76.4	75.5	74.5	73.6	72.6	71.7	70.8	69.8	68.9
44	76.4	75.4	74.5	73.5	72.6	71.6	70.7	69.8	68.8
45	76.4	75.4	74.4	73.5	72.5	71.6	70.6	69.7	68.8
46	76.3	75.4	74.4	73.4	72.5	71.5	70.6	69.7	68.7
47	76.3	75.3	74.4	73.4	72.4	71.5	70.5	69.6	68.7
48	76.3	75.3	74.3	73.4	72.4	71.5	70.5	69.6	68.6
49	76.2	75.3	74.3	73.3	72.4	71.4	70.5	69.5	68.6
50	76.2	75.2	74.3	73.3	72.3	71.4	70.4	69.5	68.5
51	76.2	75.2	74.2	73.3	72.3	71.3	70.4	69.4	68.5
52	76.2	75.2	74.2	73.2	72.3	71.3	70.4	69.4	68.4
53	76.1	75.2	74.2	73.2	72.3	71.3	70.3	69.4	68.4
54	76.1	75.1	74.2	73.2	72.2	71.3	70.3	69.3	68.4
55	76.1	75.1	74.2	73.2	72.2	71.2	70.3	69.3	68.3
56	76.1	75.1	74.1	73.2	72.2	71.2	70.2	69.3	68.3
57	76.1	75.1	74.1	73.1	72.2	71.2	70.2	69.3	68.3
58	76.1	75.1	74.1	73.1	72.1	71.2	70.2	69.2	68.3
59	76.0	75.1	74.1	73.1	72.1	71.2	70.2	69.2	68.2
60	76.0	75.0	74.1	73.1	72.1	71.1	70.2	69.2	68.2
61	76.0	75.0	74.1	73.1	72.1	71.1	70.1	69.2	68.2
62	76.0	75.0	74.0	73.1	72.1	71.1	70.1	69.2	68.2
63	76.0	75.0	74.0	73.0	72.1	71.1	70.1	69.1	68.2
64	76.0	75.0	74.0	73.0	72.1	71.1	70.1	69.1	68.2
65	76.0	75.0	74.0	73.0	72.0	71.1	70.1	69.1	68.1
66	76.0	75.0	74.0	73.0	72.0	71.1	70.1	69.1	68.1

67	76.0	75.0	74.0	73.0	72.0	71.0	70.1	69.1	68.1
68	75.9	75.0	74.0	73.0	72.0	71.0	70.1	69.1	68.1
69	75.9	75.0	74.0	73.0	72.0	71.0	70.0	69.1	68.1
70	75.9	74.9	74.0	73.0	72.0	71.0	70.0	69.1	68.1
71	75.9	74.9	74.0	73.0	72.0	71.0	70.0	69.0	68.1
72	75.9	74.9	73.9	73.0	72.0	71.0	70.0	69.0	68.1
73	75.9	74.9	73.9	73.0	72.0	71.0	70.0	69.0	68.1
74	75.9	74.9	73.9	73.0	72.0	71.0	70.0	69.0	68.0
75	75.9	74.9	73.9	72.9	72.0	71.0	70.0	69.0	68.0
76	75.9	74.9	73.9	72.9	72.0	71.0	70.0	69.0	68.0
77	75.9	74.9	73.9	72.9	72.0	71.0	70.0	69.0	68.0
78	75.9	74.9	73.9	72.9	71.9	71.0	70.0	69.0	68.0
79	75.9	74.9	73.9	72.9	71.9	71.0	70.0	69.0	68.0
80	75.9	74.9	73.9	72.9	71.9	71.0	70.0	69.0	68.0
81	75.9	74.9	73.9	72.9	71.9	71.0	70.0	69.0	68.0
82	75.9	74.9	73.9	72.9	71.9	70.9	70.0	69.0	68.0
83	75.9	74.9	73.9	72.9	71.9	70.9	70.0	69.0	68.0
84	75.9	74.9	73.9	72.9	71.9	70.9	70.0	69.0	68.0
85	75.9	74.9	73.9	72.9	71.9	70.9	70.0	69.0	68.0
86	75.9	74.9	73.9	72.9	71.9	70.9	70.0	69.0	68.0
87	75.9	74.9	73.9	72.9	71.9	70.9	70.0	69.0	68.0
88	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
89	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
90	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
91	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
92	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
93	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
94	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
95	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
96	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
97	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
98	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
99	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
100	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
101	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
102	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
103	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
104	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
105	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
106	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
107	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
108	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
109	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
110	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
111	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0

112	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
113	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
114	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
115	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
116	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
117	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
118	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
119	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
120+	75.9	74.9	73.9	72.9	71.9	70.9	69.9	69.0	68.0
Ages	***18***	***19***	***20***	***21***	***22***	***23***	***24***	***25***	***26***
0	86.6	86.5	86.4	86.2	86.1	86.0	85.9	85.9	85.8
1	85.8	85.7	85.5	85.4	85.3	85.2	85.1	85.0	84.9
2	85.0	84.8	84.7	84.5	84.4	84.3	84.2	84.1	84.0
3	84.1	84.0	83.8	83.7	83.5	83.4	83.3	83.2	83.1
4	83.3	83.1	83.0	82.8	82.7	82.5	82.4	82.3	82.2
5	82.5	82.3	82.2	82.0	81.8	81.7	81.6	81.4	81.3
6	81.7	81.5	81.3	81.2	81.0	80.8	80.7	80.6	80.4
7	81.0	80.7	80.5	80.3	80.2	80.0	79.8	79.7	79.6
8	80.2	80.0	79.8	79.5	79.3	79.2	79.0	78.8	78.7
9	79.5	79.2	79.0	78.8	78.5	78.3	78.2	78.0	77.8
10	78.8	78.5	78.2	78.0	77.8	77.5	77.3	77.2	77.0
11	78.1	77.8	77.5	77.2	77.0	76.8	76.5	76.4	76.2
12	77.4	77.1	76.8	76.5	76.2	76.0	75.8	75.6	75.4
13	76.8	76.4	76.1	75.8	75.5	75.2	75.0	74.8	74.6
14	76.2	75.8	75.4	75.1	74.8	74.5	74.2	74.0	73.8
15	75.6	75.2	74.8	74.4	74.1	73.8	73.5	73.3	73.0
16	75.0	74.6	74.2	73.8	73.4	73.1	72.8	72.5	72.3
17	74.5	74.0	73.6	73.2	72.8	72.5	72.1	71.8	71.5
18	74.0	73.5	73.0	72.6	72.2	71.8	71.5	71.1	70.8
19	73.5	73.0	72.5	72.0	71.6	71.2	70.8	70.5	70.1
20	73.0	72.5	72.0	71.5	71.0	70.6	70.2	69.8	69.5
21	72.6	72.0	71.5	71.0	70.5	70.0	69.6	69.2	68.8
22	72.2	71.6	71.0	70.5	70.0	69.5	69.0	68.6	68.2
23	71.8	71.2	70.6	70.0	69.5	69.0	68.5	68.0	67.6
24	71.5	70.8	70.2	69.6	69.0	68.5	68.0	67.5	67.1
25	71.1	70.5	69.8	69.2	68.6	68.0	67.5	67.0	66.5
26	70.8	70.1	69.5	68.8	68.2	67.6	67.1	66.5	66.0
27	70.5	69.8	69.1	68.5	67.8	67.2	66.6	66.1	65.5
28	70.3	69.5	68.8	68.1	67.5	66.8	66.2	65.6	65.1
29	70.0	69.3	68.5	67.8	67.1	66.5	65.8	65.2	64.6
30	69.8	69.0	68.3	67.5	66.8	66.2	65.5	64.9	64.2
31	69.6	68.8	68.0	67.3	66.6	65.8	65.2	64.5	63.9
32	69.4	68.6	67.8	67.0	66.3	65.6	64.9	64.2	63.5
33	69.2	68.4	67.6	66.8	66.0	65.3	64.6	63.9	63.2
34	69.0	68.2	67.4	66.6	65.8	65.1	64.3	63.6	62.9

35	68.9	68.0	67.2	66.4	65.6	64.8	64.1	63.3	62.6
36	68.7	67.9	67.1	66.2	65.4	64.6	63.8	63.1	62.3
37	68.6	67.7	66.9	66.1	65.2	64.4	63.6	62.8	62.1
38	68.5	67.6	66.8	65.9	65.1	64.2	63.4	62.6	61.9
39	68.4	67.5	66.6	65.8	64.9	64.1	63.3	62.4	61.6
40	68.3	67.4	66.5	65.6	64.8	63.9	63.1	62.3	61.5
41	68.2	67.3	66.4	65.5	64.6	63.8	62.9	62.1	61.3
42	68.1	67.2	66.3	65.4	64.5	63.6	62.8	61.9	61.1
43	68.0	67.1	66.2	65.3	64.4	63.5	62.7	61.8	61.0
44	67.9	67.0	66.1	65.2	64.3	63.4	62.5	61.7	60.8
45	67.9	66.9	66.0	65.1	64.2	63.3	62.4	61.5	60.7
46	67.8	66.9	65.9	65.0	64.1	63.2	62.3	61.4	60.6
47	67.7	66.8	65.9	65.0	64.0	63.1	62.2	61.3	60.5
48	67.7	66.7	65.8	64.9	64.0	63.0	62.1	61.2	60.3
49	67.6	66.7	65.7	64.8	63.9	63.0	62.1	61.2	60.3
50	67.6	66.6	65.7	64.8	63.8	62.9	62.0	61.1	60.2
51	67.5	66.6	65.6	64.7	63.8	62.8	61.9	61.0	60.1
52	67.5	66.5	65.6	64.7	63.7	62.8	61.9	60.9	60.0
53	67.4	66.5	65.5	64.6	63.7	62.7	61.8	60.9	59.9
54	67.4	66.5	65.5	64.6	63.6	62.7	61.7	60.8	59.9
55	67.4	66.4	65.5	64.5	63.6	62.6	61.7	60.8	59.8
56	67.4	66.4	65.4	64.5	63.5	62.6	61.6	60.7	59.8
57	67.3	66.4	65.4	64.5	63.5	62.5	61.6	60.7	59.7
58	67.3	66.3	65.4	64.4	63.5	62.5	61.6	60.6	59.7
59	67.3	66.3	65.4	64.4	63.4	62.5	61.5	60.6	59.6
60	67.3	66.3	65.3	64.4	63.4	62.4	61.5	60.5	59.6
61	67.2	66.3	65.3	64.3	63.4	62.4	61.5	60.5	59.6
62	67.2	66.2	65.3	64.3	63.4	62.4	61.4	60.5	59.5
63	67.2	66.2	65.3	64.3	63.3	62.4	61.4	60.5	59.5
64	67.2	66.2	65.2	64.3	63.3	62.3	61.4	60.4	59.5
65	67.2	66.2	65.2	64.3	63.3	62.3	61.4	60.4	59.5
66	67.2	66.2	65.2	64.2	63.3	62.3	61.3	60.4	59.4
67	67.1	66.2	65.2	64.2	63.3	62.3	61.3	60.4	59.4
68	67.1	66.2	65.2	64.2	63.2	62.3	61.3	60.3	59.4
69	67.1	66.1	65.2	64.2	63.2	62.3	61.3	60.3	59.4
70	67.1	66.1	65.2	64.2	63.2	62.2	61.3	60.3	59.4
71	67.1	66.1	65.1	64.2	63.2	62.2	61.3	60.3	59.3
72	67.1	66.1	65.1	64.2	63.2	62.2	61.3	60.3	59.3
73	67.1	66.1	65.1	64.2	63.2	62.2	61.2	60.3	59.3
74	67.1	66.1	65.1	64.1	63.2	62.2	61.2	60.3	59.3
75	67.1	66.1	65.1	64.1	63.2	62.2	61.2	60.3	59.3
76	67.1	66.1	65.1	64.1	63.2	62.2	61.2	60.2	59.3
77	67.0	66.1	65.1	64.1	63.1	62.2	61.2	60.2	59.3
78	67.0	66.1	65.1	64.1	63.1	62.2	61.2	60.2	59.3
79	67.0	66.1	65.1	64.1	63.1	62.2	61.2	60.2	59.3

80	67.0	66.1	65.1	64.1	63.1	62.1	61.2	60.2	59.2
81	67.0	66.0	65.1	64.1	63.1	62.1	61.2	60.2	59.2
82	67.0	66.0	65.1	64.1	63.1	62.1	61.2	60.2	59.2
83	67.0	66.0	65.1	64.1	63.1	62.1	61.2	60.2	59.2
84	67.0	66.0	65.1	64.1	63.1	62.1	61.2	60.2	59.2
85	67.0	66.0	65.1	64.1	63.1	62.1	61.2	60.2	59.2
86	67.0	66.0	65.1	64.1	63.1	62.1	61.1	60.2	59.2
87	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
88	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
89	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
90	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
91	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
92	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
93	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
94	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
95	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
96	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
97	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
98	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
99	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
100	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
101	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
102	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
103	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
104	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
105	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
106	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
107	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
108	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
109	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
110	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
111	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
112	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
113	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
114	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
115	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
116	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
117	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
118	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
119	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
120+	67.0	66.0	65.0	64.1	63.1	62.1	61.1	60.2	59.2
Ages	***27***	***28***	***29***	***30***	***31***	***32***	***33***	***34***	***35***
0	85.7	85.6	85.6	85.5	85.4	85.4	85.3	85.3	85.3
1	84.8	84.7	84.7	84.6	84.6	84.5	84.5	84.4	84.4
2	83.9	83.8	83.8	83.7	83.6	83.6	83.5	83.5	83.4

3	83.0	82.9	82.8	82.8	82.7	82.6	82.6	82.5	82.5
4	82.1	82.0	81.9	81.8	81.8	81.7	81.6	81.6	81.5
5	81.2	81.1	81.0	80.9	80.9	80.8	80.7	80.7	80.6
6	80.3	80.2	80.1	80.0	79.9	79.9	79.8	79.7	79.7
7	79.4	79.3	79.2	79.1	79.0	78.9	78.9	78.8	78.7
8	78.6	78.4	78.3	78.2	78.1	78.0	77.9	77.9	77.8
9	77.7	77.6	77.4	77.3	77.2	77.1	77.0	77.0	76.9
10	76.8	76.7	76.6	76.4	76.3	76.2	76.1	76.0	76.0
11	76.0	75.8	75.7	75.6	75.5	75.3	75.2	75.1	75.0
12	75.2	75.0	74.9	74.7	74.6	74.5	74.3	74.2	74.1
13	74.4	74.2	74.0	73.9	73.7	73.6	73.5	73.3	73.2
14	73.6	73.4	73.2	73.0	72.9	72.7	72.6	72.5	72.4
15	72.8	72.6	72.4	72.2	72.0	71.9	71.7	71.6	71.5
16	72.0	71.8	71.6	71.4	71.2	71.0	70.9	70.7	70.6
17	71.3	71.0	70.8	70.6	70.4	70.2	70.0	69.9	69.7
18	70.5	70.3	70.0	69.8	69.6	69.4	69.2	69.0	68.9
19	69.8	69.5	69.3	69.0	68.8	68.6	68.4	68.2	68.0
20	69.1	68.8	68.5	68.3	68.0	67.8	67.6	67.4	67.2
21	68.5	68.1	67.8	67.5	67.3	67.0	66.8	66.6	66.4
22	67.8	67.5	67.1	66.8	66.6	66.3	66.0	65.8	65.6
23	67.2	66.8	66.5	66.2	65.8	65.6	65.3	65.1	64.8
24	66.6	66.2	65.8	65.5	65.2	64.9	64.6	64.3	64.1
25	66.1	65.6	65.2	64.9	64.5	64.2	63.9	63.6	63.3
26	65.5	65.1	64.6	64.2	63.9	63.5	63.2	62.9	62.6
27	65.0	64.5	64.1	63.7	63.2	62.9	62.5	62.2	61.9
28	64.5	64.0	63.5	63.1	62.7	62.3	61.9	61.5	61.2
29	64.1	63.5	63.0	62.6	62.1	61.7	61.3	60.9	60.5
30	63.7	63.1	62.6	62.0	61.6	61.1	60.7	60.3	59.9
31	63.2	62.7	62.1	61.6	61.1	60.6	60.1	59.7	59.3
32	62.9	62.3	61.7	61.1	60.6	60.1	59.6	59.1	58.7
33	62.5	61.9	61.3	60.7	60.1	59.6	59.1	58.6	58.1
34	62.2	61.5	60.9	60.3	59.7	59.1	58.6	58.1	57.6
35	61.9	61.2	60.5	59.9	59.3	58.7	58.1	57.6	57.1
36	61.6	60.9	60.2	59.5	58.9	58.3	57.7	57.2	56.6
37	61.3	60.6	59.9	59.2	58.6	57.9	57.3	56.7	56.2
38	61.1	60.3	59.6	58.9	58.2	57.6	56.9	56.3	55.7
39	60.9	60.1	59.4	58.6	57.9	57.2	56.6	55.9	55.3
40	60.7	59.9	59.1	58.4	57.6	56.9	56.3	55.6	55.0
41	60.5	59.7	58.9	58.1	57.4	56.7	56.0	55.3	54.6
42	60.3	59.5	58.7	57.9	57.1	56.4	55.7	55.0	54.3
43	60.1	59.3	58.5	57.7	56.9	56.2	55.4	54.7	54.0
44	60.0	59.1	58.3	57.5	56.7	55.9	55.2	54.4	53.7
45	59.8	59.0	58.1	57.3	56.5	55.7	54.9	54.2	53.4
46	59.7	58.8	58.0	57.2	56.3	55.5	54.7	54.0	53.2
47	59.6	58.7	57.9	57.0	56.2	55.4	54.5	53.7	53.0

48	59.5	58.6	57.7	56.9	56.0	55.2	54.4	53.6	52.8
49	59.4	58.5	57.6	56.7	55.9	55.0	54.2	53.4	52.6
50	59.3	58.4	57.5	56.6	55.8	54.9	54.1	53.2	52.4
51	59.2	58.3	57.4	56.5	55.6	54.8	53.9	53.1	52.2
52	59.1	58.2	57.3	56.4	55.5	54.7	53.8	52.9	52.1
53	59.0	58.1	57.2	56.3	55.4	54.6	53.7	52.8	52.0
54	59.0	58.0	57.1	56.2	55.3	54.5	53.6	52.7	51.8
55	58.9	58.0	57.1	56.2	55.3	54.4	53.5	52.6	51.7
56	58.8	57.9	57.0	56.1	55.2	54.3	53.4	52.5	51.6
57	58.8	57.9	56.9	56.0	55.1	54.2	53.3	52.4	51.5
58	58.7	57.8	56.9	56.0	55.0	54.1	53.2	52.3	51.4
59	58.7	57.8	56.8	55.9	55.0	54.1	53.2	52.2	51.3
60	58.7	57.7	56.8	55.9	54.9	54.0	53.1	52.2	51.3
61	58.6	57.7	56.7	55.8	54.9	54.0	53.0	52.1	51.2
62	58.6	57.6	56.7	55.8	54.8	53.9	53.0	52.1	51.1
63	58.6	57.6	56.7	55.7	54.8	53.9	52.9	52.0	51.1
64	58.5	57.6	56.6	55.7	54.8	53.8	52.9	52.0	51.0
65	58.5	57.5	56.6	55.7	54.7	53.8	52.8	51.9	51.0
66	58.5	57.5	56.6	55.6	54.7	53.7	52.8	51.9	50.9
67	58.5	57.5	56.5	55.6	54.7	53.7	52.8	51.8	50.9
68	58.4	57.5	56.5	55.6	54.6	53.7	52.7	51.8	50.9
69	58.4	57.5	56.5	55.6	54.6	53.7	52.7	51.8	50.8
70	58.4	57.4	56.5	55.5	54.6	53.6	52.7	51.7	50.8
71	58.4	57.4	56.5	55.5	54.6	53.6	52.7	51.7	50.8
72	58.4	57.4	56.5	55.5	54.5	53.6	52.6	51.7	50.8
73	58.4	57.4	56.4	55.5	54.5	53.6	52.6	51.7	50.7
74	58.3	57.4	56.4	55.5	54.5	53.6	52.6	51.7	50.7
75	58.3	57.4	56.4	55.5	54.5	53.5	52.6	51.6	50.7
76	58.3	57.4	56.4	55.4	54.5	53.5	52.6	51.6	50.7
77	58.3	57.3	56.4	55.4	54.5	53.5	52.6	51.6	50.7
78	58.3	57.3	56.4	55.4	54.5	53.5	52.6	51.6	50.6
79	58.3	57.3	56.4	55.4	54.5	53.5	52.5	51.6	50.6
80	58.3	57.3	56.4	55.4	54.4	53.5	52.5	51.6	50.6
81	58.3	57.3	56.4	55.4	54.4	53.5	52.5	51.6	50.6
82	58.3	57.3	56.3	55.4	54.4	53.5	52.5	51.6	50.6
83	58.3	57.3	56.3	55.4	54.4	53.5	52.5	51.6	50.6
84	58.3	57.3	56.3	55.4	54.4	53.5	52.5	51.5	50.6
85	58.3	57.3	56.3	55.4	54.4	53.5	52.5	51.5	50.6
86	58.2	57.3	56.3	55.4	54.4	53.5	52.5	51.5	50.6
87	58.2	57.3	56.3	55.4	54.4	53.4	52.5	51.5	50.6
88	58.2	57.3	56.3	55.4	54.4	53.4	52.5	51.5	50.6
89	58.2	57.3	56.3	55.4	54.4	53.4	52.5	51.5	50.6
90	58.2	57.3	56.3	55.4	54.4	53.4	52.5	51.5	50.6
91	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.6
92	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.6

93	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.6
94	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.6
95	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.6
96	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.6
97	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.6
98	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.6
99	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.6
100	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.6
101	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.6
102	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.6
103	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
104	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
105	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
106	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
107	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
108	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
109	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
110	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
111	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
112	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
113	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
114	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
115	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
116	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
117	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
118	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
119	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
120+	58.2	57.3	56.3	55.3	54.4	53.4	52.5	51.5	50.5
Ages	***36***	***37***	***38***	***39***	***40***	***41***	***42***	***43***	***44***
0	85.2	85.2	85.2	85.1	85.1	85.1	85.0	85.0	85.0
1	84.3	84.3	84.3	84.2	84.2	84.2	84.1	84.1	84.1
2	83.4	83.3	83.3	83.3	83.2	83.2	83.2	83.1	83.1
3	82.4	82.4	82.3	82.3	82.3	82.2	82.2	82.2	82.2
4	81.5	81.4	81.4	81.4	81.3	81.3	81.3	81.2	81.2
5	80.5	80.5	80.4	80.4	80.4	80.3	80.3	80.3	80.2
6	79.6	79.5	79.5	79.5	79.4	79.4	79.3	79.3	79.3
7	78.7	78.6	78.6	78.5	78.5	78.4	78.4	78.3	78.3
8	77.7	77.7	77.6	77.6	77.5	77.5	77.4	77.4	77.3
9	76.8	76.7	76.7	76.6	76.6	76.5	76.5	76.4	76.4
10	75.9	75.8	75.7	75.7	75.6	75.6	75.5	75.5	75.4
11	75.0	74.9	74.8	74.7	74.7	74.6	74.6	74.5	74.5
12	74.0	74.0	73.9	73.8	73.7	73.7	73.6	73.6	73.5
13	73.1	73.1	73.0	72.9	72.8	72.8	72.7	72.6	72.6
14	72.2	72.1	72.1	72.0	71.9	71.8	71.8	71.7	71.6
15	71.4	71.3	71.2	71.1	71.0	70.9	70.8	70.8	70.7

16	70.5	70.4	70.3	70.2	70.1	70.0	69.9	69.8	69.8
17	69.6	69.5	69.4	69.3	69.2	69.1	69.0	68.9	68.8
18	68.7	68.6	68.5	68.4	68.3	68.2	68.1	68.0	67.9
19	67.9	67.7	67.6	67.5	67.4	67.3	67.2	67.1	67.0
20	67.1	66.9	66.8	66.6	66.5	66.4	66.3	66.2	66.1
21	66.2	66.1	65.9	65.8	65.6	65.5	65.4	65.3	65.2
22	65.4	65.2	65.1	64.9	64.8	64.6	64.5	64.4	64.3
23	64.6	64.4	64.2	64.1	63.9	63.8	63.6	63.5	63.4
24	63.8	63.6	63.4	63.3	63.1	62.9	62.8	62.7	62.5
25	63.1	62.8	62.6	62.4	62.3	62.1	61.9	61.8	61.7
26	62.3	62.1	61.9	61.6	61.5	61.3	61.1	61.0	60.8
27	61.6	61.3	61.1	60.9	60.7	60.5	60.3	60.1	60.0
28	60.9	60.6	60.3	60.1	59.9	59.7	59.5	59.3	59.1
29	60.2	59.9	59.6	59.4	59.1	58.9	58.7	58.5	58.3
30	59.5	59.2	58.9	58.6	58.4	58.1	57.9	57.7	57.5
31	58.9	58.6	58.2	57.9	57.6	57.4	57.1	56.9	56.7
32	58.3	57.9	57.6	57.2	56.9	56.7	56.4	56.2	55.9
33	57.7	57.3	56.9	56.6	56.3	56.0	55.7	55.4	55.2
34	57.2	56.7	56.3	55.9	55.6	55.3	55.0	54.7	54.4
35	56.6	56.2	55.7	55.3	55.0	54.6	54.3	54.0	53.7
36	56.1	55.6	55.2	54.7	54.3	54.0	53.6	53.3	53.0
37	55.6	55.1	54.6	54.2	53.8	53.4	53.0	52.6	52.3
38	55.2	54.6	54.1	53.6	53.2	52.8	52.4	52.0	51.6
39	54.7	54.2	53.6	53.1	52.7	52.2	51.8	51.4	51.0
40	54.3	53.8	53.2	52.7	52.2	51.7	51.2	50.8	50.4
41	54.0	53.4	52.8	52.2	51.7	51.2	50.7	50.2	49.8
42	53.6	53.0	52.4	51.8	51.2	50.7	50.2	49.7	49.2
43	53.3	52.6	52.0	51.4	50.8	50.2	49.7	49.2	48.7
44	53.0	52.3	51.6	51.0	50.4	49.8	49.2	48.7	48.2
45	52.7	52.0	51.3	50.7	50.0	49.4	48.8	48.3	47.7
46	52.4	51.7	51.0	50.3	49.7	49.0	48.4	47.8	47.3
47	52.2	51.5	50.7	50.0	49.3	48.7	48.0	47.4	46.8
48	52.0	51.2	50.5	49.7	49.0	48.4	47.7	47.1	46.4
49	51.8	51.0	50.2	49.5	48.8	48.1	47.4	46.7	46.1
50	51.6	50.8	50.0	49.2	48.5	47.8	47.1	46.4	45.7
51	51.4	50.6	49.8	49.0	48.3	47.5	46.8	46.1	45.4
52	51.3	50.4	49.6	48.8	48.0	47.3	46.5	45.8	45.1
53	51.1	50.3	49.5	48.6	47.8	47.1	46.3	45.6	44.8
54	51.0	50.1	49.3	48.5	47.7	46.9	46.1	45.3	44.6
55	50.9	50.0	49.1	48.3	47.5	46.7	45.9	45.1	44.3
56	50.7	49.9	49.0	48.2	47.3	46.5	45.7	44.9	44.1
57	50.6	49.8	48.9	48.0	47.2	46.3	45.5	44.7	43.9
58	50.5	49.7	48.8	47.9	47.1	46.2	45.4	44.5	43.7
59	50.5	49.6	48.7	47.8	46.9	46.1	45.2	44.4	43.6
60	50.4	49.5	48.6	47.7	46.8	46.0	45.1	44.3	43.4

61	50.3	49.4	48.5	47.6	46.7	45.8	45.0	44.1	43.3
62	50.2	49.3	48.4	47.5	46.6	45.7	44.9	44.0	43.1
63	50.2	49.3	48.3	47.4	46.5	45.7	44.8	43.9	43.0
64	50.1	49.2	48.3	47.4	46.5	45.6	44.7	43.8	42.9
65	50.1	49.1	48.2	47.3	46.4	45.5	44.6	43.7	42.8
66	50.0	49.1	48.2	47.2	46.3	45.4	44.5	43.6	42.7
67	50.0	49.0	48.1	47.2	46.3	45.4	44.4	43.5	42.6
68	49.9	49.0	48.1	47.1	46.2	45.3	44.4	43.5	42.6
69	49.9	49.0	48.0	47.1	46.2	45.2	44.3	43.4	42.5
70	49.9	48.9	48.0	47.0	46.1	45.2	44.3	43.3	42.4
71	49.8	48.9	47.9	47.0	46.1	45.1	44.2	43.3	42.4
72	49.8	48.9	47.9	47.0	46.0	45.1	44.2	43.2	42.3
73	49.8	48.8	47.9	46.9	46.0	45.1	44.1	43.2	42.3
74	49.8	48.8	47.9	46.9	46.0	45.0	44.1	43.2	42.2
75	49.7	48.8	47.8	46.9	45.9	45.0	44.1	43.1	42.2
76	49.7	48.8	47.8	46.9	45.9	45.0	44.0	43.1	42.2
77	49.7	48.8	47.8	46.9	45.9	45.0	44.0	43.1	42.1
78	49.7	48.7	47.8	46.8	45.9	44.9	44.0	43.0	42.1
79	49.7	48.7	47.8	46.8	45.9	44.9	44.0	43.0	42.1
80	49.7	48.7	47.8	46.8	45.9	44.9	43.9	43.0	42.1
81	49.7	48.7	47.7	46.8	45.8	44.9	43.9	43.0	42.0
82	49.7	48.7	47.7	46.8	45.8	44.9	43.9	43.0	42.0
83	49.6	48.7	47.7	46.8	45.8	44.9	43.9	43.0	42.0
84	49.6	48.7	47.7	46.8	45.8	44.9	43.9	42.9	42.0
85	49.6	48.7	47.7	46.8	45.8	44.8	43.9	42.9	42.0
86	49.6	48.7	47.7	46.7	45.8	44.8	43.9	42.9	42.0
87	49.6	48.7	47.7	46.7	45.8	44.8	43.9	42.9	42.0
88	49.6	48.7	47.7	46.7	45.8	44.8	43.9	42.9	42.0
89	49.6	48.7	47.7	46.7	45.8	44.8	43.9	42.9	41.9
90	49.6	48.6	47.7	46.7	45.8	44.8	43.9	42.9	41.9
91	49.6	48.6	47.7	46.7	45.8	44.8	43.9	42.9	41.9
92	49.6	48.6	47.7	46.7	45.8	44.8	43.8	42.9	41.9
93	49.6	48.6	47.7	46.7	45.8	44.8	43.8	42.9	41.9
94	49.6	48.6	47.7	46.7	45.8	44.8	43.8	42.9	41.9
95	49.6	48.6	47.7	46.7	45.8	44.8	43.8	42.9	41.9
96	49.6	48.6	47.7	46.7	45.8	44.8	43.8	42.9	41.9
97	49.6	48.6	47.7	46.7	45.8	44.8	43.8	42.9	41.9
98	49.6	48.6	47.7	46.7	45.8	44.8	43.8	42.9	41.9
99	49.6	48.6	47.7	46.7	45.8	44.8	43.8	42.9	41.9
100	49.6	48.6	47.7	46.7	45.8	44.8	43.8	42.9	41.9
101	49.6	48.6	47.7	46.7	45.8	44.8	43.8	42.9	41.9
102	49.6	48.6	47.7	46.7	45.8	44.8	43.8	42.9	41.9
103	49.6	48.6	47.7	46.7	45.8	44.8	43.8	42.9	41.9
104	49.6	48.6	47.7	46.7	45.8	44.8	43.8	42.9	41.9
105	49.6	48.6	47.7	46.7	45.7	44.8	43.8	42.9	41.9

106	49.6	48.6	47.7	46.7	45.7	44.8	43.8	42.9	41.9
107	49.6	48.6	47.7	46.7	45.7	44.8	43.8	42.9	41.9
108	49.6	48.6	47.7	46.7	45.7	44.8	43.8	42.9	41.9
109	49.6	48.6	47.7	46.7	45.7	44.8	43.8	42.9	41.9
110	49.6	48.6	47.7	46.7	45.7	44.8	43.8	42.9	41.9
111	49.6	48.6	47.7	46.7	45.7	44.8	43.8	42.9	41.9
112	49.6	48.6	47.7	46.7	45.7	44.8	43.8	42.9	41.9
113	49.6	48.6	47.7	46.7	45.7	44.8	43.8	42.9	41.9
114	49.6	48.6	47.7	46.7	45.7	44.8	43.8	42.9	41.9
115	49.6	48.6	47.7	46.7	45.7	44.8	43.8	42.9	41.9
116	49.6	48.6	47.7	46.7	45.7	44.8	43.8	42.9	41.9
117	49.6	48.6	47.7	46.7	45.7	44.8	43.8	42.9	41.9
118	49.6	48.6	47.7	46.7	45.7	44.8	43.8	42.9	41.9
119	49.6	48.6	47.7	46.7	45.7	44.8	43.8	42.9	41.9
120+	49.6	48.6	47.7	46.7	45.7	44.8	43.8	42.9	41.9
Ages	***45***	***46***	***47***	***48***	***49***	***50***	***51***	***52***	***53***
0	85.0	84.9	84.9	84.9	84.9	84.9	84.8	84.8	84.8
1	84.1	84.0	84.0	84.0	84.0	84.0	84.0	83.9	83.9
2	83.1	83.1	83.1	83.0	83.0	83.0	83.0	83.0	83.0
3	82.1	82.1	82.1	82.1	82.1	82.0	82.0	82.0	82.0
4	81.2	81.1	81.1	81.1	81.1	81.1	81.0	81.0	81.0
5	80.2	80.2	80.2	80.1	80.1	80.1	80.1	80.1	80.0
6	79.2	79.2	79.2	79.2	79.1	79.1	79.1	79.1	79.1
7	78.3	78.2	78.2	78.2	78.2	78.1	78.1	78.1	78.1
8	77.3	77.3	77.3	77.2	77.2	77.2	77.2	77.1	77.1
9	76.4	76.3	76.3	76.3	76.2	76.2	76.2	76.2	76.1
10	75.4	75.4	75.3	75.3	75.3	75.2	75.2	75.2	75.2
11	74.4	74.4	74.4	74.3	74.3	74.3	74.2	74.2	74.2
12	73.5	73.4	73.4	73.4	73.3	73.3	73.3	73.2	73.2
13	72.5	72.5	72.4	72.4	72.4	72.3	72.3	72.3	72.3
14	71.6	71.5	71.5	71.5	71.4	71.4	71.3	71.3	71.3
15	70.6	70.6	70.5	70.5	70.5	70.4	70.4	70.4	70.3
16	69.7	69.7	69.6	69.6	69.5	69.5	69.4	69.4	69.4
17	68.8	68.7	68.7	68.6	68.6	68.5	68.5	68.4	68.4
18	67.9	67.8	67.7	67.7	67.6	67.6	67.5	67.5	67.4
19	66.9	66.9	66.8	66.7	66.7	66.6	66.6	66.5	66.5
20	66.0	65.9	65.9	65.8	65.7	65.7	65.6	65.6	65.5
21	65.1	65.0	65.0	64.9	64.8	64.8	64.7	64.7	64.6
22	64.2	64.1	64.0	64.0	63.9	63.8	63.8	63.7	63.7
23	63.3	63.2	63.1	63.0	63.0	62.9	62.8	62.8	62.7
24	62.4	62.3	62.2	62.1	62.1	62.0	61.9	61.9	61.8
25	61.5	61.4	61.3	61.2	61.2	61.1	61.0	60.9	60.9
26	60.7	60.6	60.5	60.3	60.3	60.2	60.1	60.0	59.9
27	59.8	59.7	59.6	59.5	59.4	59.3	59.2	59.1	59.0
28	59.0	58.8	58.7	58.6	58.5	58.4	58.3	58.2	58.1

29	58.1	58.0	57.9	57.7	57.6	57.5	57.4	57.3	57.2
30	57.3	57.2	57.0	56.9	56.7	56.6	56.5	56.4	56.3
31	56.5	56.3	56.2	56.0	55.9	55.8	55.6	55.5	55.4
32	55.7	55.5	55.4	55.2	55.0	54.9	54.8	54.7	54.6
33	54.9	54.7	54.5	54.4	54.2	54.1	53.9	53.8	53.7
34	54.2	54.0	53.7	53.6	53.4	53.2	53.1	52.9	52.8
35	53.4	53.2	53.0	52.8	52.6	52.4	52.2	52.1	52.0
36	52.7	52.4	52.2	52.0	51.8	51.6	51.4	51.3	51.1
37	52.0	51.7	51.5	51.2	51.0	50.8	50.6	50.4	50.3
38	51.3	51.0	50.7	50.5	50.2	50.0	49.8	49.6	49.5
39	50.7	50.3	50.0	49.7	49.5	49.2	49.0	48.8	48.6
40	50.0	49.7	49.3	49.0	48.8	48.5	48.3	48.0	47.8
41	49.4	49.0	48.7	48.4	48.1	47.8	47.5	47.3	47.1
42	48.8	48.4	48.0	47.7	47.4	47.1	46.8	46.5	46.3
43	48.3	47.8	47.4	47.1	46.7	46.4	46.1	45.8	45.6
44	47.7	47.3	46.8	46.4	46.1	45.7	45.4	45.1	44.8
45	47.2	46.7	46.3	45.9	45.5	45.1	44.7	44.4	44.1
46	46.7	46.2	45.7	45.3	44.9	44.5	44.1	43.8	43.4
47	46.3	45.7	45.2	44.8	44.3	43.9	43.5	43.1	42.8
48	45.9	45.3	44.8	44.3	43.8	43.3	42.9	42.5	42.1
49	45.5	44.9	44.3	43.8	43.3	42.8	42.3	41.9	41.5
50	45.1	44.5	43.9	43.3	42.8	42.3	41.8	41.4	40.9
51	44.7	44.1	43.5	42.9	42.3	41.8	41.3	40.8	40.4
52	44.4	43.8	43.1	42.5	41.9	41.4	40.8	40.3	39.9
53	44.1	43.4	42.8	42.1	41.5	40.9	40.4	39.9	39.4
54	43.8	43.1	42.5	41.8	41.2	40.6	40.0	39.4	38.9
55	43.6	42.9	42.2	41.5	40.8	40.2	39.6	39.0	38.4
56	43.4	42.6	41.9	41.2	40.5	39.8	39.2	38.6	38.0
57	43.1	42.4	41.6	40.9	40.2	39.5	38.9	38.2	37.6
58	42.9	42.2	41.4	40.7	39.9	39.2	38.6	37.9	37.3
59	42.8	42.0	41.2	40.4	39.7	39.0	38.3	37.6	36.9
60	42.6	41.8	41.0	40.2	39.5	38.7	38.0	37.3	36.6
61	42.4	41.6	40.8	40.0	39.2	38.5	37.7	37.0	36.3
62	42.3	41.5	40.6	39.8	39.0	38.3	37.5	36.8	36.1
63	42.2	41.3	40.5	39.7	38.9	38.1	37.3	36.6	35.8
64	42.1	41.2	40.4	39.5	38.7	37.9	37.1	36.3	35.6
65	41.9	41.1	40.2	39.4	38.6	37.7	36.9	36.2	35.4
66	41.8	41.0	40.1	39.3	38.4	37.6	36.8	36.0	35.2
67	41.8	40.9	40.0	39.1	38.3	37.5	36.6	35.8	35.0
68	41.7	40.8	39.9	39.0	38.2	37.3	36.5	35.7	34.9
69	41.6	40.7	39.8	38.9	38.1	37.2	36.4	35.5	34.7
70	41.5	40.6	39.7	38.8	38.0	37.1	36.2	35.4	34.6
71	41.5	40.6	39.7	38.8	37.9	37.0	36.1	35.3	34.5
72	41.4	40.5	39.6	38.7	37.8	36.9	36.0	35.2	34.3
73	41.4	40.4	39.5	38.6	37.7	36.8	36.0	35.1	34.2

74	41.3	40.4	39.5	38.6	37.7	36.8	35.9	35.0	34.1
75	41.3	40.3	39.4	38.5	37.6	36.7	35.8	34.9	34.1
76	41.2	40.3	39.4	38.5	37.5	36.6	35.7	34.9	34.0
77	41.2	40.3	39.3	38.4	37.5	36.6	35.7	34.8	33.9
78	41.2	40.2	39.3	38.4	37.5	36.5	35.6	34.7	33.9
79	41.1	40.2	39.3	38.3	37.4	36.5	35.6	34.7	33.8
80	41.1	40.2	39.2	38.3	37.4	36.5	35.5	34.6	33.7
81	41.1	40.1	39.2	38.3	37.3	36.4	35.5	34.6	33.7
82	41.1	40.1	39.2	38.3	37.3	36.4	35.5	34.6	33.7
83	41.1	40.1	39.2	38.2	37.3	36.4	35.4	34.5	33.6
84	41.0	40.1	39.2	38.2	37.3	36.3	35.4	34.5	33.6
85	41.0	40.1	39.1	38.2	37.3	36.3	35.4	34.5	33.6
86	41.0	40.1	39.1	38.2	37.2	36.3	35.4	34.5	33.5
87	41.0	40.1	39.1	38.2	37.2	36.3	35.4	34.4	33.5
88	41.0	40.0	39.1	38.2	37.2	36.3	35.3	34.4	33.5
89	41.0	40.0	39.1	38.1	37.2	36.3	35.3	34.4	33.5
90	41.0	40.0	39.1	38.1	37.2	36.3	35.3	34.4	33.5
91	41.0	40.0	39.1	38.1	37.2	36.2	35.3	34.4	33.5
92	41.0	40.0	39.1	38.1	37.2	36.2	35.3	34.4	33.5
93	41.0	40.0	39.1	38.1	37.2	36.2	35.3	34.4	33.4
94	41.0	40.0	39.1	38.1	37.2	36.2	35.3	34.4	33.4
95	41.0	40.0	39.1	38.1	37.2	36.2	35.3	34.4	33.4
96	41.0	40.0	39.1	38.1	37.2	36.2	35.3	34.3	33.4
97	41.0	40.0	39.1	38.1	37.2	36.2	35.3	34.3	33.4
98	41.0	40.0	39.1	38.1	37.2	36.2	35.3	34.3	33.4
99	41.0	40.0	39.1	38.1	37.2	36.2	35.3	34.3	33.4
100	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
101	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
102	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
103	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
104	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
105	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
106	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
107	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
108	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
109	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
110	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
111	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
112	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
113	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
114	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
115	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
116	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
117	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
118	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4

119	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
120+	41.0	40.0	39.0	38.1	37.1	36.2	35.3	34.3	33.4
Ages	***54***	***55***	***56***	***57***	***58***	***59***	***60***	***61***	***62***
0	84.8	84.8	84.8	84.8	84.8	84.7	84.7	84.7	84.7
1	83.9	83.9	83.9	83.9	83.9	83.9	83.8	83.8	83.8
2	82.9	82.9	82.9	82.9	82.9	82.9	82.9	82.9	82.9
3	82.0	82.0	81.9	81.9	81.9	81.9	81.9	81.9	81.9
4	81.0	81.0	81.0	81.0	80.9	80.9	80.9	80.9	80.9
5	80.0	80.0	80.0	80.0	80.0	80.0	79.9	79.9	79.9
6	79.0	79.0	79.0	79.0	79.0	79.0	79.0	79.0	78.9
7	78.1	78.1	78.0	78.0	78.0	78.0	78.0	78.0	78.0
8	77.1	77.1	77.1	77.0	77.0	77.0	77.0	77.0	77.0
9	76.1	76.1	76.1	76.1	76.1	76.0	76.0	76.0	76.0
10	75.1	75.1	75.1	75.1	75.1	75.1	75.0	75.0	75.0
11	74.2	74.2	74.1	74.1	74.1	74.1	74.1	74.1	74.0
12	73.2	73.2	73.2	73.1	73.1	73.1	73.1	73.1	73.1
13	72.2	72.2	72.2	72.2	72.1	72.1	72.1	72.1	72.1
14	71.3	71.2	71.2	71.2	71.2	71.2	71.1	71.1	71.1
15	70.3	70.3	70.2	70.2	70.2	70.2	70.2	70.1	70.1
16	69.3	69.3	69.3	69.3	69.2	69.2	69.2	69.2	69.2
17	68.4	68.3	68.3	68.3	68.3	68.2	68.2	68.2	68.2
18	67.4	67.4	67.4	67.3	67.3	67.3	67.3	67.2	67.2
19	66.5	66.4	66.4	66.4	66.3	66.3	66.3	66.3	66.2
20	65.5	65.5	65.4	65.4	65.4	65.4	65.3	65.3	65.3
21	64.6	64.5	64.5	64.5	64.4	64.4	64.4	64.3	64.3
22	63.6	63.6	63.5	63.5	63.5	63.4	63.4	63.4	63.4
23	62.7	62.6	62.6	62.5	62.5	62.5	62.4	62.4	62.4
24	61.7	61.7	61.6	61.6	61.6	61.5	61.5	61.5	61.4
25	60.8	60.8	60.7	60.7	60.6	60.6	60.5	60.5	60.5
26	59.9	59.8	59.8	59.7	59.7	59.6	59.6	59.6	59.5
27	59.0	58.9	58.8	58.8	58.7	58.7	58.7	58.6	58.6
28	58.0	58.0	57.9	57.9	57.8	57.8	57.7	57.7	57.6
29	57.1	57.1	57.0	56.9	56.9	56.8	56.8	56.7	56.7
30	56.2	56.2	56.1	56.0	56.0	55.9	55.9	55.8	55.8
31	55.3	55.3	55.2	55.1	55.0	55.0	54.9	54.9	54.8
32	54.5	54.4	54.3	54.2	54.1	54.1	54.0	54.0	53.9
33	53.6	53.5	53.4	53.3	53.2	53.2	53.1	53.0	53.0
34	52.7	52.6	52.5	52.4	52.3	52.2	52.2	52.1	52.1
35	51.8	51.7	51.6	51.5	51.4	51.3	51.3	51.2	51.1
36	51.0	50.9	50.7	50.6	50.5	50.5	50.4	50.3	50.2
37	50.1	50.0	49.9	49.8	49.7	49.6	49.5	49.4	49.3
38	49.3	49.1	49.0	48.9	48.8	48.7	48.6	48.5	48.4
39	48.5	48.3	48.2	48.0	47.9	47.8	47.7	47.6	47.5
40	47.7	47.5	47.3	47.2	47.1	46.9	46.8	46.7	46.6
41	46.9	46.7	46.5	46.3	46.2	46.1	46.0	45.8	45.7

42	46.1	45.9	45.7	45.5	45.4	45.2	45.1	45.0	44.9
43	45.3	45.1	44.9	44.7	44.5	44.4	44.3	44.1	44.0
44	44.6	44.3	44.1	43.9	43.7	43.6	43.4	43.3	43.1
45	43.8	43.6	43.4	43.1	42.9	42.8	42.6	42.4	42.3
46	43.1	42.9	42.6	42.4	42.2	42.0	41.8	41.6	41.5
47	42.5	42.2	41.9	41.6	41.4	41.2	41.0	40.8	40.6
48	41.8	41.5	41.2	40.9	40.7	40.4	40.2	40.0	39.8
49	41.2	40.8	40.5	40.2	39.9	39.7	39.5	39.2	39.0
50	40.6	40.2	39.8	39.5	39.2	39.0	38.7	38.5	38.3
51	40.0	39.6	39.2	38.9	38.6	38.3	38.0	37.7	37.5
52	39.4	39.0	38.6	38.2	37.9	37.6	37.3	37.0	36.8
53	38.9	38.4	38.0	37.6	37.3	36.9	36.6	36.3	36.1
54	38.4	37.9	37.5	37.1	36.7	36.3	36.0	35.7	35.4
55	37.9	37.4	36.9	36.5	36.1	35.7	35.3	35.0	34.7
56	37.5	36.9	36.5	36.0	35.5	35.1	34.8	34.4	34.1
57	37.1	36.5	36.0	35.5	35.0	34.6	34.2	33.8	33.4
58	36.7	36.1	35.5	35.0	34.5	34.1	33.6	33.2	32.8
59	36.3	35.7	35.1	34.6	34.1	33.6	33.1	32.7	32.3
60	36.0	35.3	34.8	34.2	33.6	33.1	32.6	32.2	31.7
61	35.7	35.0	34.4	33.8	33.2	32.7	32.2	31.7	31.2
62	35.4	34.7	34.1	33.4	32.8	32.3	31.7	31.2	30.8
63	35.1	34.4	33.8	33.1	32.5	31.9	31.3	30.8	30.3
64	34.9	34.2	33.5	32.8	32.2	31.5	31.0	30.4	29.9
65	34.6	33.9	33.2	32.5	31.9	31.2	30.6	30.0	29.5
66	34.4	33.7	33.0	32.3	31.6	30.9	30.3	29.7	29.1
67	34.2	33.5	32.7	32.0	31.3	30.6	30.0	29.4	28.7
68	34.1	33.3	32.5	31.8	31.1	30.4	29.7	29.1	28.4
69	33.9	33.1	32.3	31.6	30.9	30.1	29.4	28.8	28.1
70	33.8	33.0	32.2	31.4	30.7	29.9	29.2	28.5	27.9
71	33.6	32.8	32.0	31.2	30.5	29.7	29.0	28.3	27.6
72	33.5	32.7	31.9	31.1	30.3	29.5	28.8	28.1	27.4
73	33.4	32.6	31.7	30.9	30.1	29.4	28.6	27.9	27.2
74	33.3	32.4	31.6	30.8	30.0	29.2	28.4	27.7	27.0
75	33.2	32.4	31.5	30.7	29.9	29.1	28.3	27.5	26.8
76	33.1	32.3	31.4	30.6	29.8	29.0	28.2	27.4	26.6
77	33.0	32.2	31.3	30.5	29.7	28.8	28.0	27.3	26.5
78	33.0	32.1	31.2	30.4	29.6	28.7	27.9	27.1	26.4
79	32.9	32.0	31.2	30.3	29.5	28.7	27.8	27.0	26.2
80	32.9	32.0	31.1	30.3	29.4	28.6	27.8	26.9	26.1
81	32.8	31.9	31.1	30.2	29.3	28.5	27.7	26.9	26.0
82	32.8	31.9	31.0	30.1	29.3	28.4	27.6	26.8	26.0
83	32.7	31.8	31.0	30.1	29.2	28.4	27.5	26.7	25.9
84	32.7	31.8	30.9	30.0	29.2	28.3	27.5	26.7	25.8
85	32.7	31.8	30.9	30.0	29.1	28.3	27.4	26.6	25.8
86	32.6	31.7	30.9	30.0	29.1	28.2	27.4	26.6	25.7

87	32.6	31.7	30.8	29.9	29.1	28.2	27.4	26.5	25.7
88	32.6	31.7	30.8	29.9	29.0	28.2	27.3	26.5	25.6
89	32.6	31.7	30.8	29.9	29.0	28.2	27.3	26.4	25.6
90	32.6	31.7	30.8	29.9	29.0	28.1	27.3	26.4	25.6
91	32.5	31.6	30.7	29.9	29.0	28.1	27.3	26.4	25.6
92	32.5	31.6	30.7	29.8	29.0	28.1	27.2	26.4	25.5
93	32.5	31.6	30.7	29.8	29.0	28.1	27.2	26.4	25.5
94	32.5	31.6	30.7	29.8	28.9	28.1	27.2	26.3	25.5
95	32.5	31.6	30.7	29.8	28.9	28.1	27.2	26.3	25.5
96	32.5	31.6	30.7	29.8	28.9	28.0	27.2	26.3	25.5
97	32.5	31.6	30.7	29.8	28.9	28.0	27.2	26.3	25.5
98	32.5	31.6	30.7	29.8	28.9	28.0	27.2	26.3	25.5
99	32.5	31.6	30.7	29.8	28.9	28.0	27.2	26.3	25.4
100	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
101	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
102	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
103	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
104	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
105	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
106	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
107	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
108	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
109	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
110	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
111	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
112	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
113	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
114	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
115	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
116	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
117	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
118	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.3	25.4
119	32.5	31.6	30.7	29.8	28.9	28.0	27.1	26.2	25.4
120+	32.5	31.6	30.6	29.8	28.9	28.0	27.1	26.2	25.4
Ages	***63***	***64***	***65***	***66***	***67***	***68***	***69***	***70***	***71***
0	84.7	84.7	84.7	84.7	84.7	84.7	84.7	84.7	84.7
1	83.8	83.8	83.8	83.8	83.8	83.8	83.8	83.8	83.8
2	82.9	82.8	82.8	82.8	82.8	82.8	82.8	82.8	82.8
3	81.9	81.9	81.9	81.9	81.9	81.8	81.8	81.8	81.8
4	80.9	80.9	80.9	80.9	80.9	80.9	80.9	80.9	80.9
5	79.9	79.9	79.9	79.9	79.9	79.9	79.9	79.9	79.9
6	78.9	78.9	78.9	78.9	78.9	78.9	78.9	78.9	78.9
7	78.0	77.9	77.9	77.9	77.9	77.9	77.9	77.9	77.9
8	77.0	77.0	77.0	76.9	76.9	76.9	76.9	76.9	76.9
9	76.0	76.0	76.0	76.0	76.0	75.9	75.9	75.9	75.9

10	75.0	75.0	75.0	75.0	75.0	75.0	75.0	74.9	74.9
11	74.0	74.0	74.0	74.0	74.0	74.0	74.0	74.0	74.0
12	73.0	73.0	73.0	73.0	73.0	73.0	73.0	73.0	73.0
13	72.1	72.1	72.0	72.0	72.0	72.0	72.0	72.0	72.0
14	71.1	71.1	71.1	71.1	71.0	71.0	71.0	71.0	71.0
15	70.1	70.1	70.1	70.1	70.1	70.1	70.0	70.0	70.0
16	69.1	69.1	69.1	69.1	69.1	69.1	69.1	69.1	69.0
17	68.2	68.2	68.1	68.1	68.1	68.1	68.1	68.1	68.1
18	67.2	67.2	67.2	67.2	67.1	67.1	67.1	67.1	67.1
19	66.2	66.2	66.2	66.2	66.2	66.2	66.1	66.1	66.1
20	65.3	65.2	65.2	65.2	65.2	65.2	65.2	65.2	65.1
21	64.3	64.3	64.3	64.2	64.2	64.2	64.2	64.2	64.2
22	63.3	63.3	63.3	63.3	63.3	63.2	63.2	63.2	63.2
23	62.4	62.3	62.3	62.3	62.3	62.3	62.3	62.2	62.2
24	61.4	61.4	61.4	61.3	61.3	61.3	61.3	61.3	61.3
25	60.5	60.4	60.4	60.4	60.4	60.3	60.3	60.3	60.3
26	59.5	59.5	59.5	59.4	59.4	59.4	59.4	59.4	59.3
27	58.6	58.5	58.5	58.5	58.5	58.4	58.4	58.4	58.4
28	57.6	57.6	57.5	57.5	57.5	57.5	57.5	57.4	57.4
29	56.7	56.6	56.6	56.6	56.5	56.5	56.5	56.5	56.5
30	55.7	55.7	55.7	55.6	55.6	55.6	55.6	55.5	55.5
31	54.8	54.8	54.7	54.7	54.7	54.6	54.6	54.6	54.6
32	53.9	53.8	53.8	53.7	53.7	53.7	53.7	53.6	53.6
33	52.9	52.9	52.8	52.8	52.8	52.7	52.7	52.7	52.7
34	52.0	52.0	51.9	51.9	51.8	51.8	51.8	51.7	51.7
35	51.1	51.0	51.0	50.9	50.9	50.9	50.8	50.8	50.8
36	50.2	50.1	50.1	50.0	50.0	49.9	49.9	49.9	49.8
37	49.3	49.2	49.1	49.1	49.0	49.0	49.0	48.9	48.9
38	48.3	48.3	48.2	48.2	48.1	48.1	48.0	48.0	47.9
39	47.4	47.4	47.3	47.2	47.2	47.1	47.1	47.0	47.0
40	46.5	46.5	46.4	46.3	46.3	46.2	46.2	46.1	46.1
41	45.7	45.6	45.5	45.4	45.4	45.3	45.2	45.2	45.1
42	44.8	44.7	44.6	44.5	44.4	44.4	44.3	44.3	44.2
43	43.9	43.8	43.7	43.6	43.5	43.5	43.4	43.3	43.3
44	43.0	42.9	42.8	42.7	42.6	42.6	42.5	42.4	42.4
45	42.2	42.1	41.9	41.8	41.8	41.7	41.6	41.5	41.5
46	41.3	41.2	41.1	41.0	40.9	40.8	40.7	40.6	40.6
47	40.5	40.4	40.2	40.1	40.0	39.9	39.8	39.7	39.7
48	39.7	39.5	39.4	39.3	39.1	39.0	38.9	38.8	38.8
49	38.9	38.7	38.6	38.4	38.3	38.2	38.1	38.0	37.9
50	38.1	37.9	37.7	37.6	37.5	37.3	37.2	37.1	37.0
51	37.3	37.1	36.9	36.8	36.6	36.5	36.4	36.2	36.1
52	36.6	36.3	36.2	36.0	35.8	35.7	35.5	35.4	35.3
53	35.8	35.6	35.4	35.2	35.0	34.9	34.7	34.6	34.5
54	35.1	34.9	34.6	34.4	34.2	34.1	33.9	33.8	33.6

55	34.4	34.2	33.9	33.7	33.5	33.3	33.1	33.0	32.8
56	33.8	33.5	33.2	33.0	32.7	32.5	32.3	32.2	32.0
57	33.1	32.8	32.5	32.3	32.0	31.8	31.6	31.4	31.2
58	32.5	32.2	31.9	31.6	31.3	31.1	30.9	30.7	30.5
59	31.9	31.5	31.2	30.9	30.6	30.4	30.1	29.9	29.7
60	31.3	31.0	30.6	30.3	30.0	29.7	29.4	29.2	29.0
61	30.8	30.4	30.0	29.7	29.4	29.1	28.8	28.5	28.3
62	30.3	29.9	29.5	29.1	28.7	28.4	28.1	27.9	27.6
63	29.8	29.4	28.9	28.5	28.2	27.8	27.5	27.2	26.9
64	29.4	28.9	28.4	28.0	27.6	27.2	26.9	26.6	26.3
65	28.9	28.4	28.0	27.5	27.1	26.7	26.3	26.0	25.7
66	28.5	28.0	27.5	27.0	26.6	26.2	25.8	25.4	25.1
67	28.2	27.6	27.1	26.6	26.1	25.7	25.3	24.9	24.5
68	27.8	27.2	26.7	26.2	25.7	25.2	24.8	24.3	24.0
69	27.5	26.9	26.3	25.8	25.3	24.8	24.3	23.9	23.4
70	27.2	26.6	26.0	25.4	24.9	24.3	23.9	23.4	22.9
71	26.9	26.3	25.7	25.1	24.5	24.0	23.4	22.9	22.5
72	26.7	26.0	25.4	24.8	24.2	23.6	23.1	22.5	22.0
73	26.5	25.8	25.1	24.5	23.9	23.3	22.7	22.2	21.6
74	26.2	25.5	24.9	24.2	23.6	23.0	22.4	21.8	21.3
75	26.1	25.3	24.6	24.0	23.3	22.7	22.1	21.5	20.9
76	25.9	25.2	24.4	23.7	23.1	22.4	21.8	21.2	20.6
77	25.7	25.0	24.3	23.5	22.9	22.2	21.5	20.9	20.3
78	25.6	24.8	24.1	23.4	22.7	22.0	21.3	20.6	20.0
79	25.5	24.7	23.9	23.2	22.5	21.8	21.1	20.4	19.8
80	25.3	24.6	23.8	23.1	22.3	21.6	20.9	20.2	19.6
81	25.2	24.5	23.7	22.9	22.2	21.5	20.7	20.0	19.4
82	25.2	24.4	23.6	22.8	22.1	21.3	20.6	19.9	19.2
83	25.1	24.3	23.5	22.7	22.0	21.2	20.5	19.7	19.0
84	25.0	24.2	23.4	22.6	21.9	21.1	20.4	19.6	18.9
85	25.0	24.1	23.3	22.6	21.8	21.0	20.3	19.5	18.8
86	24.9	24.1	23.3	22.5	21.7	20.9	20.2	19.4	18.7
87	24.9	24.0	23.2	22.4	21.6	20.9	20.1	19.3	18.6
88	24.8	24.0	23.2	22.4	21.6	20.8	20.0	19.2	18.5
89	24.8	24.0	23.1	22.3	21.5	20.7	20.0	19.2	18.4
90	24.7	23.9	23.1	22.3	21.5	20.7	19.9	19.1	18.4
91	24.7	23.9	23.1	22.3	21.5	20.7	19.9	19.1	18.3
92	24.7	23.9	23.0	22.2	21.4	20.6	19.8	19.0	18.3
93	24.7	23.8	23.0	22.2	21.4	20.6	19.8	19.0	18.2
94	24.7	23.8	23.0	22.2	21.4	20.6	19.8	19.0	18.2
95	24.6	23.8	23.0	22.2	21.4	20.6	19.7	18.9	18.2
96	24.6	23.8	23.0	22.2	21.3	20.5	19.7	18.9	18.1
97	24.6	23.8	23.0	22.1	21.3	20.5	19.7	18.9	18.1
98	24.6	23.8	22.9	22.1	21.3	20.5	19.7	18.9	18.1
99	24.6	23.8	22.9	22.1	21.3	20.5	19.7	18.9	18.1

100	24.6	23.8	22.9	22.1	21.3	20.5	19.7	18.9	18.1
101	24.6	23.8	22.9	22.1	21.3	20.5	19.7	18.9	18.1
102	24.6	23.7	22.9	22.1	21.3	20.5	19.7	18.8	18.0
103	24.6	23.7	22.9	22.1	21.3	20.5	19.6	18.8	18.0
104	24.6	23.7	22.9	22.1	21.3	20.5	19.6	18.8	18.0
105	24.6	23.7	22.9	22.1	21.3	20.5	19.6	18.8	18.0
106	24.6	23.7	22.9	22.1	21.3	20.5	19.6	18.8	18.0
107	24.6	23.7	22.9	22.1	21.3	20.5	19.6	18.8	18.0
108	24.6	23.7	22.9	22.1	21.3	20.5	19.6	18.8	18.0
109	24.6	23.7	22.9	22.1	21.3	20.4	19.6	18.8	18.0
110	24.6	23.7	22.9	22.1	21.3	20.4	19.6	18.8	18.0
111	24.6	23.7	22.9	22.1	21.3	20.4	19.6	18.8	18.0
112	24.6	23.7	22.9	22.1	21.3	20.4	19.6	18.8	18.0
113	24.6	23.7	22.9	22.1	21.3	20.4	19.6	18.8	18.0
114	24.6	23.7	22.9	22.1	21.3	20.4	19.6	18.8	18.0
115	24.6	23.7	22.9	22.1	21.3	20.4	19.6	18.8	18.0
116	24.6	23.7	22.9	22.1	21.3	20.4	19.6	18.8	18.0
117	24.6	23.7	22.9	22.1	21.2	20.4	19.6	18.8	18.0
118	24.5	23.7	22.9	22.1	21.2	20.4	19.6	18.8	18.0
119	24.5	23.7	22.9	22.1	21.2	20.4	19.6	18.8	18.0
120+	24.5	23.7	22.9	22.0	21.2	20.4	19.6	18.8	18.0
Ages	***72***	***73***	***74***	***75***	***76***	***77***	***78***	***79***	***80***
0	84.7	84.6	84.6	84.6	84.6	84.6	84.6	84.6	84.6
1	83.8	83.8	83.8	83.8	83.8	83.8	83.8	83.8	83.8
2	82.8	82.8	82.8	82.8	82.8	82.8	82.8	82.8	82.8
3	81.8	81.8	81.8	81.8	81.8	81.8	81.8	81.8	81.8
4	80.9	80.8	80.8	80.8	80.8	80.8	80.8	80.8	80.8
5	79.9	79.9	79.9	79.9	79.9	79.8	79.8	79.8	79.8
6	78.9	78.9	78.9	78.9	78.9	78.9	78.9	78.9	78.9
7	77.9	77.9	77.9	77.9	77.9	77.9	77.9	77.9	77.9
8	76.9	76.9	76.9	76.9	76.9	76.9	76.9	76.9	76.9
9	75.9	75.9	75.9	75.9	75.9	75.9	75.9	75.9	75.9
10	74.9	74.9	74.9	74.9	74.9	74.9	74.9	74.9	74.9
11	73.9	73.9	73.9	73.9	73.9	73.9	73.9	73.9	73.9
12	73.0	73.0	73.0	72.9	72.9	72.9	72.9	72.9	72.9
13	72.0	72.0	72.0	72.0	72.0	72.0	71.9	71.9	71.9
14	71.0	71.0	71.0	71.0	71.0	71.0	71.0	71.0	71.0
15	70.0	70.0	70.0	70.0	70.0	70.0	70.0	70.0	70.0
16	69.0	69.0	69.0	69.0	69.0	69.0	69.0	69.0	69.0
17	68.1	68.1	68.0	68.0	68.0	68.0	68.0	68.0	68.0
18	67.1	67.1	67.1	67.1	67.1	67.0	67.0	67.0	67.0
19	66.1	66.1	66.1	66.1	66.1	66.1	66.1	66.1	66.1
20	65.1	65.1	65.1	65.1	65.1	65.1	65.1	65.1	65.1
21	64.2	64.2	64.1	64.1	64.1	64.1	64.1	64.1	64.1
22	63.2	63.2	63.2	63.2	63.2	63.1	63.1	63.1	63.1

23	62.2	62.2	62.2	62.2	62.2	62.2	62.2	62.2	62.1
24	61.3	61.2	61.2	61.2	61.2	61.2	61.2	61.2	61.2
25	60.3	60.3	60.3	60.3	60.2	60.2	60.2	60.2	60.2
26	59.3	59.3	59.3	59.3	59.3	59.3	59.3	59.3	59.2
27	58.4	58.4	58.3	58.3	58.3	58.3	58.3	58.3	58.3
28	57.4	57.4	57.4	57.4	57.4	57.3	57.3	57.3	57.3
29	56.5	56.4	56.4	56.4	56.4	56.4	56.4	56.4	56.4
30	55.5	55.5	55.5	55.5	55.4	55.4	55.4	55.4	55.4
31	54.5	54.5	54.5	54.5	54.5	54.5	54.5	54.5	54.4
32	53.6	53.6	53.6	53.5	53.5	53.5	53.5	53.5	53.5
33	52.6	52.6	52.6	52.6	52.6	52.6	52.6	52.5	52.5
34	51.7	51.7	51.7	51.6	51.6	51.6	51.6	51.6	51.6
35	50.8	50.7	50.7	50.7	50.7	50.7	50.6	50.6	50.6
36	49.8	49.8	49.8	49.7	49.7	49.7	49.7	49.7	49.7
37	48.9	48.8	48.8	48.8	48.8	48.8	48.7	48.7	48.7
38	47.9	47.9	47.9	47.8	47.8	47.8	47.8	47.8	47.8
39	47.0	46.9	46.9	46.9	46.9	46.9	46.8	46.8	46.8
40	46.0	46.0	46.0	45.9	45.9	45.9	45.9	45.9	45.9
41	45.1	45.1	45.0	45.0	45.0	45.0	44.9	44.9	44.9
42	44.2	44.1	44.1	44.1	44.0	44.0	44.0	44.0	43.9
43	43.2	43.2	43.2	43.1	43.1	43.1	43.0	43.0	43.0
44	42.3	42.3	42.2	42.2	42.2	42.1	42.1	42.1	42.1
45	41.4	41.4	41.3	41.3	41.2	41.2	41.2	41.1	41.1
46	40.5	40.4	40.4	40.3	40.3	40.3	40.2	40.2	40.2
47	39.6	39.5	39.5	39.4	39.4	39.3	39.3	39.3	39.2
48	38.7	38.6	38.6	38.5	38.5	38.4	38.4	38.3	38.3
49	37.8	37.7	37.7	37.6	37.5	37.5	37.5	37.4	37.4
50	36.9	36.8	36.8	36.7	36.6	36.6	36.5	36.5	36.5
51	36.0	36.0	35.9	35.8	35.7	35.7	35.6	35.6	35.5
52	35.2	35.1	35.0	34.9	34.9	34.8	34.7	34.7	34.6
53	34.3	34.2	34.1	34.1	34.0	33.9	33.9	33.8	33.7
54	33.5	33.4	33.3	33.2	33.1	33.0	33.0	32.9	32.9
55	32.7	32.6	32.4	32.4	32.3	32.2	32.1	32.0	32.0
56	31.9	31.7	31.6	31.5	31.4	31.3	31.2	31.2	31.1
57	31.1	30.9	30.8	30.7	30.6	30.5	30.4	30.3	30.3
58	30.3	30.1	30.0	29.9	29.8	29.7	29.6	29.5	29.4
59	29.5	29.4	29.2	29.1	29.0	28.8	28.7	28.7	28.6
60	28.8	28.6	28.4	28.3	28.2	28.0	27.9	27.8	27.8
61	28.1	27.9	27.7	27.5	27.4	27.3	27.1	27.0	26.9
62	27.4	27.2	27.0	26.8	26.6	26.5	26.4	26.2	26.1
63	26.7	26.5	26.2	26.1	25.9	25.7	25.6	25.5	25.3
64	26.0	25.8	25.5	25.3	25.2	25.0	24.8	24.7	24.6
65	25.4	25.1	24.9	24.6	24.4	24.3	24.1	23.9	23.8
66	24.8	24.5	24.2	24.0	23.7	23.5	23.4	23.2	23.1
67	24.2	23.9	23.6	23.3	23.1	22.9	22.7	22.5	22.3

68	23.6	23.3	23.0	22.7	22.4	22.2	22.0	21.8	21.6
69	23.1	22.7	22.4	22.1	21.8	21.5	21.3	21.1	20.9
70	22.5	22.2	21.8	21.5	21.2	20.9	20.6	20.4	20.2
71	22.0	21.6	21.3	20.9	20.6	20.3	20.0	19.8	19.6
72	21.6	21.1	20.7	20.4	20.0	19.7	19.4	19.2	18.9
73	21.1	20.7	20.3	19.9	19.5	19.1	18.8	18.6	18.3
74	20.7	20.3	19.8	19.4	19.0	18.6	18.3	18.0	17.7
75	20.4	19.9	19.4	18.9	18.5	18.1	17.8	17.4	17.1
76	20.0	19.5	19.0	18.5	18.1	17.7	17.3	16.9	16.6
77	19.7	19.1	18.6	18.1	17.7	17.2	16.8	16.4	16.1
78	19.4	18.8	18.3	17.8	17.3	16.8	16.4	16.0	15.6
79	19.2	18.6	18.0	17.4	16.9	16.4	16.0	15.6	15.2
80	18.9	18.3	17.7	17.1	16.6	16.1	15.6	15.2	14.7
81	18.7	18.1	17.4	16.9	16.3	15.8	15.3	14.8	14.4
82	18.5	17.9	17.2	16.6	16.0	15.5	15.0	14.5	14.0
83	18.3	17.7	17.0	16.4	15.8	15.2	14.7	14.2	13.7
84	18.2	17.5	16.8	16.2	15.6	15.0	14.4	13.9	13.4
85	18.1	17.4	16.7	16.0	15.4	14.8	14.2	13.6	13.1
86	17.9	17.2	16.5	15.9	15.2	14.6	14.0	13.4	12.9
87	17.8	17.1	16.4	15.7	15.1	14.4	13.8	13.2	12.7
88	17.7	17.0	16.3	15.6	14.9	14.3	13.7	13.1	12.5
89	17.7	16.9	16.2	15.5	14.8	14.2	13.5	12.9	12.3
90	17.6	16.9	16.1	15.4	14.7	14.1	13.4	12.8	12.2
91	17.5	16.8	16.1	15.3	14.6	14.0	13.3	12.7	12.1
92	17.5	16.7	16.0	15.3	14.6	13.9	13.2	12.6	11.9
93	17.4	16.7	15.9	15.2	14.5	13.8	13.1	12.5	11.9
94	17.4	16.6	15.9	15.2	14.4	13.7	13.1	12.4	11.8
95	17.4	16.6	15.9	15.1	14.4	13.7	13.0	12.3	11.7
96	17.4	16.6	15.8	15.1	14.3	13.6	12.9	12.3	11.6
97	17.3	16.6	15.8	15.0	14.3	13.6	12.9	12.2	11.6
98	17.3	16.5	15.8	15.0	14.3	13.6	12.9	12.2	11.5
99	17.3	16.5	15.7	15.0	14.3	13.5	12.8	12.2	11.5
100	17.3	16.5	15.7	15.0	14.2	13.5	12.8	12.1	11.5
101	17.3	16.5	15.7	15.0	14.2	13.5	12.8	12.1	11.4
102	17.3	16.5	15.7	14.9	14.2	13.5	12.8	12.1	11.4
103	17.3	16.5	15.7	14.9	14.2	13.5	12.8	12.1	11.4
104	17.2	16.5	15.7	14.9	14.2	13.5	12.7	12.0	11.4
105	17.2	16.5	15.7	14.9	14.2	13.4	12.7	12.0	11.4
106	17.2	16.5	15.7	14.9	14.2	13.4	12.7	12.0	11.4
107	17.2	16.5	15.7	14.9	14.2	13.4	12.7	12.0	11.4
108	17.2	16.5	15.7	14.9	14.2	13.4	12.7	12.0	11.4
109	17.2	16.4	15.7	14.9	14.2	13.4	12.7	12.0	11.3
110	17.2	16.4	15.7	14.9	14.2	13.4	12.7	12.0	11.3
111	17.2	16.4	15.7	14.9	14.2	13.4	12.7	12.0	11.3
112	17.2	16.4	15.7	14.9	14.2	13.4	12.7	12.0	11.3

113	17.2	16.4	15.7	14.9	14.2	13.4	12.7	12.0	11.3
114	17.2	16.4	15.7	14.9	14.1	13.4	12.7	12.0	11.3
115	17.2	16.4	15.7	14.9	14.1	13.4	12.7	12.0	11.3
116	17.2	16.4	15.6	14.9	14.1	13.4	12.7	12.0	11.3
117	17.2	16.4	15.6	14.9	14.1	13.4	12.7	12.0	11.3
118	17.2	16.4	15.6	14.9	14.1	13.4	12.6	11.9	11.3
119	17.2	16.4	15.6	14.8	14.1	13.4	12.6	11.9	11.2
120+	17.2	16.4	15.6	14.8	14.1	13.3	12.6	11.9	11.2
Ages	***81***	***82***	***83***	***84***	***85***	***86***	***87***	***88***	***89***
0	84.6	84.6	84.6	84.6	84.6	84.6	84.6	84.6	84.6
1	83.8	83.8	83.7	83.7	83.7	83.7	83.7	83.7	83.7
2	82.8	82.8	82.8	82.8	82.8	82.8	82.8	82.8	82.8
3	81.8	81.8	81.8	81.8	81.8	81.8	81.8	81.8	81.8
4	80.8	80.8	80.8	80.8	80.8	80.8	80.8	80.8	80.8
5	79.8	79.8	79.8	79.8	79.8	79.8	79.8	79.8	79.8
6	78.9	78.9	78.9	78.9	78.8	78.8	78.8	78.8	78.8
7	77.9	77.9	77.9	77.9	77.9	77.9	77.9	77.9	77.9
8	76.9	76.9	76.9	76.9	76.9	76.9	76.9	76.9	76.9
9	75.9	75.9	75.9	75.9	75.9	75.9	75.9	75.9	75.9
10	74.9	74.9	74.9	74.9	74.9	74.9	74.9	74.9	74.9
11	73.9	73.9	73.9	73.9	73.9	73.9	73.9	73.9	73.9
12	72.9	72.9	72.9	72.9	72.9	72.9	72.9	72.9	72.9
13	71.9	71.9	71.9	71.9	71.9	71.9	71.9	71.9	71.9
14	71.0	70.9	70.9	70.9	70.9	70.9	70.9	70.9	70.9
15	70.0	70.0	70.0	70.0	70.0	70.0	70.0	69.9	69.9
16	69.0	69.0	69.0	69.0	69.0	69.0	69.0	69.0	69.0
17	68.0	68.0	68.0	68.0	68.0	68.0	68.0	68.0	68.0
18	67.0	67.0	67.0	67.0	67.0	67.0	67.0	67.0	67.0
19	66.0	66.0	66.0	66.0	66.0	66.0	66.0	66.0	66.0
20	65.1	65.1	65.1	65.1	65.1	65.1	65.0	65.0	65.0
21	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1
22	63.1	63.1	63.1	63.1	63.1	63.1	63.1	63.1	63.1
23	62.1	62.1	62.1	62.1	62.1	62.1	62.1	62.1	62.1
24	61.2	61.2	61.2	61.2	61.2	61.1	61.1	61.1	61.1
25	60.2	60.2	60.2	60.2	60.2	60.2	60.2	60.2	60.2
26	59.2	59.2	59.2	59.2	59.2	59.2	59.2	59.2	59.2
27	58.3	58.3	58.3	58.3	58.3	58.2	58.2	58.2	58.2
28	57.3	57.3	57.3	57.3	57.3	57.3	57.3	57.3	57.3
29	56.4	56.3	56.3	56.3	56.3	56.3	56.3	56.3	56.3
30	55.4	55.4	55.4	55.4	55.4	55.4	55.4	55.4	55.4
31	54.4	54.4	54.4	54.4	54.4	54.4	54.4	54.4	54.4
32	53.5	53.5	53.5	53.5	53.5	53.5	53.4	53.4	53.4
33	52.5	52.5	52.5	52.5	52.5	52.5	52.5	52.5	52.5
34	51.6	51.6	51.6	51.5	51.5	51.5	51.5	51.5	51.5
35	50.6	50.6	50.6	50.6	50.6	50.6	50.6	50.6	50.6

36	49.7	49.7	49.6	49.6	49.6	49.6	49.6	49.6	49.6
37	48.7	48.7	48.7	48.7	48.7	48.7	48.7	48.7	48.7
38	47.7	47.7	47.7	47.7	47.7	47.7	47.7	47.7	47.7
39	46.8	46.8	46.8	46.8	46.8	46.7	46.7	46.7	46.7
40	45.8	45.8	45.8	45.8	45.8	45.8	45.8	45.8	45.8
41	44.9	44.9	44.9	44.9	44.8	44.8	44.8	44.8	44.8
42	43.9	43.9	43.9	43.9	43.9	43.9	43.9	43.9	43.9
43	43.0	43.0	43.0	42.9	42.9	42.9	42.9	42.9	42.9
44	42.0	42.0	42.0	42.0	42.0	42.0	42.0	42.0	41.9
45	41.1	41.1	41.1	41.0	41.0	41.0	41.0	41.0	41.0
46	40.1	40.1	40.1	40.1	40.1	40.1	40.1	40.0	40.0
47	39.2	39.2	39.2	39.2	39.1	39.1	39.1	39.1	39.1
48	38.3	38.3	38.2	38.2	38.2	38.2	38.2	38.2	38.1
49	37.3	37.3	37.3	37.3	37.3	37.2	37.2	37.2	37.2
50	36.4	36.4	36.4	36.3	36.3	36.3	36.3	36.3	36.3
51	35.5	35.5	35.4	35.4	35.4	35.4	35.4	35.3	35.3
52	34.6	34.6	34.5	34.5	34.5	34.5	34.4	34.4	34.4
53	33.7	33.7	33.6	33.6	33.6	33.5	33.5	33.5	33.5
54	32.8	32.8	32.7	32.7	32.7	32.6	32.6	32.6	32.6
55	31.9	31.9	31.8	31.8	31.8	31.7	31.7	31.7	31.7
56	31.1	31.0	31.0	30.9	30.9	30.9	30.8	30.8	30.8
57	30.2	30.1	30.1	30.0	30.0	30.0	29.9	29.9	29.9
58	29.3	29.3	29.2	29.2	29.1	29.1	29.1	29.0	29.0
59	28.5	28.4	28.4	28.3	28.3	28.2	28.2	28.2	28.2
60	27.7	27.6	27.5	27.5	27.4	27.4	27.4	27.3	27.3
61	26.9	26.8	26.7	26.7	26.6	26.6	26.5	26.5	26.4
62	26.0	26.0	25.9	25.8	25.8	25.7	25.7	25.6	25.6
63	25.2	25.2	25.1	25.0	25.0	24.9	24.9	24.8	24.8
64	24.5	24.4	24.3	24.2	24.1	24.1	24.0	24.0	24.0
65	23.7	23.6	23.5	23.4	23.3	23.3	23.2	23.2	23.1
66	22.9	22.8	22.7	22.6	22.6	22.5	22.4	22.4	22.3
67	22.2	22.1	22.0	21.9	21.8	21.7	21.6	21.6	21.5
68	21.5	21.3	21.2	21.1	21.0	20.9	20.9	20.8	20.7
69	20.7	20.6	20.5	20.4	20.3	20.2	20.1	20.0	20.0
70	20.0	19.9	19.7	19.6	19.5	19.4	19.3	19.2	19.2
71	19.4	19.2	19.0	18.9	18.8	18.7	18.6	18.5	18.4
72	18.7	18.5	18.3	18.2	18.1	17.9	17.8	17.7	17.7
73	18.1	17.9	17.7	17.5	17.4	17.2	17.1	17.0	16.9
74	17.4	17.2	17.0	16.8	16.7	16.5	16.4	16.3	16.2
75	16.9	16.6	16.4	16.2	16.0	15.9	15.7	15.6	15.5
76	16.3	16.0	15.8	15.6	15.4	15.2	15.1	14.9	14.8
77	15.8	15.5	15.2	15.0	14.8	14.6	14.4	14.3	14.2
78	15.3	15.0	14.7	14.4	14.2	14.0	13.8	13.7	13.5
79	14.8	14.5	14.2	13.9	13.6	13.4	13.2	13.1	12.9
80	14.4	14.0	13.7	13.4	13.1	12.9	12.7	12.5	12.3

81	14.0	13.6	13.2	12.9	12.6	12.4	12.2	12.0	11.8
82	13.6	13.2	12.8	12.5	12.2	11.9	11.7	11.5	11.3
83	13.2	12.8	12.4	12.1	11.8	11.5	11.2	11.0	10.8
84	12.9	12.5	12.1	11.7	11.4	11.1	10.8	10.5	10.3
85	12.6	12.2	11.8	11.4	11.0	10.7	10.4	10.1	9.9
86	12.4	11.9	11.5	11.1	10.7	10.4	10.0	9.8	9.5
87	12.2	11.7	11.2	10.8	10.4	10.0	9.7	9.4	9.1
88	12.0	11.5	11.0	10.5	10.1	9.8	9.4	9.1	8.8
89	11.8	11.3	10.8	10.3	9.9	9.5	9.1	8.8	8.5
90	11.6	11.1	10.6	10.1	9.7	9.3	8.9	8.6	8.3
91	11.5	10.9	10.4	9.9	9.5	9.1	8.7	8.3	8.0
92	11.4	10.8	10.3	9.8	9.3	8.9	8.5	8.1	7.8
93	11.3	10.7	10.1	9.6	9.2	8.7	8.3	7.9	7.6
94	11.2	10.6	10.0	9.5	9.0	8.6	8.2	7.8	7.4
95	11.1	10.5	9.9	9.4	8.9	8.5	8.0	7.6	7.3
96	11.0	10.4	9.9	9.3	8.8	8.4	7.9	7.5	7.1
97	11.0	10.4	9.8	9.2	8.7	8.3	7.8	7.4	7.0
98	10.9	10.3	9.7	9.2	8.7	8.2	7.7	7.3	6.9
99	10.9	10.2	9.7	9.1	8.6	8.1	7.6	7.2	6.8
100	10.8	10.2	9.6	9.1	8.5	8.0	7.6	7.2	6.8
101	10.8	10.2	9.6	9.0	8.5	8.0	7.5	7.1	6.7
102	10.8	10.1	9.6	9.0	8.5	8.0	7.5	7.0	6.6
103	10.7	10.1	9.5	9.0	8.4	7.9	7.4	7.0	6.6
104	10.7	10.1	9.5	8.9	8.4	7.9	7.4	7.0	6.6
105	10.7	10.1	9.5	8.9	8.4	7.9	7.4	6.9	6.5
106	10.7	10.1	9.5	8.9	8.4	7.9	7.4	6.9	6.5
107	10.7	10.1	9.5	8.9	8.4	7.9	7.4	6.9	6.5
108	10.7	10.1	9.5	8.9	8.4	7.8	7.4	6.9	6.5
109	10.7	10.1	9.5	8.9	8.4	7.8	7.4	6.9	6.5
110	10.7	10.1	9.5	8.9	8.3	7.8	7.4	6.9	6.5
111	10.7	10.1	9.5	8.9	8.3	7.8	7.3	6.9	6.5
112	10.7	10.1	9.5	8.9	8.3	7.8	7.3	6.9	6.5
113	10.7	10.0	9.4	8.9	8.3	7.8	7.3	6.9	6.4
114	10.7	10.0	9.4	8.9	8.3	7.8	7.3	6.9	6.4
115	10.7	10.0	9.4	8.8	8.3	7.8	7.3	6.8	6.4
116	10.6	10.0	9.4	8.8	8.3	7.7	7.3	6.8	6.4
117	10.6	10.0	9.4	8.8	8.2	7.7	7.2	6.8	6.3
118	10.6	10.0	9.3	8.8	8.2	7.7	7.2	6.7	6.3
119	10.6	9.9	9.3	8.7	8.2	7.6	7.1	6.6	6.2
120+	10.5	9.9	9.3	8.7	8.1	7.6	7.1	6.6	6.1
Ages	***90***	***91***	***92***	***93***	***94***	***95***	***96***	***97***	***98***
0	84.6	84.6	84.6	84.6	84.6	84.6	84.6	84.6	84.6
1	83.7	83.7	83.7	83.7	83.7	83.7	83.7	83.7	83.7
2	82.8	82.8	82.8	82.8	82.8	82.8	82.8	82.8	82.8
3	81.8	81.8	81.8	81.8	81.8	81.8	81.8	81.8	81.8

4	80.8	80.8	80.8	80.8	80.8	80.8	80.8	80.8	80.8
5	79.8	79.8	79.8	79.8	79.8	79.8	79.8	79.8	79.8
6	78.8	78.8	78.8	78.8	78.8	78.8	78.8	78.8	78.8
7	77.9	77.9	77.9	77.9	77.9	77.9	77.9	77.9	77.9
8	76.9	76.9	76.9	76.9	76.9	76.9	76.9	76.9	76.9
9	75.9	75.9	75.9	75.9	75.9	75.9	75.9	75.9	75.9
10	74.9	74.9	74.9	74.9	74.9	74.9	74.9	74.9	74.9
11	73.9	73.9	73.9	73.9	73.9	73.9	73.9	73.9	73.9
12	72.9	72.9	72.9	72.9	72.9	72.9	72.9	72.9	72.9
13	71.9	71.9	71.9	71.9	71.9	71.9	71.9	71.9	71.9
14	70.9	70.9	70.9	70.9	70.9	70.9	70.9	70.9	70.9
15	69.9	69.9	69.9	69.9	69.9	69.9	69.9	69.9	69.9
16	69.0	69.0	69.0	69.0	69.0	69.0	69.0	69.0	69.0
17	68.0	68.0	68.0	68.0	68.0	68.0	68.0	68.0	68.0
18	67.0	67.0	67.0	67.0	67.0	67.0	67.0	67.0	67.0
19	66.0	66.0	66.0	66.0	66.0	66.0	66.0	66.0	66.0
20	65.0	65.0	65.0	65.0	65.0	65.0	65.0	65.0	65.0
21	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1
22	63.1	63.1	63.1	63.1	63.1	63.1	63.1	63.1	63.1
23	62.1	62.1	62.1	62.1	62.1	62.1	62.1	62.1	62.1
24	61.1	61.1	61.1	61.1	61.1	61.1	61.1	61.1	61.1
25	60.2	60.2	60.2	60.2	60.2	60.2	60.2	60.2	60.2
26	59.2	59.2	59.2	59.2	59.2	59.2	59.2	59.2	59.2
27	58.2	58.2	58.2	58.2	58.2	58.2	58.2	58.2	58.2
28	57.3	57.3	57.3	57.3	57.3	57.3	57.3	57.3	57.3
29	56.3	56.3	56.3	56.3	56.3	56.3	56.3	56.3	56.3
30	55.4	55.3	55.3	55.3	55.3	55.3	55.3	55.3	55.3
31	54.4	54.4	54.4	54.4	54.4	54.4	54.4	54.4	54.4
32	53.4	53.4	53.4	53.4	53.4	53.4	53.4	53.4	53.4
33	52.5	52.5	52.5	52.5	52.5	52.5	52.5	52.5	52.5
34	51.5	51.5	51.5	51.5	51.5	51.5	51.5	51.5	51.5
35	50.6	50.6	50.6	50.6	50.6	50.6	50.6	50.6	50.6
36	49.6	49.6	49.6	49.6	49.6	49.6	49.6	49.6	49.6
37	48.6	48.6	48.6	48.6	48.6	48.6	48.6	48.6	48.6
38	47.7	47.7	47.7	47.7	47.7	47.7	47.7	47.7	47.7
39	46.7	46.7	46.7	46.7	46.7	46.7	46.7	46.7	46.7
40	45.8	45.8	45.8	45.8	45.8	45.8	45.8	45.8	45.8
41	44.8	44.8	44.8	44.8	44.8	44.8	44.8	44.8	44.8
42	43.9	43.9	43.8	43.8	43.8	43.8	43.8	43.8	43.8
43	42.9	42.9	42.9	42.9	42.9	42.9	42.9	42.9	42.9
44	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9
45	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0
46	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0
47	39.1	39.1	39.1	39.1	39.1	39.1	39.1	39.1	39.1
48	38.1	38.1	38.1	38.1	38.1	38.1	38.1	38.1	38.1

49	37.2	37.2	37.2	37.2	37.2	37.2	37.2	37.2	37.2
50	36.3	36.2	36.2	36.2	36.2	36.2	36.2	36.2	36.2
51	35.3	35.3	35.3	35.3	35.3	35.3	35.3	35.3	35.3
52	34.4	34.4	34.4	34.4	34.4	34.4	34.3	34.3	34.3
53	33.5	33.5	33.5	33.4	33.4	33.4	33.4	33.4	33.4
54	32.6	32.5	32.5	32.5	32.5	32.5	32.5	32.5	32.5
55	31.7	31.6	31.6	31.6	31.6	31.6	31.6	31.6	31.6
56	30.8	30.7	30.7	30.7	30.7	30.7	30.7	30.7	30.7
57	29.9	29.9	29.8	29.8	29.8	29.8	29.8	29.8	29.8
58	29.0	29.0	29.0	29.0	28.9	28.9	28.9	28.9	28.9
59	28.1	28.1	28.1	28.1	28.1	28.1	28.0	28.0	28.0
60	27.3	27.3	27.2	27.2	27.2	27.2	27.2	27.2	27.2
61	26.4	26.4	26.4	26.4	26.3	26.3	26.3	26.3	26.3
62	25.6	25.6	25.5	25.5	25.5	25.5	25.5	25.5	25.5
63	24.7	24.7	24.7	24.7	24.7	24.6	24.6	24.6	24.6
64	23.9	23.9	23.9	23.8	23.8	23.8	23.8	23.8	23.8
65	23.1	23.1	23.0	23.0	23.0	23.0	23.0	23.0	22.9
66	22.3	22.3	22.2	22.2	22.2	22.2	22.2	22.1	22.1
67	21.5	21.5	21.4	21.4	21.4	21.4	21.3	21.3	21.3
68	20.7	20.7	20.6	20.6	20.6	20.6	20.5	20.5	20.5
69	19.9	19.9	19.8	19.8	19.8	19.7	19.7	19.7	19.7
70	19.1	19.1	19.0	19.0	19.0	18.9	18.9	18.9	18.9
71	18.4	18.3	18.3	18.2	18.2	18.2	18.1	18.1	18.1
72	17.6	17.5	17.5	17.4	17.4	17.4	17.4	17.3	17.3
73	16.9	16.8	16.7	16.7	16.6	16.6	16.6	16.6	16.5
74	16.1	16.1	16.0	15.9	15.9	15.9	15.8	15.8	15.8
75	15.4	15.3	15.3	15.2	15.2	15.1	15.1	15.0	15.0
76	14.7	14.6	14.6	14.5	14.4	14.4	14.3	14.3	14.3
77	14.1	14.0	13.9	13.8	13.7	13.7	13.6	13.6	13.6
78	13.4	13.3	13.2	13.1	13.1	13.0	12.9	12.9	12.9
79	12.8	12.7	12.6	12.5	12.4	12.3	12.3	12.2	12.2
80	12.2	12.1	11.9	11.9	11.8	11.7	11.6	11.6	11.5
81	11.6	11.5	11.4	11.3	11.2	11.1	11.0	11.0	10.9
82	11.1	10.9	10.8	10.7	10.6	10.5	10.4	10.4	10.3
83	10.6	10.4	10.3	10.1	10.0	9.9	9.9	9.8	9.7
84	10.1	9.9	9.8	9.6	9.5	9.4	9.3	9.2	9.2
85	9.7	9.5	9.3	9.2	9.0	8.9	8.8	8.7	8.7
86	9.3	9.1	8.9	8.7	8.6	8.5	8.4	8.3	8.2
87	8.9	8.7	8.5	8.3	8.2	8.0	7.9	7.8	7.7
88	8.6	8.3	8.1	7.9	7.8	7.6	7.5	7.4	7.3
89	8.3	8.0	7.8	7.6	7.4	7.3	7.1	7.0	6.9
90	8.0	7.7	7.5	7.3	7.1	6.9	6.8	6.7	6.6
91	7.7	7.5	7.2	7.0	6.8	6.6	6.5	6.4	6.2
92	7.5	7.2	7.0	6.7	6.5	6.4	6.2	6.1	5.9
93	7.3	7.0	6.7	6.5	6.3	6.1	5.9	5.8	5.7

94	7.1	6.8	6.5	6.3	6.1	5.9	5.7	5.5	5.4
95	6.9	6.6	6.4	6.1	5.9	5.7	5.5	5.3	5.2
96	6.8	6.5	6.2	5.9	5.7	5.5	5.3	5.1	5.0
97	6.7	6.4	6.1	5.8	5.5	5.3	5.1	4.9	4.8
98	6.6	6.2	5.9	5.7	5.4	5.2	5.0	4.8	4.6
99	6.5	6.1	5.8	5.5	5.3	5.0	4.8	4.6	4.5
100	6.4	6.0	5.7	5.4	5.2	4.9	4.7	4.5	4.3
101	6.3	6.0	5.6	5.3	5.1	4.8	4.6	4.4	4.2
102	6.3	5.9	5.6	5.3	5.0	4.7	4.5	4.3	4.1
103	6.2	5.9	5.5	5.2	4.9	4.7	4.5	4.2	4.1
104	6.2	5.8	5.5	5.2	4.9	4.6	4.4	4.2	4.0
105	6.1	5.8	5.4	5.1	4.9	4.6	4.4	4.1	4.0
106	6.1	5.8	5.4	5.1	4.8	4.6	4.3	4.1	3.9
107	6.1	5.8	5.4	5.1	4.8	4.6	4.3	4.1	3.9
108	6.1	5.7	5.4	5.1	4.8	4.5	4.3	4.1	3.9
109	6.1	5.7	5.4	5.1	4.8	4.5	4.3	4.1	3.9
110	6.1	5.7	5.4	5.1	4.8	4.5	4.3	4.1	3.9
111	6.1	5.7	5.4	5.1	4.8	4.5	4.3	4.1	3.9
112	6.1	5.7	5.4	5.1	4.8	4.5	4.3	4.0	3.8
113	6.1	5.7	5.3	5.0	4.7	4.5	4.2	4.0	3.8
114	6.0	5.7	5.3	5.0	4.7	4.4	4.2	4.0	3.8
115	6.0	5.6	5.3	5.0	4.7	4.4	4.2	4.0	3.8
116	6.0	5.6	5.2	4.9	4.6	4.4	4.1	3.9	3.7
117	5.9	5.5	5.2	4.9	4.6	4.3	4.0	3.8	3.6
118	5.8	5.5	5.1	4.8	4.5	4.2	3.9	3.7	3.5
119	5.8	5.4	5.0	4.7	4.4	4.1	3.8	3.6	3.3
120+	5.7	5.3	4.9	4.6	4.3	4.0	3.7	3.4	3.2
Ages	***99***	***100***	***101***	***102***	***103***	***104***	***105***	***106***	***107***
0	84.6	84.6	84.6	84.6	84.6	84.6	84.6	84.6	84.6
1	83.7	83.7	83.7	83.7	83.7	83.7	83.7	83.7	83.7
2	82.8	82.8	82.8	82.8	82.8	82.8	82.8	82.8	82.8
3	81.8	81.8	81.8	81.8	81.8	81.8	81.8	81.8	81.8
4	80.8	80.8	80.8	80.8	80.8	80.8	80.8	80.8	80.8
5	79.8	79.8	79.8	79.8	79.8	79.8	79.8	79.8	79.8
6	78.8	78.8	78.8	78.8	78.8	78.8	78.8	78.8	78.8
7	77.9	77.9	77.9	77.9	77.9	77.9	77.9	77.9	77.9
8	76.9	76.9	76.9	76.9	76.9	76.9	76.9	76.9	76.9
9	75.9	75.9	75.9	75.9	75.9	75.9	75.9	75.9	75.9
10	74.9	74.9	74.9	74.9	74.9	74.9	74.9	74.9	74.9
11	73.9	73.9	73.9	73.9	73.9	73.9	73.9	73.9	73.9
12	72.9	72.9	72.9	72.9	72.9	72.9	72.9	72.9	72.9
13	71.9	71.9	71.9	71.9	71.9	71.9	71.9	71.9	71.9
14	70.9	70.9	70.9	70.9	70.9	70.9	70.9	70.9	70.9
15	69.9	69.9	69.9	69.9	69.9	69.9	69.9	69.9	69.9
16	69.0	69.0	69.0	69.0	69.0	69.0	69.0	69.0	69.0

17	68.0	68.0	68.0	68.0	68.0	68.0	68.0	68.0	68.0
18	67.0	67.0	67.0	67.0	67.0	67.0	67.0	67.0	67.0
19	66.0	66.0	66.0	66.0	66.0	66.0	66.0	66.0	66.0
20	65.0	65.0	65.0	65.0	65.0	65.0	65.0	65.0	65.0
21	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1
22	63.1	63.1	63.1	63.1	63.1	63.1	63.1	63.1	63.1
23	62.1	62.1	62.1	62.1	62.1	62.1	62.1	62.1	62.1
24	61.1	61.1	61.1	61.1	61.1	61.1	61.1	61.1	61.1
25	60.2	60.2	60.2	60.2	60.2	60.2	60.2	60.2	60.2
26	59.2	59.2	59.2	59.2	59.2	59.2	59.2	59.2	59.2
27	58.2	58.2	58.2	58.2	58.2	58.2	58.2	58.2	58.2
28	57.3	57.3	57.3	57.3	57.3	57.3	57.3	57.3	57.3
29	56.3	56.3	56.3	56.3	56.3	56.3	56.3	56.3	56.3
30	55.3	55.3	55.3	55.3	55.3	55.3	55.3	55.3	55.3
31	54.4	54.4	54.4	54.4	54.4	54.4	54.4	54.4	54.4
32	53.4	53.4	53.4	53.4	53.4	53.4	53.4	53.4	53.4
33	52.5	52.5	52.5	52.5	52.5	52.5	52.5	52.5	52.5
34	51.5	51.5	51.5	51.5	51.5	51.5	51.5	51.5	51.5
35	50.6	50.6	50.6	50.6	50.5	50.5	50.5	50.5	50.5
36	49.6	49.6	49.6	49.6	49.6	49.6	49.6	49.6	49.6
37	48.6	48.6	48.6	48.6	48.6	48.6	48.6	48.6	48.6
38	47.7	47.7	47.7	47.7	47.7	47.7	47.7	47.7	47.7
39	46.7	46.7	46.7	46.7	46.7	46.7	46.7	46.7	46.7
40	45.8	45.8	45.8	45.8	45.8	45.8	45.7	45.7	45.7
41	44.8	44.8	44.8	44.8	44.8	44.8	44.8	44.8	44.8
42	43.8	43.8	43.8	43.8	43.8	43.8	43.8	43.8	43.8
43	42.9	42.9	42.9	42.9	42.9	42.9	42.9	42.9	42.9
44	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9
45	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0
46	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0
47	39.1	39.0	39.0	39.0	39.0	39.0	39.0	39.0	39.0
48	38.1	38.1	38.1	38.1	38.1	38.1	38.1	38.1	38.1
49	37.2	37.1	37.1	37.1	37.1	37.1	37.1	37.1	37.1
50	36.2	36.2	36.2	36.2	36.2	36.2	36.2	36.2	36.2
51	35.3	35.3	35.3	35.3	35.3	35.3	35.3	35.3	35.3
52	34.3	34.3	34.3	34.3	34.3	34.3	34.3	34.3	34.3
53	33.4	33.4	33.4	33.4	33.4	33.4	33.4	33.4	33.4
54	32.5	32.5	32.5	32.5	32.5	32.5	32.5	32.5	32.5
55	31.6	31.6	31.6	31.6	31.6	31.6	31.6	31.6	31.6
56	30.7	30.7	30.7	30.7	30.7	30.7	30.7	30.7	30.7
57	29.8	29.8	29.8	29.8	29.8	29.8	29.8	29.8	29.8
58	28.9	28.9	28.9	28.9	28.9	28.9	28.9	28.9	28.9
59	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0
60	27.2	27.1	27.1	27.1	27.1	27.1	27.1	27.1	27.1
61	26.3	26.3	26.3	26.3	26.3	26.3	26.3	26.3	26.3

62	25.4	25.4	25.4	25.4	25.4	25.4	25.4	25.4	25.4
63	24.6	24.6	24.6	24.6	24.6	24.6	24.6	24.6	24.6
64	23.8	23.8	23.8	23.7	23.7	23.7	23.7	23.7	23.7
65	22.9	22.9	22.9	22.9	22.9	22.9	22.9	22.9	22.9
66	22.1	22.1	22.1	22.1	22.1	22.1	22.1	22.1	22.1
67	21.3	21.3	21.3	21.3	21.3	21.3	21.3	21.3	21.3
68	20.5	20.5	20.5	20.5	20.5	20.5	20.5	20.5	20.5
69	19.7	19.7	19.7	19.7	19.6	19.6	19.6	19.6	19.6
70	18.9	18.9	18.9	18.8	18.8	18.8	18.8	18.8	18.8
71	18.1	18.1	18.1	18.0	18.0	18.0	18.0	18.0	18.0
72	17.3	17.3	17.3	17.3	17.3	17.2	17.2	17.2	17.2
73	16.5	16.5	16.5	16.5	16.5	16.5	16.5	16.5	16.5
74	15.7	15.7	15.7	15.7	15.7	15.7	15.7	15.7	15.7
75	15.0	15.0	15.0	14.9	14.9	14.9	14.9	14.9	14.9
76	14.3	14.2	14.2	14.2	14.2	14.2	14.2	14.2	14.2
77	13.5	13.5	13.5	13.5	13.5	13.5	13.4	13.4	13.4
78	12.8	12.8	12.8	12.8	12.8	12.7	12.7	12.7	12.7
79	12.2	12.1	12.1	12.1	12.1	12.0	12.0	12.0	12.0
80	11.5	11.5	11.4	11.4	11.4	11.4	11.4	11.4	11.4
81	10.9	10.8	10.8	10.8	10.7	10.7	10.7	10.7	10.7
82	10.2	10.2	10.2	10.1	10.1	10.1	10.1	10.1	10.1
83	9.7	9.6	9.6	9.6	9.5	9.5	9.5	9.5	9.5
84	9.1	9.1	9.0	9.0	9.0	8.9	8.9	8.9	8.9
85	8.6	8.5	8.5	8.5	8.4	8.4	8.4	8.4	8.4
86	8.1	8.0	8.0	8.0	7.9	7.9	7.9	7.9	7.9
87	7.6	7.6	7.5	7.5	7.4	7.4	7.4	7.4	7.4
88	7.2	7.2	7.1	7.0	7.0	7.0	6.9	6.9	6.9
89	6.8	6.8	6.7	6.6	6.6	6.6	6.5	6.5	6.5
90	6.5	6.4	6.3	6.3	6.2	6.2	6.1	6.1	6.1
91	6.1	6.0	6.0	5.9	5.9	5.8	5.8	5.8	5.8
92	5.8	5.7	5.6	5.6	5.5	5.5	5.4	5.4	5.4
93	5.5	5.4	5.3	5.3	5.2	5.2	5.1	5.1	5.1
94	5.3	5.2	5.1	5.0	4.9	4.9	4.9	4.8	4.8
95	5.0	4.9	4.8	4.7	4.7	4.6	4.6	4.6	4.6
96	4.8	4.7	4.6	4.5	4.5	4.4	4.4	4.3	4.3
97	4.6	4.5	4.4	4.3	4.2	4.2	4.1	4.1	4.1
98	4.5	4.3	4.2	4.1	4.1	4.0	4.0	3.9	3.9
99	4.3	4.2	4.1	4.0	3.9	3.8	3.8	3.8	3.7
100	4.2	4.1	3.9	3.8	3.7	3.7	3.6	3.6	3.6
101	4.1	3.9	3.8	3.7	3.6	3.5	3.5	3.5	3.4
102	4.0	3.8	3.7	3.6	3.5	3.4	3.4	3.3	3.3
103	3.9	3.7	3.6	3.5	3.4	3.3	3.3	3.2	3.2
104	3.8	3.7	3.5	3.4	3.3	3.3	3.2	3.2	3.2
105	3.8	3.6	3.5	3.4	3.3	3.2	3.1	3.1	3.1
106	3.8	3.6	3.5	3.3	3.2	3.2	3.1	3.1	3.1

107	3.7	3.6	3.4	3.3	3.2	3.2	3.1	3.1	3.0
108	3.7	3.6	3.4	3.3	3.2	3.1	3.1	3.0	3.0
109	3.7	3.6	3.4	3.3	3.2	3.1	3.1	3.0	3.0
110	3.7	3.5	3.4	3.3	3.2	3.1	3.1	3.0	3.0
111	3.7	3.5	3.4	3.3	3.2	3.1	3.0	3.0	3.0
112	3.7	3.5	3.4	3.3	3.2	3.1	3.0	3.0	3.0
113	3.6	3.5	3.4	3.2	3.1	3.1	3.0	3.0	2.9
114	3.6	3.5	3.3	3.2	3.1	3.0	3.0	2.9	2.9
115	3.6	3.4	3.3	3.2	3.1	3.0	2.9	2.9	2.9
116	3.5	3.3	3.2	3.1	3.0	2.9	2.8	2.8	2.8
117	3.4	3.3	3.1	3.0	2.9	2.8	2.7	2.7	2.7
118	3.3	3.1	3.0	2.8	2.7	2.6	2.6	2.5	2.5
119	3.1	2.9	2.8	2.6	2.5	2.4	2.4	2.3	2.3
120+	3.0	2.8	2.6	2.5	2.3	2.2	2.1	2.1	2.1
Ages	***108***	***109***	***110***	***111***	***112***	***113***	***114***	***115***	***116***
0	84.6	84.6	84.6	84.6	84.6	84.6	84.6	84.6	84.6
1	83.7	83.7	83.7	83.7	83.7	83.7	83.7	83.7	83.7
2	82.8	82.8	82.8	82.8	82.8	82.8	82.8	82.8	82.8
3	81.8	81.8	81.8	81.8	81.8	81.8	81.8	81.8	81.8
4	80.8	80.8	80.8	80.8	80.8	80.8	80.8	80.8	80.8
5	79.8	79.8	79.8	79.8	79.8	79.8	79.8	79.8	79.8
6	78.8	78.8	78.8	78.8	78.8	78.8	78.8	78.8	78.8
7	77.9	77.9	77.9	77.9	77.9	77.9	77.9	77.9	77.9
8	76.9	76.9	76.9	76.9	76.9	76.9	76.9	76.9	76.9
9	75.9	75.9	75.9	75.9	75.9	75.9	75.9	75.9	75.9
10	74.9	74.9	74.9	74.9	74.9	74.9	74.9	74.9	74.9
11	73.9	73.9	73.9	73.9	73.9	73.9	73.9	73.9	73.9
12	72.9	72.9	72.9	72.9	72.9	72.9	72.9	72.9	72.9
13	71.9	71.9	71.9	71.9	71.9	71.9	71.9	71.9	71.9
14	70.9	70.9	70.9	70.9	70.9	70.9	70.9	70.9	70.9
15	69.9	69.9	69.9	69.9	69.9	69.9	69.9	69.9	69.9
16	69.0	69.0	69.0	69.0	69.0	69.0	69.0	69.0	69.0
17	68.0	68.0	68.0	68.0	68.0	68.0	68.0	68.0	68.0
18	67.0	67.0	67.0	67.0	67.0	67.0	67.0	67.0	67.0
19	66.0	66.0	66.0	66.0	66.0	66.0	66.0	66.0	66.0
20	65.0	65.0	65.0	65.0	65.0	65.0	65.0	65.0	65.0
21	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1
22	63.1	63.1	63.1	63.1	63.1	63.1	63.1	63.1	63.1
23	62.1	62.1	62.1	62.1	62.1	62.1	62.1	62.1	62.1
24	61.1	61.1	61.1	61.1	61.1	61.1	61.1	61.1	61.1
25	60.2	60.2	60.2	60.2	60.2	60.2	60.2	60.2	60.2
26	59.2	59.2	59.2	59.2	59.2	59.2	59.2	59.2	59.2
27	58.2	58.2	58.2	58.2	58.2	58.2	58.2	58.2	58.2
28	57.3	57.3	57.3	57.3	57.3	57.3	57.3	57.3	57.3
29	56.3	56.3	56.3	56.3	56.3	56.3	56.3	56.3	56.3

30	55.3	55.3	55.3	55.3	55.3	55.3	55.3	55.3	55.3
31	54.4	54.4	54.4	54.4	54.4	54.4	54.4	54.4	54.4
32	53.4	53.4	53.4	53.4	53.4	53.4	53.4	53.4	53.4
33	52.5	52.5	52.5	52.5	52.5	52.5	52.5	52.5	52.5
34	51.5	51.5	51.5	51.5	51.5	51.5	51.5	51.5	51.5
35	50.5	50.5	50.5	50.5	50.5	50.5	50.5	50.5	50.5
36	49.6	49.6	49.6	49.6	49.6	49.6	49.6	49.6	49.6
37	48.6	48.6	48.6	48.6	48.6	48.6	48.6	48.6	48.6
38	47.7	47.7	47.7	47.7	47.7	47.7	47.7	47.7	47.7
39	46.7	46.7	46.7	46.7	46.7	46.7	46.7	46.7	46.7
40	45.7	45.7	45.7	45.7	45.7	45.7	45.7	45.7	45.7
41	44.8	44.8	44.8	44.8	44.8	44.8	44.8	44.8	44.8
42	43.8	43.8	43.8	43.8	43.8	43.8	43.8	43.8	43.8
43	42.9	42.9	42.9	42.9	42.9	42.9	42.9	42.9	42.9
44	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9
45	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0
46	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0
47	39.0	39.0	39.0	39.0	39.0	39.0	39.0	39.0	39.0
48	38.1	38.1	38.1	38.1	38.1	38.1	38.1	38.1	38.1
49	37.1	37.1	37.1	37.1	37.1	37.1	37.1	37.1	37.1
50	36.2	36.2	36.2	36.2	36.2	36.2	36.2	36.2	36.2
51	35.3	35.3	35.3	35.3	35.3	35.3	35.3	35.3	35.3
52	34.3	34.3	34.3	34.3	34.3	34.3	34.3	34.3	34.3
53	33.4	33.4	33.4	33.4	33.4	33.4	33.4	33.4	33.4
54	32.5	32.5	32.5	32.5	32.5	32.5	32.5	32.5	32.5
55	31.6	31.6	31.6	31.6	31.6	31.6	31.6	31.6	31.6
56	30.7	30.7	30.7	30.7	30.7	30.7	30.7	30.7	30.7
57	29.8	29.8	29.8	29.8	29.8	29.8	29.8	29.8	29.8
58	28.9	28.9	28.9	28.9	28.9	28.9	28.9	28.9	28.9
59	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0
60	27.1	27.1	27.1	27.1	27.1	27.1	27.1	27.1	27.1
61	26.3	26.3	26.3	26.3	26.3	26.3	26.3	26.3	26.3
62	25.4	25.4	25.4	25.4	25.4	25.4	25.4	25.4	25.4
63	24.6	24.6	24.6	24.6	24.6	24.6	24.6	24.6	24.6
64	23.7	23.7	23.7	23.7	23.7	23.7	23.7	23.7	23.7
65	22.9	22.9	22.9	22.9	22.9	22.9	22.9	22.9	22.9
66	22.1	22.1	22.1	22.1	22.1	22.1	22.1	22.1	22.1
67	21.3	21.3	21.3	21.3	21.3	21.3	21.3	21.3	21.3
68	20.5	20.4	20.4	20.4	20.4	20.4	20.4	20.4	20.4
69	19.6	19.6	19.6	19.6	19.6	19.6	19.6	19.6	19.6
70	18.8	18.8	18.8	18.8	18.8	18.8	18.8	18.8	18.8
71	18.0	18.0	18.0	18.0	18.0	18.0	18.0	18.0	18.0
72	17.2	17.2	17.2	17.2	17.2	17.2	17.2	17.2	17.2
73	16.5	16.4	16.4	16.4	16.4	16.4	16.4	16.4	16.4
74	15.7	15.7	15.7	15.7	15.7	15.7	15.7	15.7	15.6

75	14.9	14.9	14.9	14.9	14.9	14.9	14.9	14.9	14.9
76	14.2	14.2	14.2	14.2	14.2	14.2	14.1	14.1	14.1
77	13.4	13.4	13.4	13.4	13.4	13.4	13.4	13.4	13.4
78	12.7	12.7	12.7	12.7	12.7	12.7	12.7	12.7	12.7
79	12.0	12.0	12.0	12.0	12.0	12.0	12.0	12.0	12.0
80	11.4	11.3	11.3	11.3	11.3	11.3	11.3	11.3	11.3
81	10.7	10.7	10.7	10.7	10.7	10.7	10.7	10.7	10.6
82	10.1	10.1	10.1	10.1	10.1	10.0	10.0	10.0	10.0
83	9.5	9.5	9.5	9.5	9.5	9.4	9.4	9.4	9.4
84	8.9	8.9	8.9	8.9	8.9	8.9	8.9	8.8	8.8
85	8.4	8.4	8.3	8.3	8.3	8.3	8.3	8.3	8.3
86	7.8	7.8	7.8	7.8	7.8	7.8	7.8	7.8	7.7
87	7.4	7.4	7.4	7.3	7.3	7.3	7.3	7.3	7.3
88	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.8	6.8
89	6.5	6.5	6.5	6.5	6.5	6.4	6.4	6.4	6.4
90	6.1	6.1	6.1	6.1	6.1	6.1	6.0	6.0	6.0
91	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.6	5.6
92	5.4	5.4	5.4	5.4	5.4	5.3	5.3	5.3	5.2
93	5.1	5.1	5.1	5.1	5.1	5.0	5.0	5.0	4.9
94	4.8	4.8	4.8	4.8	4.8	4.7	4.7	4.7	4.6
95	4.5	4.5	4.5	4.5	4.5	4.5	4.4	4.4	4.4
96	4.3	4.3	4.3	4.3	4.3	4.2	4.2	4.2	4.1
97	4.1	4.1	4.1	4.1	4.0	4.0	4.0	4.0	3.9
98	3.9	3.9	3.9	3.9	3.8	3.8	3.8	3.8	3.7
99	3.7	3.7	3.7	3.7	3.7	3.6	3.6	3.6	3.5
100	3.6	3.6	3.5	3.5	3.5	3.5	3.5	3.4	3.3
101	3.4	3.4	3.4	3.4	3.4	3.4	3.3	3.3	3.2
102	3.3	3.3	3.3	3.3	3.3	3.2	3.2	3.2	3.1
103	3.2	3.2	3.2	3.2	3.2	3.1	3.1	3.1	3.0
104	3.1	3.1	3.1	3.1	3.1	3.1	3.0	3.0	2.9
105	3.1	3.1	3.1	3.0	3.0	3.0	3.0	2.9	2.8
106	3.0	3.0	3.0	3.0	3.0	3.0	2.9	2.9	2.8
107	3.0	3.0	3.0	3.0	3.0	2.9	2.9	2.9	2.8
108	3.0	3.0	3.0	3.0	2.9	2.9	2.9	2.8	2.8
109	3.0	3.0	3.0	3.0	2.9	2.9	2.9	2.8	2.8
110	3.0	3.0	3.0	2.9	2.9	2.9	2.9	2.8	2.7
111	3.0	3.0	2.9	2.9	2.9	2.9	2.8	2.8	2.7
112	2.9	2.9	2.9	2.9	2.9	2.9	2.8	2.8	2.7
113	2.9	2.9	2.9	2.9	2.9	2.8	2.8	2.8	2.7
114	2.9	2.9	2.9	2.8	2.8	2.8	2.8	2.7	2.6
115	2.8	2.8	2.8	2.8	2.8	2.8	2.7	2.7	2.6
116	2.8	2.8	2.7	2.7	2.7	2.7	2.6	2.6	2.5
117	2.7	2.6	2.6	2.6	2.6	2.6	2.5	2.5	2.4
118	2.5	2.5	2.5	2.4	2.4	2.4	2.4	2.3	2.2
119	2.3	2.3	2.2	2.2	2.2	2.2	2.1	2.1	2.0

120+	2.0	2.0	2.0	2.0	2.0	1.9	1.9	1.8	1.8
Ages	***117***	***118***	***119***	***120+***					
0	84.6	84.6	84.6	84.6					
1	83.7	83.7	83.7	83.7					
2	82.8	82.8	82.8	82.8					
3	81.8	81.8	81.8	81.8					
4	80.8	80.8	80.8	80.8					
5	79.8	79.8	79.8	79.8					
6	78.8	78.8	78.8	78.8					
7	77.9	77.9	77.9	77.9					
8	76.9	76.9	76.9	76.9					
9	75.9	75.9	75.9	75.9					
10	74.9	74.9	74.9	74.9					
11	73.9	73.9	73.9	73.9					
12	72.9	72.9	72.9	72.9					
13	71.9	71.9	71.9	71.9					
14	70.9	70.9	70.9	70.9					
15	69.9	69.9	69.9	69.9					
16	69.0	69.0	69.0	69.0					
17	68.0	68.0	68.0	68.0					
18	67.0	67.0	67.0	67.0					
19	66.0	66.0	66.0	66.0					
20	65.0	65.0	65.0	65.0					
21	64.1	64.1	64.1	64.1					
22	63.1	63.1	63.1	63.1					
23	62.1	62.1	62.1	62.1					
24	61.1	61.1	61.1	61.1					
25	60.2	60.2	60.2	60.2					
26	59.2	59.2	59.2	59.2					
27	58.2	58.2	58.2	58.2					
28	57.3	57.3	57.3	57.3					
29	56.3	56.3	56.3	56.3					
30	55.3	55.3	55.3	55.3					
31	54.4	54.4	54.4	54.4					
32	53.4	53.4	53.4	53.4					
33	52.5	52.5	52.5	52.5					
34	51.5	51.5	51.5	51.5					
35	50.5	50.5	50.5	50.5					
36	49.6	49.6	49.6	49.6					
37	48.6	48.6	48.6	48.6					
38	47.7	47.7	47.7	47.7					
39	46.7	46.7	46.7	46.7					
40	45.7	45.7	45.7	45.7					
41	44.8	44.8	44.8	44.8					
42	43.8	43.8	43.8	43.8					

43	42.9	42.9	42.9	42.9
44	41.9	41.9	41.9	41.9
45	41.0	41.0	41.0	41.0
46	40.0	40.0	40.0	40.0
47	39.0	39.0	39.0	39.0
48	38.1	38.1	38.1	38.1
49	37.1	37.1	37.1	37.1
50	36.2	36.2	36.2	36.2
51	35.3	35.3	35.3	35.3
52	34.3	34.3	34.3	34.3
53	33.4	33.4	33.4	33.4
54	32.5	32.5	32.5	32.5
55	31.6	31.6	31.6	31.6
56	30.7	30.7	30.7	30.6
57	29.8	29.8	29.8	29.8
58	28.9	28.9	28.9	28.9
59	28.0	28.0	28.0	28.0
60	27.1	27.1	27.1	27.1
61	26.3	26.3	26.2	26.2
62	25.4	25.4	25.4	25.4
63	24.6	24.5	24.5	24.5
64	23.7	23.7	23.7	23.7
65	22.9	22.9	22.9	22.9
66	22.1	22.1	22.1	22.0
67	21.2	21.2	21.2	21.2
68	20.4	20.4	20.4	20.4
69	19.6	19.6	19.6	19.6
70	18.8	18.8	18.8	18.8
71	18.0	18.0	18.0	18.0
72	17.2	17.2	17.2	17.2
73	16.4	16.4	16.4	16.4
74	15.6	15.6	15.6	15.6
75	14.9	14.9	14.8	14.8
76	14.1	14.1	14.1	14.1
77	13.4	13.4	13.4	13.3
78	12.7	12.6	12.6	12.6
79	12.0	11.9	11.9	11.9
80	11.3	11.3	11.2	11.2
81	10.6	10.6	10.6	10.5
82	10.0	10.0	9.9	9.9
83	9.4	9.3	9.3	9.3
84	8.8	8.8	8.7	8.7
85	8.2	8.2	8.2	8.1
86	7.7	7.7	7.6	7.6
87	7.2	7.2	7.1	7.1

88	6.8	6.7	6.6	6.6
89	6.3	6.3	6.2	6.1
90	5.9	5.8	5.8	5.7
91	5.5	5.5	5.4	5.3
92	5.2	5.1	5.0	4.9
93	4.9	4.8	4.7	4.6
94	4.6	4.5	4.4	4.3
95	4.3	4.2	4.1	4.0
96	4.0	3.9	3.8	3.7
97	3.8	3.7	3.6	3.4
98	3.6	3.5	3.3	3.2
99	3.4	3.3	3.1	3.0
100	3.3	3.1	2.9	2.8
101	3.1	3.0	2.8	2.6
102	3.0	2.8	2.6	2.5
103	2.9	2.7	2.5	2.3
104	2.8	2.6	2.4	2.2
105	2.7	2.6	2.4	2.1
106	2.7	2.5	2.3	2.1
107	2.7	2.5	2.3	2.1
108	2.7	2.5	2.3	2.0
109	2.6	2.5	2.3	2.0
110	2.6	2.5	2.2	2.0
111	2.6	2.4	2.2	2.0
112	2.6	2.4	2.2	2.0
113	2.6	2.4	2.2	1.9
114	2.5	2.4	2.1	1.9
115	2.5	2.3	2.1	1.8
116	2.4	2.2	2.0	1.8
117	2.3	2.1	1.9	1.6
118	2.1	1.9	1.7	1.4
119	1.9	1.7	1.3	1.1
120+	1.6	1.4	1.1	1.0

(e) *Mortality rates*. The following are the mortality rates used to calculate the tables set forth in paragraphs (b), (c), and (d) of this section.

Table 4 to Paragraph (e)

Age	*Probability of Death*
0	0.001762
1	0.000441
2	0.000292
3	0.000232
4	0.000177

Age	*Probability of Death*
5	0.000161
6	0.000153
7	0.000145
8	0.000132
9	0.000127
10	0.000128
11	0.000135
12	0.000146
13	0.000164
14	0.000192
15	0.000223
16	0.000253
17	0.000276
18	0.000293
19	0.000304
20	0.000313
21	0.000343
22	0.000377
23	0.000421
24	0.000466
25	0.000520
26	0.000581
27	0.000630
28	0.000677
29	0.000720
30	0.000763
31	0.000799
32	0.000824
33	0.000833
34	0.000830
35	0.000823
36	0.000819
37	0.000824
38	0.000836
39	0.000853
40	0.000879
41	0.000909
42	0.000945
43	0.000980
44	0.001019
45	0.001065
46	0.001132
47	0.001225
48	0.001345

Age	*Probability of Death*
49	0.001485
50	0.001656
51	0.001874
52	0.002121
53	0.002397
54	0.002701
55	0.003032
56	0.003390
57	0.003774
58	0.004181
59	0.004613
60	0.005071
61	0.005554
62	0.006071
63	0.006624
64	0.007225
65	0.007884
66	0.008238
67	0.008659
68	0.009163
69	0.009767
70	0.010491
71	0.011358
72	0.012385
73	0.013598
74	0.015014
75	0.016670
76	0.018587
77	0.020815
78	0.023391
79	0.026387
80	0.029850
81	0.033883
82	0.038544
83	0.043880
84	0.049956
85	0.056799
86	0.064436
87	0.072882
88	0.082137
89	0.092172
90	0.102919
91	0.114344
92	0.126605

Age	*Probability of Death*
93	0.139936
94	0.154844
95	0.171902
96	0.187210
97	0.204659
98	0.222921
99	0.241884
100	0.261476
101	0.281536
102	0.301847
103	0.322371
104	0.342940
105	0.361261
106	0.372886
107	0.381098
108	0.383358
109	0.385709
110	0.388092
111	0.390353
112	0.392822
113	0.395188
114	0.397567
115	0.400000
116	0.400000
117	0.400000
118	0.400000
119	0.400000
120	0.400000

(f) *Applicability dates*—(1) *In general*. The life expectancy tables and Uniform Lifetime Table set forth in this section apply for distribution calendar years beginning on or after January 1, 2022. For life expectancy tables and the Uniform Lifetime Table applicable for earlier distribution calendar years, see §1.401(a)(9)-9, as set forth in 26 CFR part 1 revised as of April 1, 2020 (formerly applicable §1.401(a)(9)-9).

(2) *Application to life expectancies that may not be recalculated*—(i) *Redetermination of initial life expectancy using current tables*. If an employee died before January 1, 2022, and, under the rules of §1.401(a)(9)-5, the distribution period that applies for a calendar year following the calendar year of the employee's death is equal to a single life expectancy calculated as of the calendar year of the employee's death (or, if applicable, the following calendar year), reduced by 1 for each subsequent year, then that life expectancy is reset as provided in paragraph (f)(2)(ii) of this section. Similarly, if an employee's sole beneficiary is the employee's surviving spouse, and the spouse dies before January 1, 2022, then the spouse's life expectancy for the calendar year of the spouse's death (which is used to determine the applicable distribution period for later years) is reset as provided in paragraph (f)(2)(ii) of this section.

(ii) *Determination of applicable distribution period*—(A) *Distribution period based on new life expectancy*. With respect to a life expectancy described in paragraph (f)(2)(i) of this section, the distribution period that applies for a distribution calendar year beginning on or after January 1, 2022, is determined by using the Single Life Table in paragraph (b) of this section to determine the initial life expectancy for the age of the relevant individual in the relevant calendar year and then reducing the resulting distribution period by 1 for each subsequent year. However, see section 401(a)(9)(H)(ii) and (iii) for rules limiting the availability of a life expectancy distribution period.

(B) *Example of redetermination*. Assume that an employee died at age 80 in 2019 and the employee's designated beneficiary (who was not the employee's spouse) was age 75 in the year of the employee's death. For 2020, the distribution

period that would have applied for the beneficiary was 12.7 years (the period applicable for a 76-year-old under the Single Life Table in formerly applicable §1.401(a)(9)-9), and for 2021, it would have been 11.7 years (the original distribution period, reduced by 1 year). For 2022, if the designated beneficiary is still alive, then the applicable distribution period would be 12.1 years (the 14.1-year life expectancy for a 76-year-old under the Single Life Table in paragraph (b) of this section, reduced by 2 years). However, see section 401(a)(9)(H)(iii) for rules regarding how to apply the required distribution rules to defined contribution plans if the eligible designated beneficiary dies prior to distribution of the employee's entire interest.

Sunita Lough,
Deputy Commissioner for Services
and Enforcement.

Approved: October 19, 2020.

David J. Kautter,
Assistant Secretary of the Treasury
(Tax Policy).

(Filed by the Office of the Federal Register on November 5, 2020, 4:15 p.m., and published in the issue of the Federal Register for November 12, 2020, 85 F.R. 72472)

Part III

Part III – Administrative, Procedural, and Miscellaneous

Forthcoming Regulations Regarding the Deductibility of Payments by Partnerships and S Corporations for Certain State and Local Income Taxes

Notice 2020-75

SECTION 1. PURPOSE

This notice announces that the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to issue proposed regulations to clarify that State and local income taxes imposed on and paid by a partnership or an S corporation on its income are allowed as a deduction by the partnership or S corporation in computing its non-separately stated taxable income or loss for the taxable year of payment.

SECTION 2. BACKGROUND

.01 *Computing taxable income or loss*

(1) Section 164(a) of the Internal Revenue Code (Code) generally allows a deduction for certain taxes for the taxable year within which paid or accrued, including: (i) State and local, and foreign, real property taxes; (ii) State and local personal property taxes; and (iii) State and local, and foreign, income, war profits, and excess profits taxes. In addition, section 164 allows a deduction for State and local, and foreign, taxes not described in the preceding sentence that are paid or accrued within the taxable year in carrying on a trade or business or an activity described in section 212 of the Code. Section 164(b)(2) provides that, for purposes of section 164, a "State or local tax" includes only a tax imposed by a State, a possession of the United States, (U.S. territory), or a political subdivision of any of the foregoing, or by the District of Columbia.

(2) Section 703(a) of the Code generally provides that the taxable income of a partnership is computed in the same manner as in the case of an individual except that the items described in section 702(a) of the Code must be separately stated and certain enumerated deductions are not allowed to the partnership. For example, section 703(a)(2)(B) disallows the deduction for taxes provided in section 164(a) with respect to taxes described in section 901 of the Code, which include not only taxes paid or accrued to foreign countries but also taxes paid or accrued to U.S. territories (which are treated as State and local taxes under section 164(b)(2)). Section 1363(b)(1) and (2) of the Code generally provides the same with respect to an S corporation.

(3) Section 702(a) provides that a partner, in determining the partner's income tax, is required to take into account separately the partner's distributive share of certain partnership items of income, gain, loss, deduction, or credit (tax items) that are set forth in that section, as well as the non-separately computed income and loss. For example, section 702(a)(6) requires that a partner take into account separately the partner's distributive share of taxes, described in section 901, paid or accrued to foreign countries and to U.S. territories.

(4) Section 1366(a)(1) of the Code provides that, in determining the tax of a shareholder of an S corporation, the shareholder is required to take into account separately the shareholder's pro rata share of the S corporation's tax items, the separate treatment of which could affect the liability for tax of any shareholder of the S corporation, as well as the non-separately computed income and loss. For this purpose, section 1366(a)(1) requires, in part, that a shareholder take into account separately the shareholder's pro rata share of the S corporation's taxes, described in section 901, paid or accrued to foreign countries and to U.S. territories.

(5) Revenue Ruling 58-25, 1958-1 C.B. 95, holds that a Cincinnati, Ohio tax imposed upon and paid by a partnership on the net profits of the partnership's business conducted in Cincinnati was deductible in computing the taxable income or loss of the partnership. The ruling holds that "any tax imposed upon and paid by a partnership on the net profits of its business conducted in Cincinnati is deductible in computing the taxable income of the partnership and the partners are not precluded from claiming the standard deduction." Thus, the partners' distributive shares of the net profits tax were not separately stated and the partners' distributive shares of the partnership's non-separately stated income or loss, which reflects a deduction for the tax paid by the partnership, could be taken into account by the partners in computing adjusted gross income under section 62 of the Code, not as itemized deductions.

.02 *State and local tax (SALT) deduction limitation*

(1) Section 164(b)(6), as added by section 11042(a) of Public Law 115-97, 131 Stat. 2054 (December 22, 2017), commonly referred to as the Tax Cuts and Jobs Act, limits an individual's deduction under section 164(a) (SALT deduction limitation) to $10,000 ($5,000 in the case of a married individual filing a separate return) for the aggregate amount of the following State and local taxes paid during the calendar year: (i) real property taxes; (ii) personal property taxes; (iii) income, war profits, and excess profits taxes; and (iv) general sales taxes. This SALT deduction limitation applies to taxable years beginning after December 31, 2017, and before January 1, 2026, and does not apply to taxes described in section 164(a)(3) that are imposed by a foreign country or to any taxes described in section 164(a)(1) and (2) that are paid and incurred in carrying on a trade or business or an activity described in section 212.

(2) In enacting section 164(b)(6), Congress provided that "taxes imposed at the entity level, such as a business tax imposed on pass-through entities, that are reflected in a partner's or S corporation shareholder's distributive or pro-rata share of income or loss on a Schedule K-1 (or similar form), will continue to reduce such partner's or shareholder's distributive or pro-rata share of income as under present law." H.R. Rep. No. 115-466, at 260 n. 172 (2017).

(3) Certain jurisdictions described in section 164(b)(2) have enacted, or are

contemplating the enactment of, tax laws that impose either a mandatory or elective entity-level income tax on partnerships and S corporations that do business in the jurisdiction or have income derived from or connected with sources within the jurisdiction. In certain instances, the jurisdiction's tax law provides a corresponding or offsetting, owner-level tax benefit, such as a full or partial credit, deduction, or exclusion. The Treasury Department and the IRS are aware that there is uncertainty as to whether entity-level payments made under these laws to jurisdictions described in section 164(b)(2) other than U.S. territories must be taken into account in applying the SALT deduction limitation at the owner level.

SECTION 3. FORTHCOMING PROPOSED REGULATIONS

.01 *Purpose and scope*. The Treasury Department and the IRS intend to issue proposed regulations to provide certainty to individual owners of partnerships and S corporations in calculating their SALT deduction limitations. Based on the statutory and administrative authorities described in section 2 of this notice, the forthcoming proposed regulations will clarify that Specified Income Tax Payments (as defined in section 3.02(1) of this notice) are deductible by partnerships and S corporations in computing their non-separately stated income or loss.

.02 *Forthcoming regulations*. To achieve the purpose described in section 3.01 of this notice, the Treasury Department and the IRS expect to propose regulations consistent with the provisions set forth in this section 3.02.

(1) *Definition of Specified Income Tax Payment*. For purposes of section 3.02 of this notice, the term "Specified Income Tax Payment" means any amount paid by a partnership or an S corporation to a State, a political subdivision of a State, or the District of Columbia (Domestic Jurisdiction) to satisfy its liability for income taxes imposed by the Domestic Jurisdiction on the partnership or the S corporation. This definition does not include income taxes imposed by U.S. territories or their political subdivisions. Thus, this definition solely includes income taxes described in section 164(b)(2) for which a deduction by a partnership is not disallowed under section 703(a)(2)(B), and such income taxes for which a deduction by an S corporation is not disallowed under section 1363(b)(2). For this purpose, a Specified Income Tax Payment includes any amount paid by a partnership or an S corporation to a Domestic Jurisdiction pursuant to a direct imposition of income tax by the Domestic Jurisdiction on the partnership or S corporation, without regard to whether the imposition of and liability for the income tax is the result of an election by the entity or whether the partners or shareholders receive a partial or full deduction, exclusion, credit, or other tax benefit that is based on their share of the amount paid by the partnership or S corporation to satisfy its income tax liability under the Domestic Jurisdiction's tax law and which reduces the partners' or shareholders' own individual income tax liabilities under the Domestic Jurisdiction's tax law.

(2) *Deductibility of Specified Income Tax Payments*. If a partnership or an S corporation makes a Specified Income Tax Payment during a taxable year, the partnership or S corporation is allowed a deduction for the Specified Income Tax Payment in computing its taxable income for the taxable year in which the payment is made.

(3) *Specified Income Tax Payments not separately taken into account*. Any Specified Income Tax Payment made by a partnership or an S corporation during a taxable year does not constitute an item of deduction that a partner or an S corporation shareholder takes into account separately under section 702 or section 1366 in determining the partner's or S corporation shareholder's own Federal income tax liability for the taxable year. Instead, Specified Income Tax Payments will be reflected in a partner's or an S corporation shareholder's distributive or pro-rata share of non-separately stated income or loss reported on a Schedule K-1 (or similar form).

(4) *Specified Income Tax Payments not taken into account for SALT deduction limitation*. Any Specified Income Tax Payment made by a partnership or an S corporation is not taken into account in applying the SALT deduction limitation to any individual who is a partner in the partnership or a shareholder of the S corporation.

SECTION 4. APPLICABILITY DATE

The proposed regulations described in this notice will apply to Specified Income Tax Payments made on or after **November 9, 2020**. The proposed regulations will also permit taxpayers described in section 3.02 of this notice to apply the rules described in this notice to Specified Income Tax Payments made in a taxable year of the partnership or S corporation ending after December 31, 2017, and made before **November 9, 2020**, provided that the Specified Income Tax Payment is made to satisfy the liability for income tax imposed on the partnership or S corporation pursuant to a law enacted prior to **November 9, 2020**. Prior to the issuance of the proposed regulations, taxpayers may rely on the provisions of this notice with respect to Specified Income Tax Payments as described in this section 4.

SECTION 5. DRAFTING INFORMATION

The principal author of this notice is the Office of Associate Chief Counsel (Passthroughs & Special Industries). However, other personnel from the Treasury Department and the IRS participated in its development. For further information regarding this notice, contact Kevin I. Babitz or Robert D. Alinsky at (202) 317-5279 (not a toll-free number).

Update for Weighted Average Interest Rates, Yield Curves, and Segment Rates

Notice 2020-81

This notice provides guidance on the corporate bond monthly yield curve, the corresponding spot segment rates used under § 417(e)(3), and the 24-month average segment rates under § 430(h)(2) of the Internal Revenue Code. In addition, this notice provides guidance as to the interest

rate on 30-year Treasury securities under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning before 2008 and the 30-year Treasury weighted average rate under § 431(c)(6)(E)(ii)(I).

YIELD CURVE AND SEGMENT RATES

Section 430 specifies the minimum funding requirements that apply to single-employer plans (except for CSEC plans under § 414(y)) pursuant to § 412. Section 430(h)(2) specifies the interest rates that must be used to determine a plan's target normal cost and funding target. Under this provision, present value is generally determined using three 24-month average interest rates ("segment rates"), each of which applies to cash flows during specified periods. To the extent provided under § 430(h)(2)(C)(iv), these segment rates are adjusted by the applicable percentage of the 25-year average segment rates for the period ending September 30 of the year preceding the calendar year in which the plan year begins.[1] However, an election may be made under § 430(h)(2)(D)(ii) to use the monthly yield curve in place of the segment rates.

Notice 2007-81, 2007-44 I.R.B. 899, provides guidelines for determining the monthly corporate bond yield curve, and the 24-month average corporate bond segment rates used to compute the target normal cost and the funding target. Consistent with the methodology specified in Notice 2007-81, the monthly corporate bond yield curve derived from October 2020 data is in Table 2020-10 at the end of this notice. The spot first, second, and third segment rates for the month of October 2020 are, respectively, 0.54, 2.38, and 3.28.

The 24-month average segment rates determined under § 430(h)(2)(C)(i) through (iii) must be adjusted pursuant to § 430(h)(2)(C)(iv) to be within the applicable minimum and maximum percentages of the corresponding 25-year average segment rates. For plan years beginning before 2021, the applicable minimum percentage is 90% and the applicable maximum percentage is 110%. For plan years beginning in 2021, the applicable minimum percentage is 85% and the applicable maximum percentage is 115%. The 25-year average segment rates for plan years beginning in 2019, 2020, and 2021 were published in Notice 2018-73, 2018-40 I.R.B. 526, Notice 2019-51, 2019-41 I.R.B. 866, and Notice 2020-72, 2020-40 I.R.B. 789, respectively.

24-MONTH AVERAGE CORPORATE BOND SEGMENT RATES

The three 24-month average corporate bond segment rates applicable for November 2020 without adjustment for the 25-year average segment rate limits are as follows:

24-Month Average Segment Rates Without 25-Year Average Adjustment

Applicable Month	First Segment	Second Segment	Third Segment
November 2020	1.99	3.21	3.80

Based on § 430(h)(2)(C)(iv), the 24-month averages applicable for November 2020, adjusted to be within the applicable minimum and maximum percentages of the corresponding 25-year average segment rates, are as follows:

Adjusted 24-Month Average Segment Rates

For Plan Years Beginning In	Applicable Month	First Segment	Second Segment	Third Segment
2019	November 2020	3.74	5.35	6.11
2020	November 2020	3.64	5.21	5.94
2021	November 2020	3.32	4.79	5.47

30-YEAR TREASURY SECURITIES INTEREST RATES

Section 431 specifies the minimum funding requirements that apply to multiemployer plans pursuant to § 412. Section 431(c)(6)(B) specifies a minimum amount for the full-funding limitation described in § 431(c)(6)(A), based on the plan's current liability. Section 431(c)(6)(E)(ii)(I) provides that the interest rate used to calculate current liability for this purpose must be no more than 5 percent above and no more than 10 percent below the weighted average of the rates of interest on 30-year Treasury securities during the four-year period ending on the last day before the beginning of the plan year. Notice 88-73, 1988-2 C.B. 383, provides guidelines for determining the weighted average interest rate. The rate of interest on 30-year Treasury securities for October 2020 is 1.57 percent. The Service determined this rate as the average of the daily determinations of yield on the

[1] Pursuant to § 433(h)(3)(A), the 3rd segment rate determined under § 430(h)(2)(C) is used to determine the current liability of a CSEC plan (which is used to calculate the minimum amount of the full funding limitation under § 433(c)(7)(C)).

30-year Treasury bond maturing in August 2050. For plan years beginning in November 2020, the weighted average of the rates of interest on 30-year Treasury securities and the permissible range of rates used to calculate current liability are as follows:

Treasury Weighted Average Rates

For Plan Years Beginning In	30-Year Treasury Weighted Average	Permissible Range 90% to 105%
November 2020	2.39	2.15 to 2.51

MINIMUM PRESENT VALUE SEGMENT RATES

In general, the applicable interest rates under § 417(e)(3)(D) are segment rates computed without regard to a 24-month average. Notice 2007-81 provides guidelines for determining the minimum present value segment rates. Pursuant to that notice, the minimum present value segment rates determined for October 2020 are as follows:

Minimum Present Value Segment Rates

Month	First Segment	Second Segment	Third Segment
October 2020	0.54	2.38	3.28

DRAFTING INFORMATION

The principal author of this notice is Tom Morgan of the Office of the Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the IRS participated in the development of this guidance. For further information regarding this notice, contact Mr. Morgan at 202-317-6700 or Paul Stern at 202-317-8702 (not toll-free numbers).

Table 2020-10
Monthly Yield Curve for October 2020
Derived from October 2020 Data

Maturity	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*
0.5	0.15	20.5	3.07	40.5	3.30	60.5	3.39	80.5	3.44
1.0	0.28	21.0	3.08	41.0	3.31	61.0	3.40	81.0	3.44
1.5	0.39	21.5	3.09	41.5	3.31	61.5	3.40	81.5	3.44
2.0	0.48	22.0	3.09	42.0	3.31	62.0	3.40	82.0	3.44
2.5	0.53	22.5	3.10	42.5	3.32	62.5	3.40	82.5	3.44
3.0	0.58	23.0	3.11	43.0	3.32	63.0	3.40	83.0	3.44
3.5	0.63	23.5	3.12	43.5	3.32	63.5	3.40	83.5	3.44
4.0	0.69	24.0	3.13	44.0	3.33	64.0	3.40	84.0	3.44
4.5	0.76	24.5	3.13	44.5	3.33	64.5	3.40	84.5	3.45
5.0	0.86	25.0	3.14	45.0	3.33	65.0	3.41	85.0	3.45
5.5	0.97	25.5	3.15	45.5	3.33	65.5	3.41	85.5	3.45
6.0	1.09	26.0	3.16	46.0	3.34	66.0	3.41	86.0	3.45
6.5	1.22	26.5	3.16	46.5	3.34	66.5	3.41	86.5	3.45
7.0	1.36	27.0	3.17	47.0	3.34	67.0	3.41	87.0	3.45
7.5	1.50	27.5	3.18	47.5	3.34	67.5	3.41	87.5	3.45
8.0	1.64	28.0	3.18	48.0	3.35	68.0	3.41	88.0	3.45
8.5	1.78	28.5	3.19	48.5	3.35	68.5	3.41	88.5	3.45
9.0	1.91	29.0	3.20	49.0	3.35	69.0	3.42	89.0	3.45
9.5	2.03	29.5	3.20	49.5	3.35	69.5	3.42	89.5	3.45
10.0	2.15	30.0	3.21	50.0	3.36	70.0	3.42	90.0	3.45
10.5	2.25	30.5	3.22	50.5	3.36	70.5	3.42	90.5	3.45
11.0	2.35	31.0	3.22	51.0	3.36	71.0	3.42	91.0	3.45
11.5	2.44	31.5	3.23	51.5	3.36	71.5	3.42	91.5	3.45
12.0	2.52	32.0	3.23	52.0	3.36	72.0	3.42	92.0	3.46
12.5	2.59	32.5	3.24	52.5	3.37	72.5	3.42	92.5	3.46
13.0	2.66	33.0	3.24	53.0	3.37	73.0	3.42	93.0	3.46
13.5	2.71	33.5	3.25	53.5	3.37	73.5	3.43	93.5	3.46
14.0	2.76	34.0	3.25	54.0	3.37	74.0	3.43	94.0	3.46
14.5	2.81	34.5	3.26	54.5	3.37	74.5	3.43	94.5	3.46
15.0	2.85	35.0	3.26	55.0	3.38	75.0	3.43	95.0	3.46
15.5	2.88	35.5	3.27	55.5	3.38	75.5	3.43	95.5	3.46
16.0	2.91	36.0	3.27	56.0	3.38	76.0	3.43	96.0	3.46
16.5	2.94	36.5	3.27	56.5	3.38	76.5	3.43	96.5	3.46
17.0	2.96	37.0	3.28	57.0	3.38	77.0	3.43	97.0	3.46
17.5	2.98	37.5	3.28	57.5	3.38	77.5	3.43	97.5	3.46
18.0	3.00	38.0	3.29	58.0	3.39	78.0	3.43	98.0	3.46
18.5	3.01	38.5	3.29	58.5	3.39	78.5	3.44	98.5	3.46
19.0	3.03	39.0	3.29	59.0	3.39	79.0	3.44	99.0	3.46
19.5	3.04	39.5	3.30	59.5	3.39	79.5	3.44	99.5	3.46
20.0	3.05	40.0	3.30	60.0	3.39	80.0	3.44	100.0	3.47

Implementation of the CARES Act Extended January 1, 2021 Due Date for Contributions to Defined Benefit Plans

Notice 2020-82

Purpose

This notice provides that the IRS will treat a contribution to a single-employer defined benefit pension plan with an extended due date of January 1, 2021 pursuant to § 3608(a)(1) of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, as timely if it is made no later than January 4, 2021 (which is the first business day after January 1, 2021).

Background

Section 412 of the Internal Revenue Code (Code) provides that a sponsor of a qualified defined benefit plan (other than a multiemployer plan as defined in § 414(f) or a CSEC plan as defined in § 414(y)) must make contributions to or under the plan for the plan year that, in the aggregate, are not less than the minimum required contribution determined under § 430 for the plan year. Section 430(j)(1) provides that the due date for the payment of any minimum required contribution for a plan year is 8½ months after the close of the plan year. Section 430(j)(3) provides that if the plan had a funding shortfall (as defined in § 430(c)(4)) for the preceding plan year, then the plan sponsor must pay four quarterly installments toward the required minimum contribution for the plan year. The due dates for the installments are April 15, July 15, and October 15 of the plan year, and January 15 of the following year (adjusted for a plan year that is not a calendar year under § 1.430(j)-1(c)(6)).

Under § 430(f), the plan sponsor of a defined benefit plan that is not a multiemployer plan may elect to maintain a prefunding balance that may be used, at the plan sponsor's election, to offset the minimum required contribution for a plan year. Under § 430(f)(6)(B)(i), a plan sponsor may elect to add contributions that exceed the minimum required contribution for a plan year (adjusted with interest using the effective interest rate for the plan year in accordance with § 430(f)(6)(B)(ii)) to the plan's prefunding balance. Section 1.430(f)-1(f)(1)(i) generally provides that any election under § 430(f) by the plan sponsor must be made by providing written notification of the election to the plan's enrolled actuary and the plan administrator. Section 1.430(f)-1(f)(2)(i) generally provides that any election under § 430(f) with respect to a plan year must be made no later than the last date for making the minimum required contribution for the plan year as described in § 430(j)(1), or such later date as prescribed in guidance published in the Internal Revenue Bulletin.

Section 3608(a)(1) of the CARES Act provides that any minimum required contribution that would otherwise be due under § 430(j) of the Code (and § 303(j) of the Employee Retirement Income Security Act, Pub. L. 93-406, as amended (ERISA)) during calendar year 2020 (including quarterly installments under § 430(j)(3) of the Code and § 303(j)(3) of ERISA) is due on January 1, 2021. Notice 2020-61, 2020-35 I.R.B. 468, provides guidance regarding the extension of time for single-employer defined benefit plan contributions under § 3608(a)(1) of the CARES Act and related interest adjustments.

Under § 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713) and § 3002(c) of ERISA, the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in this notice for purposes of ERISA, as well as the Code. Thus, the provisions of this notice pertaining to § 430 of the Code also apply for purposes of § 303 of ERISA.

Date for making contributions

The extension of the due date for contributions covered by § 3608(a)(1) of the CARES Act to January 1, 2021, is intended to allow employers sponsoring these plans to defer these payment obligations until calendar year 2021. Deferring these payment obligations until calendar year 2021 helps employers to alleviate an additional adverse impact on their businesses that were already harmed by the COVID-19 pandemic. However, financial institutions cannot transfer funds on the January 1, 2021 due date. This effectively requires many employers to make these contributions prior to January 1, 2021, which would be inconsistent with the legislative intent to defer the payment obligation until calendar year 2021.

In order to achieve this deferral of the payment obligation until calendar year 2021 for all employers impacted by § 3608(a)(1) of the CARES Act, the IRS will treat a contribution with an extended due date of January 1, 2021 pursuant to § 3608(a)(1) of the CARES Act as timely if it is made no later than January 4, 2021 (which is the first business day after January 1, 2021). However, for a contribution that is made by January 4, 2021, and is treated as timely pursuant to this notice, the amount of the minimum required contribution that is satisfied by the contribution (and the amount that may be added to the plan's prefunding balance on account of any excess contribution) is determined by computing the applicable interest adjustment using the actual contribution date.[1]

To conform the due date for relevant elections related to a plan's funding balances to the treatment provided by this notice, if the plan year is a plan year for which the extended due date for minimum required contributions under § 3608(a) of the CARES Act applies, then the deadline for a plan sponsor's election to add to a prefunding balance or to use a prefunding balance or a funding standard carryover balance to offset the minimum required contribution for that plan year is extended to January 4, 2021.[2]

This notice does not affect the treatment of a contribution that is due on January 1, 2021, pursuant to § 3608(a)(1) of the CARES Act, but that is not made by January 4, 2021. Thus, the computations in Example 1(b) of Q&A-6 of Notice 2020-61 (which illustrate a situation in which required contributions due on Jan-

[1] See Notice 2020-61 for guidance regarding the contributions to which § 3608(a)(1) of the CARES Act applies and the interest adjustments pursuant to § 3608(a)(2).
[2] Q&A-10 of Notice 2020-61 extended the due date for these elections to January 1, 2021.

uary 1, 2021, pursuant to § 3608(a)(1) of the CARES Act are made on February 15, 2021) are not affected by this notice.

Effect on other documents

Notice 2020-61 is modified.

Drafting information

The principal author of this notice is Tom Morgan of the Office of the Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the IRS participated in the development of this guidance. For further information regarding this notice, contact Mr. Morgan or Linda Marshall at 202-317-6700 (not a toll-free call).

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26 CFR 601.201: Rulings and determination letters. (Also: Part I, Sections 832, 846; 1.832-4, 1.846-1.)

Rev. Proc. 2020-48

SECTION 1. PURPOSE

This revenue procedure prescribes discount factors for the 2020 accident year for use by insurance companies in computing discounted unpaid losses under § 846 of the Internal Revenue Code and discounted estimated salvage recoverable under § 832. This revenue procedure also provides, for convenience, discount factors for losses incurred in the 2019 accident year and earlier accident years for use in taxable years beginning in 2020. The discount factors for accident years before 2020 were prescribed in Rev. Proc. 2019-31, 2019-33 I.R.B. 643. See Rev. Proc. 2019-31 and Rev. Proc. 2019-06, 2019-02 IRB 284, for background concerning the loss payment patterns and application of the discount factors.

SECTION 2. SCOPE

This revenue procedure applies to any insurance company that is required to discount unpaid losses under § 846 for a line of business using the discount factors published by the Secretary, and also applies to any insurance company that is required to discount estimated salvage recoverable under § 832.

SECTION 3. DISCOUNT FACTORS FOR THE 2020 ACCIDENT YEAR

.01 The tables in this section 3 present separately for each line of business the discount factors for losses incurred in the 2020 accident year for use by insurance companies in computing discounted unpaid losses under § 846 and estimated salvage recoverable under § 832. All of the discount factors presented in these tables are determined by using the applicable interest rate for 2020 under § 846(c), which is 3.08 percent, compounded semiannually, and the payment patterns for the 2017 determination year determined by the Secretary under § 846(d). All of the discount factors presented in these tables are determined by assuming all loss payments occur in the middle of the calendar year.

.02 Section V of Notice 88-100, 1988-2 C.B. 439, sets forth a composite method for computing discounted unpaid losses for accident years that are not separately reported on the annual statement. Tables 1 and 2 separately provide discount factors for insurance companies that have elected to use the composite method of Notice 88-100. See Rev. Proc. 2002-74, 2002-2 C.B. 980. The discount factors computed using the composite method are unrelated to the composite discount factors referred to in § 1.846-1(b)(1)(ii) and (4) of the Income Tax Regulations, which apply to lines of business for which the Secretary has not published discount factors. The composite discount factors for use with respect to such lines of business are labelled "Short-Tail Composite" (in Table 1, part B) and "Long-Tail Composite" (in Table 2, part B). The "Miscellaneous Casualty" discount factors referenced in § 1.846-1(b)(2) are not set forth in tables, but are equivalent to the "Short-Tail Composite" discount factors.

Table 1 (part A)

Discount Factors Under Section 846 (percent)

For Losses Incurred in Accident Year 2020 in Short-Tail Lines of Business

Taxable Year Beginning in	Auto Physical Damage	Fidelity/Surety	Financial Guaranty/ Mortgage Guaranty	International	Other*
2020	98.3139	95.8052	95.5582	96.1310	96.9677
2021	97.0010	97.0010	97.0010	97.0010	97.0010
Taxpayer Not Using Composite Method					
Years after 2021	98.4834	98.4834	98.4834	98.4834	98.4834
Taxpayer Using the Composite Method					
2022	98.4834	98.4834	98.4834	98.4834	98.4834
Years after 2022	Use composite discount factors published for the relevant accident year.**				

*** For Accident and Health lines of business (other than disability income or credit disability insurance), the discount factor for taxable year 2020 is 98.4834 percent. For later years, the discount factor for losses incurred in 2020 is the discount factor published for Accident and Health lines of business for losses incurred in the accident year coinciding with the taxable year.**

****The relevant accident year is the accident year that is two years prior to the specified taxable year.**

Table 1 (part B)

Discount Factors Under Section 846 (percent)

For Losses Incurred in Accident Year 2020 in Short-Tail Lines of Business

Taxable Year Beginning in	Reinsurance - Nonproportional Assumed Financial Lines	Reinsurance - Nonproportional Assumed Liability	Reinsurance - Nonproportional Assumed Property	Special Property (Fire, Allied Lines, Inland Marine, Earthquake, Burglary & Theft)	Warranty	Short-Tail Composite
2020	95.4035	94.6016	96.1125	97.3985	98.1106	96.8566
2021	97.0010	97.0010	97.0010	97.0010	97.0010	97.0010
Taxpayer Not Using Composite Method						
Years after 2021	98.4834	98.4834	98.4834	98.4834	98.4834	98.4834
Taxpayer Using the Composite Method						
2022	98.4834	98.4834	98.4834	98.4834	98.4834	98.4834
Years after 2022	Use composite discount factors published for the relevant accident year.**					

****The relevant accident year is the accident year that is two years prior to the specified taxable year.**

Table 2 (part A)

Discount Factors Under Section 846 (percent)

For Losses Incurred in Accident Year 2020 in Long-Tail Lines of Business

Taxable Year Beginning in	Commercial Auto/Truck Liability/Medical	Medical Professional Liability - Claims-Made	Medical Professional Liability - Occurrence	Multiple Peril Lines	Other Liability - Claims-Made	Other Liability - Occurrence
2020	93.7894	91.2887	86.3302	95.0975	90.4958	88.9133
2021	94.5252	92.3148	88.4733	93.3939	91.3319	89.7843
2022	95.0694	92.5421	90.0641	93.7004	91.8577	90.3548
2023	95.1096	92.8346	91.4580	92.9075	91.9007	90.5269
2024	94.9861	92.9813	92.4445	91.0317	91.7488	90.2789
2025	94.8262	93.0034	93.2158	91.2360	92.2753	90.3502
2026	95.1140	93.9822	94.0622	90.9324	92.7671	90.3726
2027	94.7512	94.9071	94.7714	90.6175	93.5594	91.6265
2028	96.2444	95.8327	95.9435	93.2279	94.6947	92.2914
2029	98.2817	97.6457	97.6874	94.6187	96.5347	94.2474
Taxpayer Not Using Composite Method						
2030	98.4834	98.4834	98.4834	96.0142	97.9102	95.6606
2031	98.4834	98.4834	98.4834	97.3886	98.4834	97.0886
Years after 2031	98.4834	98.4834	98.4834	98.4834	98.4834	98.4834
Taxpayer Using the Composite Method						
2030	98.4834	98.4834	98.4834	96.7819	98.0023	96.5869
Years after 2030	Use composite discount factors published for the relevant accident year.*					

*The relevant accident year is the accident year that is ten years prior to the specified taxable year.

Table 2 (part B)

Discount Factors Under Section 846 (percent)

For Losses Incurred in Accident Year 2020 in Long-Tail Lines of Business

Taxable Year Beginning in	Private Passenger Auto Liability/ Medical	Products Liability - Claims-Made	Products Liability - Occurrence	Workers' Compensation	Long-Tail Composite
2020	95.4796	85.3166	87.3013	87.5556	92.4450
2021	95.0805	85.7949	88.6772	85.9962	91.3753
2022	95.0391	87.6480	89.4512	84.8651	91.0823
2023	94.6635	83.1315	90.8125	83.3180	89.8805
2024	93.9744	84.4598	89.4430	82.7387	88.2753
2025	94.0255	85.8393	89.4917	82.1898	88.1551
2026	94.2730	87.2786	90.4502	82.5646	88.1342
2027	94.8300	88.5618	91.4434	83.4400	88.6931
2028	95.4472	89.8703	91.8491	84.0701	89.9615
2029	97.6225	91.2045	94.1596	86.0229	91.7954
Taxpayer Not Using Composite Method					
2030	98.4834	92.5645	95.5800	87.2812	93.1592
2031	98.4834	93.9501	97.0253	88.5644	94.5437
2032	98.4834	95.3597	98.4834	89.8730	95.9411
2033	98.4834	96.7878	98.4834	91.2073	97.3233
2034	98.4834	98.2068	98.4834	92.5675	98.4834
2035	98.4834	98.4834	98.4834	93.9532	98.4834
2036	98.4834	98.4834	98.4834	95.3630	98.4834
2037	98.4834	98.4834	98.4834	96.7916	98.4834
2038	98.4834	98.4834	98.4834	98.2114	98.4834
Years after 2038	98.4834	98.4834	98.4834	98.4834	98.4834
Taxpayer Using the Composite Method					
2030	98.4834	94.5507	96.5457	91.0641	94.9230
Years after 2030	Use composite discount factors published for the relevant accident year.*				

***The relevant accident year is the accident year that is ten years prior to the specified taxable year.**

SECTION 4. DISCOUNT FACTORS FOR TAXABLE YEARS BEGINNING IN 2020

.01 The tables in this section 4 present separately for each line of business discount factors for losses incurred in the 2020 accident year and earlier accident years for use by insurance companies in computing discounted unpaid losses under § 846 and estimated salvage recoverable under § 832 in taxable years beginning in 2020. The discount factors for losses incurred in accident years 2019 and 2020 presented in these tables are determined by using the applicable interest rate for 2019 (3.09 percent, compounded semiannually) and 2020 (3.08 percent, compounded semiannually), respectively, under § 846(c). All other discount factors presented in these tables are determined by using the applicable interest rate for 2018, which is 2.94 percent, compounded semiannually. All of the discount factors presented in these tables are determined by using the payment patterns for the 2017 determination year determined by the Secretary under § 846(d) and by assuming all loss payments occur in the middle of the calendar year. See Rev. Proc. 2019-31 (prescribing discount factors for the 2019 accident year and "Revised Discount Factors" for accident years beginning before 2019).

.02 Table 4 separately provides discount factors for insurance companies that have elected to use the composite method of Notice 88-100. See Rev. Proc. 2002-74. The discount factors computed using the composite method are unrelated to the composite discount factors referred to in § 1.846-1(b)(1)(ii) and (4), which apply

to lines of business for which the Secretary has not published discount factors. The composite discount factors for use with respect to such lines of business are labelled "Short-Tail Composite" (in Table 3, part B) and "Long-Tail Composite" (in Table 4, part B). The "Miscellaneous Casualty" discount factors referenced in § 1.846-1(b)(2) are not set forth in tables, but are equivalent to the "Short-Tail Composite" discount factors.

Table 3 (part A)

Discount Factors Under Section 846 (percent)

For Taxable Year(s) Beginning in 2020

Short-Tail Lines of Business

Accident Year	Auto Physical Damage	Fidelity/Surety	Financial Guaranty/ Mortgage Guaranty	International	Other*
2020	98.3139	95.8052	95.5582	96.1310	96.9677
2019	96.9916	96.9916	96.9916	96.9916	96.9916
Years before 2019	98.5513	98.5513	98.5513	98.5513	98.5513

*** For Accident and Health lines of business (other than disability income or credit disability insurance), the discount factor for taxable year 2020 is 98.4834 percent.**

Table 3 (part B)

Discount Factors Under Section 846 (percent)

For Taxable Year(s) Beginning in 2020

Short-Tail Lines of Business

Accident Year	Reinsurance - Nonproportional Assumed Financial Lines	Reinsurance - Nonproportional Assumed Liability	Reinsurance - Nonproportional Assumed Property	Special Property (Fire, Allied Lines, Inland Marine, Earthquake, Burglary & Theft)	Warranty	Short-Tail Composite
2020	95.4035	94.6016	96.1125	97.3985	98.1106	96.8566
2019	96.9916	96.9916	96.9916	96.9916	96.9916	96.9916
Years before 2019	98.5513	98.5513	98.5513	98.5513	98.5513	98.5513

Table 4 (part A)

Discount Factors Under Section 846 (percent)

For Taxable Year(s) Beginning in 2020

Long-Tail Lines of Business

Accident Year	Commercial Auto/Truck Liability/ Medical	Medical Professional Liability - Claims-Made	Medical Professional Liability - Occurrence	Multiple Peril Lines	Other Liability - Claims-Made	Other Liability - Occurrence
2020	93.7894	91.2887	86.3302	95.0975	90.4958	88.9133
2019	94.5084	92.2917	88.4392	93.3741	91.3061	89.7544
2018	95.2819	92.8576	90.4811	93.9651	92.1992	90.7535
2017	95.3204	93.1388	91.8194	93.2041	92.2415	90.9196
2016	95.2024	93.2805	92.7664	91.4064	92.0976	90.6836
2015	95.0498	93.3035	93.5069	91.6039	92.6040	90.7542
2014	95.3260	94.2423	94.3189	91.3154	93.0770	90.7788
2013	94.9804	95.1291	94.9993	91.0177	93.8378	91.9830
2012	96.4102	96.0160	96.1220	93.5200	94.9264	92.6228
2011	98.3585	97.7503	97.7902	94.8530	96.6876	94.4974
Taxpayer Not Using the Composite Method						
2010	98.5513	98.5513	98.5513	96.1895	98.0033	95.8511
2009	98.5513	98.5513	98.5513	97.5045	98.5513	97.2176
Years before 2009	98.5513	98.5513	98.5513	98.5513	98.5513	98.5513
Taxpayer Using the Composite Method						
Years before 2011	98.5513	98.5513	98.5513	96.9185	98.0920	96.7300

Table 4 (part B)

Discount Factors Under Section 846 (percent)

For Taxable Year(s) Beginning in 2020

Long-Tail Lines of Business

Accident Year	Private Passenger Auto Liability/ Medical	Products Liability - Claims-Made	Products Liability - Occurrence	Workers' Compensation	Long-Tail Composite
2020	95.4796	85.3166	87.3013	87.5556	92.4450
2019	95.0654	85.7548	88.6442	85.9577	91.3501
2018	95.2520	88.1407	89.8860	85.4517	91.4469
2017	94.8920	83.8076	91.1924	83.9662	90.2933
2016	94.2325	85.0889	89.8810	83.4129	88.7546
2015	94.2824	86.4184	89.9309	82.8905	88.6421
2014	94.5205	87.8040	90.8527	83.2567	88.6258
2013	95.0550	89.0388	91.8072	84.1036	89.1661
2012	95.6473	90.2969	92.1992	84.7150	90.3858
2011	97.7282	91.5785	94.4133	86.5946	92.1457
Taxpayer Not Using the Composite Method					
2010	98.5513	92.8838	95.7739	87.8065	93.4541
2009	98.5513	94.2124	97.1571	89.0414	94.7812
2008	98.5513	95.5629	98.5513	90.2995	96.1195
2007	98.5513	96.9299	98.5513	91.5813	97.4421
2006	98.5513	98.2868	98.5513	92.8867	98.5513
2005	98.5513	98.5513	98.5513	94.2154	98.5513
2004	98.5513	98.5513	98.5513	95.5661	98.5513
2003	98.5513	98.5513	98.5513	96.9334	98.5513
2002	98.5513	98.5513	98.5513	98.2913	98.5513
Years before 2002	98.5513	98.5513	98.5513	98.5513	98.5513
Taxpayer Using the Composite Method					
Years before 2011	98.5513	94.7288	96.6903	91.2579	95.0968

SECTION 5. DRAFTING INFORMATION

The principal author of this revenue procedure is Megan McGuire of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure contact Ms. McGuire at (202) 317-6995 (not a toll-free number).

Section 846.—Discounted Unpaid Losses Defined.

26 C.F.R. 1.846-1: Application of discount factors.

Applicable unpaid loss discount factors for the 2020 accident year for purposes of section 846. See Rev. Proc. 2020-48, page 1459.

Section 832.—Insurance company taxable income.

26 C.F.R. 1.832-4: Gross income.

Applicable salvage discount factors for the 2020 accident year, which must be used to compute discounted estimated salvage recoverable under section 832. See Rev. Proc. 2020-48, page 1459.

Part IV

26 CFR Part 1

Notice of Proposed Rulemaking

Guidance Related to the Foreign Tax Credit; Clarification of Foreign-Derived Intangible Income

REG-101657-20

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the foreign tax credit, including guidance on the disallowance of a credit or deduction for foreign income taxes with respect to dividends eligible for a dividends-received deduction; the allocation and apportionment of interest expense, foreign income tax expense, and certain deductions of life insurance companies; the definition of a foreign income tax and a tax in lieu of an income tax; transition rules relating to the impact on loss accounts of net operating loss carrybacks allowed by reason of the Coronavirus Aid, Relief, and Economic Security Act; the definition of foreign branch category and financial services income; and the time at which foreign taxes accrue and can be claimed as a credit. This document also contains proposed regulations clarifying rules relating to foreign-derived intangible income. The proposed regulations affect taxpayers that claim credits or deductions for foreign income taxes, or that claim a deduction for foreign-derived intangible income.

DATES: Written or electronic comments and requests for a public hearing must be received by February 10, 2021.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-101657-20) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The IRS expects to have limited personnel available to process public comments that are submitted on paper through mail. The Department of the Treasury (the "Treasury Department") and the IRS will publish for public availability any comment submitted electronically, and to the extent practicable on paper, to its public docket. Send paper submissions to: CC:PA:LPD:PR (REG-101657-20), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations under §§1.245A(d)-1, 1.336-2, 1.338-9, 1.861-3, 1.861-20, 1.904-6, 1.960-1, and 1.960-2, Suzanne M. Walsh, (202) 317-4908; concerning §§1.250(b)-1, 1.861-8, 1.861-9, and 1.861-14, Jeffrey P. Cowan, (202) 317-4924; concerning §1.250(b)-5, Brad McCormack, (202) 317-6911; concerning §§1.164-2, 1.901-1, 1.901-2, 1.903-1, 1.905-1, and 1.905-3, Tianlin (Laura) Shi, (202) 317-6987; concerning §§1.367(b)-3, 1.367(b)-4, and 1.367(b)-10, Logan Kincheloe, (202) 317-6075; concerning §§1.367(b)-7, 1.861-10, 1.904-2, 1.904-4, 1.904-5, and 1.904(f)-12, Jeffrey L. Parry, (202) 317-4916; concerning submissions of comments and requests for a public hearing, Regina Johnson, (202) 317-5177 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

On December 7, 2018, the Treasury Department and the IRS published proposed regulations (REG-105600-18) relating to foreign tax credits in the **Federal Register** (83 FR 63200) (the "2018 FTC proposed regulations"). Those regulations addressed several significant changes that the Tax Cuts and Jobs Act (Pub. L. 115-97, 131 Stat. 2054, 2208 (2017)) (the "TCJA") made with respect to the foreign tax credit rules and related rules for allocating and apportioning deductions in determining the foreign tax credit limitation. On December 17, 2019, portions of the 2018 FTC proposed regulations were finalized in TD 9882, published in the **Federal Register** (84 FR 69022) (the "2019 FTC final regulations"). On the same date, new proposed regulations were issued addressing changes made by the TCJA as well as other related foreign tax credit rules (the "2019 FTC proposed regulations"). Correcting amendments to the 2019 FTC final regulations and the 2019 FTC proposed regulations were published in the **Federal Register** on May 15, 2020, see 85 FR 29323 (2019 FTC final regulations) and 85 FR 29368 (2019 FTC proposed regulations). The 2019 FTC proposed regulations are finalized in the Rules and Regulations section of this issue of the **Federal Register** (the "2020 FTC final regulations").

On July 15, 2020, the Treasury Department and the IRS finalized regulations under section 250 (the "section 250 regulations") in TD 9901, published in the **Federal Register** (85 FR 43042).

This document contains proposed regulations (the "proposed regulations") addressing: (1) the determination of foreign income taxes subject to the credit and deduction disallowance provision of section 245A(d); (2) the determination of oil and gas extraction income from domestic and foreign sources and of electronically supplied services under the section 250 regulations; (3) the impact of the repeal of section 902 on certain regulations issued under section 367(b); (4) the sourcing of inclusions under sections 951, 951A, and 1293; (5) the allocation and apportionment of interest deductions, including rules for allocating interest expense of foreign bank branches and certain regulated utility companies, an election to capitalize research and experimental expenditures and advertising expenses for purposes of calculating tax basis, and a revision to the controlled foreign corporation ("CFC") netting rule; (6) the allocation and apportionment of section 818(f) expenses of life insurance companies that are members of consolidated groups; (7) the allocation and apportionment of foreign income tax-

es, including taxes imposed with respect to disregarded payments; (8) the definitions of a foreign income tax and a tax in lieu of an income tax, including the addition of a jurisdictional nexus requirement and changes to the net gain requirement, the treatment of certain tax credits, the treatment of foreign tax law elections for purposes of the noncompulsory payment rules, and the substitution requirement under section 903; (9) the allocation of the liability for foreign income taxes in connection with certain mid-year transfers or reorganizations; (10) transition rules to account for the effect on loss accounts of net operating loss carrybacks to pre-2018 taxable years that are allowed under the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, 134 Stat. 281 (2020); (11) the foreign branch category rules in §1.904-4(f) and the definition of a financial services entity for purposes of section 904; and (12) the time at which credits for foreign income taxes can be claimed pursuant to sections 901(a) and 905(a).

Explanation of Provisions

I. *Foreign Income Taxes with Respect to Dividends for Purposes of Section 245A(d)*

Section 245A(d)(1) provides that no credit is allowed under section 901 for any taxes paid or accrued (or treated as paid or accrued) with respect to any dividend for which a deduction is allowed under that section. Section 245A(d)(2) disallows a deduction under chapter 1 for any tax for which a credit is not allowable under section 901 by reason of section 245A(d)(1). Section 245A(e)(3) also provides that no credit or deduction is allowed for foreign income taxes paid or accrued with respect to a hybrid dividend or a tiered hybrid dividend.

Proposed §1.245A(d)-1(a) generally provides that neither a foreign tax credit under section 901 nor a deduction is allowed for foreign income taxes (as defined in §1.901-2(a)) that are "attributable to" certain amounts. For this purpose, the proposed regulations rely on the rules in §1.861-20, contained in the 2020 FTC final regulations and proposed to be modified in these proposed regulations, that allocate and apportion foreign income taxes to income for purposes of various operative sections, including sections 904, 960, and 965(g). Specifically, proposed §1.245A(d)-1 provides that §1.861-20 (which includes portions contained in these proposed regulations as well as in the 2020 FTC final regulations) applies for purposes of determining foreign income taxes paid or accrued that are attributable to any dividend for which a deduction is allowed under section 245A(a), to a hybrid dividend or tiered hybrid dividend, or to previously taxed earnings and profits that arose as a result of a sale or exchange that by reason of section 964(e)(4) or 1248 gave rise to a deduction under section 245A(a) or as a result of a tiered hybrid dividend that by reason of section 245A(e)(2) gave rise to an inclusion in the gross income of a United States shareholder (collectively, such previously taxed earnings and profits are referred to as "section 245A(d) PTEP").

In addition, the rules apply to foreign income taxes that are imposed with respect to certain foreign taxable events, such as a deemed distribution under foreign law or an inclusion under a foreign law CFC inclusion regime, even though such event does not give rise to a distribution or inclusion for Federal income tax purposes. Proposed §1.245A(d)-1(a) provides that foreign income taxes that are attributable to "specified earnings and profits" are also subject to the disallowance under section 245A(d). Under proposed §1.245A(d)-1(b), §1.861-20 applies to determine whether foreign income taxes are attributable to specified earnings and profits. Under §1.861-20, foreign income taxes may be allocated and apportioned by reference to specified earnings and profits, even though the person paying or accruing the foreign income tax does not have a corresponding U.S. item in the form of a distribution of, or income inclusion with respect to, such earnings and profits. See, for example, §1.861-20(d)(2)(ii)(B), (C), or (D) (foreign law distribution or foreign law disposition and certain foreign law transfers between taxable units), (d)(3)(i)(C) (income from a reverse hybrid), (d)(3)(iii) (foreign law inclusion regime), and proposed §1.861-20(d)(3)(v)(C)(*1*)(*i*) (disregarded payment treated as a remittance). Specified earnings and profits means earnings and profits that would give rise to a section 245A deduction (without regard to the holding period requirement under section 246 or the rules under §1.245A-5 that disallow a deduction under section 245A(a) for certain dividends), a hybrid dividend, or a tiered hybrid dividend, or a distribution sourced from section 245A(d) PTEP if an amount of money equal to all of the foreign corporation's earnings and profits were distributed. Therefore, for example, a credit or deduction for foreign income taxes paid or accrued by a domestic corporation that is a United States shareholder ("U.S. shareholder") with respect to a distribution that is not recognized for Federal income tax purposes (for example, in the case of a consent dividend under foreign tax law that is not regarded for Federal income tax purposes, or a distribution of stock that is excluded from gross income under section 305(a) but is treated as a taxable dividend under foreign tax law) is not allowed under section 245A(d) to the extent those foreign income taxes are attributable to specified earnings and profits.

An anti-avoidance rule is included in proposed §1.245A(d)-1 to address situations in which taxpayers engage in transactions with a principal purpose of avoiding the purposes of section 245A(d), which is to disallow a foreign tax credit or deduction with respect to foreign income taxes imposed on income that is effectively exempt from tax (due to the availability of a deduction under section 245A(a)) or with respect to foreign income taxes imposed on a hybrid dividend or tiered hybrid dividend. Such transactions may include transactions to separate foreign income taxes from the income to which they relate in situations that are not explicitly covered under §1.861-20 (including, for example, loss sharing transactions under group relief regimes). Such transactions may also include successive distributions (under foreign law) out of earnings and profits that, under the rules in §1.861-20, are treated as distributed out of previously taxed earnings and profits (and therefore foreign income taxes attributable to such amounts are not generally subject to the disallowance under section 245A(d)), when there is no reduction of such previously taxed earnings and profits due to the absence of a distribution under Federal in-

come tax law. See proposed §1.245A(d)-1(e)(4) (*Example 3*). The Treasury Department and the IRS are concerned that because the rules in §1.861-20(d) addressing foreign law distributions and dispositions do not currently make adjustments to a foreign corporation's earnings and profits to reflect distributions that are not recognized for Federal income tax purposes, such foreign law transactions could be used to circumvent the purposes of section 245A(d). Comments are requested on potential revisions to §1.861-20(d) that could address these concerns, including the possibility of maintaining separate earnings and profits accounts, characterized with reference to the relevant statutory and residual groupings, for each taxable unit whereby the accounts would be adjusted annually to reflect transactions that occurred under foreign law but not under Federal income tax law.

II. *Clarifications to Regulations Under Section 250*

A. *Definition of domestic and foreign oil and gas extraction income*

Section 250 provides a domestic corporation a deduction ("section 250 deduction") for its foreign-derived intangible income ("FDII") as well as its global intangible low-taxed income ("GILTI") inclusion amount and the amount treated as a dividend under section 78 that is attributable to its GILTI inclusion. The section 250 deduction attributable to FDII is calculated in part by determining the foreign-derived portion of a corporation's deduction eligible income ("DEI"). DEI is defined as the excess of gross DEI over the deductions (including taxes) properly allocable to such gross income. See section 250(b)(3)(A) and §1.250(b)-1(c)(2). Gross DEI is determined without regard to domestic oil and gas extraction income ("DOGEI"), which is defined as income described in section 907(c)(1) determined by substituting "within the United States" for "without the United States." See section 250(b)(3)(B) and §1.250(b)-1(c)(7). Similarly, foreign oil and gas extraction income ("FOGEI") as defined in section 907(c)(1) is excluded from the computation of gross tested income which is used to determine a U.S. shareholder's GILTI inclusion amount. See §1.951A-2(c)(1)(v).

The Treasury Department and the IRS have determined that it would be inappropriate for taxpayers to use inconsistent methods to determine the amounts of DOGEI and FOGEI from the sale of oil or gas that has been transported or processed. Taxpayers with both types of income may have an incentive to minimize their DOGEI in order to maximize their potential section 250 deduction attributable to FDII, while in contrast maximizing their FOGEI in order to minimize their gross tested income, even though this would also decrease the amount of the section 250 deduction attributable to their GILTI inclusion amount. Accordingly, the proposed regulations provide that taxpayers must use a consistent method for purposes of determining both DOGEI and FOGEI. See proposed §1.250(b)-1(c)(7). Similarly, for purposes of allocating and apportioning deductions, taxpayers are already required under existing regulations to use the same method of allocation and the same principles of apportionment where more than one operative section, for example sections 250 and 904, apply. See §1.861-8(f)(2)(i).

B. *Definition of electronically supplied service*

Section 1.250(b)-5(c)(5) defines the term "electronically supplied service" to mean a general service (other than an advertising service) that is delivered primarily over the internet or an electronic network, and provides that such services include, by way of examples, cloud computing and digital streaming services.

Since the publication of the section 250 regulations, the Treasury Department and the IRS have determined that the definition of electronically supplied services could be interpreted in a manner that includes services that were not primarily electronic and automated in nature but rather where the renderer applies human effort or judgment, such as professional services that are provided through the internet or an electronic network. Therefore, these proposed regulations clarify that the value of the service to the end user must be derived primarily from the service's automation or electronic delivery in order to be an electronically supplied service. The regulations further provide that services that primarily involve the application of human effort by the renderer to provide the service (not including the effort involved in developing or maintaining the technology to enable the electronic service) are not electronically supplied services. For example, certain services for which automation or electronic delivery is not a primary driver of value, such as legal, accounting, medical, or teaching services delivered electronically and synchronously, are not electronically supplied services.

III. *Carryover of Earnings and Profits and Taxes When One Foreign Corporation Acquires Assets of Another Foreign Corporation in a Section 381 Transaction*

Section 1.367(b)-7 provides rules regarding the manner and the extent to which earnings and profits and foreign income taxes of a foreign corporation carry over when one foreign corporation ("foreign acquiring corporation") acquires the assets of another foreign corporation ("foreign target corporation") in a transaction described in section 381 (the combined corporation, the "foreign surviving corporation"). See §1.367(b)-7(a). Before the repeal of section 902 in the TCJA, these rules were primarily relevant for determining the foreign income taxes of the foreign surviving corporation that were considered deemed paid by its U.S. shareholder with respect to a distribution or inclusion under section 902 or 960, respectively.

Section 1.367(b)-7 applies differently with respect to "pooling corporations" and "nonpooling corporations." A pooling corporation is a foreign corporation with respect to which certain ownership requirements were satisfied in pre-2018 taxable years and that, as a result, maintained "pools" of post-1986 undistributed earnings and related post-1986 foreign income taxes. See §1.367(b)-2(l)(9). In general, if the foreign surviving corporation was a pooling corporation, the post-1986 undistributed earnings and post-1986 foreign income taxes of the foreign acquiring corporation and the foreign target corporation were combined on a separate

category-by-separate category basis. See §1.367(b)-7(d)(1). However, the regulations required the foreign surviving corporation to combine the taxes related to a deficit in a separate category of post-1986 undistributed earnings of one or both of the foreign acquiring corporation or foreign target corporation (a "hovering deficit") with other post-1986 foreign income taxes in that separate category only on a pro rata basis as the hovering deficit was absorbed by post-transaction earnings in the same separate category. See §1.367(b)-7(d)(2)(iii). Similarly, a hovering deficit in a separate category of post-1986 undistributed earnings could offset only earnings and profits accumulated by the foreign surviving corporation after the section 381 transaction. Under §1.367(b)-7(d)(2)(ii), the reduction or offset was generally deemed to occur as of the first day of the foreign surviving corporation's first taxable year following the year in which the post-transaction earnings accumulated.

A nonpooling corporation is a foreign corporation that is not a pooling corporation and, as a result, maintains "annual layers" of pre-1987 accumulated profits and pre-1987 foreign income taxes. See §1.367(b)-2(l)(10). In general, a foreign surviving corporation maintains the annual layers of pre-1987 accumulated profits and pre-1987 foreign income taxes, and the taxes related to a deficit in an annual layer cannot be associated with post-section 381 transaction earnings of the foreign surviving corporation.

As a result of the repeal of section 902 in the TCJA, post-1986 foreign income taxes and pre-1987 foreign income taxes of foreign corporations are generally no longer relevant for taxable years beginning on or after January 1, 2018. In addition, consistent with the TCJA, the Treasury Department and the IRS issued regulations under section 960 clarifying that only current year taxes are taken into account in determining taxes deemed paid under section 960. See §1.960-1(c)(2). Current year tax means certain foreign income tax paid or accrued by a controlled foreign corporation in a current taxable year. See §1.960-1(b)(4).

In light of the changes made by the TCJA and subsequent implementing regulations, the proposed regulations provide rules to clarify the treatment of foreign income taxes of a foreign surviving corporation in taxable years of foreign corporations beginning on or after January 1, 2018, and for taxable years of U.S. shareholders in which or with which such taxable years of foreign corporations end ("post-2017 taxable years"). The proposed regulations provide that all foreign target corporations, foreign acquiring corporations, and foreign surviving corporations are treated as nonpooling corporations in post-2017 taxable years and that any amounts remaining in the post-1986 undistributed earnings and post-1986 foreign income taxes of any such corporation as of the end of the foreign corporation's last taxable year beginning before January 1, 2018, are treated as earnings and taxes in a single pre-pooling annual layer in the foreign corporation's post-2017 taxable years.

The proposed regulations also clarify that foreign income taxes that are related to non-previously taxed earnings of a foreign acquiring corporation and a foreign target corporation that were accumulated in taxable years before the current taxable year of the foreign corporation, or in a foreign target corporation's taxable year that ends on the date of the section 381 transaction, are not treated as current year taxes (as defined in §1.960-1(b)(4)) of a foreign surviving corporation in any post-2017 taxable year. Furthermore, the proposed regulations clarify that foreign income taxes related to hovering deficits are not current year taxes in the year that the hovering deficit is absorbed, in part because the hovering deficit is not considered to offset post-1986 undistributed earnings until the first day of the foreign surviving corporation's first taxable year following the year in which the post-transaction earnings accumulated. In addition, because such taxes were paid or accrued by a foreign corporation in a prior taxable year, they are not considered paid or accrued by the foreign corporation in the current taxable year and therefore are not current year taxes under §1.960-1(b)(4). Finally, foreign income taxes related to a hovering deficit in pre-1987 accumulated profits generally will not be reduced or deemed paid unless a foreign tax refund restores a positive balance to the associated earnings pursuant to section 905(c); therefore, such foreign income taxes are never included in current year taxes.

In addition to the proposed changes to §1.367(b)-7, the proposed regulations remove some references to section 902 in other regulations issued under section 367(b) that are no longer relevant as a result of the repeal of section 902. For example, pursuant to §1.367(b)-4(b)(2), a deemed dividend inclusion is required in certain cases upon the receipt of preferred stock by an exchanging shareholder, in order to prevent the excessive potential shifting of earnings and profits, notwithstanding that the exchanging shareholder's status as a section 1248 shareholder is preserved. One of the conditions for application of the rule requires a domestic corporation to meet the ownership threshold of section 902(a) or (b) and, thus, be eligible for a deemed paid credit on distributions from the transferee foreign corporation. §1.367(b)-4(b)(2)(i)(B). These proposed rules generally retain the substantive ownership threshold of this requirement, but without reference to section 902 and by modifying the ownership threshold requirement to consider not only voting power but value as well. Specifically, §1.367(b)-4(b)(2)(i)(B) is revised to require that a domestic corporation owns at least 10 percent of the transferee foreign corporation by vote or value.

Comments are requested as to whether further changes to §1.367(b)-4 or 1.367(b)-7, or any changes to other regulations issued under section 367, are appropriate in order to clarify their application after the repeal of section 902. In addition, the Treasury Department and the IRS are studying the interaction of §1.367(b)-4(b)(2) with section 245A and other Code provisions and considering whether additional revisions to the regulation are appropriate in light of TCJA generally. Comments are specifically requested with respect to the proposed revisions to §1.367(b)-4(b)(2), including whether there is a continuing need to prevent excessive potential shifting of earnings and profits through the use of preferred stock in light of the TCJA generally. For example, the Treasury Department and the IRS are considering, and request comments on, the extent to which, in certain transactions described in §1.367(b)-4(b)(2), (1) an exchanging shareholder who would not qualify for a

deduction under section 245A could potentially shift earnings and profits of a foreign acquired corporation to a transferee foreign corporation with a domestic corporate shareholder that would qualify for a deduction under section 245A, or (2) a domestic corporate exchanging shareholder of a foreign acquired corporation with no earnings and profits could access the earnings and profits of a transferee foreign corporation.

IV. *Source of Inclusions under Sections 951, 951A, 1293, and Associated Section 78 Dividend*

Sections 861(a) and 862(a) contain rules to determine the source of certain items of gross income. Section 863(a) provides that the source of items of gross income not specified in sections 861(a) and 862(a) will be determined under regulations prescribed by the Secretary. As a result of changes to section 960 made by the TCJA, the Treasury Department and the IRS revised the regulations under section 960. As part of that revision, the Treasury Department and the IRS removed former §1.960-1(h)(1), which contained a source rule for the amount included in gross income under section 951 and the associated section 78 dividend. Section 1.960-1(h)(1) provided that, for purposes of section 904, the amount included in gross income of a domestic corporation under section 951 with respect to a foreign corporation, plus any section 78 dividend to which such section 951 inclusion gave rise by reason of taxes deemed paid by such domestic corporation, was derived from sources within the foreign country or possession of the United States under the laws of which such foreign corporation, or the first-tier corporation in the same chain of ownership as such foreign corporation, was created or organized.

Although section 904(h)(1) treats as from sources within the United States certain amounts included in gross income under section 951(a) that otherwise would be treated as derived from sources without the United States, absent former §1.960-1(h)(1), no rule specifies the source of inclusions under section 951 before the application of section 904(h)(1). In addition, the rule in former §1.960-1(h)(1) only provided for the source of a domestic corporation's section 951 inclusions for purposes of section 904. A similar lack of guidance exists with respect to the source of inclusions under section 951A. See section 951A(f)(1)(A) (requiring the application of section 904(h)(1) with respect to amounts included in gross income under section 951A(a) in the same manner as amounts included under section 951(a)(1)(A)). The removal of former §1.960-1(h)(1) also left uncertain the source of amounts included in gross income as a result of an election under section 1293(a), because under section 1293(f)(1), such amounts are treated for purposes of section 960 as amounts included in gross income under section 951(a).

To clarify the source of income inclusions after the removal of former §1.960-1(h)(1), the proposed regulations include a new rule in §1.861-3(d), which provides that for purposes of the sourcing provisions an amount included in the gross income of a United States person under section 951 is treated as a dividend received by the United States person directly from the foreign corporation that generated the inclusion.

This proposed rule differs from former §1.960-1(h)(1) in two respects. First, former §1.960-1(h)(1) provided that if the foreign corporation that generated the income included under section 951 was held indirectly through other foreign corporations, the amount included was treated as if it had been paid through such intermediate corporations and as received from the first-tier foreign corporation. The Treasury Department and the IRS have determined that, in light of the repeal of section 902, and because a section 951 inclusion with respect to a lower-tier CFC is not treated as a deemed distribution through the first-tier CFC, the source of the inclusion should be determined by reference to the lower-tier CFC.

Second, former §1.960-1(h)(1) treated the entire amount of the inclusion under section 951 as derived from sources without the United States. However, the Treasury Department and the IRS have determined that because dividends and inclusions of the same earnings and profits should be sourced in the same manner, the general rule for inclusions under section 951 should be consistent with the rule in section 861(a)(2)(B) and §1.861-3(a)(3) that treats dividends as derived from sources within the United States to the extent that the dividend is from a foreign corporation with significant income effectively connected with the conduct of a trade or business in the United States. This is particularly appropriate in circumstances in which effectively connected income is not excluded from subpart F income under section 952(b) (which could arise as a result of a treaty obligation of the United States precluding the effectively connected income from being taxed by the United States in the hands of the CFC). In addition, the Treasury Department and the IRS have determined that the source of a taxpayer's gross income from an inclusion of CFC earnings that are subject to a high rate of foreign tax should be the same, regardless of whether the taxpayer includes the income under subpart F or elects the high-taxed exception of section 954(b)(4) and repatriates the earnings as a dividend. Therefore, the proposed regulations provide that the source of an inclusion under section 951 is determined under the same rules as those for dividends. However, the resourcing rules in section 904(h) and §1.904-5(m) independently operate to ensure that dividends and inclusions under section 951(a) that are attributable to U.S. source income of the CFC retain that U.S. source in the hands of the United States shareholder.

The proposed regulations also clarify that the source of section 78 dividends associated with inclusions under section 951 follows the rules for sourcing dividends. See also §1.78-1(a).

Finally, and consistent with sections 951A(f)(1)(A) and 1293(f)(1), the proposed regulations apply the same rules with respect to inclusions under sections 951A and 1293 and the associated section 78 dividend.

V. *Allocation and Apportionment of Expenses Under Section 861 Regulations*

A. *Election to capitalize R&E and advertising expenditures*

A taxpayer determines its foreign tax credit limitation under section 904, in part, based on the taxpayer's taxable income from sources without the United States. Taxable income from sources

without the United States is determined by deducting from the items of gross income from sources without the United States the expenses, losses, and other deductions properly allocated and apportioned to that income, and a ratable part of any expenses, losses, or other deductions that cannot definitely be allocated to some item or class of gross income. See section 862(b). Section 864(e)(2) generally requires taxpayers to allocate and apportion interest expense on the basis of assets, rather than income. Under the asset method, a taxpayer apportions interest expense to the various statutory or residual groupings based on the average total value of assets within each grouping for the taxable year as determined under the asset valuation rules of §1.861-9T(g).

The preamble to the 2019 FTC proposed regulations stated that the Treasury Department and the IRS continue to study the rules for allocating and apportioning interest deductions, and requested comments on a potential proposal to provide for the capitalization and amortization of certain expenses solely for purposes of §1.861-9 to better reflect asset values under the tax book value method. One comment supported the adoption of such a rule.

The Treasury Department and the IRS recognize that internally-developed intangible assets (including intangible assets such as goodwill that are created as a result of advertising) that have no tax book value because the costs of generating them have been currently deducted may nevertheless have continuing economic value, and that debt financing may support the generation and maintenance of that value. Accordingly, proposed §1.861-9(k) provides an election for taxpayers to capitalize and amortize their research and experimental ("R&E") and advertising expenditures incurred in a taxable year. This election is analogous to the election under §1.861-9(i) to determine asset values based on the alternative tax book value method, since both elections allow taxpayers to determine the tax book value of an asset in a manner that is different from the general rules that apply under Federal income tax law, but solely for purposes of allocating and apportioning interest expense under §1.861-9, and not for any other Federal income tax purpose (such as determining the amount of any deduction actually allowed for depreciation or amortization).

Proposed §1.861-9(k)(1) and (2) generally provides that for purposes of allocating and apportioning interest expense under §1.861-9, an electing taxpayer capitalizes and amortizes its R&E expenditures under the rules in section 174 as contained in Pub. L. 115–97, title I, §13206(a), which generally requires that beginning in taxable years beginning in 2022, R&E expenditures must be capitalized and then amortized.

Similarly, proposed §1.861-9(k)(1) and (3) generally requires an electing taxpayer to capitalize and amortize its advertising expenditures. The definition of advertising expenditures and the method of cost recovery contained in proposed §1.861-9(k)(3) is based on prior legislative proposals (which have not been enacted) proposing that certain advertising expenditures be capitalized. See, for example, H.R.1, 113th Cong. Section 3110 (2014). Comments are requested on whether a different definition of advertising expenditures or a different method of cost recovery should be adopted for purposes of the election in proposed §1.861-9(k).

B. *Nonrecourse debt of certain utility companies*

Section 1.861-10T provides certain exceptions to the general asset-based apportionment of interest expense requirement under section 864(e)(2), including rules that directly allocate interest expense to the income generated by certain assets that are subject to "qualified nonrecourse indebtedness." See §1.861-10T(b).

A comment to the 2019 FTC proposed regulations asserted that interest expense incurred on certain debt of regulated utility companies should be directly allocated to income from assets of the utility business because the debt must be approved by a regulatory agency and relates directly to the underlying needs of the utility business. The comment suggested that the existing rules for qualified nonrecourse indebtedness were insufficient because utility indebtedness is often subject to guarantees and cross collateralizations that permit the lender to seek recovery beyond any identified property, and because the cash flows of a regulated utility company used to support utility indebtedness are broader than the permitted cash flows described in §1.861-10T(b).

In response to this comment, the proposed regulations provide that certain interest expense of regulated utility companies is directly allocated to assets of the utility business. See proposed §1.861-10(f). The type of utility companies that qualify for the rule, and the rules for tracing debt to assets, are modeled on similar rules provided in regulations under section 163(j). See §§1.163(j)-1(b)(15) and 1.163(j)-10(d)(2). Consistent with the approach taken in §1.163(j)-10(d)(2), the proposed regulations expand the scope of permitted cash flows under §1.861-10T(b) but do not modify the requirement that the creditor look to particular assets as security for payment on the loan because unsecured debt generally is supported by all of the assets of the borrower. See also Part XI.L.2 of the Summary of Comments and Explanation of Revisions to TD 9905 (85 FR 56686).

C. *Revision to CFC netting rule relating to CFC-to-CFC loans*

Section 1.861-10(e)(8)(v) provides that for purposes of applying the CFC netting rule of §1.861-10(e), certain loans made by one CFC to another CFC are treated as loans made by a U.S. shareholder to the borrower CFC, to the extent the U.S. shareholder makes capital contributions directly or indirectly to the lender CFC, and are treated as related group indebtedness. No income derived from the U.S. shareholder's ownership of the lender CFC stock is treated as interest income derived from related group indebtedness, including subpart F inclusions related to the interest income earned by the lender CFC. As a result, no interest expense is generally allocated to income related to the CFC-to-CFC debt, but the debt may nevertheless increase the amount of allocable related group indebtedness for which a reduction in assets is required under §1.861-10(e)(7).

The Treasury Department and the IRS have determined that the failure to account for income related to the CFC-to-CFC debt can distort the general allocation and apportionment of other interest expense under §1.861-9. Therefore, the

proposed regulations revise §1.861-10(e)(8)(v) to provide that CFC-to-CFC debt is not treated as related group indebtedness for purposes of the CFC netting rule. Proposed §1.861-10(e)(8)(v) also provides that CFC-to-CFC debt is not treated as related group indebtedness for purposes of determining the foreign base period ratio, which is based on the average of related group debt-to-asset ratios in the five prior taxable years, even if the CFC-to-CFC debt was otherwise properly treated as related group indebtedness in a prior year. This is necessary to prevent distortions that would otherwise arise in comparing the ratio in a year in which CFC-to-CFC debt was treated as related group indebtedness to the ratio in a year in which the CFC-to-CFC debt is not treated as related group indebtedness.

D. *Direct allocation of interest expense for foreign bank branches*

Under §§1.861-8 through 1.861-13, the combined interest expense of a domestic corporation and its foreign branches is allocated and apportioned to income categories on the basis of the tax book value of their combined assets. Comments received with respect to the 2018 and 2019 FTC proposed regulations asserted that special rules were needed for financial institutions for allocating and apportioning interest expense to foreign branch category income. The comments asserted that the general approach under §§1.861-8 through 1.861-13 fails to take into account the fact that foreign branches of financial institutions have assets and liabilities that reflect interest rates that differ from interest rates related to assets and liabilities of the home office held in the United States. As a result, the general approach results in over- or under- allocation of interest expense to the foreign branch category income.

In response to this comment, the proposed regulations provide that interest expense reflected on a foreign banking branch's books and records is directly allocated against the foreign branch category income of that foreign branch, to the extent it has foreign branch category income. The proposed regulations also provide for a corresponding reduction in the value of the assets of the foreign branch for purposes of allocating other interest expense of the foreign branch owner. See proposed §1.861-10(g).

Comments are requested as to whether additional rules are needed to account for disregarded interest payments between foreign branches and between a foreign branch and a foreign branch owner. Comments are also requested as to whether adjustments to the amount of foreign branch liabilities subject to this rule are necessary to account for differing asset-to-liability ratios in a foreign branch and a foreign branch owner.

E. *Treatment of section 818(f) expenses for consolidated groups*

Section 818(f)(1) provides that a life insurance company's deduction for life insurance reserves and certain other deductions ("section 818(f) expenses") are treated as items which cannot definitely be allocated to an item or class of gross income. Proposed §1.861-14(h) in the 2019 FTC proposed regulations provided that section 818(f) expenses are allocated and apportioned on a separate company basis instead of on a life subgroup basis. In the 2020 FTC final regulations, this rule was withdrawn in response to comments. As discussed in Part I.C of the Summary of Comments and Explanation of Revisions to the 2020 FTC final regulations, the Treasury Department and the IRS have determined that there are merits and drawbacks to both the separate company and the life subgroup approaches.

These proposed regulations provide that section 818(f) expenses must be allocated and apportioned on a life subgroup basis, but that a one-time election is allowed for consolidated groups to choose instead to apply a separate company approach. A consolidated group's use of the separate entity method constitutes a binding choice to use the method chosen for that year for all members of the group and all taxable years thereafter.

F. *Allocation and apportionment of foreign income taxes*

1. Background

These proposed regulations repropose certain of the 2019 FTC proposed regulations in order to provide more detailed and comprehensive guidance regarding the assignment of foreign gross income, and the allocation and apportionment of the associated foreign income tax expense, to the statutory and residual groupings in certain cases. Comments to the 2019 FTC proposed regulations had requested more detailed guidance regarding the assignment to the statutory and residual groupings of foreign gross income arising from transactions that are dispositions of stock under Federal income tax law. In response to these comments, the Treasury Department and IRS have determined that it is appropriate to propose a comprehensive set of rules for dispositions of both stock and partnership interests, as well as rules that, similar to rules in the 2020 FTC final regulations for distributions with respect to stock, provide detailed rules for transactions that are distributions with respect to a partnership interest under Federal income tax law. The proposed regulations also address comments requesting that the rules for the assignment to the statutory and residual groupings of foreign gross income arising from disregarded payments distinguish between disregarded payments that would be deductible if regarded under Federal income tax law and disregarded payments that would, if the payor (or recipient) were a corporation under Federal income tax law, be distributions with respect to stock or contributions to capital. See also Part IV.B of the Summary of Comments and Explanation of Revisions in the 2020 FTC final regulations.

2. Dispositions of stock

Proposed §1.861-20(d)(3)(i)(D) contains rules assigning to statutory and residual groupings the foreign gross income and associated foreign tax that arise from a transaction that is treated for Federal income tax purposes as a sale or other disposition of stock. These rules assign the foreign gross income first to the statutory and residual groupings to which any U.S. dividend amount, a term that applies in the disposition context when there is an amount of gain to which section 1248(a) or 964(e) applies, is assigned, to the extent thereof. Foreign gross income is next

assigned to the grouping to which the U.S. capital gain amount is assigned, to the extent thereof.

Any excess of the foreign gross income recognized by reason of the transaction over the sum of the U.S. dividend amount and the U.S. capital gain amount is assigned to the statutory and residual groupings in the same proportions as the proportions in which the tax book value of the stock is (or would be if the taxpayer were a United States person) assigned to the groupings under the rules of §1.861-9(g) in the U.S. taxable year in which the disposition occurs. This rule, which uses the asset apportionment percentages of the tax book value of the stock as a surrogate for earnings of the corporation that are not recognized for U.S. tax purposes, associates foreign tax on a U.S. return of capital amount (that is, foreign tax on foreign gain in excess of the amount of gain recognized for U.S. tax purposes) with the same groupings to which the tax would be assigned under §1.861-20(d)(3)(i)(B)(*2*) of the 2020 FTC final regulations if the item of foreign gross income arose from a distribution made by the corporation, rather than a sale or other disposition of the stock.

As discussed in Part III.B of the Summary of Comments and Explanation of Revisions to the 2020 FTC final regulations, the Treasury Department and the IRS have determined that it is appropriate to treat foreign tax on a U.S. return of capital amount resulting from a distribution as a timing difference in the recognition of corporate earnings. The proposed regulations adopt the same rule in the case of a foreign tax on a U.S. return of capital amount resulting from a disposition of stock. The Treasury Department and the IRS have determined that this result is appropriate because a foreign country generally recognizes more gain on a disposition of stock than is recognized for U.S. tax purposes when the shareholder's tax basis in the stock is greater for U.S. tax purposes than for foreign tax purposes, and this disparity typically occurs when the shareholder's U.S. tax basis in the stock has been increased under section 961 to reflect subpart F or GILTI inclusions of earnings attributable to the stock. Comments are requested on whether other situations more commonly result in this disparity, such that different rules might be appropriate for distributions and sales in order to better match foreign tax on income included in the foreign tax base with income included in the U.S. tax base.

3. Partnership transactions

The proposed regulations contain new rules on the treatment of distributions from partnerships and sales of partnership interests, including partnerships that are treated as corporations for foreign law purposes. In general, these rules follow similar principles as the rules for distributions from corporations and sales of stock.

The rule in proposed §1.861-20(d)(3)(ii)(B), like the rule for assigning foreign tax on a return of capital with respect to stock, uses the asset apportionment percentages of the tax book value of the partner's distributive share of the partnership's assets (or, in the case of a limited partner with less than a 10 percent interest, the tax book value of the partnership interest) as a surrogate for the partner's distributive share of earnings of the partnership that are not recognized in the year in which the distribution is made for U.S. tax purposes. Proposed §1.861-20(d)(3)(ii)(C) similarly associates foreign tax on a U.S. return of capital amount in connection with the sale or other disposition of a partnership interest with a hypothetical distributive share. The Treasury Department and the IRS have determined that this rule is appropriate because foreign tax on a return of capital distribution from a partnership most commonly occurs in the case of hybrid partnerships (that is, entities that are treated as partnerships for U.S. tax purposes but as corporations for foreign tax purposes). In this case, earnings that have been recognized and capitalized into basis by the partner for U.S. tax purposes as a distributive share of income in prior years are not subject to foreign tax until the earnings are distributed. Similarly, the higher U.S. tax basis in an interest in a hybrid partnership accounts for the most common cases where the amount of foreign gross income that results from a sale of a partnership interest exceeds the amount of taxable gain for U.S. tax purposes. Comments are requested on whether a different ordering rule or matching convention may better match foreign tax on income included in the foreign tax base with income included in the U.S. tax base. Comments are also requested on whether special rules are needed to associate foreign gross income and the associated foreign tax on distributions from partnerships and sales of partnership interests with items that are subject to special treatment for U.S. tax purposes (such as gain recharacterized as ordinary income under section 751).

4. Disregarded payments

i. Background

The proposed regulations contain a new comprehensive set of rules addressing the allocation and apportionment of foreign income taxes relating to disregarded payments. In general, the 2019 FTC proposed regulations assigned foreign gross income included by reason of a disregarded payment by a branch owner to the residual grouping and assigned foreign gross income included by reason of a disregarded payment by a branch to its owner by reference to the asset apportionment percentages of the tax book value of the branch assets in the statutory and residual groupings. Comments noted that this rule, in the context of section 960, could lead to the assignment of foreign income taxes to the residual grouping rather than a grouping to which an inclusion under section 951 or 951A is attributable, resulting in the disallowance of foreign tax credits. Comments requested that, for purposes of assigning foreign gross income included by reason of a disregarded payment to a statutory or residual grouping, the rule should identify disregarded payments that should be treated as made out of current earnings, and distinguish those payments from other types of disregarded payments.

ii. Reattribution payments

Proposed §1.861-20(d)(3)(v) contains new rules that generally assign foreign gross income arising from the receipt of disregarded payments and the associated foreign tax to the recipient's statutory and residual groupings based on the current or accumulated income of the payor (as computed for U.S. tax purposes) out of which the disregarded payment is considered to be made. For this purpose, the regulations

refer to disregarded payments made to or by a taxable unit. In the case of a taxpayer that is an individual or a domestic corporation, a taxable unit means a foreign branch, a foreign branch owner, or a non-branch taxable unit, as defined in proposed §1.904-4(f)(3). In the case of a taxpayer that is a foreign corporation, a taxable unit means a tested unit as such term is defined in proposed §1.954-1(d)(2), as contained in proposed regulations (REG-127732-19) addressing the high-tax exception under section 954(b)(4), published in the **Federal Register** (85 FR 44650) on July 23, 2020 (the "2020 HTE proposed regulations"). See proposed §1.861-20(d)(3)(v)(A) and (d)(3)(v)(E)(*10*).

Proposed §1.861-20(d)(3)(v)(B)(*1*) addresses the assignment of foreign gross income that arises from the portion of a disregarded payment that results in a reattribution of U.S. gross income from the payor taxable unit to the recipient taxable unit. Under proposed §1.861-20(d)(3)(v)(B)(*1*), the foreign gross income is assigned to the statutory and residual groupings to which the amount of U.S. gross income that is reattributed (a "reattribution amount") is initially assigned upon receipt of the disregarded payment by a taxable unit, before taking into account reattribution payments made by the recipient taxable unit. For this purpose, under proposed §1.861-20(d)(3)(v)(B)(*2*), in the case of a taxpayer that is an individual or a domestic corporation, the attribution rules in §1.904-4(f)(2) apply to determine the section 904 separate categories of reattribution amounts received by foreign branches, foreign branch owners, and non-branch taxable units. In the case of a taxpayer that is a foreign corporation, the attribution rules in proposed §1.954-1(d)(1)(iii) (as contained in the 2020 HTE proposed regulations)[1] apply to determine the reattribution amounts received by a tested unit in the tested income and subpart F income groupings of its tested units for purposes of the applying the high-tax exception of section 954(b)(4). Under proposed §1.861-20(d)(3)(v)(B)(*2*), the rules in the 2020 HTE proposed regulations for attributing U.S. gross income to tested units also apply to attribute items of foreign gross income to tested units for purposes of allocating and apportioning the associated foreign income taxes in computing the amount of an inclusion and deemed-paid taxes under sections 951, 951A, and 960.

For purposes of applying all other operative sections, the U.S. gross income that is attributable to a taxable unit is determined under the principles of the foreign branch category rules (for U.S. taxpayers) or the high-tax exception rules (for foreign corporations). The foreign branch category rules of §1.904-4(f)(2) generally attribute U.S. gross income to taxable units on the basis of books and records, as modified to reflect Federal income tax principles, and reattribute U.S. gross income between the general category and the foreign branch category by reason of certain disregarded payments between a foreign branch and its owner, or another foreign branch, that would be deductible if regarded for Federal income tax purposes. The reattribution is made by reference to the statutory and residual groupings of the payor to which the disregarded payment would be allocated and apportioned if it were regarded for Federal income tax purposes.

Proposed §1.954-1(d)(1)(iii), as contained in the 2020 HTE proposed regulations, generally adopts the principles of §1.904-4(f)(2) for purposes of assigning U.S. gross income to tested units of a controlled foreign corporation for purposes of the high-tax exception. However, although §1.904-4(f)(2)(vi) does not treat disregarded interest payments as a disregarded reallocation transaction, under proposed §1.954-1(d)(1)(iii)(B) of the 2020 HTE proposed regulations, disregarded interest payments are treated as reattribution payments to the extent they are deductible for foreign law purposes in the country where the payor taxable unit is a tax resident. Proposed §1.954-1(d)(1)(iii)(B)(*4*) provides that these disregarded interest payments are treated as made ratably out of the payor's current year U.S. gross income to the extent thereof, and provides ordering rules when the same taxable unit both makes and receives disregarded interest payments. Comments are requested on additional ordering rules that should be included in the final regulations, including rules that apply when multiple taxable units both make and receive disregarded payments, such as rules for determining the starting point for assigning reattribution payments received by taxable units, and the order in which particular types of disregarded payments made by taxable units are allocated and apportioned to U.S. gross income (including income attributable to reattribution payments received by the payor taxable unit) of the payor taxable unit. In addition, because proposed §1.861-20(d)(3)(v) more clearly coordinates with the provisions in proposed §1.954-1(d)(1), the proposed regulations propose to update proposed §1.954-1(d)(1)(iv)(A) (as contained in the 2020 HTE proposed regulations) to clarify that the rules in §1.861-20 (rather than the principles of §1.904-6(b)(2)) apply in the case of disregarded payments. In order to achieve consistency with the new tested unit rules in proposed §1.954-1(d) and taxable unit rules in §1.861-20(d)(3)(v), the proposed regulations also contain a modification to the high-tax kickout rules in §1.904-4(c)(4) to provide that the grouping rules at the CFC level are applied on a tested unit (instead of foreign QBU) basis.

Proposed §1.861-20(d)(3)(v)(B)(*3*) provides that the statutory or residual grouping to which foreign gross income of a taxable unit (including foreign gross income that arises from the receipt of a disregarded payment) is assigned is determined without regard to reattribution payments made by the taxable unit, and that no item of foreign gross income is reassigned to another taxable unit by reason of a reattribution payment that reattributes U.S. gross income of the payor taxable unit to another taxable unit by reason of such reattribution payments. Under this rule, if foreign gross income is associated under §1.861-20(d)(1) with a corresponding U.S. item initially attributed to a payor taxable unit, that foreign gross income is always assigned to the grouping that includes the U.S. gross income of that payor taxable unit. The effect of this rule and proposed §1.861-20(d)(3)(v)(B)(*1*) is to allocate and apportion foreign tax imposed on foreign gross income that is as-

[1] References to §1.954-1(d) in these proposed regulations are to proposed §1.954-1(d) as contained in the 2020 HTE proposed regulations.

sociated either with a corresponding U.S. item that is initially attributed to a payor taxable unit or with a reattribution amount that is attributed to a recipient taxable unit (before taking into account reattribution payments made by the recipient taxable unit) to the grouping that includes the U.S. gross income of the taxable unit that paid the foreign tax; no portion of the foreign tax is associated with U.S. gross income that is reattributed to another taxable unit by reason of a reattribution payment.

In the case of foreign income tax imposed on the basis of foreign taxable income for a taxable period (that is, net basis taxes), this rule will generally produce appropriate results because foreign gross income of a taxable unit will generally be reduced by foreign law deductions for disregarded payments made by that taxable unit, so that the amount of the payor's foreign taxable income will approximate the amount of U.S. taxable income attributed to the taxable unit after accounting for reattribution payments made and received by that taxable unit. Foreign gross basis taxes (such as withholding taxes) imposed on foreign gross income of a taxable unit, if not reassigned along with the associated U.S. gross income that is reattributed to another taxable unit as the result of a reattribution payment, however, may in some cases distort the effective foreign tax rate of the payor taxable unit. The Treasury Department and the IRS have determined that rules reattributing foreign gross basis taxes among taxable units by reason of reattribution payments would require complex ordering rules that would be unduly burdensome for taxpayers to apply and for the IRS to administer. Comments are requested on whether the final regulations should include different rules, including anti-abuse rules, to account for the assignment of foreign gross basis taxes paid by taxable units that make disregarded payments.

iii. Remittances and contributions

Similar to the rules in the 2019 FTC proposed regulations, proposed §1.861-20(d)(3)(v)(C)(*1*)(*i*) assigns foreign gross income that arises from a disregarded payment that is treated as a remittance for U.S. tax purposes by reference to the statutory and residual groupings to which the assets of the payor taxable unit are assigned (or would be assigned if the taxable unit were a United States person) under the rules of §1.861-9 for purposes of apportioning interest expense. This rule uses the payor's asset apportionment percentages as a proxy for the accumulated earnings of the payor taxable unit from which the remittance is made. Proposed §1.861-20(d)(3)(v)(C)(*1*)(*ii*) provides that for this purpose the assets of the taxable unit making the remittance are determined in accordance with the rules of §1.987-6(b) that apply in determining the source and separate category of exchange gain or loss on a section 987 remittance, as modified in two respects.

First, for purposes of §1.860-20(d)(3)(v)(C)(*1*)(*i*) the assets of the remitting taxable unit include stock owned by the taxable unit, even though for purposes of section 987 such stock may be treated as owned directly by the owner of the taxable unit. This rule helps to ensure that foreign tax on remittances are properly associated with earnings of corporations that may be distributed through the taxable unit.

Second, proposed §1.861-20(d)(3)(v)(C)(*1*)(*ii*) modifies the determination of assets under §1.987-6(b)(2) to provide that the assets of a taxable unit that give rise to U.S. gross income that is assigned to another taxable unit by reason of a reattribution payment are treated as assets of the recipient taxable unit. The Treasury Department and the IRS have determined that reassigning the tax book value of assets among taxable units in proportion to the U.S. gross income attributed to a taxable unit, after taking into account all reattribution payments made and received by the taxable unit, for purposes of determining the statutory and residual groupings to which foreign tax on a remittance is assigned is appropriate to properly match the foreign tax with the accumulated earnings out of which the remittance is made. In addition, because it uses asset values that are already required to be computed and maintained for other Federal income tax purposes, this reattribution rule is less complicated to apply than a rule that would treat disregarded assets and liabilities as if they were regarded for U.S. tax purposes in applying this rule.

However, the Treasury Department and the IRS acknowledge that any asset method for associating foreign gross income included by the remittance recipient with the payor's accumulated earnings may lead to inexact determinations of the groupings of the accumulated earnings out of which a remittance is paid, particularly when a taxable unit makes a remittance in conjunction with reattribution payments. The potential for distortions exist to the extent the tax book value of assets does not reflect their income-producing value, as in the case of self-developed intangibles the costs of which are currently expensed, as well as to the extent the characterization of the tax book value of an asset based on the income generated by the asset in the current taxable year does not reflect the characterization of the income generated by the asset over time. Comments are requested on whether a different method of determining the statutory and residual groupings to which a remittance is assigned, such as the maintenance of historical accounts of accumulated earnings of taxable units, including adjustments to reflect disregarded payments among taxable units, could produce more accurate results without unduly increasing administrative burdens.

Similar to the rule in the 2019 FTC proposed regulations, proposed §1.861-20(d)(3)(v)(C)(*2*) provides that foreign gross income and the associated foreign tax that arise from the receipt of a contribution are assigned to the residual category, except as provided under the rules for an operative section (such as under proposed §1.904-6(b)(2)(ii), which assigns foreign tax on contributions to a foreign branch to the foreign branch category). Proposed §1.861-20(d)(3)(v)(E)(*2*) defines a contribution as a disregarded transfer of property that would be treated as a transaction described in section 118 or 351 if the recipient taxable unit were treated as a corporation for Federal income tax purposes, or the excess amount of a disregarded payment made to a taxable unit that the payor unit owns over the amount that is treated as a reattribution payment.

Foreign tax paid by a foreign corporation that is allocated and apportioned to the residual category is not eligible to be deemed paid under section 960. See §1.960-1(e). However, because proposed §1.861-20(d)(3)(v) treats most disregarded payments as reattribution payments or

remittances, and contributions (as characterized for corporate law purposes) are rarely subject to foreign tax, the Treasury Department and the IRS expect this rule will have limited application.

Proposed §1.861-20(d)(3)(v)(C)(*3*) provides an ordering rule attributing the amount of foreign gross income that arises from the receipt of a disregarded payment that includes both a reattribution payment and a remittance or contribution first to the portion of the disregarded payment that is a reattribution payment. Any excess amount of the foreign gross income item is attributed to the portion of the disregarded payment that is a remittance or contribution.

In addition, proposed §1.861-20(d)(2)(ii)(D) provides that if an item of foreign gross income arises from an event that for foreign law purposes is treated as a distribution, contribution, accrual, or payment between taxable units, but that is not treated as a disregarded payment for Federal income tax purposes (for example, a consent dividend from a disregarded entity), the foreign gross income and associated foreign tax are assigned in the same way as if a transfer of property in the amount of the foreign gross income item resulted in a disregarded payment in the year the foreign tax is paid or accrued.

Finally, in light of the heightened importance of the rules in §1.904-4(f), which are being applied in connection with §1.861-20 as well as the high-tax exception rules in §1.951A-2(c)(7), the proposed regulations include some technical changes to the rules in §1.904-4(f) that will facilitate this interaction. See Part XI.A of this Explanation of Provisions.

iv. Disregarded payments with respect to disregarded sales of property

Proposed §1.861-20(d)(3)(v)(D) clarifies that an item of foreign gross income attributable to gain recognized under foreign law by reason of a disregarded payment received in exchange for property is characterized and assigned under §1.861-20(d)(2)(ii)(A) of the 2020 FTC final regulations, that is, as a timing difference in the taxation of the property's built-in gain. Proposed §1.861-20(d)(3)(v)(D) further provides that if a taxpayer recognizes U.S. gross income as a result of a disposition of property that was previously received in exchange for a disregarded payment, any item of foreign gross income that the taxpayer recognizes as a result of that same disposition is assigned to a statutory or residual grouping under the U.S. corresponding item rules in §1.861-20(d)(1) of the 2020 FTC final regulations. Because in this situation the seller's basis in the property initially acquired in a disregarded sale is not adjusted for U.S. tax purposes, but is assumed to reflect the purchase price for foreign tax purposes, the assignment of the foreign gross income resulting from the regarded sale of the property is made without regard to any reattribution of the gain that is recognized for U.S. tax purposes under §1.904-4(f)(2)(vi)(A) or (D), which apply to attribute U.S. gross income in the amount of the property's built-in gain at the time of the initial acquisition to the foreign branch or foreign branch owner that originally transferred the property in the disregarded sale. The same result obtains with respect to all taxable units under proposed §1.861-20(d)(3)(v)(B)(*3*).

5. Group-relief regimes

The Treasury Department and the IRS are concerned about the use of certain foreign law group-relief regimes (that is, regimes that allow for the sharing of losses of one member of a group with another member) to create a mismatch in how foreign income taxes are characterized under §1.861-20 for purposes of various operative sections, including sections 245A(d), 904, and 960. Comments are requested on the appropriate treatment of foreign income taxes paid or accrued in connection with the sharing of losses.

VI. *Creditability of Foreign Taxes Under Sections 901 and 903*

A. *Definition of foreign income tax*

1. Background and overview

Section 901 allows a credit for foreign income, war profits, and excess profits taxes, and section 903 provides that such taxes include a tax in lieu of a generally-imposed foreign income, war profits, or excess profits tax.[2] Section 1.901-2, which was originally promulgated in 1983 in TD 7918 (the "1983 final regulations"), sets forth conditions for determining when a foreign levy is a foreign income, war profits, and excess profits tax (collectively, an "income tax") that is creditable under section 901. Under the existing regulations, a foreign levy is an income tax if and only if (1) it is a tax, and (2) the predominant character of that tax is that of an income tax in the U.S. sense. See §1.901-2(a)(1). Under §1.901-2(a)(3), the predominant character of a foreign tax is that of an income tax in the U.S. sense if it meets two requirements: (1) the foreign tax is likely to reach net gain in the normal circumstances in which it applies (the "net gain requirement"), and (2) it is not a "soak-up" tax. To satisfy the net gain requirement, a tax must meet the realization, gross receipts, and net income requirements in §1.901-2(b)(2), (3), and (4), respectively. Under §1.901-2(a)(1), a foreign tax either is or is not a foreign income tax, in its entirety, for all persons subject to the foreign tax. This all-or-nothing rule ensures consistent outcomes for taxpayers and minimizes the administrative burdens on the IRS that would result if the creditability of a foreign tax instead varied depending on each taxpayer's particular facts.

The Treasury Department and the IRS have determined that it is necessary and appropriate to require that a foreign tax conform to traditional international norms of taxing jurisdiction as reflected in the Internal Revenue Code in order to qualify as an income tax in the U.S. sense, or as a tax in lieu of an income tax. As discussed in more detail in Part VI.A.2 of this Explanation of Provisions, this requirement will ensure that the foreign tax credit operates in accordance with its purpose to mitigate double taxation of income that is attributable to a taxpayer's activities or investment in a foreign country.

In addition, the Treasury Department and the IRS have determined that it is necessary and appropriate to revise the net gain requirement in order to better align the regulatory tests with norms reflected

[2] Taxpayers may generally claim a deduction instead of a credit for these foreign taxes, as well as for certain other foreign taxes that do not qualify for the foreign tax credit. See section 164(a).

in the Internal Revenue Code that define an income tax in the U.S. sense, as well as to simplify and clarify the application of the rules. In particular, the existing regulations provide that the net gain requirement is met if a foreign tax reaches net gain in the "normal circumstances" in which it applies. However, this rule leads to inappropriate results and presupposes an empirical analysis requiring access to information that is difficult for taxpayers and the IRS to obtain. Therefore, the proposed regulations narrow the situations in which an empirical analysis is relevant in analyzing the nature of a foreign tax. See Part VI.A.3 of this Explanation of Provisions.

The proposed regulations make other changes to improve or clarify the rules, and to address issues that have arisen since the 1983 final regulations were issued. In particular, the proposed regulations introduce the term "net income tax" to describe foreign levies described in section 901 and the term "foreign income tax" to describe foreign levies described in section 901 or 903. See also Part X.F of this Explanation of Provisions (describing conforming changes made to §§1.960-1 and 1.960-2). Conforming changes to the terms and definitions cross-referenced in other regulations will be made when the proposed regulations are finalized.

The proposed regulations specifically address the treatment of surtaxes and the circumstances in which a source-based withholding tax on cross-border income can qualify as a foreign income tax. The proposed regulations also reorganize the existing regulations to address soak-up taxes as part of the determination of the amount of tax paid, rather than as part of the definition of a foreign income tax, and clarify the rules for determining when a foreign tax is a separate levy. The proposed regulations addressing the amount of tax paid also modify the treatment of refundable credits, clarify the interaction between the rules addressing refundable amounts and multiple levies, and clarify the application of the noncompulsory payment rules with respect to foreign tax law elections. Finally, the proposed regulations revise the definition of a tax in lieu of an income tax. These rules are described in more detail in Parts VI.A.3.v, VI.A.4, VI.A.5, VI.B, and VI.C of this Explanation of Provisions.

The proposed regulations do not include proposed amendments to the rules in §1.901-2A addressing dual capacity taxpayers. However, certain proposed changes to §§1.901-2 and 1.903-1 may impact §1.901-2A. For example, when the proposed regulations are finalized, certain terms that are defined in §1.901-2 and cross-referenced in §1.901-2A will need to be updated. Comments are requested on whether additional changes to §1.901-2A are appropriate in light of the proposed revisions to §§1.901-2 and 1.903-1.

2. Jurisdictional nexus requirement

As a dollar-for-dollar credit against U.S. income tax, the foreign tax credit is intended to mitigate double taxation of foreign source income. This fundamental purpose is served most appropriately if there is substantial conformity in the principles used to calculate the base of the foreign tax and the base of the U.S. income tax. This conformity extends not just to ascertaining whether the foreign tax base approximates U.S. taxable income determined on the basis of realized gross receipts reduced by allocable expenses, but also to whether there is a sufficient nexus between the income that is subject to tax and the foreign jurisdiction imposing the tax. Although prior regulations under section 901 did contain jurisdictional limitations on the definition of an income tax, see §4.901-2(a)(1)(iii) (1980) (requiring that a foreign tax follow "reasonable rules regarding source of income, residence, or other bases for taxing jurisdiction"), the existing regulations do not contain such a rule.

In recent years, several foreign countries have adopted or are considering adopting a variety of novel extraterritorial taxes that diverge in significant respects from traditional norms of international taxing jurisdiction as reflected in the Internal Revenue Code. In addition, the Treasury Department and the IRS have received requests for guidance on whether the definition of foreign income tax includes a jurisdictional limitation, and recommending that the regulations adopt a rule requiring that income subject to foreign tax bear an appropriate connection to a foreign country for a foreign tax to be eligible for the foreign tax credit. In light of these developments, the Treasury Department and the IRS have determined that it is appropriate to revisit the regulatory definition of a foreign income tax to ensure that to be creditable, foreign taxes in fact have a predominant character of "an income tax in the U.S. sense."

The Treasury Department and the IRS have determined that in order to qualify as a creditable income tax, the foreign tax law must require a sufficient nexus between the foreign country and the taxpayer's activities or investment of capital or other assets that give rise to the income being taxed. For example, a tax imposed by a foreign country on a taxpayer's income that lacks a sufficient nexus to such country (such as the lack of operations, employees, factors of production, or management in that foreign country) is not an income tax in the U.S. sense and should not be eligible for a foreign tax credit if paid or accrued by U.S. taxpayers. Such a nexus is required in order for persons and income to be subject to U.S. income tax, and so a similar nexus reflecting the foreign country's exercise of taxing jurisdiction consistent with Federal income tax principles should be required in order for foreign taxes to be eligible for a dollar-for-dollar credit against U.S. income tax.

The proposed regulations therefore require that for a foreign tax to qualify as an income tax, the tax must conform with established international norms, reflected in the Internal Revenue Code and related guidance, for allocating profit between associated enterprises, for allocating business profits of nonresidents to a taxable presence in the foreign country, and for taxing cross-border income based on source or the situs of property (together, the "jurisdictional nexus requirement"). Proposed §1.901-2(c)(1)(i) generally provides that in the case of a foreign country imposing tax on nonresidents, the foreign tax law must determine the amount of income subject to tax based on the nonresident's activities located in the foreign country (including its functions, assets, and risks located in the foreign country). Thus, for example, rules that are consistent with the rules under section 864(c) for taxing income effectively connected with a U.S. trade or business, or with Articles 5 and 7 of the U.S. Model Income

Tax Convention for taxing profits attributable to a permanent establishment, will meet this requirement. However, foreign countries that, for example, impose tax by using as a significant factor the location of customers, users, or any other similar destination-based criterion to allocate profit (for example, by deeming a taxable presence based on the existence of customers) will not satisfy the jurisdictional nexus requirement.

If the foreign tax law imposes tax on a nonresident's income based on the income arising from sources in the foreign country (for example, tax imposed on interest, rents, or royalties sourced in the foreign country and paid to a nonresident), proposed §1.901-2(c)(1)(ii) requires the sourcing rules of the foreign tax law to be reasonably similar to the sourcing rules that apply for Federal income tax purposes. For the avoidance of doubt, the proposed regulations provide that in the case of income from services, the income must be sourced based on the place of performance of the services, not the location of the services recipient.

The jurisdictional nexus requirement for taxing gains from sales or other dispositions of property is separately addressed in proposed §1.901-2(c)(1)(iii), which provides that income from sales or other dispositions of property by nonresidents that do not meet the activities requirement in proposed §1.901-2(c)(1)(i) satisfy the jurisdictional nexus requirement only with respect to gains on the disposition of real property in the foreign country or movable property forming part of the business property of a taxable presence in the foreign country (or from interests in certain entities holding such property). This rule is consistent with the fact that Federal income tax law generally does not tax gains of nonresidents that do not have a trade or business in the United States. See, for example, section 865(a)(2) and (e)(2); §1.871-7(a)(1); see also U.S. Model Income Tax Convention (2016), Art. 13.

A similar rule applies under proposed §1.901-2(c)(2) with respect to determining the income of a resident taxpayer in cases where income of a related entity may be allocated under transfer pricing rules to the resident taxpayer. For the jurisdictional nexus requirement to be satisfied in such a case, the foreign tax law's transfer pricing rules must be determined under arm's length principles. Thus, for example, foreign tax laws that contain transfer pricing rules that are consistent with the arm's length standard under the section 482 regulations, or with the arm's length principle under the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, will satisfy this requirement. However, foreign transfer pricing rules that allocate profits by taking into account as a significant factor the location of customers, users, or any other similar destination-based criterion will not satisfy the jurisdictional nexus requirement. Comments are requested on whether special rules are needed to address foreign transfer pricing rules that allocate profits to a resident on a formulary basis (rather than on the basis of arm's length prices), such as through the use of fixed margins in a manner that is not consistent with arm's length principles. The jurisdictional nexus requirement is not violated when a foreign country imposes tax on the worldwide income of a resident taxpayer, including under controlled foreign corporation regimes that deem income to be included (or distributed) to a resident shareholder (as opposed to allocated directly to the resident under a transfer pricing adjustment). For this purpose, the terms resident and nonresident are defined in proposed §1.901-2(g)(6) and in the case of an entity, the classification is generally based on the entity's place of incorporation or management.

As part of its response to the extraterritorial tax measures referred to in this Part VI.A.2 of the Explanation of Provisions, the Treasury Department has been actively engaged in negotiations with other countries, as part of the OECD/G20 Inclusive Framework on BEPS, to explore the possibility of a new international framework for allocating taxing rights.[3] If an agreement is reached that includes the United States, the Treasury Department recognizes that changes to the foreign tax credit system may be required at that time.

No inference is intended as to the application of existing §§1.901-2 and 1.903-1 to the treatment of novel extraterritorial foreign taxes such as digital services taxes, diverted profits taxes, or equalization levies. In addition, the proposed regulations, when finalized, would not affect the application of existing income tax treaties to which the United States is a party with respect to covered taxes (including any specifically identified taxes) that are creditable under the treaty. Comments are requested on the extent to which the new jurisdictional nexus requirement may impact the treatment of other types of foreign taxes, and on alternative approaches the Treasury Department and the IRS may consider to modify the rules to achieve the policy objectives described in this Part VI.A.2 of the Explanation of Provisions.

3. Net gain requirement

i. Use of empirical analysis

The existing regulations provide that the net gain requirement is met if a foreign tax reaches net gain in the "normal circumstances" in which it applies. See §1.901-2(a)(1). As noted in the preamble to the 1983 final regulations, this rule is based on the standard set forth in *Inland Steel Company v. United States*, 677 F.2d 72 (Ct. Cl. 1982), *Bank of America Nat'l Trust and Savings Ass'n v. United States*, 459 F.2d 513 (Ct. Cl. 1972) ("*Bank of America I*"), and *Bank of America Nat'l Trust and Savings Ass'n v. Comm'r*, 61 T.C. 752 (1974), *aff'd*, 538 F.2d 334 (9th Cir.1976) ("*Bank of America II*"). See TD 7918, 48 FR 46272-01 (1983).

The Treasury Department and the IRS have determined that, in some respects, the empirical analysis contemplated by the existing regulations is unnecessary to identify the essential elements of an income tax in the U.S. sense. In addition, in the absence of specific rules and thresh-

[3] See Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy (January 2020), available at https://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf.

olds in the regulations on how to evaluate empirical data (if even available), both taxpayers and the IRS have had difficulties in applying the existing regulations to foreign taxes in a consistent and predictable manner. In some cases, the reliance on empirical data to determine whether the requirements of the existing regulations are met creates uncertainty and undue burdens for taxpayers and the IRS, considering challenges in obtaining the necessary information. Therefore, the proposed regulations limit the relevance of the "normal circumstances" in which the tax applies, as well as the role of the predominant character analysis, in determining whether a tax meets the various components of the net gain requirement. These changes will lead to more accurate and consistent outcomes and reduce the compliance and administrative burdens of the existing law requirement that taxpayers and the IRS obtain from the foreign government empirical information, such as tax return information for persons subject to the tax, to determine the normal circumstances in which the tax applies.

Instead, proposed §1.901-2(b)(1) generally provides that whether a tax is a foreign income tax is determined under the terms of the foreign tax law, taking into account statutes, regulations, case law, and administrative rulings or other official pronouncements, as modified by treaties. Accordingly, whether a tax satisfies the net gain requirement is generally based on whether the terms of the foreign tax law governing the computation of the tax base meet the realization, gross receipts, and cost recovery requirements that make up the net gain requirement under §1.901-2(a)(3). This approach will better allow taxpayers and the IRS to evaluate the nature of the foreign tax based on objective and readily available information (that is, based on the terms of the foreign tax law, rather than how it is applied in practice), to achieve more consistent and predictable outcomes. Evaluation of the normal circumstances in which the tax applies is still a factor in determining whether specific elements of the net gain requirement are satisfied, but the proposed regulations specifically identify the elements of the requirement for which this type of empirical evidence is relevant.

ii. Realization requirement

Under the existing regulations, a foreign tax generally satisfies the realization requirement if, judged on the basis of its predominant character, it is imposed upon or after the occurrence of events ("realization events") that would result in the realization of income under the Code, or in certain cases, it is imposed on the occurrence of a pre-realization event, such as in the case of a foreign law mark-to-market regime. See §1.901-2(b)(2)(i).

As discussed in Part VI.A.3.i of this Explanation of Provisions, due to the burdens resulting from the requirement to perform an empirical analysis to ascertain the nature of a tax, the proposed regulations provide more specific rules regarding the elements of the requirement for which this type of empirical evidence is relevant. In particular, the Treasury Department and the IRS have determined that the inclusion in the foreign tax base of insignificant amounts of gross receipts that do not meet the realization requirement should not prevent an otherwise-qualifying foreign tax from qualifying as an income tax. Accordingly, proposed §1.901-2(b)(2) provides that if a foreign tax generally meets the various realization requirements described in proposed §1.901-2(b)(2)(i)(A) through (C), except with respect to one or more specific and defined classes of nonrealization events, the tax may still be treated as meeting the realization requirement if the incidence and amounts of gross receipts attributable to the nonrealization events are minimal relative to the incidence and amounts of gross receipts attributable to events covered by the foreign tax that do meet the realization requirement. This determination is made based on the application of the foreign tax to all taxpayers subject to the foreign tax (rather than on a taxpayer-by-taxpayer basis). Therefore, for example, if a foreign tax contains all of the same realization requirements as the Code, but also imposes tax on imputed rent with respect to owner-occupied housing, the foreign tax may still qualify as a foreign income tax if, relative to all of the income of all taxpayers that are subject to the tax, imputed rental income comprises a relatively small amount (even if for some taxpayers, all of their income may constitute imputed rent). Comments are requested on whether the regulations could substitute a more objective standard for identifying acceptable deviations from the realization requirement that would avoid the need for empirical analysis.

Proposed §1.901-2(b)(2)(i)(C) consolidates the rules relating to pre-realization timing differences, including the rule currently in §1.901-2(b)(2)(ii) that foreign taxes imposed on a shareholder on deemed distributions or inclusions (such as inclusions similar to those imposed by U.S. law under subpart F) of income realized by the distributing entity satisfy the realization requirement, so long as a second tax is not imposed on the shareholder on the same income upon the occurrence of a later event (such as an actual distribution). Under proposed §1.901-2(b)(2)(i)(C), because a shareholder-level tax on a distribution from a corporation is imposed on a different taxpayer, the shareholder-level tax is not treated as a second tax on the corporation's income (including income arising from a pre-realization event). For this purpose, proposed §1.901-2(b)(2)(i)(C) provides that a disregarded entity is treated as a taxpayer separate from its owner. Comments are requested on whether there are additional categories of pre-realization timing differences that should be included in the final regulations.

Finally, the Treasury Department and the IRS expect to update the examples illustrating the realization requirement that are contained in §1.901-2(b)(2)(iv) and include them in the regulations when proposed §1.901-2(b)(2) is finalized.

iii. Gross receipts requirement

Under existing §1.901-2(b)(3), a foreign tax satisfies the gross receipts requirement if, judged on the basis of its predominant character, it is imposed on the basis of (1) gross receipts; or (2) gross receipts computed under a method that is likely to produce an amount that is not greater than the fair market value of actual arm's length gross receipts ("the alternative gross receipts test"). See §1.901-2(b)(3)(ii) *Examples 1* and *2*.

The proposed regulations modify the alternative gross receipts test to provide that it is satisfied in the case of tax imposed on deemed gross receipts arising from pre-realization timing difference

events described in proposed §1.901-2(b)(2)(i)(C) (that is, a mark-to-market regime, tax on the physical transfer, processing, or export of readily marketable property, or a deemed distribution or inclusion), or on the basis of gross receipts from a non-realization event that is insignificant and therefore does not cause the foreign tax to fail the realization requirement in proposed §1.901-2(b)(2). Therefore, taxes on insignificant non-realization events or pre-realization timing difference events that satisfy the realization requirement in proposed §1.901-2(b)(2)(i)(C) also satisfy the gross receipts test.

However, the proposed regulations remove the provision referring to gross receipts computed under a method that is "likely" to produce an amount not greater than gross receipts. This rule purports to allow for foreign taxes to be imposed on an amount greater than the amount of income actually realized, or the value of the property being taxed, and the Treasury Department and the IRS have determined that such a tax should not be considered to be a tax on income, since it can be imposed on amounts in excess of actual gross receipts. In addition, the Treasury Department and the IRS have determined that the test is vague, unduly burdensome, and has given rise to controversies requiring taxpayers and the IRS to conduct an empirical evaluation to determine whether a nonconforming statutory method of determining alternative gross receipts is likely not to exceed the fair market value of actual gross receipts. See, for example, *Phillips Petroleum v. Comm'r*, 104 T.C. 256 (1995) (applying the former §1.901-2T (1980) TD 7739). The Treasury Department and the IRS have determined that, other than in the case of insignificant non-realization events, only a tax base determined with reference to realized gross receipts or, in the case of a pre-realization timing difference event, the value or amount of a deemed inclusion or accrual (and not an approximation of gross receipts), should qualify as an income tax in the U.S. sense. In contrast, a tax based on alternative measurements of gross receipts, such as a foreign tax that requires gross receipts to be calculated by applying a markup to costs, fundamentally diverges from the measurement of realized gross receipts under the Internal Revenue Code, and could result in a taxable base that exceeds the amount of income properly attributable to the taxpayer's activities or investment in the foreign country. The revised rule will also minimize the need for empirical analyses, making it simpler for both taxpayers and the IRS to determine whether a tax satisfies the net gain requirement.

This rule is not intended to implicate the allocation of gross income under transfer pricing or branch profit attribution rules, which are instead addressed under proposed §1.901-2(c). Proposed §1.901-2(b)(3)(i) provides that in determining a taxpayer's actual gross receipts, amounts that are properly allocated to such taxpayer under the jurisdictional nexus rules in proposed §1.901-2(c), such as pursuant to transfer pricing rules that properly allocate income to a taxpayer on the basis of costs incurred by that entity, are treated as the taxpayer's actual gross receipts.

iv. Cost recovery requirement

Under the net income requirement in the existing regulations, foreign tax law must permit the recovery of the significant costs and expenses attributable, under reasonable principles, to gross receipts included in the taxable base. A foreign tax law permits the recovery of significant costs and expenses even if such costs and expenses are recovered at a different time than they would be under the Code, unless the time of recovery is such that under the circumstances there is effectively a denial of recovery. Under the "nonconfiscatory gross basis tax" rule in §1.901-2(b)(4) of the existing regulations, which reflects the standard described in *Bank of America I*, a foreign tax whose base is gross receipts or gross income does not satisfy the net income requirement except in the "rare situation" when the tax is almost certain to reach some net gain in the normal circumstances in which it applies because costs and expenses will almost never be so high as to offset gross receipts or gross income, respectively, and the rate of the tax is such that after the tax is paid persons subject to the tax are almost certain to have net gain. Thus, a tax on the gross receipts or gross income of businesses can satisfy the net income requirement in the existing regulations if businesses subject to the tax are almost certain never to incur a loss (after payment of the tax).

The Treasury Department and the IRS have determined that to constitute an income tax for U.S. tax purposes, that is, a tax on net gain, the base of a foreign tax should conform in essential respects to the determination of taxable income for Federal income tax purposes. See, for example, *Keasbey & Mattison Co. v. Rothensies*, 133 F.2d 894, 895 (3d Cir. 1943) (holding that the criteria prescribed by U.S. revenue laws are determinative of the meaning of the term "income taxes" in applying the former version of section 901); and *Comm'r v. American Metal Co.*, 221 F.2d 134, 137 (2d Cir. 1955) (providing that "the determinative question is 'whether the foreign tax is the substantial equivalent of an 'income tax' as that term is understood in the United States'"). The Treasury Department and the IRS have determined that any foreign tax imposed on a gross basis is by definition not an income tax in the U.S. sense, regardless of the rate at which it is imposed or the extent of the associated costs.

In addition, the Treasury Department and the IRS have determined that the empirical standards contained in *Bank of America I* and that are contemplated by the nonconfiscatory gross basis tax rule in the existing regulations create substantial compliance and administrative burdens for taxpayers and the IRS when evaluating whether a foreign tax is an income tax in the U.S. sense. For example, the IRS and taxpayers must obtain foreign tax return information with respect to all persons subject to the tax to determine if persons subject to the tax are almost certain never to incur an after-tax loss. See, for example, *PPL Corp. v. Comm'r*, 135 T.C. 304 (2010), *rev'd*, 665 F.3d 60 (3d Cir. 2011), *rev'd*, 569 U.S. 329 (2013); *Texasgulf, Inc. v. Comm'r*, 107 T.C. 51 (1996), *aff'd*, 172 F.3d 209 (2d Cir. 1999); and *Exxon Corp. v. Comm'r*, 113 T.C. 338 (1999) (applying the empirical analysis required by the regulations).

Therefore, the proposed regulations remove the nonconfiscatory gross basis tax rule. Instead, the proposed regulations provide that whether a tax meets the net gain requirement is made solely on the basis of the terms of the foreign tax law that define the foreign taxable base,

without any consideration of the rate of tax imposed on that base. See proposed §1.901-2(b)(1). In addition, the cost recovery requirement in proposed §1.901-2(b)(4) requires the deductions allowed under the foreign tax law to approximate the cost recovery provisions of the Internal Revenue Code in order for the foreign tax to qualify as an income tax in the U.S. sense. Under proposed §1.901-2(b)(4)(i)(A), a tax that is imposed on gross receipts or gross income, without reduction for any costs or expenses attributable to earning that income, cannot qualify as a net income tax, without regard to whether the empirical impact of the tax is confiscatory, and even if in practice there are no or few costs and expenses attributable to all or particular types of gross receipts included in the foreign tax base. Under this rule, the cost recovery requirement is not satisfied for taxes such as payroll taxes on gross income from wages, but may be satisfied in the case of a personal income tax similar to that imposed under section 1 of the Code on all gross income (including wages), if the foreign country allows taxpayers to reduce such gross income by the substantial costs and expenses that are reasonably attributable to such gross income (taking into account any reasonable deduction disallowance provisions).

Under the "alternative allowance rule" in §1.901-2(b)(4) of the existing regulations, a foreign tax that does not permit recovery of one or more significant costs or expenses, but that provides allowances that effectively compensate for nonrecovery of such significant costs or expenses, is considered to permit recovery of such costs or expenses. The Treasury Department and IRS have determined, however, that the alternative allowance rule fundamentally diverges from the approach to cost recovery in the Internal Revenue Code, and so is inconsistent with an essential element of an income tax in the U.S. sense. Moreover, it is unduly burdensome, and may be impossible as a practical matter, for taxpayers and the IRS to determine whether an alternative allowance under foreign tax law effectively compensates for the nonrecovery of significant costs or expenses attributable to realized gross receipts under that foreign law. The alternative allowance rule in the existing regulations has given rise to controversies between taxpayers and the IRS, and different interpretations by the courts, over whether the rule requires taxpayers to demonstrate that the alternative allowance exceeds disallowed expense deductions for a majority of persons potentially subject to the tax, a majority of persons that actually pay the tax, or for taxpayers in the aggregate, determined by comparing the aggregate amounts of disallowed deductions and alternative allowances reported on the foreign tax returns of all persons subject to the tax. See, for example, *Texasgulf, Inc. v. Comm'r*, 107 T.C. 51 (1996), *aff'd*, 172 F3d 209 (2d Cir. 1999); and *Exxon Corp. v. Comm'r*, 113 T.C. 338 (1999). Therefore, the proposed regulations at §1.901-2(b)(4)(i)(A) modify the alternative allowance rule to treat alternative allowances as meeting the cost recovery requirement only if the foreign tax law expressly guarantees that the alternative allowance will equal or exceed actual costs (for example, under a provision identical to percentage depletion allowed under section 613).

The proposed regulations at §1.901-2(b)(4)(i)(B)(*1*) retain the existing rule that foreign tax law is considered to permit the recovery of significant costs and expenses even if the costs and expenses are recovered at a different time than they would be if the Internal Revenue Code applied, unless the time of recovery is so much later (for example, after the property becomes worthless or is disposed of) as effectively to constitute a denial of such recovery. The regulations clarify that the different time can be either earlier or later than it would be if the Code applied, and that time value of money considerations relating to the economic cost (or value) of accelerating (or deferring) a foreign tax liability are not relevant in determining the amount of recovered costs and expenses.

The proposed regulations also add a new rule to allow a tax to satisfy the cost recovery requirement even if recovery of all or a portion of certain costs or expenses is disallowed, if such disallowance is consistent with the types of disallowances required under the Internal Revenue Code. See proposed §1.901-2(b)(4)(i)(B)(*2*). For example, foreign tax law is considered to permit the recovery of significant costs and expenses even if such law disallows interest deductions equal to a certain percentage of adjusted taxable income similar to the limitation under section 163(j) or disallows interest and royalty deductions in connection with hybrid transactions similar to those subject to section 267A. This new provision is consistent with the rule that principles of U.S. law apply to determine whether a tax is a creditable income tax. See §1.901-2(a)(1)(ii); see also, for example, *Keasbey*, 133 F.2d at 897; and *American Metal*, 221 F.2d at 137.

Finally, proposed §1.901-2(b)(4)(i)(B)(*2*) provides that an empirical analysis of a foreign tax is still pertinent, in part, in determining whether a cost or expense is significant for purposes of the cost recovery requirement. In particular, the significance of a cost or expense is determined based on whether, for all taxpayers to which the foreign tax applies, the item of cost or expense constitutes a significant portion of the total costs or expenses. However, proposed §1.901-2(b)(4)(i)(B)(*2*) adds certainty by providing that costs or expenses related to capital expenditures, interest, rents, royalties, services, and research and experimentation are always treated as significant costs or expenses. The Treasury Department and the IRS have determined that these types of costs represent a substantial portion of expenses typically deducted in computing taxable income for U.S. tax purposes. Requiring a foreign tax law to allow recovery of these costs will increase assurances that the income subject to U.S. and foreign tax is actually subject to double taxation. Because interest expense in particular is a significant cost that under section 864(e)(2) is allocable to all of a taxpayer's worldwide income-producing activities regardless of where it is incurred, a foreign levy that allows, for example, no deduction for interest expense is not an income tax in the U.S. sense, even if U.S. taxpayers record minimal interest expense in foreign countries that restrict its deductibility.

v. Qualifying surtax

The Treasury Department and the IRS have received questions on the appropriate treatment of certain foreign taxes that are computed as a percentage of the tax due under a separate levy that is itself an income tax. To address the treatment of these taxes, proposed §1.901-2(b)(5) adds a rule providing that a foreign tax satisfies

the net gain requirement if the base of the foreign tax is the amount of a foreign income tax.

4. Soak-up taxes

The proposed regulations move the soak-up tax rule from the rules that define a creditable levy to the rules for determining the amount of creditable tax that is considered paid. See proposed §1.901-2(e)(6). Because the rules at existing §§1.901-2(a)(3)(ii) and 1.903-1(b)(2) treat an otherwise creditable levy as a soak-up tax only to the extent it would not be imposed but for the availability of a credit, this change is more consistent with the general structure of the regulations that determine whether a separate levy as a whole qualifies as a creditable tax, and then identifies the amount of a particular taxpayer's foreign tax liability that is paid or accrued and can be claimed as a foreign tax credit.

In addition, the proposed regulations omit the special rule in §1.903-1(b)(2) that limits the portion of a tax in lieu of an income tax that is a soak-up tax to the amount by which the foreign tax exceeds the income tax that would have been paid if the taxpayer had instead been subject to the generally-imposed income tax. The Treasury Department and the IRS have determined that this rule is inconsistent with the rationale for making soak-up taxes not creditable, which is to ensure that the foreign country does not impose a soak-up tax liability that under the existing regulations could be allowed as a foreign tax credit to reduce the taxpayer's U.S. tax liability.

Finally, the Treasury Department and the IRS are reconsidering the examples illustrating the soak-up tax rules that are contained in §§1.901-2(c)(2) and 1.903-1(b)(3) (*Examples 6* and *7*) and expect to include updated examples in the regulations when proposed §1.901-2(e)(6) is finalized. Comments are requested on whether additional issues are presented by currently applicable soak-up taxes that should be addressed in the final regulations.

5. Separate levy determination

Whether a foreign levy is an income tax is determined independently for each separate foreign levy. For purposes of sections 901 and 903, whether a single levy or separate levies are imposed by a foreign country depends on U.S. principles and not on whether foreign law imposes the levy or levies in a single or separate statutes. Section §1.901-2(d)(1) of the existing regulations provides that, where the base of a levy is different in kind, and not merely in degree, for different classes of persons subject to the levy, the levy is considered for purposes of sections 901 and 903 to impose separate levies for such classes of persons.

The proposed regulations revise §1.901-2(d)(1) to clarify the determination of whether a foreign levy is separate from another foreign levy for purposes of determining if a levy meets the requirements of section 901 or 903. The Treasury Department and the IRS have determined that the standards under the existing regulations for making this determination are unclear. In one place the existing regulations state that the only differentiating factor is if the base of the levy is different in kind, as opposed to degree. See, for example, §1.901-2(d)(1) ("foreign levies identical to the taxes imposed by sections 11, 541, 881, 882, 1491, and 3111 of the Internal Revenue Code are each separate levies, because the base of each of those levies differs in kind, and not merely in degree"). However, in the same sentence, the regulations suggest that one levy may be separate from another levy if a different class of taxpayers is subject to each levy, regardless of whether the base of the two levies is different in kind. See, for example, id. ("a foreign levy identical to the tax imposed by section 871(b) of the Internal Revenue Code is a separate levy from a foreign levy identical to the tax imposed by section 1 of the Internal Revenue Code *as it applies to persons other than those described in section 871(b)*" (emphasis added)).

The proposed regulations modify the rules for determining whether a foreign levy is a separate levy to clarify how U.S. principles are relevant in determining whether one foreign levy is separate from another foreign levy. In general, the proposed regulations identify separate levies as those that include different items of income and expense in determining the base of the tax, but in certain circumstances separate levies may result even if the taxable base of each levy is the same. In particular, proposed §1.901-2(d)(1)(i) provides that a foreign levy is always separate from another foreign levy if the levy is imposed by a different foreign tax authority, even if the base of the tax is the same. Proposed §1.901-2(d)(1)(ii) provides the general rule that separate levies are imposed on particular classes of taxpayers if the taxable base is different for those taxpayers. For example, the proposed regulations provide that a foreign levy identical to the tax imposed by section 3101 (employee tax on wage income) is a separate levy from the foreign levy identical to the tax imposed by section 3111 (employer tax on wages paid). Proposed §1.901-2(d)(1)(ii) also provides that income included in the taxable base of a separate levy may also be included in the taxable base of another levy (which may or may not also include other items of income); and separate levies are considered to be imposed if the taxable bases are not combined as a single taxable base. Therefore, a foreign levy identical to the tax imposed by section 1411 is a separate levy from a foreign levy identical to the tax imposed by section 1 because tax is separately imposed on the income included in each taxable base.

Additionally, the proposed regulations at §1.901-2(d)(1)(iii) provide that a foreign levy imposed on nonresidents is treated as a separate levy from that imposed on residents of the taxing jurisdiction, even if the base is the same for both levies, and even if the levies are treated as a single levy under foreign tax law. These changes are intended to ensure that, in general, if a generally-imposed income tax on residents is also imposed on an extraterritorial basis on some nonresidents, in violation of the jurisdictional nexus requirement, only the portion of the levy that applies to nonresidents will not be treated as a foreign income tax. Otherwise, a foreign country's general income tax regime could fail to qualify as a net income tax if the tax was also imposed on an extraterritorial basis on some nonresidents.

Finally, proposed §1.901-2(d)(1)(iii) provides that a withholding tax on gross income of nonresidents is treated as a separate levy with respect to each class of gross income (as listed in section 61) to which it applies. This special rule is provided in order to allow withholding taxes

that are imposed on several classes of income, based on sourcing rules that meet the jurisdictional nexus requirement with respect to only some of the classes of income, to be analyzed as separate levies under the covered withholding tax rule in §1.903-1(c)(2). See Part VI.C.3 of this Explanation of Provisions.

B. *Amount of tax that is considered paid*

1. Background

As discussed in more detail in Part X of this Explanation of Provisions, section 901 allows a credit for foreign income taxes in either the year the taxes are paid or the year the taxes accrue, according to the taxpayer's method of accounting for such taxes. See section 905(a). Regardless of the year in which the credit is allowed, the taxpayer must both owe and actually remit the foreign income tax to be entitled to a foreign tax credit for such tax. See section 905(b); *Chrysler v. Comm'r*, 116 T.C. 465, 469 n.2 (2001), *aff'd*, 436 F.3d. 644 (6th Cir. 2006). The taxpayer's liability for the tax may become fixed and determinable in a different taxable year than that in which the tax is remitted, so that the taxpayer's entitlement to the credit may be perfected in a taxable year after the taxable year in which the credit is allowed.

Section 1.901-2(e) of the existing regulations provides rules for determining the amount of foreign tax that is considered paid and eligible for credit under section 901. The existing regulations at §1.901-2(g)(1) and proposed §1.901-2(g)(5) clarify that the word "paid" as used in §1.901-2(e) means "paid" or "accrued," depending on whether the taxpayer claims the foreign tax credit for taxes paid (that is, remitted) or accrued (that is, for which the liability becomes fixed) during the taxable year. The proposed regulations clarify in several respects the amount of tax that is considered paid (or accrued, as the case may be) and eligible for credit. These clarifications are explained in Parts VI.B.2 and 3 of this Explanation of Provisions.

2. Refundable amounts, credits, and multiple levies

Under §1.901-2(e)(2)(i) of the existing regulations, a payment to a foreign country is not treated as an amount of tax paid to the extent that it is reasonably certain that the amount will be refunded, credited, rebated, abated, or forgiven. That regulation further provides that it is not reasonably certain that an amount will be refunded, credited, rebated, abated, or forgiven if the amount is not greater than a reasonable approximation of the final tax liability to the foreign country.

Current law is unclear whether an amount that is not treated as an amount of tax paid under §1.901-2(e)(5)(i) because it is reasonably certain to be credited against a taxpayer's tentative liability for a second foreign tax should be treated as a constructive refund of the credited amount from the foreign country, followed by a constructive payment by the taxpayer of the second foreign tax. The law is similarly unclear as to whether credits allowed under foreign tax law that are computed with reference to amounts other than foreign tax payments (such as, for example, investment tax credits) may be treated as a constructive receipt of cash by the taxpayer from the foreign country, followed by a constructive payment by the taxpayer of foreign income tax. The results have sometimes differed depending on whether the credit is refundable under foreign law, that is, whether taxpayers are entitled to receive a cash payment from the foreign country to the extent the credit exceeds the taxpayer's foreign income tax liability. See, for example, Rev. Rul. 86-134, 1986-2 C.B. 104 (investment incentives reduced tentative Dutch income tax liability during period in which such incentives could only be claimed as an offset against the income tax liability, rather than as a refundable credit).

The Treasury Department and the IRS have determined that the current uncertainty as to how to properly account for tax credits leads to varying and inconsistent interpretations and that a single, clear rule regarding the treatment of tax credits would improve the consistency in outcomes for taxpayers. In addition, the Treasury Department and the IRS are concerned that if the use of tax credits can be treated as a means of payment of a foreign income tax for foreign tax credit purposes, then foreign countries, rather than reducing their tax rates, could instead offer tax credits that would have the same economic effect without reducing the amount of foreign income tax that is treated as paid by taxpayers for purposes of the foreign tax credit. The Treasury Department and the IRS have also determined it is too administratively challenging to determine whether a foreign country whose law provides for nominally refundable credits in practice actually issues cash payments to taxpayers that do not have income tax liabilities equal to the credit. In addition, the Treasury Department and the IRS have determined that the rule in §1.901-2(e)(2)(i) with respect to amounts that will be "credited" is ambiguous. Section 1.901-2(e)(4)(i) of the existing regulations provides that if, under foreign law, a taxpayer's tentative liability for one levy (the "first levy") is or can be reduced by the amount of the taxpayer's liability for a different levy (the "second levy"), then the amount considered paid by the taxpayer to the foreign country pursuant to the second levy is an amount equal to its entire liability for that levy, and the remainder of the amount paid is considered paid pursuant to the first levy. However, §1.901-2(e)(2)(i) suggests that the credited amount of the second levy is not considered paid.

Therefore, proposed §1.901-2(e)(2)(i) provides certainty on the treatment of credited amounts by eliminating the provision that suggests that an amount of tax is not treated as paid if it is allowed as a credit. Instead, proposed §1.901-2(e)(2)(ii) provides that foreign income tax is not considered paid if it is reduced by a tax credit, regardless of whether the amount of the tax credit is refundable in cash. Therefore, an amount allowed as a credit (including, but not limited to, an amount paid under one levy that is credited against an amount due under another levy) is not treated as a constructive payment of cash from the foreign country (or a constructive refund of the levy that is paid) followed by a constructive payment of the levy that is reduced by the credit, even if the creditable amount is refundable in cash to the extent it exceeds the taxpayer's liability for the levy that is reduced by the credit. However, proposed §1.901-2(e)(2)(iii) provides that overpayments of tax (which exceed the taxpayer's liability and so are not treated as an amount of tax paid) that are refundable in cash at the taxpayer's option and that are applied in satisfac-

tion of the taxpayer's liability for foreign income tax may qualify as an amount of such foreign income tax paid.

Comments are requested on whether additional rules should be provided for government grants that are provided outside of the foreign tax system, and the circumstances in which such grants should also be treated as a reduction in the amount of tax paid.

Finally, as noted in this Part VI.B.2, the multiple levy rule in §1.901-2(e)(4) of the existing regulations provides that when an amount of a second levy is applied as a credit to reduce the taxpayer's liability for a first levy, the full amount of the second levy (and not the amount of the first levy that is offset by the credit) is considered paid. The proposed regulations clarify the multiple levy rule by referring to the first levy as the "reduced levy" and to the second levy as the "applied levy." The proposed regulations also modify an existing example and add a new example to illustrate the application of proposed §1.901-2(e)(2) and (4). See proposed §1.901-2(e)(4)(ii).

3. Noncompulsory payments

i. Background

Section 1.901-2(e)(5) provides that an amount paid is not a compulsory payment, and thus is not an amount of tax paid, to the extent that the amount paid exceeds the amount of the taxpayer's liability under foreign law for tax (the "noncompulsory payment rule"). Section 1.901-2(e)(5) further provides that if foreign tax law includes options or elections whereby a taxpayer's liability may be shifted, in whole or part, to a different year, the taxpayer's use or failure to use such options or elections does not result in a noncompulsory payment, and that a settlement by a taxpayer of two or more issues will be evaluated on an overall basis, not on an issue-by-issue basis, in determining whether an amount is a compulsory amount. In addition, it provides that a taxpayer is not required to alter its form of doing business, its business conduct, or the form of any transaction in order to reduce its liability for tax under foreign law.

On March 30, 2007, proposed regulations (REG-156779-06) were published in the **Federal Register** at 72 FR 15081 that, in part, would amend §1.901-2(e)(5) to treat as a single taxpayer all foreign entities in which the same United States person has a direct or indirect interest of 80 percent or more (a "U.S.-owned foreign group"). The proposed rule (the "2007 proposed regulations") would apply for purposes of determining whether amounts paid are compulsory payments of foreign tax, for example, when one member of a U.S.-owned foreign group surrenders a loss to another member of the group that reduces the foreign tax due from the second member in that year but increases the amount of foreign tax owed by the loss member in a subsequent year. In Notice 2007-95, 2007-2 C.B. 1091, the Treasury Department and the IRS announced that, in reviewing comments received, it was determined that the proposed change may lead to inappropriate results in certain cases and that the proposed change would be effective for taxable years beginning after the publication of final regulations, but that taxpayers may rely on that portion of the proposed regulations for taxable years ending on or after March 29, 2007, and beginning on or before the date on which final regulations are published.

Section 1.909-2 provides an exclusive list of foreign tax credit splitter arrangements, including a loss-sharing splitter arrangement, which exists under a foreign group relief or other loss-sharing regime to the extent a "usable shared loss" of a "U.S. combined income group" (that is, an individual or corporation and all the entities with which it combines income and expense under Federal income tax law) is used to offset foreign taxable income of another U.S. combined income group. See §1.909-1(b)(2).

ii. Treatment of elections and other clarifications

Section 1.901-2(e)(5) currently applies on a taxpayer-by-taxpayer basis, obligating each taxpayer to minimize its liability for foreign taxes over time. The 2007 proposed regulations were intended to create a limited exception to the taxpayer-by-taxpayer approach, recognizing that the net effect of a loss surrender in the case of a group relief regime may be to minimize the amount of foreign taxes paid in the aggregate by the group over time. However, the 2007 proposed regulations were both overinclusive and underinclusive. Comments criticized the approach taken, including how the U.S.-owned foreign group was defined, and noted that the proposal had created uncertainty over the extent to which noncompulsory payment issues arise in situations not addressed by the proposed regulations. In addition, as noted in Notice 2007-95, the Treasury Department and the IRS have determined that the 2007 proposed regulations would lead to inappropriate results in certain cases. Furthermore, a comment received in connection with 2012 temporary regulations issued under section 909 (TD 9597, 77 FR 8127) recommended that the 2007 proposed regulations be withdrawn in light of the coverage of loss-sharing splitter arrangements under the section 909 regulations.

The Treasury Department and the IRS agree that the 2007 proposed regulations should be withdrawn. However, withdrawing the 2007 proposed regulations (which taxpayers were permitted to rely on under Notice 2007-95) without providing additional guidance could result in a disallowance of all foreign tax credits related to loss-sharing arrangements because under §1.901-2(e)(5) the requirement to minimize foreign income tax liability applies on a taxpayer-by-taxpayer basis. To address this issue, proposed §1.901-2(e)(5)(ii)(B)(*2*) provides that when foreign law permits one foreign entity to join a consolidated group, or to surrender its loss to offset the income of another foreign entity pursuant to a foreign group relief or other loss-sharing regime, a taxpayer's decision to file as a consolidated group, to surrender or not to surrender a loss, or to use or not to use a surrendered loss, will not give rise to a noncompulsory payment.

Although the proposed regulations will generally exempt loss surrender under group relief or other loss-sharing regimes from the noncompulsory payment regulations, the Treasury Department and the IRS remain concerned that in certain cases loss sharing arrangements, particularly when combined with hybrid arrangements, may be used to separate foreign taxes from the related income. For example, if passive category income of a CFC is offset for U.S. tax purposes by a loss

recognized by a disregarded entity owned by that CFC, but that loss is surrendered to reduce general category tested income of an affiliated CFC for foreign tax purposes, under §1.909-3(a) the split taxes of the loss CFC may be eligible to be deemed paid if the affiliated CFC's related income is included in the U.S. shareholder's income in the same taxable year, but such taxes may not be properly associated with the related income. Therefore, the Treasury Department and the IRS are considering whether additional guidance on loss sharing arrangements, including for example under §1.861-20, is needed. Comments are requested on this and other aspects of the treatment of loss sharing arrangements.

The existing regulations at §1.901-2(e)(5) provide that where foreign tax law includes options or elections whereby a taxpayer's foreign income tax liability may be shifted to a different year, the taxpayer's use or failure to use such options or elections does not result in a noncompulsory payment. However, the regulations are not clear as to whether the use or failure to use options or elections that result in an overall change in foreign income tax liability over time would result in a noncompulsory payment. For example, a taxpayer's choice to capitalize and amortize capital expenditures over time, rather than to claim a current expense deduction, does not result in a noncompulsory payment; in contrast, a taxpayer's election to compute its tax liability under one of two alternative regimes, one of which qualifies as an income tax and one of which qualifies as a tax in lieu of an income tax, may result in a noncompulsory payment if the taxpayer does not choose the option that is reasonably calculated to minimize its liability for creditable foreign tax over time. Accordingly, proposed §1.901-2(e)(5)(ii) provides that the use or failure to use such an option or election is relevant to whether a taxpayer has minimized its liability for foreign income taxes. However, an exception is provided for elections to surrender losses under a foreign consolidation, group relief or other loss-surrender regime, as well as for an option or election to treat an entity as fiscally transparent or non-fiscally transparent for foreign tax purposes. Because these elections and options generally have the effect of shifting to another entity, rather than reducing in the aggregate, a taxpayer group's foreign income tax liability, the Treasury Department and the IRS have determined that foreign tax credit concerns related to the use or failure to use such an election or option are more appropriately addressed under other rules. The Treasury Department and IRS request comments on whether there are other foreign options or elections that should be excepted from the general rule.

The Treasury Department and IRS are aware that some taxpayers have taken the position that because §1.901-2(e)(5) refers to payments of "foreign taxes," rather than "foreign income taxes," the noncompulsory payment regulations only require taxpayers to minimize their total liability for all foreign taxes in the aggregate (including non-income taxes such as excise taxes), as opposed to minimizing foreign income tax. The Treasury Department and IRS disagree with this interpretation, since §1.901-2(e) defines the amount of "taxes paid" for purposes of section 901, which only applies to creditable foreign income taxes. Accordingly, proposed §1.901-2(e)(5)(i) clarifies that taxpayers are obligated to minimize their foreign income tax liabilities. For example, if a taxpayer may choose to apply a tax credit to reduce either the amount of a creditable income tax or the amount of a non-creditable excise tax, then the proposed regulations require that the taxpayer choose to minimize its liability for the creditable income tax; if instead the taxpayer chooses to apply the credit against the excise tax, income tax in the amount of the applied credit is considered a noncompulsory payment.

Finally, proposed §1.901-2(e)(5)(i) clarifies that the time value of money is not relevant in determining whether a taxpayer has met its obligation to minimize the amount of its foreign income tax liabilities over time. This rule is consistent with the rule in §1.901-2(b)(4), providing that the amount of costs that are treated as recovered in computing the base of a foreign tax is the same, regardless of whether a taxpayer chooses to deduct currently, or to capitalize and amortize, a particular expense. Therefore, for example, if a taxpayer subject to foreign income tax at a rate of 20 percent chooses to capitalize a $100x cost and deduct it ratably over five years rather than to deduct the entire $100x cost in the first year, the full $100x cost is considered recovered under either option, and is not affected by the fact that as an economic matter the present value of the $20x reduction in tax liability by reason of the $100x deduction in the first year exceeds the discounted present value of the same $20x reduction in tax spread over five years. Similarly, under proposed §1.901-2(e)(5)(i), the taxpayer will be treated as paying the same amount of foreign income tax regardless of whether it chooses to pay that amount in the current tax year or in a later year.

Although the Treasury Department and the IRS understand that time value of money considerations have economic effects, for Federal income tax purposes income and expenses (including taxes) generally are neither discounted nor indexed by reference to time value of money considerations. A regime that required taxpayers to minimize the discounted present value, rather than the nominal amount, of foreign income tax liabilities would be complex, requiring assumptions about future tax rates and appropriate discount rates. Similarly, a regime that required taxpayers to compare the discounted present value of a foreign tax credit for a foreign income tax to the discounted present value of a deduction for an alternative payment of non-creditable tax that would be incurred in a different year and select the option that minimized the cost to the U.S. fisc would be comparably complex and burdensome for taxpayers to apply and for the IRS to administer. Accordingly, the proposed regulations provide that economic considerations related to the discounted present value of U.S. and foreign tax benefits are not taken into account for purposes of determining the amount of cost recovery or the amount of foreign income tax that is, or would be under foreign tax law options available to the taxpayer, paid or accrued over time.

C. *Tax in lieu of income tax*

1. In general

Section 903 provides that, for purposes of the foreign tax credit, the term "income, war profits, and excess profits taxes" includes a tax paid in lieu of an income tax

otherwise generally imposed by any foreign country or by any possession of the United States (an "in lieu of tax"). The existing regulations clarify that the foreign country's purpose in imposing the foreign tax (for example, whether it imposes the foreign tax because of administrative difficulty in determining the base of the income tax otherwise generally imposed) is immaterial. See §1.903-1(a). The existing regulations further provide that it is immaterial whether the base of the foreign tax bears any relation to realized net income and that the base may, for example, be gross income, gross receipts or sales, or the number of units produced or sold. See §1.903-1(b)(1). The existing regulations also require that the foreign tax meet a substitution requirement, which is satisfied if the tax in fact operates as a tax imposed in substitution for, and not in addition to, an income tax or a series of income taxes otherwise generally imposed. See id.

The proposed regulations revise the substitution requirement by more specifically defining the circumstances in which a foreign tax is considered "in lieu of" a generally-imposed income tax, consistent with the interpretation of the substitution requirement in prior judicial decisions. See, for example, *Metro. Life Ins. Co. v. United States*, 375 F.2d 835, 838-40 (Ct. Cl. 1967). In addition, the proposed regulations provide that an in lieu of tax under section 903, by virtue of the substitution requirement, must also satisfy the jurisdictional nexus requirement described in proposed §1.901-2(c). Although prior regulations under section 903 did contain a jurisdictional limitation with respect to in lieu of taxes, see §4.903-1(a)(4) (1980) (requiring that an in lieu of tax follow "reasonable rules of taxing jurisdiction within the meaning of §4.901-2(a)(1)(iii)"), the existing regulations do not contain such a rule. The reasons for adopting a jurisdictional nexus requirement under §1.901-2, as described in Part VI.A.2 of this Explanation of Provisions, apply equally to in lieu of taxes described in section 903. In addition, this rule is necessary to ensure that a foreign tax that is imposed on net gain but that fails the jurisdictional nexus requirement in §1.901-2 cannot be converted into a creditable tax under section 903 simply by being imposed on a taxable base other than income (such as a tax on gross receipts).

Furthermore, the proposed regulations include a special rule for certain cross-border source-based withholding taxes in order to clarify the application of the substitution requirement to such taxes. The rules in proposed §1.903-1 apply independently to each separate levy. Therefore, if a separate levy is an in lieu of tax, and a second levy is later enacted by the same foreign country, such second levy may also qualify as an in lieu of tax if the requirements in proposed §1.903-1 are met.

2. Substitution requirement

The foreign tax that is being analyzed under section 903 (the "tested foreign tax") satisfies the substitution requirement only if, based on the foreign tax law, four tests are met. First, as under the existing regulations, a separate levy that is a foreign income tax described in §1.901-2(a)(3) (a "foreign net income tax") must be generally imposed by the same foreign country (a "generally-imposed net income tax"). See proposed §1.903-1(c)(1)(i).

Second, proposed §1.903-1(c)(1)(ii) requires that neither the generally-imposed net income tax nor any other separate levy that is a foreign net income tax imposed by the same foreign country that imposes the tested foreign tax is imposed with respect to any portion of the income to which the amounts (such as sales or units of production) that form the base of the tested foreign tax relate (the "excluded income"). For example, if a tonnage tax regime applies with respect to a taxpayer engaged in shipping, income from shipping must be excluded from the foreign country's regular net income tax for the tonnage tax to qualify as an in lieu of tax. This requirement is not met if, under the foreign tax law, a net income tax imposed by the same foreign country applies to the excluded income of any persons that are subject to the tested foreign tax, even if not all of the persons subject to the tested foreign tax are subject to the net income tax.

Third, proposed §1.903-1(c)(1)(iii) requires that, but for the existence of the tested foreign tax, the generally-imposed net income tax would be imposed on the excluded income. For example, if a tonnage tax regime applies with respect to a taxpayer engaged in shipping, it must be shown that, but for the existence of such regime, the regular income tax would apply to income from shipping. This "but for" requirement is met only if the imposition of the tested foreign tax bears a "close connection" to the failure to impose the generally-imposed net income tax on the excluded income. See *Metro. Life Ins. Co*, 375 F.2d at 840.

The proposed regulations provide that the close connection requirement is satisfied if the generally-imposed net income tax would apply by its terms to the excluded income but for the fact that it is expressly excluded. For example, if a corporate income tax regime would, by its terms, apply to all corporations, but income of insurance companies is expressly excluded by law under such regime and taxed under a separate regime, then the close connection requirement is met.

Otherwise, a close connection must be established with proof that the foreign country made a "cognizant and deliberate choice" to impose the tested foreign tax instead of the generally-imposed net income tax. Id. Such proof may take into account the legislative history of either the tested foreign tax or the generally-imposed net income tax for purposes of ascertaining the intent and purpose of the two taxes in order to determine the relationship between them.

Not all income derived by persons subject to the tested foreign tax need be excluded income, as long as the tested foreign tax applies only to amounts that relate to the excluded income. For example, if a taxpayer that earns income from operating restaurants and hotels is subject to a generally-imposed net income tax except that, pursuant to an agreement with the foreign country, the taxpayer's income from restaurants is subject to a tax based on number of tables and not to the income tax, the table tax can meet the substitution requirement notwithstanding that the hotel income is subject to the generally-imposed net income tax.

Fourth, proposed §1.903-1(c)(1)(iv) requires that, if the generally-imposed net income tax were applied to the excluded income, the generally-imposed net income tax would either continue to qualify as a foreign net income tax, or would itself

constitute a separate levy that is a foreign net income tax. This rule is intended to ensure that a foreign tax can qualify as an in lieu of tax only if the foreign country imposing the tax could instead have subjected the excluded income to a tax on net gain that would satisfy the jurisdictional nexus requirement in §1.901-2(c).

Finally, proposed §1.861-20(h) provides a rule for allocating and apportioning foreign taxes described in section 903 (other than withholding taxes) to statutory and residual groupings. In general, the rule provides that the in lieu of tax is allocated and apportioned in the same proportions as the excluded income.

3. Covered withholding tax

Gross-basis taxes, such as withholding taxes, do not satisfy the net gain requirement under proposed §1.901-2(b). While such withholding taxes may be treated as in lieu of taxes under section 903, the analysis under section 903 and existing §1.903-1 is unclear. Therefore, proposed §1.903-1(c)(2) provides a special rule for applying the substitution requirement to certain "covered withholding taxes" imposed by a foreign country that also has a generally-imposed net income tax.

First, the tax must be a withholding tax (as defined in section 901(k)(1)(B)) that is imposed on gross income of persons who are nonresidents of the foreign country imposing the tax. See proposed §1.903-1(c)(2)(i).

Second, the tax cannot be in addition to a net income tax that is imposed by the foreign country on any portion of the income subject to the withholding tax. See proposed §1.903-1(c)(2)(ii). Thus, for example, if a withholding tax applies by its terms to certain gross income of nonresidents that is also subject to the generally-imposed net income tax if it is attributable to a taxable presence of the nonresident in the foreign country imposing the tax, the withholding tax cannot meet the substitution requirement, including as to nonresidents that do not have a taxable presence in that country.

Third, the withholding tax must meet the source-based jurisdictional nexus requirement in proposed §1.901-2(c)(1)(ii), requiring that rules for sourcing income to the foreign country are reasonably similar to the sourcing rules that apply for Federal income tax purposes (including that services income is sourced to the place of performance). Similar to the rule in proposed §1.903-1(c)(1)(iv) requiring that the generally-imposed net income tax, if expanded to cover the excluded income, would continue to qualify as a net income tax under §1.901-2, proposed §1.903-1(c)(2)(iii) requires that the income subject to the withholding tax satisfies the source requirement described in §1.901-2(c)(1)(ii).

VII. *Rules for Allocating Taxes after Certain Ownership and Entity Classification Changes*

A. *Background*

On February 14, 2012, the **Federal Register** published final regulations (77 FR 8124, TD 9576) under section 901 concerning the determination of the person who pays a tax for foreign tax credit purposes (the "2012 final regulations"). The 2012 final regulations address the inappropriate separation of foreign income taxes from the income on which the tax was imposed in certain circumstances. The 2012 final regulations provide rules for allocating foreign tax imposed on the combined income of multiple persons, as well as rules for allocating entity-level foreign tax imposed on partnerships and disregarded entities that undergo ownership or certain entity classification changes that do not cause the foreign taxable year of the partnership or disregarded entity (the "continuing foreign taxable year") to close.

Section 1.901-2(f)(4)(i) of the 2012 final regulations addresses partnership terminations under section 708(b)(1) that do not cause the foreign taxable year to close. Under this provision, foreign tax paid or accrued with respect to the continuing foreign taxable year (for example, in the case of a section 708(b)(1) termination, foreign tax paid or accrued by a successor corporation or owner of a disregarded entity) is allocated between each terminating partnership and successor entity (or, in the case of a partnership that becomes a disregarded entity, the owner of the disregarded entity). The allocation is based upon the respective portions of the foreign tax base that are attributable under the principles of §1.1502-76(b) to the period of existence of the terminating partnership and successor entity or the period of ownership by a disregarded entity owner during the continuing foreign taxable year. Section 1.901-2(f)(4)(i) also provides similar rules for allocating foreign tax paid or accrued by a partnership among the respective portions of the partnership's U.S. taxable year that end with, and begin after, a change in a partner's interest in the partnership that does not result in a partnership termination (a variance).

Section 1.901-2(f)(4)(ii) of the 2012 final regulations addresses a change in the ownership of a disregarded entity that does not cause the foreign taxable year of the entity to close. Under this rule, foreign tax paid or accrued with respect to the foreign taxable year is allocated between the transferor and transferee of the disregarded entity. The allocation is made based on the respective portions of the foreign tax base that are attributable under the principles of §1.1502-76(b) to the period of ownership of each transferor and transferee.

B. *Covered events*

The proposed regulations move the §1.901-2(f)(4) allocation rules that apply in the case of partnership terminations and variances and other ownership and entity classification changes to new §1.901-2(f)(5), and modify those rules to ensure that they cover any entity classification change under U.S. tax law that does not cause the entity's foreign taxable year to close. The proposed regulations also clarify certain aspects of the 2012 final regulations. The general legal liability rules for taxes imposed on partnerships and disregarded entities are now contained in proposed §1.901-2(f)(4) and are generally unchanged from the 2012 final regulations.

Proposed §1.901-2(f)(5)(i) provides a single allocation rule that applies to a partnership, disregarded entity, or corporation that undergoes one or more "covered events" during its foreign taxable year that do not result in a closing of the foreign taxable year. Under proposed §1.901-2(f)(5)(ii), a covered event is a partnership termination under section 708(b)(1), a transfer of a disregarded entity, or a change in the entity classification of a

disregarded entity or a corporation. These proposed regulations therefore apply to allocate foreign tax paid or accrued with respect to the continuing foreign taxable year of a partnership that terminates under section 708(b)(1), a disregarded entity that becomes a partnership or a corporation, and a corporation that becomes a partnership or a disregarded entity. In addition, proposed §1.901-2(f)(5)(iv) allocates foreign tax paid or accrued with respect to certain changes in a partner's interest in a partnership (a "variance") by treating the variance as a covered event.

These proposed regulations also ensure that the allocation rules apply not just in the case of one or more covered events of the same type within a continuing foreign taxable year, but also in the case of any combination of covered events. For example, proposed §1.901-2(f)(5) applies to foreign tax that is paid or accrued with respect to a continuing foreign taxable year in which a corporation elects to be treated as a disregarded entity and the disregarded entity subsequently becomes a partnership. A portion of foreign tax is allocated among all persons that were predecessor entities (namely, a terminating partnership or corporation undergoing an entity classification change) or prior owners (namely, the owner of a disregarded entity that is transferred or undergoes an entity classification change) during the continuing foreign taxable year. Like the rules provided in the 2012 final regulations, the allocation is made based on the respective portions of the foreign tax base for the continuing foreign taxable year that are attributable under the principles of §1.1502-76(b) to the period of existence or ownership of each predecessor entity or prior owner during such year.

C. *Timing of the payment or accrual of an allocated tax*

These proposed regulations also provide consistent rules for when allocated tax is treated as paid or accrued. Proposed §1.901-2(f)(5)(i) provides that tax allocated to a predecessor entity is treated as paid or accrued as of the close of the last day of its last U.S. taxable year, and that tax allocated to the prior owner of a disregarded entity is treated as paid or accrued as of the close of the last day of its U.S. taxable year in which the change in ownership occurs.

D. *Treatment of withholding taxes*

The 2012 final regulations do not clearly state whether foreign withholding taxes are subject to the allocation rules. As explained in Part VI.A of this Explanation of Provisions, foreign taxes are allocated based on the portion of the foreign tax base that is attributed to the period of existence or ownership of each predecessor or prior owner during the foreign taxable year, applying the principles of §1.1502-76(b). The principles of §1.1502-76(b) allow taxpayers to use either a closing of the books method or a ratable allocation method in attributing the foreign tax base to these periods.

If the ratable allocation method is used, foreign tax is generally allocated to a predecessor entity or prior owner based on its ratable share of the foreign tax base for the continuing foreign taxable year. In the case of net basis foreign tax paid or accrued by a new owner or successor entity with respect to a continuing foreign taxable year, the resulting allocation of a portion of the tax to a predecessor entity or prior owner is appropriate because the predecessor entity or prior owner generally took into account for U.S. tax purposes a portion of the related income on which the net basis tax was imposed. However, in the case of withholding tax that is imposed on an amount that accrues for U.S. tax purposes when it is paid, such as a dividend, an allocation of a portion of the withholding tax based on ratably allocating the dividend income over the foreign taxable year to a predecessor entity or prior owner is not appropriate because the predecessor entity or prior owner will not have taken any of the related dividend income into account for U.S. tax purposes. Even if withholding tax is imposed on income, such as interest, that accrues for U.S. tax purposes ratably over a period, an allocation of a portion of the withholding tax to a predecessor entity or prior owner based on ratably allocating the interest income over the foreign taxable year may not be appropriate if the foreign taxable year is not the same period as the accrual period under the terms of the instrument that generated the interest.

Because applying the ratable allocation method under proposed §1.901-2(f)(5) to allocate withholding taxes to a predecessor entity or prior owner may separate withholding taxes from income that accrues when paid, and may not achieve appropriate matching of withholding taxes and related income in the case of withholding tax imposed on income that accrues over a period, these proposed regulations provide that withholding taxes paid in the foreign taxable year of a covered event are not subject to allocation under proposed §1.901-2(f)(5).

E. *Elections under sections 336(e) and 338*

Sections 1.336-2(g)(3)(ii) and 1.338-9(d) provide rules for allocating foreign tax between old target and new target where a section 336(e) election or 338 election, respectively, is in effect with respect to the sale, exchange, or distribution of the target and the transaction does not cause old target's foreign taxable year to close. The proposed regulations clarify that, in the case of a section 338 election, the allocation is made with respect to the portions of the foreign tax base that are attributable under §1.1502-76(b) principles to old target and new target, and clarify how the allocation is made if there are multiple transfers of the stock of target that are each subject to a separate section 338 election during the foreign taxable year. The proposed regulations also provide that if a section 338 election is made for target and target holds an interest in a disregarded entity or partnership, the rules of §1.901-2(f)(4) and (5) apply to determine the person who is considered for Federal income tax purposes to pay foreign income tax imposed at the entity level on the income of the disregarded entity or partnership. In addition, the proposed regulations clarify that withholding tax is not subject to allocation. Finally, the proposed regulations make a conforming change to the allocation rules that apply where a section 336(e) election is in effect by providing that withholding taxes are not subject to allocation.

VIII. *Transition Rules Accounting for NOL Carrybacks*

A. *Background*

The 2019 FTC final regulations provide transition rules for assigning any separate

limitation loss ("SLL") or overall foreign loss ("OFL") accounts in a pre-2018 separate category to a post-2017 separate category. The regulations also provide transition rules for how an SLL or OFL that reduced pre-2018 general category income is recaptured in post-2017 years, and for how to treat foreign losses that are part of general category net operating losses ("NOLs") incurred in pre-2018 taxable years that are carried forward to post-2017 taxable years. See §1.904(f)-12(j).

The transition rules included in the 2019 FTC final regulations did not address post-2017 NOL carrybacks to pre-2018 taxable years because section 172 generally did not allow for NOL carrybacks when the 2019 FTC final regulations were issued. However, on March 27, 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, 134 Stat. 281 (2020) (the "CARES Act"), which revised section 172(b) to allow taxpayers to carry back, for five years, NOLs incurred in 2018 through 2020.

B. *Rule for post-2017 NOL carrybacks*

The proposed regulations provide rules analogous to the existing transition rules in §1.904(f)-12(j) to situations involving an NOL arising in a post-2017 taxable year that is carried back to a pre-2018 taxable year. In particular, proposed §1.904(f)-12(j)(5)(i) confirms that the rules of §1.904(g)-3(b) apply to the NOL carryback, and provides that income in a pre-2018 separate category in the taxable year to which the NOL is carried back is generally treated as if it included only income that would be assigned to the same separate category in post-2017 taxable years. Therefore, any SLL created by reason of a passive category component of a post-2017 NOL that is carried back to offset pre-2018 general category income will be recaptured in post-2017 taxable years as general category income, and not as a combination of post-2017 general, foreign branch, or section 951A category income.

However, in order to reduce the potential for creating SLLs by reason of the carryback of a post-2017 NOL component in the foreign branch category or section 951A category to a pre-2018 taxable year, the proposed regulations provide that such losses will first ratably offset a taxpayer's general category income in the carryback year, to the extent thereof, and that no SLL account will be created as a result of that offset. The amount of income in the general category available to be offset under this rule is determined after first offsetting the general category income in the carryback year by a post-2017 NOL component in the general category that is carried back to the same year.

IX. *Foreign Tax Credit Limitation Under Section 904*

A. *Revisions to definition of foreign branch category income*

The proposed regulations revise certain aspects of the foreign branch category income rules in §1.904-4(f) to account for a broader range of disregarded payments, as well as to better coordinate with the rules in §1.861-20 and the elective high-tax exception rules in proposed §1.954-1(d) of the 2020 HTE proposed regulations (85 FR 44650).

Section 904(d)(2)(J)(i) defines foreign branch category income as business profits of a United States person that are attributable to qualified business units in foreign countries. Section 1.904-4(f)(2)(ii) and (iii) of the 2019 FTC final regulations provide that income attributable to a foreign branch does not include income arising from activities carried out in the United States or income arising from stock that is not dealer property. Section 1.904-4(f)(1)(ii) of the 2019 FTC final regulations, reflecting section 904(d)(2)(J)(ii), provides that passive category income is excluded from foreign branch category income. These rules exclude from foreign branch category income for purposes of section 904 income generated by assets that may be owned through the foreign branch and reflected on its books and records, but that is not properly characterized as business profits attributable to foreign branch activities.

In contrast, in the different context of applying the disregarded payment rules in proposed §1.861-20(d)(3)(v) or proposed §1.954-1(d), which rely on the rules in §1.904-4(f), such income is properly attributed to a taxable unit or a tested unit, respectively, for purposes of those provisions. In order to facilitate the incorporation by cross-reference of the rules and principles in §1.904-4(f) for attributing income to taxable units for purposes of other provisions, the proposed regulations move the exclusions for income arising from U.S. activities and stock to §1.904-4(f)(1)(iii) and (iv), respectively, and modify the language to provide that such income may be attributable to a foreign branch but is always excluded from foreign branch category income. See also Part V.F.4 of this Explanation of Provisions (discussing the rules in proposed §1.861-20(d)(3)(v)(B)(*2*) for attributing income to taxable units). This technical change does not reflect any reconsideration by the Treasury Department and the IRS of the determination in the 2019 FTC final regulations that income arising from U.S. activities and stock do not constitute business profits that are attributable to foreign branches within the meaning of section 904(d)(2)(J).

Proposed §1.904-4(f)(2)(vi)(G) provides that the disregarded reallocation payment rules generally apply in the case of disregarded payments made to and from a "non-branch taxable unit" (as defined in proposed §§1.904-4(f)(3) and 1.904-6(b)(2)(i)(B)), which includes certain persons and interests that do not meet the definition of a foreign branch or foreign branch owner. This change accounts for the fact that disregarded payments may occur among, for example, foreign branches, foreign branch owners, and disregarded entities that have no trade or business (and are therefore not foreign branches). In order to attribute gross income to a foreign branch or a foreign branch owner, disregarded payments to and from non-branch taxable units must cause the reattribution of current gross income to the same extent as disregarded payments to and from foreign branches and foreign branch owners. The gross income attributed to a non-branch taxable unit after taking into account all the disregarded payments that it makes and receives must then be further attributed to a foreign branch (if it is part of a "foreign branch group"), or foreign branch owner (if it is part of a "foreign branch owner group"), to the extent of its ownership of the non-branch taxable unit. For this purpose, a non-branch taxable unit is part of either a foreign branch group or a foreign branch owner group

to the extent it is owned, including indirectly through other non-branch taxable units, by a foreign branch or a foreign branch owner, respectively. The gross income that is attributed to the members of a foreign branch group is attributed to the foreign branch that owns the group, and the gross income that is attributed to the members of a foreign branch owner group is attributed to the foreign branch owner that owns the group.

The proposed regulations also clarify that the reattribution of gross income by reason of disregarded payments is capped at the amount of current gross income in the payor foreign branch or foreign branch owner. See proposed §1.904-4(f)(2)(vi)(A).

Finally, the proposed regulations include more detailed rules on the treatment of payments between foreign branches, and provide an example illustrating the application of the matching rule in §1.1502-13 to the rules in §1.904-4(f)(2)(vi) in response to a comment received with respect to the 2019 FTC proposed regulations. See proposed §1.904-4(f)(4)(xiii) through (xv) (*Examples 13* through *15*).

B. *Financial services entities*

Section 904(d)(2)(D)(i) provides that financial services income can only be received or accrued by a person "predominantly engaged in the active conduct of a banking, insurance, financing, or similar business." The 2019 FTC proposed regulations modified the definition of a financial services entity ("FSE") by adopting a definition of "predominantly engaged in the active conduct of a banking, insurance, financing, or similar business" and "income derived in the active conduct of a banking, insurance, financing, or similar business." As discussed in the preamble to the 2020 FTC final regulations, in response to comments made in response to the 2019 FTC proposed regulations, the Treasury Department and the IRS determined that these provisions of the 2019 FTC proposed regulations should be revised and reproposed to provide an additional opportunity for comment.

The proposed regulations retain the general approach of the existing §1.904-4(e) final regulations by providing a numerical test whereby an entity is a financial services entity if more than a threshold percentage of its gross income is derived directly from active financing income, and the regulations continue to contain a list of income that qualifies as active financing income. However, the proposed regulations lower the threshold from 80 percent to 70 percent, and further provide that active financing income must generally be earned from customers or other counterparties that are not related parties. These changes will promote simplification and greater consistency between Code provisions that have complementary policy objectives, while still taking into account the differences between sections 954 and 904. The modified rule also makes clear that internal financing companies do not qualify as financial services entities if 70 percent or less of their gross income meets the unrelated customer requirement. In addition, the proposed regulations modify §1.904-5(b)(2) to provide that the look-through rules in §1.904-5 apply in all cases to assign related party payments attributable to passive category income to the passive category, including in the case of related party payments made to a financial services entity. Comments are requested on the treatment of related party payments in the numerator and denominator of the 70-percent gross income test, and whether related party payments should in some cases constitute active financing income.

In the case of an insurance company's income from investments, the Treasury Department and the IRS recognize that an insurance company must hold passive investment assets to support its insurance obligations, including capital and surplus in addition to insurance reserves, to ensure the company's ability to satisfy insurance liabilities if claims are greater than anticipated or investment returns are less than anticipated. However, the Treasury Department and the IRS have determined that limits on the amount of an insurance company's investment income that may be treated as active financing income are appropriate in cases where an insurance company holds substantially more investment assets and earns substantially more passive investment income than necessary to support its insurance business. Thus, proposed §1.904-4(e)(2)(ii) imposes a cap on the amount of an insurance company's income from investments that may be treated as active financing income. The cap is determined based on an applicable percentage of the insurance company's total insurance liabilities. If investment income exceeds the insurance company's investment income limitation, investment income in excess of the limitation is not considered ordinary and necessary to the proper conduct of the company's insurance business and will not qualify as active financing income.

The Treasury Department and the IRS request comments on the investment income limitation rule and in particular on whether the applicable percentages selected for life and nonlife insurance companies are reasonable.

X. *Sections 901(a) and 905(a)—Rules Regarding When the Foreign Tax Credit Can Be Claimed*

A. *Background*

Section 901(a) provides that a taxpayer has the option, for each taxable year, to claim a credit for foreign income taxes paid or accrued to a foreign country in such taxable year, subject to the limitations under section 904. Alternatively, a taxpayer may deduct the foreign income taxes under section 164(a)(3). The deduction and credit for foreign income taxes are mutually exclusive; section 275(a)(4) provides that no deduction shall be allowed for foreign income taxes if the taxpayer chooses to take to any extent the benefits of section 901. Section 1.901-1(c) of the existing regulations, which clarifies the application of section 275(a)(4), provides that if a taxpayer chooses with respect to any taxable year to claim a credit for taxes to any extent, such choice will be considered to apply to all taxes paid or accrued in such taxable year to all foreign countries, and no portion shall be allowed as a deduction in such taxable year or any succeeding taxable year.

Section 901(a) further provides that the choice to claim the foreign tax credit for any taxable year "may be made or changed at any time before the expiration of the period prescribed for making a claim for credit or refund of the tax imposed by this chapter for such taxable year." Section 6511 prescribes the periods

for making a claim for credit or refund of U.S. tax. The default period under section 6511(a) is three years from the time the taxpayer filed the relevant return or two years from when the tax is paid, whichever is later. Section 6511(d) sets forth special periods of limitation for making a claim of credit or refund of U.S. tax that is attributable to particular attributes. Under section 6511(d)(3), if the refund relates to an overpayment attributable to any taxes paid or accrued to any foreign country for which credit is allowed under section 901, the taxpayer has 10 years from the un-extended due date of the return for the taxable year in which the foreign taxes are paid or accrued to file the claim. See §301.6511(d)-3. Section 6511(d)(2) sets out a special limitations period for refund claims "attributable to a net operating loss carryback" of three years from the due date of the return for the year in which the net operating loss originated. The existing regulations at §1.901-1(d) provide that a taxpayer can claim the benefits of section 901 (or claim a deduction in lieu of a foreign tax credit) at any time before the expiration of the period prescribed by section 6511(d)(3)(A).

Section 905(a) and §1.905-1(a) of the existing regulations provide that a taxpayer may claim a credit for foreign income taxes either in the year the taxes accrue or in the year the taxes are paid, depending on the taxpayer's method of accounting. Sections 1.446-1(c) and 1.461-1 provide rules for when income and liabilities are taken into account for taxpayers using the cash receipts and disbursement method of accounting (cash method) and for taxpayers using the accrual method of accounting. Under §1.461-1(a)(1), cash method taxpayers generally take into account allowable deductions in the taxable year in which paid. For accrual method taxpayers, §1.461-1(a)(2) provides that liabilities are taken into account in the taxable year in which all the events have occurred that establish the fact of the liability, the amount of the liability can be determined with reasonable accuracy, and economic performance has occurred with respect to the liability. If the liability of a taxpayer is to pay a tax, economic performance occurs as the tax is paid to the governmental authority that imposed the tax. See §1.461-4(g)(6)(i). However, in the case of foreign income taxes, economic performance occurs when the requirements of the all events test, other than economic performance, are met, whether or not the taxpayer elects to credit such taxes under section 901. See §1.461-4(g)(6)(iii)(B). In the case of foreign income taxes imposed on the basis of a taxable period, because all of the events that fix the fact and amount of liability for the foreign tax with reasonable accuracy do not occur until the end of the foreign taxable year, such foreign income taxes accrue and are creditable in the U.S. tax year within which the taxpayer's foreign taxable year ends. See §1.960-1(b)(4); Revenue Ruling 61-93, 1961-1 C.B. 390.

Section 905(a) also provides that, regardless of the taxpayer's method of accounting, a taxpayer can elect to claim the foreign tax credit in the year in which the taxes accrue. Once made, this election is irrevocable and must be followed in all subsequent years. In addition, courts have held that the election to claim the foreign tax credit on the accrual basis cannot be made on an amended return. See *Strong v. Willcuts*, 17 AFTR 1027 (D. Minn.) (1935) (holding that taxpayer may not change to accrual basis on an amended return because when the taxpayer made an election that the Government has accepted, the rights of the parties became fixed); see also Rev. Rul. 59-101, 1959-1 C.B. 189 (holding that a taxpayer who elected on his original return to claim credit for foreign income tax accrued may not change this election and file amended returns to claim credit for foreign taxes in the year paid). However, for the year the election is made, a taxpayer can claim a credit both for taxes that accrue in that year as well as taxes paid in such year that had accrued in prior years. See *Ferrer v. Comm'r*, 35 T.C. 617 (1961) (holding that a cash method taxpayer is entitled, in the year he elects pursuant to section 905(a) to claim foreign tax credits on the accrual basis, to claim a credit for prior years' foreign income taxes paid as well as foreign income taxes accrued in that year), *rev'd on other grounds*, 304 F.2d 125 (2d Cir. 1962).

With respect to the accrual of a contested tax, the Supreme Court held in *Dixie Pine Products Co. v. Comm'r*, 320 U.S. 516 (1944), that a state income tax that is contested is not fixed, and so does not accrue, until the contest is resolved. See also section 461(f) (rule permitting taxpayers to deduct contested taxes in the year in which they are paid does not apply to foreign income taxes). The contested tax doctrine, however, does not apply in determining when foreign taxes accrue for purposes of the foreign tax credit. See *Cuba Railroad Co. v. United States*, 124 F. Supp. 182, 185 (S.D.N.Y. 1954) (holding that taxes with respect to taxpayer's 1943 income accrued for purposes of the foreign tax credit in 1943 even though the tax was contested and paid in a later year). In Revenue Ruling 58-55, 1958-1 C.B. 266, the IRS examined *Dixie Pine* and *Cuba Railroad*, as well as the legislative history and purpose of the foreign tax credit provisions, and concluded that a contested foreign tax does not accrue until the contest is resolved and the liability becomes finally determined, but for foreign tax credit purposes, the foreign tax, once finally determined, is considered to accrue in the taxable year to which it relates. The revenue ruling further clarified that this "relation back" rule does not apply for purposes of determining the taxable year in which foreign taxes may be deducted under section 164, which is governed by the contested tax doctrine.

The relation back rule has since been consistently applied by courts. See, for example, *United States v. Campbell*, 351 F.2d 336, 338 (2d Cir. 1965) (explaining that if a taxpayer contests his liability for a foreign tax imposed on income in 1960, and the liability is finally adjudicated in 1965, the taxpayer may not claim the credit until 1965, but at that time the credit relates back to offset U.S. tax imposed on taxpayer's 1960 income); *Albemarle Corp. & Subsidiaries v. United States*, 797 F.3d 1011, 1019 (Fed. Cir. 2015) (holding that in the context of determining in what year a taxpayer is eligible to claim a foreign tax credit, the relation back doctrine applies, and thus the 10-year limitations period for filing a refund claim started to run from the un-extended due date for the return for the year to which the tax relates, not the later year in which the contest was resolved). In Revenue Ruling 70-290, 1970-1 C.B. 160, the IRS held that contested taxes that have been paid to the foreign country may be provision-

ally accrued and claimed as a foreign tax credit, even if the liability has not actually accrued because the taxpayer continues to contest its liability for the tax in the foreign country. The revenue ruling reasons that this is permissible because section 905(c) would require a redetermination of U.S. tax liability if the taxpayer's contest is successful, and the foreign tax is refunded to the taxpayer by the foreign government. Revenue Ruling 84-125, 1984-2 C.B. 125, similarly held that a taxpayer is eligible to claim a credit for the portion of contested taxes that have actually been paid for the taxable year in which the contested liability relates because such taxes are accruable at the time of payment, even though the amount of the liability is not finally determined.

The Treasury Department and the IRS received comments in response to the 2019 FTC proposed regulations asking for clarification on when contested taxes accrue for purposes of the foreign tax credit and for clarification regarding whether the special period of limitations in section 6511(d)(3)(A) applies in the case of a refund claim relating to foreign income taxes that a taxpayer chose to deduct. Questions have also arisen regarding whether taxpayers can make an election to claim the foreign tax credit or revoke such an election (in order to deduct the foreign taxes) on an amended return when making or revoking such election results in a time-barred U.S. tax deficiency in one or more intervening years because the assessment statute under section 6501 does not align with the time for making or changing the election under §1.901-1(d).

These proposed regulations provide rules clarifying when a foreign tax credit may be taken for both cash method taxpayers and for accrual method taxpayers, and in the case of accrual method taxpayers, clarify the application of the relation-back doctrine. The proposed regulations also modify the period during which a taxpayer can change the choice to claim a credit or a deduction for foreign income taxes on an amended return to align with the different refund periods under section 6511. The proposed regulations also clarify that a change from claiming a deduction to claiming a credit, or vice versa, for foreign income taxes results in a foreign tax redetermination under section 905(c). In addition, the proposed regulations address mismatch and time-barred deficiency issues resulting from the application of the relation-back doctrine for the accrual of foreign income taxes for purposes of the foreign tax credit, and the application of the contested tax doctrine for purposes of determining when foreign income taxes can be deducted.

B. *Rules for choosing to deduct or credit foreign income taxes*

1. Application of section 275(a)(4)

Section 1.901-1(c) of the existing regulations, interpreting section 275(a)(4), provides that if a taxpayer chooses to claim a foreign tax credit to any extent with respect to the taxable year, such choice applies to all creditable taxes and no deduction for any such taxes is allowed in such taxable year or in any succeeding taxable year. Questions have arisen as to whether this rule prevents taxpayers from claiming either the benefit of a credit or a deduction with respect to additional taxes that are paid in a taxable year in which a taxpayer claims a foreign tax credit if those additional taxes relate (under the relation-back doctrine) to an earlier year in which taxpayer claimed a deduction. As described in Part X.A of this Explanation of Provisions, additional tax paid by an accrual method taxpayer (or a cash method taxpayer that has elected to claim foreign tax credits using the accrual method) as a result of a foreign tax audit or at the end of a contest relate back and are considered to accrue in the taxable year to which the taxes relate. Thus, the additional taxes are not creditable in the year they are paid and would only be creditable in the relation-back year. However, if a taxpayer deducted foreign income taxes in the relation-back year, the taxpayer cannot claim an additional deduction in the earlier year because the additional taxes accrue for deduction purposes in the year the additional taxes are paid.

The Treasury Department and the IRS have determined that this result is not intended by section 275(a)(4), the purpose of which is to prevent taxpayers from claiming the benefits of both a credit and a deduction with respect to the same taxes. Thus, the proposed regulations provide an exception which allows a taxpayer that is claiming credits on an accrual basis to claim, in a year in which it has elected to claim a credit for foreign income taxes that accrue in that year, also to deduct additional taxes paid in that year that, for foreign tax credit purposes, relate back and are considered to accrue in a prior year in which the taxpayer deducted foreign income taxes. See proposed §1.901-1(c)(3).

2. Period within which an election to claim a foreign tax credit can be made or changed

The proposed regulations also modify §1.901-1(d), which sets forth the period during which a taxpayer can make or change its election to claim a foreign tax credit. Existing §1.901-1(d), which was amended in 1987 under TD 8160 (52 FR 33930-02), provides that a taxpayer can, for a particular taxable year, claim the benefits of section 901 or claim a deduction in lieu of a foreign tax credit at any time before the expiration of the period prescribed by section 6511(d)(3)(A) (or section 6511(c) if the period is extended by agreement). The 1987 amendment was preceded by cases in which courts determined that the applicable period of limitations for making an initial election to claim a foreign tax credit under section 901 is the special 10-year period in section 6511(d)(3)(A). See *Woodmansee v. United States*, 578 F.2d 1302 (9th Cir. 1978); *Hart v. United States*, 585 F.2d 1025 (Ct. Cl. 1978) (also holding that prior regulations, which required taxpayers to make the election to claim a foreign tax credit within the three-year period prescribed by 6511(a), were invalid).

However, as recent court decisions have made clear, the 10-year statute of limitations in section 6511(d)(3)(A) applies only to claims for credit or refund of U.S. taxes attributable to foreign income taxes for which the taxpayer was allowed a credit; it does not apply in the case of a claim for credit or refund of U.S. taxes attributable to foreign income taxes for which a taxpayer claimed a deduction under section 164(a)(3). See, for example, *Trusted Media Brands, Inc. v. United States*, 899 F.3d 175 (2d Cir. 2018). In addition, the reason for the

special period of limitations provided by section 6511(d)(3) is to allow taxpayers to seek a refund of U.S. tax if foreign taxes were assessed or increased after the regular three-year statute of limitations period has run, and to better align with the IRS' ability to assess additional U.S. tax under section 905(c) when a taxpayer receives a refund of the foreign income tax claimed as a credit. The special period of limitations is not needed when a taxpayer instead claims a deduction, because accrued foreign income taxes do not relate back for deduction purposes, and the additional tax paid as a result of the foreign assessment can be claimed as a deduction in the year the contest is resolved.

Therefore, the Treasury Department and the IRS have determined that the better interpretation of section 901(a) is that the period for choosing or changing the election to claim a credit or a deduction is based on the applicable refund period, depending on the choice made. Thus, an election to claim a credit, or to change from claiming a deduction to claiming a credit, for taxes paid or accrued in a particular year must be made before the expiration of the 10-year period prescribed by section 6511(d)(3)(A) within which a claim for refund attributable to foreign tax credits may be made, but a choice to claim a deduction, or to change from claiming a credit to claiming a deduction, for taxes paid or accrued in a particular year must be made before the expiration of the three-year period prescribed by section 6511(a) within which a claim for refund attributable to a section 164 deduction may be made. See proposed §1.901-1(d). This proposed rule eliminates the mismatch between the election and refund periods that exists under the existing regulations, whereby a taxpayer who makes a timely election to change from claiming a credit to claiming a deduction within a 10-year period may in some cases be time-barred from obtaining a refund of U.S. taxes attributable to the resulting decrease in taxable income for the deduction year. In addition, the proposed rule is consistent with the court's decision in each of *Hart* and *Woodmansee*, since it allows taxpayers to elect to claim a credit within the 10-year period provided by section 6511(d)(3)(A).

3. Change in election treated as a foreign tax redetermination under section 905(c)

As part of the 2019 FTC final regulations, the Treasury Department and the IRS issued final regulations under §1.905-3 to provide guidance on when foreign tax redeterminations occur. Section 1.905-3(a) provides that a foreign tax redetermination means a change in the liability for a foreign income tax or certain other changes that affect a taxpayer's foreign tax credit. Consistent with section 905(c), this includes when foreign income taxes for which a taxpayer claimed a credit are refunded, foreign income taxes when paid or later adjusted differ from amounts a taxpayer claimed as a credit or added to PTEP group taxes, and when accrued taxes are not paid within 24 months of the close of the taxable year to which the taxes relate. The 2020 FTC final regulations further modify the definition of foreign tax redetermination to include changes to foreign income tax liability that affect a taxpayer's U.S. tax liability even when there is no change to the amount of foreign tax credits claimed, such as when a change to foreign taxes affects subpart F and GILTI inclusion amounts or affects whether or not a CFC's subpart F income and tested income is eligible for the high-tax exception under section 954(b)(4) in the year to which the redetermined foreign tax relates.

These proposed regulations further amend §1.905-3 to provide that a foreign tax redetermination includes a change by a taxpayer in its decision to claim a credit or a deduction for foreign income taxes that may affect a taxpayer's U.S. tax liability. Section 905(c)(1)(A) provides that a foreign tax redetermination is required "if accrued taxes when paid differ from the amounts claimed as credits by the taxpayer." When a taxpayer changes its election from claiming a credit to claiming a deduction, or vice versa, with respect to foreign income taxes paid or accrued in a particular year, the amount of tax that was accrued and paid differs from the amount that has been claimed as a credit by the taxpayer. Accordingly, a change in a taxpayer's election to claim a credit or a deduction for foreign income taxes is described in section 905(c)(1)(A) even if the foreign income tax liability remains unchanged.

This interpretation is consistent with the purpose of section 905(c) and within the constraints courts have placed in interpreting the provision. As noted by the court in *Texas Co. (Caribbean) Ltd. v. Comm'r*, 12 T.C. 925 (1949), section 905(c) addresses problems for which the relevant information might not be available within the general period of limitations or ones where the taxpayer has exclusive control of the information, which justify removing these situations from the generally-applicable period of limitations on assessment. The court in *Texas Co.* held that a U.S. tax deficiency that results from a computational error, which was discoverable by the IRS within the normal assessment period, is not within the scope of section 905(c). A taxpayer's decision to change its election can occur outside the normal assessment period under section 6501(a) and is information that is under the exclusive control of the taxpayer. Thus, the Treasury Department and the IRS have determined that it is appropriate to treat a change in election as a foreign tax redetermination that requires a redetermination of U.S. tax liability for the affected years and notification of the IRS to the extent required under §1.905-4.

The effect of treating a change in a taxpayer's decision to claim a credit or a deduction for foreign income taxes as a foreign tax redetermination is that the IRS may assess and collect any U.S. tax deficiencies in intervening years that result from the taxpayer's change in election, even if the generally-applicable three-year assessment period under section 6501(a) has expired. See section 6501(c)(5). This can occur, for example, if a timely change to switch from deductions originally claimed in a loss year (to increase a net operating loss) to credits (in order to claim a carryforward of excess foreign taxes in a later year) would result in a time-barred deficiency in a year to which the net operating loss that was increased by the deductions for foreign taxes was originally carried. Currently, the law is unclear how section 274(a)(4), equitable doctrines such as the duty of consistency, or the mitigation provisions under sections 1311 through 1314 operate to prevent taxpayers from obtaining a double benefit (through both a deduction and a credit) for a single amount of foreign income tax paid. These

uncertainties have led taxpayers to request guidance from the IRS to clarify the effect of a timely change in election on their U.S. tax liabilities. The proposed regulations provide a clear and efficient process by which taxpayers can eliminate uncertainty with respect to the tax consequences of changing from claiming a credit to claiming a deduction, or vice versa, for foreign income taxes, within the time period allowed.

C. *Rules for when a cash method taxpayer can claim the foreign tax credit*

Proposed §1.905-1(c) provides rules on when foreign income taxes are creditable for taxpayers using the cash method of accounting. Consistent with §1.461-1(a)(1), which provides that for taxpayers using the cash method, amounts representing allowable deductions are taken into account in the taxable year in which they are paid, proposed §1.905-1(c)(1) provides that foreign income taxes are creditable in the taxable year in which they are paid. Foreign income taxes are generally considered paid in the year the taxes are remitted to the foreign country. However, foreign income taxes that are withheld from gross income by the payor are considered paid in the year withheld. See proposed §1.905-1(c)(1). As discussed in Part VI.B of this Explanation of Provisions, taxes that are not paid within the meaning of §1.901-2(e) because they exceed a reasonable approximation of the taxpayer's final foreign income tax liability are not eligible for a foreign tax credit.

The regulations at §1.905-3(a) further provide that a refund of foreign income taxes that have been claimed as a credit in the year paid, or a subsequent determination that the amount paid exceeds the taxpayer's liability for foreign income tax, is a foreign tax redetermination under section 905(c), and the taxpayer must file an amended return and redetermine its U.S. tax liability for the affected years. However, additional taxes that are paid by a cash method taxpayer in a later year with respect to a prior year do not relate back to the prior year, nor do they result in a redetermination of foreign income taxes paid and U.S. tax lability under section 905(c) for the prior year; instead, those additional taxes are creditable in the year in which they are paid.

Proposed 1.905-1(e) sets forth rules for cash method taxpayers electing to claim foreign tax credits on an accrual basis. As provided by section 905(a), this election is irrevocable, and once made, must be followed in all subsequent years, and consistent with the holding in *Strong v. Willcuts*, the election generally cannot be made on an amended return. See proposed §1.905-1(e)(1). However, the proposed regulations provide exceptions to these general rules in order to ensure that a taxpayer who makes this election to switch from claiming credits on a cash basis to an accrual basis is not double taxed in certain situations. First, proposed §1.905-1(e)(2) provides that a taxpayer who has previously never claimed a foreign tax credit may make the election to claim the foreign tax credit on an accrual basis when the taxpayer claims the credit, even if such initial claim for credit is made on an amended return. In addition, following the decision in *Ferrer v. CIR*, proposed §1.905-1(e)(3) provides that, for the taxable year in which the accrual election is made and for the subsequent years in which a taxpayer claims a foreign tax credit on an accrual basis, that taxpayer can claim a foreign tax credit for taxes paid in the year, if pursuant to the rules for accrual method taxpayers that are described in Part X.D of this Explanation of Provisions, those taxes paid relate to a taxable year before the taxpayer elected to claim credits on an accrual basis. The Treasury Department and the IRS have determined that this result is appropriate because otherwise taxpayers that make the accrual election would, in effect, have to forego a credit for prior year taxes, unless the election is made for the very first year in which a credit is claimed.

D. *Rules for accrual method taxpayers*

1. In general

Proposed §1.905-1(d)(1) provides general rules for when taxpayers using the accrual method of accounting can claim a foreign tax credit. This determination requires applying the all events test contained in §1.461-1. In accordance with §1.461-1(a)(2)(i), foreign income taxes accrue in the taxable year in which all the events have occurred that establish the fact of liability, and the amount of the liability can be determined with reasonable accuracy. See also §1.461-4(g)(6)(iii)(B) (economic performance with respect to foreign income taxes occurs when the requirements of the all events test, other than the payment prong of the economic performance requirement, are met). The proposed regulations confirm that where the all events test has not been met with respect to a foreign income tax liability, such as in the case where the tax liability is contingent upon a distribution of earnings, such taxes have not accrued and may not be claimed as a credit. See proposed §1.905-1(d)(1)(i).

Proposed §1.905-1(d)(1)(ii) incorporates the relation-back doctrine, and provides that, for foreign tax credit purposes, once the all events test is met, the foreign income taxes relate back and are considered to accrue in the year to which the taxes relate, the "relation-back year." For example, additional taxes paid as a result of a foreign adjustment relate back and are considered to accrue at the end of the foreign taxable year(s) with respect to which the taxes were adjusted. Thus, the additional taxes paid in the later year are creditable in the relation-back year, not in the year in which the additional taxes are paid. See proposed §1.905-1(d)(6)(iii) (*Example 3*); see also §1.905-3(b)(1)(ii)(A) (*Example 1*). Moreover, in the case of foreign income taxes which are treated as refunded pursuant to §1.905-3(a) because they were not paid within 24 months of the close of the taxable year in which they first accrued, proposed §1.905-1(d)(1)(ii) provides that when payment is later made, the taxes are considered to accrue in the relation-back year.

2. Special rule for 52-53 week taxable years

Consistent with Revenue Ruling 61-93, the proposed regulations provide that the liability for a foreign tax becomes fixed on the last day of the taxpayer's foreign taxable year; thus, foreign income taxes generally accrue and are creditable in the taxpayer's U.S. taxable year with or within which its foreign taxable year

ends. However, the Treasury Department and the IRS have determined that it is appropriate to provide a limited exception to this rule in order to address mismatches that occur for taxpayers that elect to use a 52-53 week taxable year for U.S. tax purposes under §1.441-2. Section 1.441-2 permits certain eligible taxpayers to elect to use a fiscal year that (i) varies from 52 to 53 weeks in length, (ii) always ends on the same day of the week, and (iii) ends either on the same day of the week that last occurs in a calendar month or on whatever date the same day of the week falls that is nearest to the last day of the calendar month.

A taxpayer that adopts a 52-53 week year, or that changes from a 52-53 week year to another fiscal year, without changing its foreign taxable year, will often have a short taxable year that does not include the foreign year-end. That short U.S. taxable year would include substantially all of the foreign income but none of the related foreign taxes. Similarly, a taxpayer that uses a 52-53 week year for U.S. tax purposes but that uses a foreign tax year that ends on a fixed month-end will in some years have a U.S. taxable year that does not include a foreign year-end and in other years have a U.S. taxable year that includes two foreign year-ends. For example, a taxpayer who uses a 52-53 week year that ends on the last Friday of December for U.S. tax purposes would have a tax year that begins Saturday, December 26, 2020, and that ends Friday, December 31, 2021, which includes two calendar year-ends. The following taxable year, which begins on Saturday, January 1, 2022, and ends on Friday, December 30, 2022, would not include a calendar year-end.

Proposed §1.905-1(d)(2) addresses these mismatches by providing that where a U.S. taxpayer uses a 52-53 week taxable year that ends by reference to the same calendar month as its foreign taxable year, and the U.S taxable year closes within 6 days of the close of the foreign taxable year, then for purposes of determining the amount of foreign income tax that accrues during the U.S. taxable year, the U.S. taxable year will be deemed to end on the last day of its foreign taxable year.

3. Accrual of contested foreign income taxes

The Treasury Department and IRS have determined that the administrative rulings that allow an accrual method taxpayer to claim a foreign tax credit for a contested tax that has been remitted to a foreign country, notwithstanding the fact that the contest is ongoing, are inconsistent with the all events test (specifically, the test's requirement that all the events must have occurred that establish the fact and amount of the liability with reasonable accuracy).[4] In addition, permitting taxpayers to claim a credit for contested taxes before the contest is resolved reduces the incentive for taxpayers to continue to pursue the contest and exhaust all effective and practical remedies, as required under §1.901-2(e)(5)(i), if the period of assessment for the year to which the taxes relate has closed and the IRS would be time-barred from disallowing the foreign tax credit claimed with respect to the contested tax paid on noncompulsory payment grounds. The Treasury Department and the IRS have determined that this is an inappropriate result that undermines the longstanding policy for requiring an amount of foreign income tax to be a compulsory payment in order to be creditable.

Therefore, the proposed regulations provide new rules for when a credit for contested foreign income taxes can be claimed. Following the Supreme Court's holding in *Dixie Pine*, and consistent with the exception to section 461(f) and §1.461-2(a)(2)(i) for foreign income taxes, proposed §1.905-1(d)(3) provides that contested foreign income taxes do not accrue until the contest is resolved, because only then is the amount of the foreign income tax liability finally determined. Thus, contested foreign income taxes accrue and are creditable only when resolution of the contest establishes the fact and the amount of a liability with reasonable accuracy, even if the taxpayer remits the contested taxes to the foreign country in an earlier year. When the contest is resolved, the liability accrues and, for foreign tax credit purposes, relates back and is considered to accrue in the earlier year to which the liability relates. Once the finally determined liability has been paid, as required by section 905(c)(2)(B) and §1.905-3(a), the taxpayer can claim a foreign tax credit in the relation-back year.

However, the Treasury Department and the IRS recognize that a taxpayer may be placed in a difficult position if it pays the contested tax to the foreign country (which it may do, for example, to toll the accrual of interest owed to the foreign country) but cannot be made whole until the contest is resolved, possibly years later. Thus, the proposed regulations provide that a taxpayer may elect to claim a provisional credit for the portion of the taxes paid, even though the contest is not resolved and the amount of the liability is not yet fixed. See proposed §1.905-1(d)(4). As a condition for making this election, a taxpayer must agree to give the IRS an opportunity to examine whether the taxpayer exhausted all effective and practical remedies when the contest is concluded by agreeing to notify the IRS when the contest concludes and by agreeing to not assert the statute of limitations as a defense to the assessment of additional taxes and interest if the IRS determines that the tax was not a compulsory payment. The proposed regulations require taxpayers making this election to file with their amended return (for the year in which the credit is claimed) a provisional foreign tax credit agreement meeting the conditions under proposed §1.905-1(d)(4)(ii) through (iv) and to file annual certifications notifying the IRS of the status of the contest.

The Treasury Department and the IRS intend to withdraw Revenue Ruling 70-290 and Revenue Ruling 84-125 when the proposed regulations are finalized. Taxpayers can make the election under proposed §1.905-1(d)(4) for contested taxes remitted in taxable years beginning on or after the date the proposed regulations are finalized but that relate to an earlier taxable year. See proposed §1.905-1(h).

4. Correction of improper accruals

The proposed regulations address issues that arise when an accrual method taxpayer, including a foreign corporation

[4] See Rev. Rul. 70-290, 1970-1 C.B. 160, and Rev. Rul. 84-125, 1984-2 C.B. 125, discussed in Part X.A of this Explanation of Provisions.

or a partnership or other pass-through entity, has established an improper method of accounting for accruing foreign income taxes. A taxpayer generally establishes an improper method of accounting for an item once it has treated the item consistently in two consecutive tax years (see Rev. Rul. 90-38, 1990-1 CB 57). Proposed §1.905-1(d)(5)(i) provides that the time at which a taxpayer accrues a foreign income tax expense generally is treated as a method of accounting, regardless of whether the taxpayer or the owners of the foreign corporation, partnership or other pass-through entity claim credits or deductions for those taxes. Therefore, taxpayers must comply with the procedures set forth in Revenue Procedure 2015-13, 2015-5 I.R.B. 419, or successor administrative procedures, to obtain the Commissioner's consent before changing from an improper method to a proper method of accruing foreign income taxes.

The proposed regulations provide specific rules, under a "modified cut-off" approach, for adjusting the amount of foreign income taxes that can be claimed as a credit or deduction in the year that a taxpayer changes from an improper to a proper method of accruing foreign income taxes (and in subsequent years, if applicable) in order to prevent a duplication or omission of any amount of foreign income tax paid. Proposed §1.905-1(d)(5)(ii) requires taxpayers to adjust the amount of foreign income tax that is assigned under §1.861-20 to each statutory or residual grouping (such as separate categories) and that properly accrues in the year of change, accounted for in the currency in which the foreign tax liability is denominated, (1) downward by the amount of foreign income tax in the same grouping that was improperly accrued and claimed as a credit or a deduction in a taxable year before the year of change ("pre-change year") and that did not properly accrue in any pre-change year, and (2) upward by the amount of foreign income tax in the same grouping that properly accrued in a pre-change year but which the taxpayer, under its improper method of accounting, failed to accrue and claim as either a credit or a deduction in any pre-change year. To the extent that the required amount of the downward adjustment exceeds the amount of properly-accrued foreign income tax in the year of change, the balance carries forward to offset properly-accrued taxes in subsequent years.

Proposed §1.905-1(d)(5)(iii) provides rules coordinating the application of the rules under section 905(c) with the rules in proposed §1.905-1(d)(5). Under proposed §1.905-1(d)(5)(iii), the determination of whether an improperly-accrued foreign income tax was paid within 24 months of the close of the taxable year to which the taxes relate for purposes of section 905(c)(2) will be measured from the close of the taxable year(s) in which the taxpayer accrued the tax. Any payment of properly-accrued tax in and after the year of change that is offset by the downward adjustment required by proposed §1.905-1(d)(5)(ii) and so not allowed as a foreign tax credit or deduction in that year is treated as a payment of the foreign income tax improperly accrued in pre-change years, in order, based on the most recently-accrued amounts.

Finally, proposed §1.905-1(d)(5)(iv) provides that when a foreign corporation, partnership, or other pass-through entity changes from an improper method of accruing foreign income taxes, the rules in §1.905-1(d)(5) apply as if the foreign corporation, partnership or other pass-through entity were eligible to, and did, claim foreign tax credits. Comments are requested on additional adjustments that may be required to prevent an omission or duplication of a tax benefit for foreign income taxes that have been improperly accrued (or which the taxpayer has improperly failed to accrue) under the taxpayer's improper method of accounting. Comments are also requested on alternative methods for implementing a method change involving the improper accrual of foreign income taxes.

E. *Creditable foreign tax expenditures of partnerships and other pass-through entities*

The proposed regulations provide rules that clarify when foreign income taxes paid or accrued by a partnership or other pass-through entity (that is, foreign income taxes for which the pass-through entity is considered to be legally liable under §1.901-2(f)) can be claimed as a credit or deduction by such entity's partners, shareholders, or beneficiaries. Consistent with the rules in §§1.702-1(a)(6) and 1.703-1(b)(2), proposed §1.905-1(f) provides that a partner that elects to claim a foreign tax credit in a taxable year may claim its distributive share of foreign income taxes that the partnership paid or accrued (as determined under the partnership's method of accounting) during the partnership's taxable year that ends with or within the partner's taxable year. Thus, the pass-through entity's method of accounting for foreign income taxes generally controls for purposes of determining the taxable year in which a partner is considered to pay or accrue its distributive share of those taxes. Therefore, a cash method taxpayer may claim a credit for its distributive share of an accrual method partnership's foreign income taxes even if the partnership has not paid (that is, remitted) the taxes to the foreign country during the partner's taxable year with or within which the partnership's tax expense accrued, so long as those taxes otherwise qualify for the credit, and subject to the rules of section 905(c)(2)(A) (treating accrued foreign taxes as refunded if not paid within 24 months). The rules in proposed §1.905-1(f) also apply in the case of shareholders of a S corporation, beneficiaries of an estate or trust, or other owners of a pass-through entity with respect to foreign income taxes paid or accrued by such entities.

With respect to a contested foreign tax liability of a pass-through entity, the proposed regulations provide that the entity takes into account and reports a contested foreign income tax to its partners, shareholders, beneficiaries, or other owners only when the contest concludes and the finally determined amount of the liability has been paid by the entity. This rule takes into account the requirement in section 905(c)(2)(B) and §1.905-3(a) that a foreign tax that first accrues more than 24 months after the close of the taxable year to which the tax relates can only be claimed as a credit once the tax has been paid. See proposed §1.905-1(f)(1). However, proposed §1.905-1(f)(2) allows a partner or other owner of a pass-through entity to claim a provisional foreign tax credit for its share of a contested foreign income tax liability that the entity has paid to the foreign country pursuant to the pro-

cedures in proposed §1.905-1(d)(4). As required by §§1.905-3(a) and 1.905-4(b), a pass-through entity is required to notify the IRS and its partners, shareholders, or beneficiaries if there is a foreign tax redetermination with respect to foreign income tax previously reported to its partners, shareholders, or beneficiaries.

F. *Conforming changes to regulations under section 960*

Existing regulations under section 960 provide a definition of a current year tax that includes language regarding the timing of accrual of a foreign income tax, including the timing of accrual of additional payments of foreign income tax resulting from a foreign tax redetermination. These proposed regulations revise this definition to cross-reference the proposed rules in §1.905-1 regarding when foreign income taxes are considered to be paid or accrued for foreign tax credit purposes.

In addition, existing rules exclude from the definition of a foreign income tax a levy for which a credit is disallowed at the level of a controlled foreign corporation. The proposed regulations revise the definition of a foreign income tax in §1.960-1(b) to include a levy that is a foreign income tax within the meaning of proposed §1.901-2(a), including a levy for which a credit is disallowed at the level of the controlled foreign corporation. These changes are necessary to clarify that a foreign income tax for which a credit is disallowed is nonetheless an item of expense that must be allocated and apportioned to an income group under the rules of §1.960-1(d) in order to determine the amount of net income in each income group.

Finally, proposed §1.960-1(b)(5) introduces a new defined term, "eligible current year taxes," that refers to current year taxes for which a foreign tax credit may be allowed. This change is necessary to ensure that the current year taxes that are deemed paid under sections 960(a) and (d) comprise only current year taxes that are eligible for a foreign tax credit. Conforming changes to §1.960-2 are proposed to provide that deemed paid computations are made only with respect to eligible current year taxes. Additional conforming changes will be proposed to §1.960-3 to address the computation of deemed paid taxes under section 960(b) as part of future proposed regulations under section 959.

XI. *Applicability Dates*

The rules in §§1.164-2(d), 1.336-2(g)(3)(ii) and (iii), 1.338-9(d), 1.368(b)-10(c)(1), 1.861-9(k), 1.861-10(f) and (g), 1.861-14(h), 1.861-20(h), 1.901-1, 1.901-2, 1.903-1, 1.904-4(e)(1)(ii) and (e)(2) and (3), 1.904-5(b)(2), 1.905-1, 1.905-3(a) and (b)(4), 1.960-1(b)(4) through (6), and 1.960-1(c)(1)(ii) through (iv) and (d)(3)(ii)(B) generally apply to taxable years beginning on or after the date final regulations adopting these rules are filed with the **Federal Register**.

Consistent with the prospective applicability date in the section 250 regulations, the revisions to §§1.250(b)-1(c)(7) and 1.250(b)-5(c)(5) apply to taxable years beginning on or after January 1, 2021. See §1.250-1(b).

The rules in proposed §§1.367(b)-4(b)(2)(i)(B), 1.367(b)-7(g), 1.367(b)-10(c)(1), 1.861-3(d), 1.861-8(e)(4)(i), and 1.861-10(e)(8)(v) generally apply to taxable years ending on or after November 2, 2020.

Proposed §§1.245A(d)-1, 1.861-20 (other than proposed §1.861-20(h)), 1.904-4(f), and 1.904-6(b)(2) apply to taxable years that begin after December 31, 2019, and end on or after November 2, 2020.

Finally, proposed §1.904(f)-12(j)(5) applies to carrybacks of net operating losses incurred in taxable years beginning after December 31, 2017, which is consistent with the applicability date in the CARES Act with respect to net operating loss carrybacks. See Pub. L. 116-136, 134 Stat. 355, section 2303(d), (2020); see also section 7805(b)(2).

Special Analyses

I. *Regulatory Planning and Review*

Executive Orders 13771, 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Executive Order 13771 designation for any final rule resulting from these proposed regulations will be informed by comments received.

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

A. *Background and need for the proposed regulations*

The U.S. foreign tax credit (FTC) regime alleviates potential double taxation by allowing a non-refundable credit for foreign income taxes paid or accrued that could be applied to reduce the U.S. tax on foreign source income. Although the Tax Cuts and Jobs Act (TCJA) eliminated the U.S. tax on some foreign source income by enacting a dividends received deduction, the United States continues to tax other foreign source income, and to provide foreign tax credits against this U.S. tax. The calculation of how foreign taxes can be credited against U.S. tax operates by defining different categories of foreign source income (a "separate category") based on the type of income.[5] Foreign taxes paid or accrued, as well as deductions for expenses borne by U.S. parents and domestic affiliates that support foreign operations, are allocated to the separate categories based on the income to which such

[5] Before the TCJA, these categories were primarily the passive income and general income categories. The TCJA added new separate categories for global intangible low-taxed income (the section 951A category) and foreign branch income.

taxes or deductions relate. These allocations of deductions reduce foreign source taxable income and therefore reduce the allowable FTCs for the separate category, since FTCs are limited to the U.S. income tax on the foreign source taxable income (that is, foreign source gross income less allocated expenses) in that separate category. Therefore, these expense allocations help to determine how much foreign tax credit is allowable, and the taxpayer can then use allowable foreign tax credits allocated to each separate category against the U.S. tax owed on income in that category.

The Code and existing regulations further provide definitions of the foreign taxes that constitute creditable foreign taxes. Section 901 allows a credit for foreign income taxes, war profits taxes, and excess profits taxes. The existing regulations under section 901 define these "foreign income taxes" such that a foreign levy is an income tax if it is a tax whose predominant character is that of an income tax in the U.S. sense. Under the existing regulations, this requires that the foreign tax is likely to reach net gain in the normal circumstances in which it applies (the "net gain requirement"), and that it is not a so-called soak-up tax.

The "net gain requirement" is made up of the realization, gross receipts, and net income requirements, and the existing regulations define in detail their meaning. Generally, the creditability of the foreign tax under the existing regulations relies on the definition of an income tax under U.S. principles, and on several aggregate empirical tests designed to determine if in practice the tax base upon which the tax is levied is an income tax base. However, compliance and administrative challenges faced by taxpayers and the IRS in implementing the existing definition of an income tax under these regulations necessitate changes to the existing structure. These proposed regulations set forth such changes.

Additionally, as a dollar-for-dollar credit against United States income tax, the foreign tax credit is intended to mitigate double taxation of foreign source income. This fundamental purpose is most appropriately served if there is substantial conformity in the principles used to calculate the base of the foreign tax and the base of the U.S. income tax, not only with respect to the definition of the income tax base, but also with respect to the jurisdictional nexus upon which the tax is levied. The Treasury Department and the IRS have received requests for guidance with respect to a jurisdictional limitation, and recommending that the regulations adopt a rule necessitating some form of nexus rule for creditable taxes. Further, countries, including the United States, have traditionally adhered to consensus-based norms governing jurisdictional nexus for the imposition of tax. However, the adoption or potential adoption by foreign countries of novel extraterritorial foreign taxes that diverge in significant respects from these norms of taxing jurisdiction now suggests that further guidance is appropriate to ensure that creditable foreign taxes in fact have a predominant character of "an income tax in the U.S. sense."

Finally, these regulations are necessary in order to respond to outstanding comments raised with respect to other regulations and in order to address a variety of issues arising from the interaction of provisions in other regulations.

The Treasury Department and the IRS issued final regulations in 2019 (84 FR 69022) (2019 FTC final regulations) and proposed regulations (84 FR 69124) (2019 FTC proposed regulations), which are being finalized in this issue of the **Federal Register** as part of the 2020 FTC final regulations. The Treasury Department and the IRS received comments with respect to the 2019 FTC proposed regulations, some of which are addressed in these proposed regulations (instead of the 2020 FTC final regulations) in order to allow further opportunity for notice and comment.

The following analysis provides an overview of the regulations, discussion of the costs and benefits of these regulations as compared with the baseline, and a discussion of alternative policy choices that were considered.

B. *Overview of the structure of and need for proposed regulations*

These proposed regulations address a variety of outstanding issues, most importantly with respect to the existing definition of an income tax. Section 901 allows a credit for foreign income taxes, and the existing regulations define the conditions under which foreign taxes will be considered income taxes. These proposed regulations revise aspects of this definition in light of challenges that taxpayers and the IRS have faced in applying the rules. In particular, the requirements in the existing regulations presuppose conclusions based on country-level or other aggregated data that can be difficult for taxpayers and the IRS to analyze for purposes of determining net gain, causing both administrative and compliance burdens and difficulties resolving disputes. Therefore, the proposed regulations revise the net gain requirements such that, in cases where data-driven conclusions have been difficult to establish historically, the requirements rely less on data of the effects of the foreign tax, and instead rely more on the terms of the foreign tax law (See Part VI.A.3 of the Explanation of Provisions for additional detail, and Part I.C.3.i. of this Special Analyses for alternatives considered and affected taxpayers). For example, a foreign tax, to be creditable, must generally be levied on gross receipts (and certain deemed gross receipts) net of deductions. Under these proposed regulations, the use of data to demonstrate that an alternative receipts base upon which the tax is levied is in practice a gross receipts equivalent cannot be used to satisfy the gross receipts portion of the net gain requirement.

In addition to these changes, the proposed regulations introduce a jurisdictional limitation for purposes of determining whether a foreign tax is an income tax in the U.S. sense; that is, the foreign tax law must require a sufficient nexus between the foreign country and the taxpayer's activities or investment of capital or other assets that give rise to the income being taxed. Therefore, a tax imposed by a foreign country on income that lacks sufficient nexus to activity in the foreign country (such as operations, employees, factors of production) in a country is not creditable. This limitation is designed to ensure that the foreign tax is an income tax in the U.S. sense by requiring that there is an appropriate nexus between the taxable amount and the taxing foreign jurisdiction (see Part VI. A.2 of the Explanation of Provisions for additional detail, and Part I.C.3.ii of this Special Analyses for discussion of alternatives considered and taxpayers affected). Together, the

clarifications and changes introduced in the net gain requirement and the jurisdictional nexus requirement will tighten the rules governing the creditability of foreign taxes and will likely restrict creditability of foreign taxes to some extent relative to the existing regulations.

Finally, these proposed regulations address other issues raised in comments or resulting from other legislation. For example, comments asked for clarification of uncertainty regarding the appropriate level of aggregation (affiliated group versus subgroup) at which expenses of life insurance companies should be allocated to foreign source income, and comments asked for clarification on when contested taxes (that is, taxes owed to a foreign government which a taxpayer disputes) accrue for purposes of the foreign tax credit. With respect to the life insurance issue, the 2019 FTC proposed regulations specified an allocation method, but requested comments regarding whether another method might be superior. Subsequent comments supported both methods for different reasons, and the Treasury Department and the IRS found both methods to have merit. Therefore, the proposed regulations allow taxpayers to choose the most appropriate method for their circumstances. (See Part V.E of the Explanation of Provisions for additional detail, and Part I.C.3.iii of this Special Analyses for alternatives considered and affected taxpayers).

With respect to the contested tax issue, the proposed regulations establish that contested taxes do not accrue (and therefore cannot be claimed as a credit) until the contest is resolved; however, the proposed regulations will allow taxpayers to claim a provisional credit for the portion of taxes already paid to the foreign government, if the taxpayer agrees to notify the IRS when the contest concludes and agrees not to assert the statute of limitations as a defense to assessment of U.S. tax if the IRS determines that the taxpayer failed to take appropriate steps to secure a refund of the foreign tax. (See Part X.D of the Explanation of Provisions for additional detail, and Part I.C.3.iv of this Special Analyses for alternatives considered and affected taxpayers). In this way, the proposed regulations alleviate taxpayer cash flow constraints that could result from temporary double taxation during the period of dispute resolution, while still providing the taxpayer with the incentive to resolve the tax dispute and providing the IRS with the ability to ensure that appropriate action was taken regarding dispute resolution.

The guidance and specificity provided by these regulations clarify which foreign taxes are creditable as income taxes, and (with respect to contested taxes) when they are creditable. The guidance also helps to resolve uncertainty and more generally to address issues raised in comments.

C. *Economic analysis*

1. Baseline

In this analysis, the Treasury Department and the IRS assess the benefits and costs of these proposed regulations relative to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these regulations.

2. Summary of economic effects

The proposed regulations provide certainty and clarity to taxpayers regarding the creditability of foreign taxes. In the absence of the enhanced specificity provided by these regulations, similarly situated taxpayers might interpret the creditability of taxes differently, particularly with respect to new extraterritorial taxes, potentially resulting in inefficient patterns of economic activity. For example, some taxpayers may forego specific economic projects, foreign or domestic, that other taxpayers deem worthwhile based on different interpretations of the tax consequences alone. The guidance provided in these regulations helps to ensure that taxpayers face more uniform incentives when making economic decisions. In general, economic performance is enhanced when businesses face more uniform signals about tax treatment.

In addition, these regulations generally reduce the compliance and administrative burdens associated with information collection and analysis required to claim foreign tax credits, relative to the no-action baseline. The regulations achieve this reduction because they rely to a significantly lesser extent on data-driven conclusions than the regulatory approach provided in the existing regulations and instead rely more on the terms and structure of the foreign tax law.

To the extent that taxpayers, in the absence of further guidance, would generally interpret the existing foreign tax credit rules as being more favorable to the taxpayer than the proposed regulations provide, the proposed regulations may result in reduced international activity relative to the no-action baseline. This reduced activity may have included both activities that could have been beneficial to the U.S. economy (perhaps because the activities would have represented enhanced international opportunities for businesses with U.S. owners) and activities that may not have been beneficial (perhaps because the activities would have been accompanied by reduced activity in the United States). Thus, the Treasury Department and the IRS recognize that foreign economic activity by U.S. taxpayers may be a complement or substitute to activity within the United States and that to the extent these regulations lead to a reduction in foreign economic activity relative to the no-action baseline, a mix of results may occur. To the extent that foreign governments, in response to these proposed regulations, alter their tax regimes to reduce their reliance on taxes that are not income taxes in the U.S. sense, any such reduction in foreign economic activity by U.S. taxpayers as a result of these proposed regulations, relative to the no-action baseline, will be mitigated.

The Treasury Department and the IRS project that the regulations will have economic effects greater than $100 million per year ($2020) relative to the no-action baseline. This determination is based on the substantial size of many of the businesses potentially affected by these regulations and the general responsiveness of business activity to effective tax rates,[6] one component of which is the creditability of foreign taxes. Based on these two magnitudes, even modest changes in the treatment of foreign taxes, relative to the no-action baseline, can be expected to

[6] See E. Zwick and J. Mahon, "Tax Policy and Heterogeneous Investment Behavior," at *American Economic Review* 2017, 107(1): 217-48 and articles cited therein.

have annual effects greater than $100 million ($2020).

The Treasury Department and the IRS have not undertaken quantitative estimates of the economic effects of these regulations. The Treasury Department and the IRS do not have readily available data or models to estimate with reasonable precision (i) the tax stances that taxpayers would likely take in the absence of the proposed regulations or under alternative regulatory approaches; (ii) the difference in business decisions that taxpayers might make between the proposed regulations and the no-action baseline or alternative regulatory approaches; or (iii) how this difference in those business decisions will affect measures of U.S. economic performance.

In the absence of such quantitative estimates, the Treasury Department and the IRS have undertaken a qualitative analysis of the economic effects of the proposed regulations relative to the no-action baseline and relative to alternative regulatory approaches. This analysis is presented in Part I.C.3 of this Special Analyses.

The Treasury Department and the IRS solicit comments on this economic analysis and particularly solicit data, models, or other evidence that may be used to enhance the rigor with which the final regulations might be developed.

3. Options Considered and Number of Affected Taxpayers, by Specific Provisions

i. "Net gain requirement" for determining a creditable foreign tax

a. Summary

Under existing rules, a foreign tax is creditable if it reaches "net gain," which is determined based in part on data-driven analysis. Therefore, under the existing rules, a gross basis tax can in certain cases be creditable if it can be shown that the tax as applied does not result in taxing more than the taxpayer's profit. In certain cases, in order to determine creditability, the IRS requests country-level or other aggregate data to analyze whether the tax reaches net gain. The creditability determination is made based on data with respect to a foreign tax in its entirety, as it is applied for all taxpayers. In other words, the tax is creditable or not creditable based on its application to all taxpayers rather than on a taxpayer-by-taxpayer basis. However, different taxpayers can and do take different positions with respect to what the language of the existing regulations and the empirical tests imply about creditability.

b. Options considered for the proposed regulations

The Treasury Department and the IRS considered three options to address concerns with the "net gain" test. The first option is not to implement any changes and to continue to determine the definition of a foreign income tax based in part on conclusions based on country-level or other aggregate data. This option would mean that the determination of whether a tax satisfies the definition of foreign income tax would continue to be administratively difficult for taxpayers and the IRS, in part because it requires the IRS and the taxpayer to obtain information from the foreign country to determine how the tax applies in practice to taxpayers subject to the tax. The existing regulations apply a "predominant character" analysis such that deviations from the net gain requirement do not cause a tax to fail this requirement if the predominant character of the tax is that of an income tax in the U.S. sense. For example, the existing regulations allow a credit for a foreign tax whose base, judged on its predominant character, is computed by reducing gross receipts by significant costs and expenses, even if gross receipts are not reduced by all allocable costs and expenses. This requires some judgment in determining whether the exclusion of some costs and expenses causes the tax to fail the net gain requirement.

The second option considered is not to use data-driven conclusions for any portion of the net gain requirement and rely only on foreign tax law to make the determination. This rule would be easier to apply compared with the first option because it requires looking only at foreign law, regulations, and rulings. However, this option could result in an overly harsh outcome, to the extent the rules determine whether a levy is an income tax in its entirety (that is, not on a taxpayer-by-taxpayer basis). For example, if a country had a personal income tax that satisfied all the requirements, except that the country also included imputed rental income in the tax base, the Treasury Department and the IRS would not necessarily want to disallow as a credit the entire personal income tax system of that country due to the one deviation from U.S. tax law definitions of income tax. As part of this option, the Treasury Department and the IRS therefore considered also allowing a parsing of each tax for conforming and non-conforming parts. For example, in the prior example, only a portion of the income tax could be disallowed (that is, the portion attributable to imputed rental income). However, this approach would be extremely complicated to administer since there would need to be special rules for determining which portion of the tax relates to the non-conforming parts and which do not. It would also imply that taxpayers could not know from the outset whether a particular levy is an income tax but would instead have to analyze the tax in each fact and circumstances in which it applied to a particular taxpayer.

The third option considered is to use data-driven conclusions only for portions of the net gain requirement. The net gain requirement consists of three requirements: the realization requirement, the gross receipts requirement, and the cost recovery requirement. The Treasury Department and the IRS considered retaining data-based conclusions in portions of the realization requirement and the cost-recovery requirement but removing them in the gross receipts requirement. This is the approach taken in these regulations. In these regulations, the cost recovery requirement retains the rule that the tax base must allow for recovery of significant costs and expenses. Data are still used in the cost recovery analysis to determine whether a cost or expense is significant with respect to all taxpayers.

Because these options differ in terms of the creditability of foreign taxes, they may increase or decrease foreign activity by U.S. taxpayers. The Treasury Department and the IRS have not projected the differences in economic activity across the three alternatives because they do not have readily available data or models that capture these effects. It is anticipated that the proposed regulations will reduce

taxpayer compliance costs relative to the baseline by significantly reducing the circumstances in which taxpayers must incur costs to obtain data (which may or may not be readily available) in order to evaluate the creditability of a tax.

The Treasury Department and the IRS do not have data or models that would allow them to quantify the reduced administrative burden resulting from these final regulations relative to alternative regulatory approaches. The Treasury Department and the IRS expect that the regulations will reduce administrative burden and compliance burdens because the collection and analysis of empirical data is time consuming for taxpayers and the IRS, and the existing regulations have resulted in a variety of disputes. Hence a reduction in required data collection should reduce burdens. Further, greater reliance on legal definitions rather than empirical review of available data has the potential to reduce the number of disputes, which also should reduce burdens.

c. Number of affected taxpayers

The Treasury Department and the IRS have determined that the population of taxpayers potentially affected by the net gain provisions of the proposed regulations includes any taxpayer with foreign operations claiming foreign tax credits (or with the potential to claim foreign tax credits). Based on currently available tax filings for tax year 2018, there were about 9.3 million Form 1116s filed by U.S. individuals to claim foreign tax credits with respect to foreign taxes paid on individual, partnership, or S corporation income. There were 17,500 Form 1118s filed by C corporations to claim foreign tax credits with respect to foreign taxes paid. In addition, there were about 16,500 C corporations with CFCs that filed at least one Form 5471 with their Form 1120 return, indicating a potential to claim a foreign tax credit even if no credit was claimed in 2018. Similarly, in these data there were about 41,000 individuals with CFCs that e-filed at least one Form 5471 with their Form 1040 return. In 2018, there were about 3,250 S corporations with CFCs that filed at least one Form 5471 with their Form 1120S return. The identified S corporations had an estimated 23,000 shareholders. Finally, the Treasury Department and the IRS estimate that there were approximately 7,500 U.S. partnerships with CFCs that e-filed at least one Form 5741 in 2018. The identified partnerships had approximately 1.7 million partners, as indicated by the number of Schedules K-1 filed by the partnerships; however, this number includes both domestic and foreign partners. Furthermore, there is, likely to be some overlap between the Form 5471 and the Form 1116 and/or 1118 filers.

These numbers suggest that between 9.3 million (under the assumption that all Form 5471 filers or shareholders of filers also filed Form 1116 or 1118) and 11 million (under the assumption that filers or shareholders of filers of Form 5471 are a separate pool from Form 1116 and 1118 filers) taxpayers will potentially be affected by these regulations. Based on Treasury tabulations of Statistics of Income data, the total volume of foreign tax credits reported on Form 1118 in 2016 was about 90 billion dollars. Data do not exist that would allow the Treasury Department or the IRS to identify how this total volume might change as a result of these regulations; however, the Treasury Department and the IRS anticipate that only a small fraction of existing FTCs would be impacted by these regulations.

ii. Jurisdictional nexus

a. Summary

Rules under existing §1.901-2 do not explicitly require, for purposes of determining whether a foreign tax is a creditable foreign income tax, the tax to be imposed only on income that has a jurisdictional nexus (or adequate connection) to the country imposing the tax. In order ensure that creditable taxes under section 901 conform to traditional international norms of taxing jurisdiction and therefore are income taxes in the U.S. sense, these regulations add a jurisdictional nexus requirement.

b. Options considered for the proposed regulations

The Treasury Department and the IRS considered the following three options for designing a nexus requirement. The first option considered is to create a jurisdictional nexus requirement based on Articles 5 (Permanent Establishment) and 7 (Business Profits) in the U.S. Model Income Tax Convention (the "U.S. Convention"). The U.S. Convention includes widely accepted and understood standards with respect to a country's right to tax a nonresident's income. The relevant articles of the U.S. Convention generally require a certain presence or level of activity before the country can impose tax on business income, and the tax can only be imposed on income that is attributable to the business activity. This option was rejected due to concerns that this standard would be too rigid and prescriptive, and such a rigid standard is not necessary; there are numerous departures from the U.S. Convention in both domestic laws and bilateral treaties, which are not considered problematic because they are not considered significant deviations from international norms.

The second option considered was to create a jurisdictional nexus requirement based on Code section 864, which contains a standard for income effectively connected with the conduct of a U.S. trade or business (ECI). The Code does not provide a definition of U.S. trade or business; it is instead defined in case law, and the definition is therefore not strictly delineated. This option was therefore rejected as potentially being too broad, and not necessarily targeting the primary concern with respect to the new extraterritorial taxes, which is that, in contrast to traditional international income tax norms governing the creditability of taxes, they are imposed based on the location of customers or users, or other destination-based criteria.

The third option considered was to require that foreign tax imposed on a nonresident must be based on the nonresident's activities located in the foreign country (including its functions, assets, and risks located in the foreign country) without taking into account as a significant factor the location of customers, users, or similar destination-based criteria. This more narrowly tailored approach better addresses the concern that extraterritorial taxes that are imposed on the basis of location of customers, users, or similar criteria should not be creditable under traditional norms

reflected in the Internal Revenue Code that govern nexus and taxing rights and therefore should be excluded from creditable income taxes. Taxes imposed on nonresidents that would meet the Code-based ECI requirement could qualify, as well as taxes that would meet the permanent establishment and business profit standard under the U.S. Convention. This is the option adopted by the Treasury Department and the IRS.

This approach is consistent with the fact that under traditional norms reflected in the Internal Revenue Code, income tax is generally imposed taking into account the location of the operations, employees, factors of production, residence, or management of the taxpayer. In contrast, consumption taxes such as sales taxes, value-added taxes, or so-called destination based income taxes are generally imposed on the basis of location of customers, users, or similar destination-based criteria. Although the tax incidence of these two groups of taxes may vary, tax incidence does not play a role in the definition of an income tax in general, or an income tax in the U.S. sense. Therefore, the choice among regulatory options was based on which option most closely aligned the definition of foreign income taxes to taxes that are income taxes in the U.S. sense.

The Treasury Department and the IRS have not attempted to estimate the differences in economic activity that might result under each of these regulatory options because they do not have readily available data or models that capture (i) the jurisdictional nexus of taxpayers' activities under the different regulatory approaches and (ii) the economic activities that taxpayers might undertake under different jurisdictional nexus criteria. The Treasury Department and the IRS further have not attempted to estimate the difference in compliance costs under each of these regulatory options.

c. Number of affected taxpayers

The Treasury Department and the IRS have determined that the population of taxpayers potentially affected by the jurisdictional nexus provisions of the proposed regulations includes any taxpayer with foreign operations claiming foreign tax credits (or with the potential to claim foreign tax credits). Based on currently available tax filings for tax year 2018, there were about 9.3 million Form 1116s filed by U.S. individuals to claim foreign tax credits with respect to foreign taxes paid on individual, partnership, or S corporation income. There were 17,500 Form 1118s filed by C corporations to claim foreign tax credits with respect to foreign taxes paid. In addition, there were about 16,500 C corporations with CFCs that filed at least one Form 5471 with their Form 1120 return, indicating a potential to claim a foreign tax credit, even if no credit was claimed in these years. Similarly, for the same period, there were about 41,000 individuals with CFCs that e-filed at least one Form 5471 with their Form 1040 return. In 2018, there were about 3,250 S corporations with CFCs that filed at least one Form 5471 with their Form 1120S return. The identified S corporations had an estimated 23,000 shareholders. Finally, the Treasury Department and the IRS estimate that there were approximately 7,500 U.S. partnerships with CFCs that e-filed at least one Form 5471 in 2018. The identified partnerships had approximately 1.7 million partners, as indicated by the number of Schedules K-1 filed by the partnerships; however, this number includes both domestic and foreign partners. Furthermore, there is likely to be overlap between the Form 5471 and the Form 1116 and/or 1118 filers.

These numbers suggest that between 9.3 million (under the assumption that all Form 5471 filers or shareholders of filers also filed Form 1116 or 1118) and 11 million (under the assumption that filers or shareholders of filers of Form 5471 are a separate pool from Form 1116 and 1118 filers) taxpayers will potentially be affected by these regulations. Based on Treasury Department tabulations of Statistics of Income data, the total volume of foreign tax credits reported on Form 1118 in 2016 was about 90 billion dollars. Data do not exist that would allow us to identify how this total volume might change as a result of these regulations; however, the Treasury Department and the IRS anticipate that only a small fraction of existing FTCs would be impacted by these regulations.

iii. Allocation and apportionment of expenses for insurance companies

a. Summary

Section 818(f) provides that for purposes of applying the expense allocation rules to a life insurance company, the deduction for policyholder dividends, reserve adjustments, death benefits, and certain other amounts ("section 818(f) expenses") are treated as items that cannot be definitely allocated to an item or class of gross income. That means, in general, that the expenses are apportioned ratably across all of the life insurance company's gross income.

Under the expense allocation rules, for most purposes, affiliated groups are treated as a single entity, although there are exceptions for certain expenses. The statute is unclear, however, about how affiliated groups are to be treated with respect to the allocation of section 818(f) expenses of life insurance companies. Depending on how section 818(f) expenses are allocated across an affiliated group, the results could be different because the gross income categories across the affiliated group could be calculated in multiple ways. The Treasury Department and the IRS received comments and are aware that in the absence of further guidance taxpayers are taking differing positions on this treatment. Some taxpayers argue that the expenses described in section 818(f) should be apportioned based on the gross income of the entire affiliated group, while others argue that expenses should be apportioned on a separate company or life subgroup basis taking into account only the gross income of life insurance companies.

b. Options considered for the proposed regulations

The Treasury Department and the IRS are aware of at least five potential methods for allocating section 818(f) expenses in a life-nonlife consolidated group. First, the expenses might be allocated solely among items of the life insurance company that has the reserves ("separate entity method"). Second, to the extent the life insurance company has engaged in a reinsurance arrangement that constitutes an intercompany transaction (as defined in

§1.1502-13(b)(1)), the expenses might be allocated in a manner that achieves single entity treatment between the ceding member and the assuming member ("limited single entity method"). Third, the expenses might be allocated among items of all life insurance members ("life subgroup method"). Fourth, the expenses might be allocated among items of all members of the consolidated group (including both life and non-life members) ("single entity method"). Fifth, the expenses might be allocated based on a facts and circumstances analysis ("facts and circumstances method").

The 2019 FTC proposed regulations proposed adopting the separate entity method because it is consistent with section 818(f) and with the separate entity treatment of reserves under §1.1502-13(e)(2). The Treasury Department and the IRS recognized, however, that this method may create opportunities for consolidated groups to use intercompany transactions to shift their section 818(f) expenses and achieve a more advantageous foreign tax credit result. Accordingly, the Treasury Department and the IRS requested comments on whether a life subgroup method more accurately reflects the relationship between section 818(f) expenses and the income producing activities of the life subgroup as a whole, and whether the life subgroup method is less susceptible to abuse because it might prevent a consolidated group from inflating its foreign tax credit limitation through intercompany transfers of assets, reinsurance transactions, or transfers of section 818(f) expenses. Comments received supported both methods and the Treasury Department and the IRS have concluded that the life subgroup method should generally be used, because it minimizes opportunities for abuse and is more consistent with the general rules allocating expenses among affiliated group members. However, recognizing that the single entity method also has merit, the proposed regulations permit a taxpayer to make a one-time election to use the separate entity method for all life insurance members in the affiliated group. This election is binding for all future years and may not be revoked without the consent of the Commissioner. Because the election is binding and applies to all members of the group, taxpayers will not be able to change allocation methods from year to year depending on which is most advantageous. The Treasury Department and the IRS may consider future proposed regulations to address any additional anti-abuse concerns (such as under section 845), if needed.

The Treasury Department and the IRS have not attempted to assess the differences in economic activity that might result under each of these regulatory options because they do not have readily available data or models that capture activities at this level of specificity. The Treasury Department and the IRS further have not estimated the difference in compliance costs under each of these regulatory options because they lack adequate data.

c. Number of affected taxpayers

The Treasury Department and the IRS have determined that the population of taxpayers potentially affected by these insurance expense allocation rules consists of life insurance companies that are members of an affiliated group. The Treasury Department and the IRS have established that there are approximately 60 such taxpayers.

iv. Creditability of contested foreign income taxes

a. Summary

Section 901 allows a taxpayer to claim a foreign tax credit for foreign income taxes paid or accrued (depending on the taxpayer's method of accounting) in a taxable year. Foreign income taxes accrue in the taxable year in which all the events have occurred that establish the fact of the liability and the amount of the liability can be determined with reasonable accuracy ("all events test"). When a taxpayer disputes or contests a foreign tax liability with a foreign country, that contested tax does not accrue until the contest concludes because only then can the amount of the liability be finally determined. However, under two IRS revenue rulings (Rev. Ruls. 70-290 and 84-125), a taxpayer is allowed to claim a credit for the portion of a contested tax that the taxpayer has actually paid to the foreign country, even though the taxpayer continues to dispute the liability. While this alleviates taxpayer cash flow constraints associated with temporary double taxation, it is not fully consistent with the all events test. In addition, it potentially disincentivizes the taxpayer from continuing to contest the foreign tax, since the tax is already credited and the dispute could be time-consuming and costly, which could result in U.S. tax being reduced by foreign tax in excess of amounts properly due.

b. Options considered for the proposed regulations

The Treasury Department and the IRS considered three options for the treatment of contested foreign taxes. The first option considered is to not make any changes to the existing rule and to continue to allow taxpayers to claim a credit for a foreign tax that is contested but that has been paid to the foreign country. The Treasury Department and the IRS determined that this option is inconsistent with the all events test. It would also result in a taxpayer potentially having two foreign tax redeterminations (FTRs) with respect to one contested liability: one FTR at the time the taxpayer pays the contested tax to the foreign country, and a second FTR when the contest concludes (if the finally determined liability differs from the amount that was paid and claimed as a credit). Furthermore, this option impinges on the IRS's ability to enforce the requirement in existing §1.902-1(e) that a tax has to be a compulsory payment in order to be creditable — if a taxpayer claims a credit for a contested tax, then surrenders the contest once the assessment statute closes, the IRS would be time-barred from challenging that the tax was not creditable on the grounds that the taxpayer failed to exhaust all practical remedies.

The second option considered is to only allow taxpayers to claim a credit when the contest concludes. In some cases, the taxpayer must pay the tax to the foreign country in order to contest the tax or in order to stop the running of interest in the foreign country. This option would leave the taxpayer out of pocket to two countries (potentially giving rise to cash flow issues for the taxpayer) while the contest is pending, which could take several years. The Treasury Department and the IRS determined that this outcome is unduly harsh.

The third option considered is to allow taxpayers the option to claim a provisional

credit for an amount of contested tax that is actually paid, even though in general, taxpayers can only claim a credit when the contest resolves. This is the option adopted in proposed §1.905-1(d)(3) and (4). As a condition for making this election, the taxpayer must enter into a provisional foreign tax credit agreement in which it agrees to notify the IRS when the contest concludes and agrees to not assert the expiration of the assessment statute (for a period of three years from the time the contest resolves) as a defense to assessment, so that the IRS is able to challenge the foreign tax credit claimed with respect to the contested tax if the IRS determines that the taxpayer failed to exhaust all practical remedies.

The Treasury Department and the IRS have not attempted to assess the differences in economic activity that might result under each of these regulatory options because they do not have readily available data or models that capture taxpayers' activities under the different treatments of contested taxes. The Treasury Department and the IRS further have not attempted to estimate the difference in compliance costs under each of these regulatory options.

c. Number of affected taxpayers

The Treasury Department and the IRS have determined that the proposed regulations potentially affect U.S. taxpayers that claim foreign tax credits on an accrual basis and that contest a foreign income tax liability with a foreign country. Although data reporting the number of taxpayers that claim a credit for contested foreign income tax in a given year are not readily available, the potentially affected population of taxpayers would, under existing §1.905-3, have a foreign tax redetermination for the year to which the contested tax relates. Data reporting the number of taxpayers subject to a foreign tax redetermination in a given year are not readily available, however some taxpayers currently subject to such redetermination will file amended returns. Based on currently available tax filings for tax year 2018, the Treasury Department and the IRS have determined that approximately 1,500 filers would be affected by these proposed regulations. This estimate is based on the number of U.S. corporations that filed an amended return that had a Form 1118 attached to the Form 1120; S corporations that filed an amended return with a Form 5471 attached to the Form 1120S or that reported an amount of foreign tax accrued on the Form 1120S, Schedule K; partnerships that filed an amended return with a Form 5471 attached to Form 1065 or that reported an amount of foreign tax accrued on Schedule K; U.S. individuals that filed an amended return and had a Form 1116 attached to the Form 1040. Because only taxpayers that claim foreign tax credits on an accrual basis could potentially be subject to the proposed regulations, only taxpayers that checked the accrual box on the Form 1116 or Form 1118, or that indicated on Schedule K that an amount of foreign income tax accrued, were taken into account for the estimate.

II. *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) ("Paperwork Reduction Act") requires that a federal agency obtain the approval of the OMB before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit.

A. *Overview*

The proposed regulations include new collection of information requirements in proposed §§1.905-1(d)(4) and (5), 1.901-1(d)(2), and 1.905-3. The collections of information in proposed §1.905-1(d)(4) apply to taxpayers that elect to claim a provisional credit for contested foreign income taxes before the contest resolves. Taxpayers making this election are required to file an agreement described in proposed §1.905-1(d)(4)(ii) as well as an annual certification described in proposed §1.905-1(d)(4)(iii). The collection of information in §1.905-1(d)(5) requires taxpayers that are correcting an improper method of accruing foreign income tax expense to file a Form 3115, Application for Change in Accounting Method, with their return. Proposed §§1.901-1(d)(2) and 1.905-3 require taxpayers that make a change between claiming a credit and a deduction for foreign income taxes to comply with the notification and reporting requirements in §1.905-4, which is being finalized in a Treasury Decision published concurrently with this notice of proposed rulemaking. The collection of information in §1.905-4 generally requires taxpayers to file an amended return for the year or years affected by a foreign tax redetermination (FTR), along with an updated Form 1116 or Form 1118, and a written statement providing specific information relating to the FTR. The burdens associated with collections of information in proposed §§1.905-1(d)(4)(iii) and (d)(5), 1.901-1(d)(2), and 1.905-3, which will be conducted through existing IRS forms, is described in Part II.B of this Special Analyses. The burden for a new collection of information in proposed §1.905-1(d)(4)(ii), which will be conducted on a new IRS form, is described in Part II.C of this Special Analyses.

B. *Collections of information — proposed §§1.905-1(d)(4)(iii), 1.905-1(d)(5), 1.901-1(d)(2), and 1.905-3*

The Treasury Department and the IRS intend that the information collection requirements described in this Part II.B will be set forth in the forms and instructions identified in Table 1.

Table 1. Table of Tax Forms Impacted

Tax Forms Impacted		
Collection of Information	Number of respondents (estimated)	Forms to which the information may be attached
§1.905-1(d)(4)(iii)	1,500	Form 1116, Form 1118
§1.905-1(d)(5)	465,500 - 514,500	Form 3115
§1.901-1(d)(2), §1.905-3	10,400 - 13,500	Form 1065 series, Form 1040 series, Form 1041 series, and Form 1120 series

Source: [MeF, DCS, and IRS's Compliance Data Warehouse]

As indicated in Table 1, the Treasury Department and the IRS intend the annual certification requirement in proposed §1.905-1(d)(4)(iii), which applies to taxpayers that elect to claim a provisional credit for contested taxes, will be conducted through amendment of existing Form 1116, Foreign Tax Credit (Individual, Estate, or Trust) (covered under OMB control numbers 1545-0074 for individuals, and 1545-0121 for estates and trusts) and existing Form 1118, Foreign Tax Credit (Corporations) (covered under OMB control number 1545-0123). The collection of information in proposed §1.905-1(d)(4)(iii) will be reflected in the Paperwork Reduction Act submission that the Treasury Department and the IRS will submit to OMB for these forms. The current status of the Paperwork Reduction Act submissions related to these forms is summarized in Table 2. The estimate for the number of impacted filers with respect to the collection of information in proposed §1.905-1(d)(4)(iii), as well as with respect to the collection of information in proposed §1.905-1(d)(4)(ii) (described in Part II.C), is based on the number of U.S. corporations that filed an amended return that had a Form 1118 attached to the Form 1120; S corporations that filed an amended return with a Form 5471 attached to the Form 1120S or that reported an amount of foreign tax accrued on the Form 1120S, Schedule K; partnerships that filed an amended return with a Form 5471 attached to Form 1065 or that reported an amount of foreign tax accrued on Schedule K; and U.S. individuals that filed an amended return and had a Form 1116 attached to the Form 1040.

The Treasury Department and the IRS expect that the collection of information in proposed §1.905-1(d)(5) will be reflected in the Paperwork Reduction Act submission that the Treasury Department and the IRS will submit to OMB for Form 3115 (covered under OMB control numbers 1545-0123 and 1545-0074). See Table 2 for current status of the Paperwork Reduction Act submission for Form 3115. Exact data is not available to estimate the number of taxpayers that have used an incorrect method of accounting for accruing foreign income taxes, and that are potentially subject to the collection of information in proposed §1.905-1(d)(5). The estimate in Table 1 of number of taxpayers potentially affected by this collection of information is based on the total number of filers in the Form 1040, Form 1041, Form 1120, Form 1120S, and Form 1065 series that indicated on their return that they use an accrual method of accounting, and that either claimed a foreign tax credit or claimed a deduction for taxes (which could include foreign income taxes). This represents an upper bound of potentially affected taxpayers. The Treasury Department and the IRS expect that only a small percentage of this population of taxpayers will be subject to the collection of information in proposed §1.905-1(d)(5), because only taxpayers that have used an improper method of accounting are subject to proposed §1.905-1(d)(5).

The collection of information resulting from proposed §§1.901-1(d)(2) and 1.905-3, which is contained in §1.905-4, will be reflected in the Paperwork Reduction Act submission that the Treasury Department and the IRS will submit for OMB control numbers 1545-0123, 1545-0074 (which cover the reporting burden for filing an amended return and amended Form 1116 and Form 1118 for individual and business filers), OMB control number 1545-0092 (which covers the reporting burden for filing an amended return for estate and trust filers), OMB control number 1545-0121 (which covers the reporting burden for filing a Form 1116 for estate and trust filers), and OMB control number 1545-1056 (which covers the reporting burden for the written statement for FTRs). Exact data are not available to estimate the additional burden imposed by proposed §§1.901-1(d)(2) and 1.905-3, which propose to amend the definition of foreign tax redetermination in §1.905-3 to include a taxpayer's change from claiming a deduction to claiming a credit, or vice versa, for foreign income taxes. Taxpayers making or changing their election to claim a foreign tax credit, under existing regulations, must already file amended returns and, if applicable, a Form 1116 or Form 1118, for the affected years. The Treasury Department and the IRS do not anticipate that proposed regulations, which would require taxpayers making this change to comply with the collection of information and reporting burden in §1.905-4, will substantially change the reporting requirement. Exact data are not available to estimate the number of taxpayers potentially subject to proposed §§1.901-1(d)(2) and 1.905-3. The estimate in Table 1 is based upon the total number of filers in the Form 1040, Form 1041, and Form 1120 series that either claimed a foreign tax credit or claimed a deduction for taxes (which could include foreign income taxes), and filed an amended return. This estimate represents an upper bound of potentially affected taxpayers.

OMB control number 1545-0123 represents a total estimated burden time for all forms and schedules for corporations of 3.344 billion hours and total estimated monetized costs of $61.558 billion ($2019). OMB control number 1545-0074 represents a total estimated burden time, including all other related forms and schedules for individuals, of 1.717 billion hours and total estimated monetized costs of $33.267 billion ($2019). OMB control number 1545-0092 represents a total estimated burden time, including related forms and schedules, but not including Form 1116, for trusts and estates, of 307,844,800 hours and total estimated monetized costs of $14.077 billion ($2018). OMB control number 1545-0121 represents a total estimated burden time for all estate and trust filers of Form 1116, of 25,066,693 hours and total estimated monetized costs of $1.744 billion ($2018). OMB control number 1545-1056 has an estimated number of respondents in a range from 8,900 to 13,500 and total estimated burden time of 56,000 hours and total estimated monetized costs of $2,583,840 ($2017).

The overall burden estimates provided for OMB control numbers 1545-0123, 1545-0074, and 1545-0092 are aggregate amounts that relate to the entire package of forms associated with these OMB control numbers and will in the future include but not isolate the estimated burden of the tax forms that will be revised as a result of the information collections in the proposed regulations. The difference between the burden estimates reported here and those future burden estimates will therefore not provide an estimate of the burden imposed by the proposed regulations. The burden estimates reported here have been reported for other regulations related to the taxation of cross-border in-

come. The Treasury Department and IRS urge readers to recognize that many of the burden estimates reported for regulations related to taxation of cross-border income are duplicates and to guard against overcounting the burden that international tax provisions impose. The Treasury Department and the IRS have not identified the estimated burdens for the collections of information in proposed §§1.905-1(d)(4)(iii) and (d)(5), 1.901-1(d)(2), and 1.905-3 because no burden estimates specific to proposed §§1.905-1(d)(4)(iii) and (d)(5), 1.901-1(d)(2), and 1.905-3 are currently available. The Treasury Department and the IRS estimate burdens on a taxpayer-type basis rather than a provision-specific basis.

The Treasury Department and the IRS request comments on all aspects of information collection burdens related to the proposed regulations, including estimates for how much time it would take to comply with the paperwork burdens described above for each relevant form and ways for the IRS to minimize the paperwork burden. Any proposed revisions to these forms that reflect the information collections contained in proposed §§1.905-1(d)(4)(iii) and (d)(5), 1.901-1(d)(2), and 1.905-3 will be made available for public comment at https://apps.irs.gov/app/picklist/list/draftTaxForms.html and will not be finalized until after these forms have been approved by OMB under the Paperwork Reduction Act.

Table 2. Status of current Paperwork Reduction submissions.

Form	Type of Filer	OMB Number(s)	Status
Form 1116	Trusts & estates (NEW Model)	1545-0121	Approved by OMB through 10/31/2020.
	https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201704-1545-023		
	Individual (NEW Model)	1545-0074	Approved by OMB through 1/31/2021.
	https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201909-1545-021		
Form 1118	Business (NEW Model)	1545-0123	Approved by OMB through 1/31/2021.
	https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201907-1545-001		
Form 3115	Business (NEW Model)	1545-0123	Approved by OMB through 1/31/2021.
	https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201907-1545-001		
	Individual (NEW Model)	1545-0074	Approved by OMB through 1/31/2021.
	https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201909-1545-021		
Notification of FTRs		1545-1056	Approved by OMB through 12/31/2020.
	https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201703-1545-008		
Amended returns	Business (NEW Model)	1545-0123	Approved by OMB through 1/31/2021.
	https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201907-1545-001		
	Individual (NEW Model)	1545-0074	Approved by OMB through 1/31/2021.
	https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201909-1545-021		
	Trusts & estates	1545-0092	Approved by OMB through 5/31/2022.
	https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201806-1545-014		

C. *Collections of information — proposed §1.905-1(d)(4)(ii)*

The collection of information contained in §1.905-1(d)(4)(ii) have been submitted to the Office of Management and Budget (OMB) for review in accordance with the Paperwork Reduction Act. Commenters are strongly encouraged to submit public comments electronically. Comments and recommendations for the proposed information collection should be sent to http://www.reginfo.gov/public/do/PRAMain, with electronic copies emailed to the IRS at omb.unit@irs.gov (indicate REG-101657-20 on the subject line). This particular information collection can be found by selecting "Currently under Review - Open for Public Comments" then by using the search function. Comments can also be mailed to OMB, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies mailed to the IRS, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collections of information should be received by January 11, 2021.

The likely respondents are: U.S. persons who pay or accrue foreign income taxes:

Estimated total annual reporting burden: 3,000 hours.

Estimated average annual burden per respondent: 2 hours.

Estimated number of respondents: 1,500.

Estimated frequency of responses: annually.

III. *Regulatory Flexibility Act*

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that the proposed regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act.

The proposed regulations provide guidance needed to comply with statutory changes and affect individuals and corporations claiming foreign tax credits. The domestic small business entities that are subject to the foreign tax credit rules in the Code and in the proposed regulations are generally those domestic small business entities that are at least 10 percent corporate shareholders of foreign corporations, and so are eligible to claim dividends received deductions or compute foreign taxes deemed paid under section 960 with respect to inclusions under subpart F and section 951A from CFCs. Other provisions of these proposed regulations might also affect domestic small business entities that operate in foreign jurisdictions or that have income from sources outside of the United States.

Based on 2018 Statistics of Income data, the Treasury Department and the IRS computed the fraction of taxpayers owning a CFC by gross receipts size class. The smaller size classes have a relatively small fraction of taxpayers that own CFCs, which suggests that many domestic small business entities would be unaffected by these regulations. Many of the important aspects of the proposed regulations, including the rules in proposed §§1.245A(d)-1(a), 1.367(b)-4, 1.367(b)-7, 1.367(b)-10, 1.861-3, and 1.960-1 apply only to U.S. persons that operate a foreign business in corporate form, and, in most cases, only if the foreign corporation is a CFC.

Other provisions in the proposed regulations, specifically the rules in proposed §§ 1.861-14 and 1.904-4, generally apply only to members of an affiliated group and insurance companies or other members of the financial services industry earning income from sources outside of the United States. It is infrequent for domestic small entities to operate as part of an affiliated group, to be taxed as an insurance company, or to constitute a financial services entity, and also earn income from sources outside of the United States. Consequently, the Treasury Department and the IRS expect that the proposed regulations are unlikely to affect a substantial number of domestic small business entities. However, adequate data are not available at this time to certify that a substantial number of small entities would be unaffected.

The Treasury Department and the IRS have determined that the proposed regulations will not have a significant economic impact on domestic small business entities. Based on information from the Statistics of Income 2017 Corporate File, foreign tax credits as a percentage of three different tax-related measures of annual receipts (see Table for variables) by corporations are substantially less than the 3 to 5 percent threshold for significant economic impact.

Size (by Business Receipts)	under $500,000	$500,000 under $1,000,000	$1,000,000 under $5,000,000	$5,000,000 under $10,000,000	$10,000,000 under $50,000,000	$50,000,000 under $100,000,000	$100,000,000 under $250,000,000	$250,000,000 or more
FTC/Total Receipts	0.12%	0.00%	0.00%	0.00%	0.01%	0.01%	0.02%	0.28%
FTC/(Total Receipts-Total Deductions)	0.61%	0.03%	0.09%	0.05%	0.35%	0.71%	1.38%	9.89%
FTC/Business Receipts	0.84%	0.00%	0.00%	0.00%	0.01%	0.01%	0.02%	0.05%

Source: Statistics of Income (2017) Form 1120

Although proposed §§1.905-1(d)(4) and (5), 1.901-1(d)(2), and 1.905-3 contain a collection of information requirement, the small businesses that are subject to these requirements are domestic small entities with significant foreign operations. The data to assess precise counts of small entities affected by proposed §§1.905-1(d)(4) and (5), 1.901-1(d)(2), and 1.905-3 are not readily available. As demonstrated in the table in this Part III of the Special Analyses, foreign tax credits do not have a significant economic impact for any gross-receipts class of business entities.[7] Therefore, the proposed regulations do not have a significant economic impact on small business entities. Accordingly, it is hereby certified that the requirements of proposed §§1.905-1(d)(4) and (5), 1.901-1(d)(2), and 1.905-3 will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f), these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses. The Treasury Department and the IRS also request comments from the public on the certifications in this Part III of the Special Analyses.

IV. *Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires

[7] Although proposed §§1.905-1(d)(5), 1.901-1(d)(2), and 1.905-3 also impact taxpayers that claim a deduction, instead of a credit, for foreign income taxes, the Treasury Department and the IRS expect that the vast majority of taxpayers that have creditable foreign income taxes would choose a dollar-for-dollar credit instead of a deduction; thus, the data in this table measuring foreign tax credit against various variables is a reasonable estimate of the economic impact of these proposed regulations.

that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. This proposed rule does not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

V. *Executive Order 13132: Federalism*

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

Comments and Request for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the "**ADDRESSES**" section. The Treasury Department and the IRS request comments on all aspects of the proposed rules. See also the specific requests for comments in the following Parts of the Explanation of Provisions: I (on potential revisions to §1.861-20(d) to address concerns regarding foreign law transactions that may circumvent the purpose of section 245A(d)), III (on the proposed revisions to §1.367(b)-4(b)(2) and on whether further changes to regulations issued under section 367 are appropriate in order to clarify their application after the repeal of section 902), V.A (on the definition of advertising expenditures and the method of cost recovery for purposes of the election in proposed §1.861-9(k)), V.D (regarding the rules on direct allocation of interest expense incurred by foreign banking branches), V.F.2 (regarding the assignment of foreign tax on a U.S. return of capital amount resulting from a disposition of stock), V.F.3 (regarding the assignment of foreign tax on partnership distributions and sales of partnership interests), V.F.4.ii (regarding ordering rules for assignment of foreign taxes with respect to multiple disregarded payments and regarding the assignment of foreign gross basis taxes paid by taxable units that make disregarded payments), V.F.4.iii (regarding the method of determining the statutory and residual groupings to which a remittance is assigned), V.F.5 (regarding the appropriate treatment of foreign income taxes paid or accrued in connection with the sharing of losses and foreign law group-relief regimes), VI.A.1 (on whether additional revisions to §1.901-2A are needed in light of the proposed revisions to §§1.901-2 and 1.903-1), VI.A.2 (regarding the jurisdictional nexus requirement in proposed §1.901-2(c), including whether special rules are needed to address foreign transfer pricing rules that allocate profits to a resident on a formulary basis), VI.A.3.ii (on whether a more objective standard for identifying acceptable deviations from the realization requirement should be adopted in the final regulations and on whether additional categories of pre-realization timing differences are needed), VI.A.4 (regarding additional issues related to soak-up taxes), VI.B.2 (regarding additional rules for government grants that are provided outside the foreign tax system), VI.B.3.ii (on the treatment of loss sharing arrangements and on other foreign options and elections that should be excepted from the general rule in §1.901-2(e)(5)(ii)), IX.B (on the treatment of related party payments in the 70-percent gross income test, on whether related party payments should in some cases constitute active financing income, and on the investment income limitation rule), and X.D.4 (on alternative methods and additional adjustments for implementing a method change involving the improper accrual of foreign income taxes).

Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at www.regulations.gov or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a public hearing are also encouraged to be made electronically. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**. Announcement 2020-4, 2020-17 IRB 1, provides that until further notice, public hearings conducted by the IRS will be held telephonically. Any telephonic hearing will be made accessible to people with disabilities.

Drafting Information

The principal authors of the proposed regulations are Corina Braun, Karen J. Cate, Jeffrey P. Cowan, Logan M. Kincheloe, Brad McCormack, Jeffrey L. Parry, Tianlin (Laura) Shi, and Suzanne M. Walsh of the Office of Associate Chief Counsel (International), as well as Sarah K. Hoyt and Brian R. Loss of Associate Chief Counsel (Corporate). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

Paragraph 1. The authority citation for part 1 is amended by adding an entry for §1.245A(d)-1 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 1.245A(d)-1 also issued under 26 U.S.C. 245A(g).

* * * * *

Par. 2. Section 1.164-2 is amended by revising paragraph (d) and adding paragraph (i) to read as follows:

§1.164-2 Deduction denied in case of certain taxes.

* * * * *

(d) *Foreign income taxes*. Except as provided in §1.901-1(c)(2) and (3), all foreign income taxes as defined in §1.901-2(a) paid or accrued (as the case may be, depending on the taxpayer's method of accounting for such taxes) in such taxable year, if the taxpayer chooses to take to any extent the benefits of section 901, relating to the credit for taxes of foreign countries and possessions of the United States, for taxes that are paid or accrued (according to the taxpayer's method of accounting for such taxes) in such taxable year.

* * * * *

(i) *Applicability dates*. Paragraph (d) of this section applies to foreign taxes paid or accrued in taxable years beginning on or after [date final regulations are filed with the **Federal Register**].

Par. 3. Section 1.245A(d)-1 is added to read as follows:

§1.245A(d)-1 Disallowance of foreign tax credit or deduction.

(a) *In general*. With respect to a domestic corporation for which a deduction under section 245A(a) is allowable, neither a foreign tax credit under section 901 nor a deduction is allowed for foreign income taxes that are attributable to a specified distribution or specified earnings and profits of a foreign corporation. In addition, if a domestic corporation is a United States shareholder of a foreign corporation ("upper-tier foreign corporation") that itself owns (including indirectly through a pass-through entity) stock of another foreign corporation ("lower-tier foreign corporation"), no foreign tax credit under section 901 (including by reason of section 960) is allowed to the domestic corporation, and no deduction is allowed to the upper-tier foreign corporation, for foreign income taxes paid or accrued by the upper-tier foreign corporation that are attributable to a specified distribution or specified earnings and profits of the lower-tier foreign corporation. Moreover, neither a foreign tax credit under section 901 nor a deduction is allowed to a successor (including an individual who is a citizen or resident of the United States) of a corporation described in this paragraph (a) for foreign income taxes that are attributable to the portion of a foreign corporation's specified earnings and profits that constitute section 245A(d) PTEP.

(b) *Attribution of foreign income taxes to specified distributions and specified earnings and profits*—(1) *In general*. Foreign income taxes are attributable to a specified distribution from a foreign corporation to the extent such taxes are allocated and apportioned under §1.861-20 to foreign taxable income arising from the specified distribution. Foreign income taxes are attributable to specified earnings and profits of a foreign corporation to the extent such taxes are allocated and apportioned under §1.860-20 to foreign taxable income arising from a distribution or inclusion under foreign law of specified earnings and profits if the event giving rise to such distribution or inclusion does not give rise to a specified distribution. See, for example, §§1.861-20(d)(2)(ii)(B), (C), or (D) (foreign law distribution or disposition and certain foreign law transfers between taxable units), 1.861-20(d)(3)(i)(C) (income from a reverse hybrid), 1.861-20(d)(3)(iii) (foreign law inclusion regime), and 1.861-20(d)(3)(v)(C)(*1*)(*i*) (disregarded payment treated as a remittance). For purposes of this paragraph (b), §1.861-20 is applied by treating foreign gross income in an amount equal to the amount of a distribution (under Federal income tax law) that is a specified distribution, or the amount of a distribution or inclusion under foreign law that would if recognized for Federal income tax purposes be a distribution out of, or inclusion with respect to, specified earnings and profits, as a statutory grouping, and any remaining portion of the foreign gross income arising from the distribution or inclusion under foreign law as the residual grouping. See also §1.960-1(e) (foreign income tax paid or accrued by a controlled foreign corporation that is assigned to the residual grouping cannot be deemed paid under section 960).

(2) *Anti-avoidance rule*. Foreign income taxes are treated as attributable to a specified distribution from, or the specified earnings and profits of, a foreign corporation if a transaction, series of related transactions, or arrangement is undertaken with a principal purpose of avoiding the purposes of section 245A(d) and this section, including, for example, by separating foreign income taxes from the income, or earnings and profits, to which such foreign income taxes relate or by making distributions (or causing inclusions) under foreign law in multiple years that give rise to foreign income taxes that are allocated and apportioned with reference to the same previously taxed earnings and profits. See paragraph (e)(4) of this section (*Example 3*).

(c) *Definitions*. The following definitions apply for purposes of this section.

(1) *Foreign income tax*. The term *foreign income tax* has the meaning set forth in §1.901-2(a).

(2) *Hybrid dividend*. The term *hybrid dividend* has the meaning set forth in §1.245A(e)-1(b)(2).

(3) *Pass-through entity*. The term *pass-through entity* has the meaning set forth in §1.904-5(a)(4).

(4) *Section 245A(d) PTEP*. The term *section 245A(d) PTEP* means previously taxed earnings and profits described in §1.960-3(c)(2)(v) or (ix) to the extent such previously taxed earnings and profits arose as a result of a sale or exchange that by reason of section 964(e)(4) or 1248 gave rise to a deduction under section 245A(a) or as a result of a tiered hybrid dividend that by reason of section 245A(e)(2) and §1.245A(e)-1(c)(1) gave rise to an inclusion in the gross income of a United States shareholder.

(5) *Specified distribution*. With respect to a domestic corporation, the term *specified distribution* means, in the case of a distribution to the domestic corporation (including indirectly through a pass-through entity), the portion of the distribution that is a dividend for which a deduction under section 245A(a) is allowed or that is a hybrid dividend or that is attributable to section 245A(d) PTEP. In addition, the term specified distribution means, in the case of a distribution from a foreign corporation to another foreign corporation (including indirectly through a pass-through entity), the portion of the distribution that is attributable to section 245A(d) PTEP or that is a tiered hybrid dividend that gives rise to an inclusion in the gross income of a United States shareholder of the second foreign corporation by reason of section 245A(e)(2) and §1.245A(e)-1(c)(1).

(6) *Specified earnings and profits*. With respect to a domestic corporation, the term *specified earnings and profits*

means the portion of earnings and profits of the foreign corporation that would give rise to a specified distribution (determined without regard to section 246 or §1.245A-5) if an amount of money equal to all of the foreign corporation's earnings and profits were distributed with respect to the stock of the foreign corporation owned by all the shareholders on any date on which the domestic corporation has an item of foreign gross income as the result of a distribution from or inclusion with respect to the foreign corporation under foreign law. In addition, for purposes of applying §1.861-20(d)(3)(i)(B) or (D) to assign foreign gross income arising from a distribution with respect to, or a disposition of, stock of the foreign corporation, earnings and profits in the amount of the U.S. return of capital amount (as defined in §1.861-20(b)) that are deemed to arise in a section 245A subgroup (after applying the asset method in §1.861-9) are also treated as specified earnings and profits.

(7) *Tiered hybrid dividend*. The term *tiered hybrid dividend* has the meaning set forth in §1.245A(e)-1(c)(2).

(d) *Effect on earnings and profits*. The disallowance of a credit or deduction for foreign income taxes under paragraph (a) of this section does not affect whether the foreign income taxes reduce earnings and profits of a corporation.

(e) *Examples*. The following examples illustrate the application of this section.

(1) *Presumed facts*. Except as otherwise provided, the following facts are presumed for purposes of the examples:

(i) USP is a domestic corporation;

(ii) CFC is a controlled foreign corporation organized in Country A, and is not a reverse hybrid (as defined in §1.861-20(b));

(iii) USP would be allowed a deduction under section 245A(a) to the extent of dividends received from CFC;

(iv) All parties have a U.S. dollar functional currency and a U.S. taxable year and foreign taxable year that correspond to the calendar year;

(v) No party has deductions for Country A tax purposes or deductions for Federal income tax purposes (other than foreign income tax expense); and

(vi) Section 245A(d) is the operative section.

(2) *Example 1: Distribution for foreign and Federal income tax purposes*—(i) *Facts*. USP owns all of the outstanding stock of CFC. As of December 31, Year 1, CFC has $800x of section 951A PTEP (as defined in §1.960-3(c)(2)(viii)) in a single annual PTEP account (as defined in §1.960-3(c)(1)), and $500x of earnings and profits described in section 959(c)(3). On December 31, Year 1, CFC distributes $1,000x of cash to USP. For Country A tax purposes, the distribution is treated entirely as a dividend to USP, and Country A imposes a withholding tax on USP of $150x with respect to the $1,000x of foreign gross income. For Federal income tax purposes, $800x of the distribution is excluded from USP's gross income and not treated as a dividend under section 959(a) and (d), respectively; the remaining $200x of the distribution gives rise to a dividend to USP.

(ii) *Analysis*—(A) *Identification of specified distribution*. With respect to USP, $200x of the distribution gives rise to a dividend for which a deduction under section 245A(a) is allowed. Accordingly, the distribution results in a $200x specified distribution. See paragraph (c)(5) of this section.

(B) *Foreign income taxes attributable to specified distribution*. For purposes of allocating and apportioning the $150x of Country A foreign income tax, §1.861-20 is applied by first assigning the $1,000x of Country A gross income to the relevant statutory and residual groupings for purposes of applying section 245A(d) as the operative section. Under paragraph (b)(1) of this section, the statutory grouping is foreign gross income in the amount of the specified distribution and the residual grouping is the remaining amount of foreign gross income. Under §1.861-20(d)(3)(i)(B)(*2*), the foreign dividend amount ($1,000x) is, to the extent of the U.S. dividend amount ($1,000x), assigned to the same statutory or residual groupings to which the distribution of the U.S. dividend amount is assigned under Federal income tax law. Thus, $200x of the foreign dividend amount is assigned to the statutory grouping, and the remaining $800x is assigned to the residual grouping. Under §1.861-20(f), $30x ($150x x $200x / $1,000x) of the Country A foreign income tax is apportioned to the statutory grouping, and $120x ($150x x $800x / $1,000x) of the Country A foreign income tax is apportioned to the residual grouping.

(C) *Disallowance*. USP is allowed neither a foreign tax credit nor a deduction for the $30x of Country A foreign income tax that is allocated and apportioned to, and therefore attributable to, the $200x specified distribution. See paragraphs (a) and (b) of this section.

(3) *Example 2: Distribution for foreign law purposes*—(i) *Facts*. USP owns all of the outstanding stock of CFC. On December 31, Year 1, CFC distributes $1,000x of its stock to USP. For Country A tax purposes, the stock distribution is treated entirely as a dividend to USP, and Country A imposes a withholding tax on USP of $150x with respect to the $1,000x of foreign gross income. For Federal income tax purposes, USP recognizes no U.S. gross income as a result of the stock distribution pursuant to section 305(a). As of December 31, Year 1, the date of the stock distribution, CFC has $800x of section 951A PTEP (as defined in §1.960-3(c)(2)(viii)) in a single annual PTEP account (as defined in §1.960-3(c)(1)), and $500x of earnings and profits described in section 959(c)(3).

(ii) *Analysis*—(A) *Identification of specified earnings and profits*. With respect to USP, CFC has $500x of specified earnings and profits because if, on December 31, Year 1, CFC were to distribute $1,300x of money (an amount equal to all of CFC's earnings and profits) with respect to its stock to USP, $500x of the distribution would be a dividend for which USP would be allowed a deduction under section 245A(a) and, therefore, would give rise to a specified distribution. See paragraphs (c)(5) and (6) of this section. The remaining $800x of the distribution would not be included in USP's gross income or treated as a dividend and, thus, would not give rise to a deduction under section 245A(a). See section 959(a) and (d), respectively.

(B) *Foreign income taxes attributable to specified earnings and profits*. For purposes of allocating and apportioning the $150x of Country A foreign income tax, §1.861-20 is applied by first assigning the $1,000x of Country A gross income to the relevant statutory and residual groupings for purposes of applying section 245A(d) as the operative section. Under paragraph (b)(1) of this section, the statutory grouping is the amount of foreign gross income arising from the foreign law distribution that would if recognized for Federal income tax purposes be a distribution out of CFC's specified earnings and profits, and the residual grouping is the remaining amount of the foreign gross income. There is no corresponding U.S. item because under section 305(a) USP recognizes no U.S. gross income with respect to the stock distribution. Under §1.861-20(d)(2)(ii)(B), the item of foreign gross income (the $1,000x dividend) is assigned under the rules of §1.861-20(d)(3)(i)(B) to the same statutory or residual groupings to which the foreign gross income would be assigned if a distribution of the same amount were made for Federal income tax purposes on December 31, Year 1, the date the stock distribution occurs for Country A tax purposes. If recognized for Federal income tax purposes, a $1,000x distribution on December 31, Year 1, would result in a U.S. dividend amount (which as defined in §1.861-20(b) includes distributions of previously taxed earnings and profits) of $1,000x. Under §1.861-20(d)(3)(i)(B)(*2*), the foreign dividend amount ($1,000x) is, to the extent of the U.S. dividend amount ($1,000x), assigned to the same statutory or residual groupings from which a distribution of the U.S. dividend amount would be made under Federal income tax law. Thus, $200x of foreign gross income related to the foreign dividend amount is assigned to the statutory grouping for the gross income that would arise from a distribution of CFC's specified earnings and profits, and $800x is assigned to the residual grouping. Under §1.861-20(f), $30x ($150x x $200x / $1,000x) of the Country A foreign income tax is apportioned to the statutory grouping, and $120x ($150x x $800x / $1,000x) of the Country A foreign income tax is apportioned to the residual grouping.

(C) *Disallowance*. USP is allowed neither a foreign tax credit nor a deduction for the $30x of Country A foreign income tax that is allocated and apportioned to, and therefore attributable to, the $500x of specified earnings and profits of CFC. See paragraphs (a) and (b) of this section.

(4) *Example 3: Successive foreign law distributions subject to anti-abuse rule*—(i) *Facts*. During Year 1, CFC generates $500x of subpart F income that is included in USP's income under section 951(a), and $500x of foreign oil and gas extraction income (as defined in section 907(c)(1)) in Country A. As of December 31, Year 1, CFC has $500x of earnings and profits described in section 959(c)(3) and $500x of section 951(a)(1)(A) PTEP (as defined in §1.960-3(c)(2)(x)). CFC generates no income in Years 2 through 4. In each of Years 2 and 3, USP makes a consent dividend election under Country A law that, for Country A tax purposes, deems CFC to distribute to USP, and USP immediately to contribute to CFC, $500x on December 31 of each year. For Country A tax purposes, each deemed distribution and contribution is treated as a dividend of $500x to USP, followed immediately by a contribution to CFC of $500x, and Country A imposes a withholding tax on USP of $150x with respect to $500x of foreign gross income in each of Years 2 and 3. For Federal income tax purposes, the Country A consent dividend is disregarded, and USP recognizes no U.S. gross income. In Year 4, CFC distributes $1,000x to USP, which for Country A tax purposes is treated as a return of contributed capital on which no withholding tax is imposed. For Federal income tax purposes, $500x of the $1,000x distribution is excluded from USP's gross income and not treated as a dividend under section 959(a) and (d), respectively; the remaining $500x of the distribution gives rise to a dividend to USP for which USP is allowed a deduction under section 245A(a). The Country A consent dividend elections in Years 2 and 3 are made with a principal purpose of avoiding the application of section 245A(d) and this section to disallow a credit or deduction for Country X withholding tax incurred with respect to CFC's specified earnings and profits.

(ii) *Analysis*—(A) *Identification of specified earnings and profits*. With respect to USP, CFC has $500x of specified earnings and profits in Years 2 and 3 because if, on the date of each foreign law distribution, CFC were to distribute $1,000x of money (an amount equal to all of CFC's earnings and profits) with respect to its stock owned by USP, $500x of the distribution would be a dividend for which USP would be allowed a deduction under section 245A(a) and, therefore, would give rise to a specified distribution. See paragraphs (c)(5) and (6) of this section.

(B) *Foreign income taxes attributable to specified earnings and profits*. For purposes of allocating and apportioning the $150x of Country A foreign income tax incurred by USP in each of Years 2 and 3, §1.861-20 is applied by first assigning the $500x of Country A gross income to the relevant statutory and residual groupings for purposes of applying section 245A(d) as the operative section. Under paragraph (b)(1) of this section, the statutory grouping is the amount of foreign gross income arising from the foreign law distribution that would if recognized for Federal income tax purposes be a distribution out of CFC's specified earnings and profits, and the residual grouping is the remaining amount of the foreign gross income. The $500x of foreign gross income is not included in the U.S. gross income of USP, and thus, there is no corresponding U.S. item. The Country A consent dividends in Years 2 and 3 meet the definition of a foreign law distribution in §1.861-20(b) because Country A treats them as a taxable distribution but Federal income tax law does not. Under §1.861-20(d)(2)(ii)(B), the $500x item of foreign law dividend income is assigned to a statutory or residual grouping by treating CFC as making an actual distribution (for Federal income tax purposes) of $500x on December 31 of each of Years 2 and 3. Accordingly, in each of Years 2 and 3, the $500x of foreign gross income arising from the foreign law distribution is assigned to the residual grouping because the hypothetical distribution is treated as distributed out of section 951(a)(1)(A) PTEP, which are not characterized as specified earnings and profits. Under §1.861-20(f), none of the $150x of Country A foreign income tax incurred by USP in each of Years 2 and 3 is apportioned to the statutory grouping relating to specified earnings and profits.

(C) *Disallowance pursuant to anti-avoidance rule*. By electing to make two successive foreign law distributions in Years 2 and 3 that were subject to Country A withholding tax and that did not individually exceed, but in the aggregate did exceed, the section 951(a)(1)(A) PTEP of CFC, and then making an actual distribution of property equal to all of the earnings and profits of CFC in Year 4 that was not subject to Country A withholding tax (because the previous consent dividends converted CFC's earnings and profits to capital for Country A tax purposes), USP would have avoided the disallowance under section 245A(d) (but for the application of the anti-avoidance rule in paragraph (b)(2) of this section) despite having received a $500x dividend that gave rise to a deduction under section 245A(a), and incurring withholding tax related to the earnings and profits that gave rise to that dividend. However, the Country A consent dividend elections in Years 2 and 3 were made with a principal purpose of avoiding the purposes of section 245A(d) and this section. Therefore, USP is allowed neither a foreign tax credit nor a deduction for $150x of Country A foreign income tax, which is treated as being attributable to the $500x of specified earnings and profits of CFC. See paragraphs (a) and (b)(2) of this section.

(f) *Applicability date*. This section applies to taxable years of a foreign corporation that begin after December 31, 2019, and end on or after November 2, 2020, and with respect to a United States person, taxable years in which or with which such taxable years of the foreign corporation end.

§1.245A(e)-1 [AMENDED]

Par. 4. Section 1.245A(e)-1 is amended by adding the language "and §1.245A(d)-1" after the language "rules of section 245A(d)" in paragraphs (b)(1)(ii), (c)(1)(iii), (g)(1)(ii) introductory text, (g)(1)(iii) introductory text, and (g)(2)(ii) introductory text.

Par. 5. Section 1.250(b)-1 is amended by adding two sentences to the end of paragraph (c)(7) to read as follows:

§1.250(b)-1 Computation of foreign-derived intangible income (FDII).

* * * * *

(c) * * *

(7) * * * A taxpayer must use a consistent method to determine the amount of its domestic oil and gas extraction income ("DOGEI") and its foreign oil and gas extraction income ("FOGEI") from the sale of oil or gas that has been transported or processed. For example, a taxpayer must use a consistent method to determine the amount of FOGEI from the sale of gasoline from foreign crude oil sources in computing the exclusion from gross tested income under §1.951A-2(c)(1)(v) and the amount of DOGEI from the sale of gasoline from domestic crude oil sources in computing its section 250 deduction.

* * * * *

Par. 6. Section 1.250(b)-5 is amended by revising paragraph (c)(5) to read as follows:

§1.250(b)-5 Foreign-derived deduction eligible income (FDDEI) services.

* * * * *

(c) * * *

(5) *Electronically supplied service*. The term *electronically supplied service* means, with respect to a general service other than an advertising service, a service that is delivered primarily over the internet or an electronic network and for which value of the service to the end user is derived primarily from automation or electronic delivery. Electronically supplied services include the provision of access to digital content (as defined in §1.250(b)-3), such as streaming content; on-demand network access to computing resources, such as networks, servers, storage, and software; the provision or support of a business or personal presence on a network, such as a website or a webpage; online intermediation platform services; services automatically generated from a computer via the internet or other network in response to data input by the recipient; and similar services. Electronically supplied services do not include services that primarily involve the application of human effort by the renderer (not considering the human effort involved in the development or maintenance of the technology enabling

the electronically supplied services). Accordingly, electronically supplied services do not include, for example certain services (such as legal, accounting, medical, or teaching services) provided electronically and synchronously.

* * * * *

Par. 7. Section 1.336-2 is amended:

1. By revising the heading of paragraph (g)(3)(ii).

2. In paragraph (g)(3)(ii)(A), by revising the first sentence and removing the language "foreign tax" and adding in its place the language "foreign income tax" in the second sentence.

3. By revising paragraphs (g)(3)(ii)(B) and (g)(3)(iii).

4. By removing both occurrences of paragraph (h) at the end of the section.

The revisions read as follows:

§1.336-2 Availability, mechanics, and consequences of section 336(e) election.

* * * * *

(g) * * *

(3) * * *

(ii) *Allocation of foreign income taxes*—(A) * * * Except as provided in paragraph (g)(3)(ii)(B) of this section, if a section 336(e) election is made for target and target's taxable year under foreign law (if any) does not close at the end of the disposition date, foreign income tax as defined in §1.960-1(b)(5) (other than a withholding tax as defined in section 901(k)(1)(B)) paid or accrued by new target with respect to such foreign taxable year is allocated between old target and new target. * * *

(B) *Foreign income taxes imposed on partnerships and disregarded entities.* If a section 336(e) election is made for target and target holds an interest in a disregarded entity (as described in §301.7701-2(c)(2)(i) of this chapter) or partnership, the rules of §1.901-2(f)(4) and (5) apply to determine the person who is considered for Federal income tax purposes to pay foreign income tax imposed at the entity level on the income of the disregarded entity or partnership.

(iii) *Disallowance of foreign tax credits under section 901(m).* For rules that may apply to disallow foreign tax credits by reason of a section 336(e) election, see section 901(m) and §§1.901(m)-1 through 1.901(m)-8.

* * * * *

Par. 8. Section 1.336-5 is revised to read as follows:

§1.336-5 Applicability dates.

Except as otherwise provided in this section, the provisions of §§1.336-1 through 1.336-4 apply to any qualified stock disposition for which the disposition date is on or after May 15, 2013. The provisions of §1.336-1(b)(5)(i)(A) relating to section 1022 apply on and after January 19, 2017. The provisions of §1.336-2(g)(3)(ii) and (iii) apply to foreign income taxes paid or accrued in taxable years beginning on or after [date final regulations are filed with the **Federal Register**].

Par. 9. Section 1.338-9 is amended by revising paragraph (d) to read as follows:

§1.338-9 International aspects of section 338.

* * * * *

(d) *Allocation of foreign income taxes*—(1) *In general.* Except as provided in paragraph (d)(3) of this section, if a section 338 election is made for target (whether foreign or domestic), and target's taxable year under foreign law (if any) does not close at the end of the acquisition date, foreign income tax as defined in §1.901-2(a)(1)) (other than a withholding tax as defined in section 901(k)(1)(B)) paid or accrued by new target with respect to such foreign taxable year is allocated between old target and new target. If there is more than one section 338 election with respect to target during target's foreign taxable year, foreign income tax paid or accrued with respect to that foreign taxable year is allocated among all old targets and new targets. The allocation is made based on the respective portions of the taxable income (as determined under foreign law) for the foreign taxable year that are attributable under the principles of §1.1502-76(b) to the period of existence of each old target and new target during the foreign taxable year.

(2) *Foreign income taxes imposed on partnerships and disregarded entities.* If a section 338 election is made for target and target holds an interest in a disregarded entity (as described in §301.7701-2(c)(2)(i) of this chapter) or partnership, the rules of §1.901-2(f)(4) and (5) apply to determine the person who is considered for Federal income tax purposes to pay foreign income tax imposed at the entity level on the income of the disregarded entity or partnership.

(3) *Disallowance of foreign tax credits under section 901(m).* For rules that may apply to disallow foreign tax credits by reason of a section 338 election, see section 901(m) and §§1.901(m)-1 through 1.901(m)-8.

(4) *Applicability date.* This paragraph (d) applies to foreign income taxes paid or accrued in taxable years beginning on or after [date final regulations are filed with the **Federal Register**].

* * * * *

§1.367(b)-2 [Amended]

Par. 10. Section 1.367(b)-2 is amended by removing the last sentence of paragraph (e)(4), *Example 1*.

§1.367(b)-3 [Amended]

Par. 11. Section 1.367(b)-3 is amended:

1. In paragraph (b)(3)(ii):

i. By removing the last sentence of *Example 1*.(ii).

ii. By removing the last sentence of *Example 2*.(ii).

2. By removing the last sentence of paragraph (c)(5), *Example 1*.(iii).

Par. 12. Section 1.367(b)-4 is amended:

1. By revising paragraph (b)(2)(i)(B).

2. By adding a sentence to the end of paragraph (h).

The revision and addition read as follows:

§1.367(b)-4 Acquisition of foreign corporate stock or assets by a foreign corporation in certain nonrecognition transactions.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(B) Immediately after the exchange, a domestic corporation directly or indirectly owns 10 percent or more of the voting power or value of the transferee foreign corporation; and

* * * * *

(h) * * * Paragraph (b)(2)(i)(B) of this section applies to exchanges completed in taxable years of exchanging shareholders ending on or after November 2, 2020, and to taxable years of exchanging shareholders ending before November 2, 2020 resulting from an entity classification election made under §301.7701-3 of this chapter that was effective on or before November 2, 2020 but was filed on or after November 2, 2020.

Par. 13. Section 1.367(b)-7 is amended:

1. By adding a sentence to the end of paragraph (b)(1).

2. By revising paragraph (g).

3. By adding paragraph (h).

The revisions and additions read as follows:

§1.367(b)-7 Carryover of earnings and profits and foreign income taxes in certain foreign-to-foreign nonrecognition transactions.

* * * * *

(b) * * *

(1) * * * See paragraph (g) of this section for rules applicable to taxable years of foreign corporations beginning on or after January 1, 2018, and taxable years of United States shareholders in which or with which such taxable years of foreign corporations end ("post-2017 taxable years").

* * * * *

(g) *Post-2017 taxable years*. As a result of the repeal of section 902 effective for taxable years of foreign corporations beginning on or after January 1, 2018, all foreign target corporations, foreign acquiring corporations, and foreign surviving corporations are treated as nonpooling corporations in post-2017 taxable years. Any amounts remaining in post-1986 undistributed earnings and post-1986 foreign income taxes of any such corporation in any separate category as of the end of the foreign corporation's last taxable year beginning before January 1, 2018, are treated as earnings and taxes in a single pre-pooling annual layer in the foreign corporation's post-2017 taxable years for purposes of this section. Foreign income taxes that are related to non-previously taxed earnings of a foreign acquiring corporation and a foreign target corporation that were accumulated in taxable years before the current taxable year of the foreign corporation, or in a foreign target's taxable year that ends on the date of the section 381 transaction, are not treated as current year taxes (as defined in §1.960-1(b)(4)) of a foreign surviving corporation in any post-2017 taxable year. In addition, foreign income taxes that are related to a hovering deficit are not treated as current year taxes of the foreign surviving corporation in any post-2017 taxable year, regardless of whether the hovering deficit is absorbed.

(h) *Applicability dates*. Except as otherwise provided in this paragraph (h), this section applies to foreign section 381 transactions that occur on or after November 6, 2006. Paragraph (g) of this section applies to taxable years of foreign corporations ending on or after November 2, 2020, and to taxable years of United States shareholders in which or with which such taxable years of foreign corporations end.

Par. 14. Section 1.367(b)-10 is amended:

1. In paragraph (c)(1), by removing the language "sections 902 or" and adding in its place the language "section".

2. By revising the heading and adding a sentence to the end of paragraph (e).

The revision and addition read as follows:

§1.367(b)-10 Acquisition of parent stock or securities for property in triangular reorganizations.

* * * * *

(e) *Applicability dates*. * * * Paragraph (c)(1) of this section applies to deemed distributions that occur in taxable years ending on or after November 2, 2020.

§1.461-1 [AMENDED]

Par. 15. Section 1.461-1 is amended by removing the language "paragraph (b)" and adding in its place the language "paragraph (g)" in the last sentence of paragraph (a)(4).

Par. 16. Section 1.861-3 is amended:

1. By revising the section heading.

2. By redesignating paragraph (d) as paragraph (e).

3. By adding a new paragraph (d).

4. In newly redesignated paragraph (e):

i. By revising the heading.

ii. By removing "this paragraph" and adding "this paragraph (e)," in its place.

iii. By adding a sentence to the end of the paragraph.

The revisions and additions read as follows:

§1.861-3 Dividends and income inclusions under sections 951, 951A, and 1293 and associated section 78 dividends.

* * * * *

(d) *Source of income inclusions under sections 951, 951A, and 1293 and associated section 78 dividends*. For purposes of sections 861 and 862 and §§ 1.861-1 and 1.862-1, and for purposes of applying this section, the amount included in gross income of a United States person under sections 951, 951A, and 1293 and the associated section 78 dividend for the taxable year with respect to a foreign corporation are treated as dividends received directly by the United States person from the foreign corporation that generated the inclusion. See section 904(h) and §1.904-5(m) for rules concerning the resourcing of inclusions under sections 951, 951A, and 1293.

(e) *Applicability dates*. * * * Paragraph (d) of this section applies to taxable years ending on or after November 2, 2020.

Par. 17. Section 1.861-8, as amended in FR Doc. 2020-21819, published elsewhere in this issue of the **Federal Register**, is further amended by revising paragraph (e)(4)(i) and adding paragraph (h)(4) to read as follows:

§1.861-8 Computation of taxable income from sources within the United States and from other sources and activities.

* * * * *

(e) * * *

(4) * * *

(i) *Expenses attributable to controlled services*. If a taxpayer performs a controlled services transaction (as defined in §1.482-9(l)(1)), which includes any activity by one member of a group of controlled taxpayers (the renderer) that results in a benefit to a controlled taxpayer (the recipient), and the renderer charges the recipient for such services, section 482 and §1.482-1 provide for an allocation

where the charge is not consistent with an arm's length result. The deductions for expenses of the taxpayer attributable to the controlled services transaction are considered definitely related to the amounts so charged and are to be allocated to such amounts.

* * * * *

(h) * * *

(4) Paragraph (e)(4)(i) of this section applies to taxable years ending on or after November 2, 2020.

Par. 18. Section 1.861-9, as amended in FR Doc. 2020-21819, published elsewhere in this issue of the **Federal Register**, is further amended:

1. By adding a sentence to the end of paragraph (g)(3).

2. By redesignating paragraph (k) as paragraph (l).

3. By adding a new paragraph (k).

4. By revising newly redesignated paragraph (l).

The additions and revision read as follows:

§1.861-9 Allocation and apportionment of interest expense and rules for asset-based apportionment.

* * * * *

(g) * * *

(3) * * * For purposes of applying section 904 as the operative section, the statutory or residual grouping of income that assets generate, have generated, or may reasonably be expected to generate is determined after taking into account any reallocation of income required under §1.904-4(f)(2)(vi).

* * * * *

(k) *Election to capitalize certain expenses in determining tax book value of assets*—(1) *In general*. Solely for purposes of apportioning interest expenses under the asset method described in paragraph (g) of this section, a taxpayer may elect to determine the tax book value of its assets by capitalizing and amortizing its research and experimental and advertising expenditures incurred in each taxable year under the rules described in paragraphs (k)(2) and (3) of this section. Any election made pursuant to this paragraph (k)(1) by a taxpayer must also be made by or on behalf of all members of an affiliated group of corporations as defined in §§1.861-11(d) and 1.861-11T(d) that includes the taxpayer. A taxpayer that makes an election under this paragraph (k)(1) for a taxable year must determine the tax book value of its assets for the taxable year as if it had capitalized its research and experimental and advertising expenditures under paragraphs (k)(2) and (3) of this section in every prior taxable year. Any election made pursuant to this paragraph (k)(1) applies to all subsequent taxable years of the taxpayer unless revoked by the taxpayer. Revocation of such an election requires the consent of the Commissioner.

(2) *Research and experimental expenditures*—(i) *In general*. A taxpayer making an election under paragraph (k)(1) of this section must capitalize its specified research or experimental expenditures paid or incurred during the taxable year (for purposes of apportioning interest expense under the asset method described in paragraph (g) of this section) under the rules in section 174, as contained in Pub. L. 115–97, title I, section 13206(a), except that the 15-year amortization period that applies to foreign research applies to all research whether conducted within or outside the United States.

(ii) *Character of asset*. The tax book value of the asset created as a result of capitalizing and amortizing specified research or experimental expenditures is apportioned to statutory and residual groupings by first assigning the asset to SIC code categories based on the SIC code categories of the specified research or experimental expenditures used to generate the asset, and then apportioning the tax book value of the asset in proportion to the taxpayer's sales in each statutory and residual grouping in the SIC code group for the taxable year in which the expenditures are or were incurred. The rules in §1.861-17 (without regard to the exclusive apportionment rule in §1.861-17(c)) apply for purposes of the preceding sentence.

(iii) *Effect of section 13206(a) of Pub. L. 115–97, title I.* Beginning with the first taxable year in which the rules in section 13206(a) of Pub. L. 115–97, title I, for capitalizing specified research or experimental expenditures for Federal income tax purposes become effective, the election in paragraph (k)(1) of this section will no longer apply to research and experimental expenditures incurred in that taxable year and subsequent taxable years, and the general rules for capitalizing and amortizing specified research or experimental expenditures under section 174 will apply instead in determining the tax book value of assets attributable to such expenditures for purposes of apportioning expenses under the asset method.

(3) *Advertising expenditures*—(i) *In general*. A taxpayer making an election under paragraph (k)(1) of this section must capitalize and amortize fifty percent of its specified advertising expenses in each taxable year for purposes of apportioning expenses under the asset method described in paragraph (g) of this section. The share of specified advertising expenses that are charged to the capital account is treated as being amortized ratably over the 10-year period beginning with the midpoint of the taxable year in which such expenses are paid or incurred. The tax book value of the asset created as a result of capitalizing specified advertising expenses is apportioned once, in the taxable year that the expenses are incurred, to the statutory and residual groupings based on the character of the gross income that would be generated by selling products to, or performing services for, the persons to whom the specified advertising expenses are directed, and ratably apportioning the tax book value of the asset based on a reasonable estimate of the number of such persons with respect to each such grouping in such taxable year. Therefore, for example, if 80 percent of specified advertising expenses incurred in Year 1 for promoting Product X relate to advertising viewed by persons within the United States and 20 percent relate to advertising viewed by persons outside the United States, and sales of Product X to persons within the United States would be U.S. source general category income and sales of Product X to persons outside the United States would be foreign source general category income, then for purposes of section 904 as the operative section, 80 percent of the asset is treated as a U.S. source general category asset and 20 percent of the asset is treated as a foreign source general category asset (regardless of the actual amount of sales or gross income generated from product sales in the taxable year). In subsequent years, the amortizable portion of the asset created from specified advertising expens-

es is treated as being amortized ratably among the statutory and residual groupings to which the tax book value of the asset was assigned in the taxable year that it was created.

(ii) *Specified advertising expenses*. The term *specified advertising expenses* means any amount paid or incurred in a taxable year (but only to the extent otherwise deductible in such taxable year), for the development, production, or placement (including any form of transmission, broadcast, publication, display, or distribution) of any communication to the general public (or portions thereof) which is intended to promote the taxpayer (or any related person under §1.861-8(c)(4)) or a trade or business of the taxpayer (or any related person), or any service, facility, or product provided pursuant to such trade or business.

(l) *Applicability dates*. (1) Except as provided in paragraphs (l)(2) and (3) of this section, this section applies to taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

(2) Paragraphs (b)(1)(i), (b)(8), and (e)(9) of this section apply to taxable years that end on or after December 16, 2019. For taxable years that both begin after December 31, 2017, and end on or after December 4, 2018, and also end before December 16, 2019, see §1.861-9T(b)(1)(i) as contained in 26 CFR part 1 revised as of April 1, 2019.

(3) Paragraph (k) of this section applies to taxable years beginning on or after [date final regulations are filed with the **Federal Register**].

Par. 19. Section 1.861-10 is amended:

1. By adding paragraph (a).

2. By revising paragraphs (e)(8)(v) and (f).

3. By adding paragraphs (g) and (h).

The additions and revisions read as follows:

§1.861-10 Special allocations of interest expense.

(a) *In general*. This section applies to all taxpayers and provides exceptions to the rules of §1.861-9 that require the allocation and apportionment of interest expense on the basis of all assets of all members of the affiliated group. Section 1.861-10T(b) describes the direct allocation of interest expense to the income generated by certain assets that are subject to qualified nonrecourse indebtedness. Section 1.861-10T(c) describes the direct allocation of interest expense to income generated by certain assets that are acquired in an integrated financial transaction. Section 1.861-10T(d) provides special rules that apply to all transactions described in §1.861-10T(b) and (c). Paragraph (e) of this section requires the direct allocation of third-party interest expense of an affiliated group to such group's investment in related controlled foreign corporations in cases involving excess related person indebtedness (as defined therein). See also §1.861-9T(b)(5), which requires the direct allocation of amortizable bond premium. Paragraph (f) of this section provides a special rule for certain regulated utility companies. Paragraph (g) of this section requires the direct allocation of interest expense in the case of certain foreign banking branches. Paragraph (h) of this section sets forth applicability dates.

* * * * *

(e) * * *

(8) * * *

(v) *Classification of loans between controlled foreign corporations*. In determining the amount of related group indebtedness for any taxable year, loans outstanding from one controlled foreign corporation to a related controlled foreign corporation are not treated as related group indebtedness. For purposes of determining the foreign base period ratio under paragraph (e)(2)(iv) of this section for a taxable year that ends on or after November 2, 2020, the rules of this paragraph (e)(8)(v) apply to determine the related group debt-to-asset ratio in each taxable year included in the foreign base period, including in taxable years that end before November 2, 2020.

* * * * *

(f) *Indebtedness of certain regulated utilities*. If an automatically excepted regulated utility trade or business (as defined in §1.163(j)-1(b)(15)(i)(A)) has qualified nonrecourse indebtedness within the meaning of the second sentence in §1.163(j)-10(d)(2), interest expense from the indebtedness is directly allocated to the taxpayer's assets in the manner and to the extent provided in §1.861-10T(b).

(g) *Direct allocation of interest expense incurred by foreign banking branches*—(1) *In general*. The foreign banking branch interest expense of a foreign banking branch is directly allocated to the foreign banking branch income of that foreign banking branch, to the extent of the foreign banking branch income. For rules that may apply to foreign banking branch interest expense in excess of amounts allocated under this paragraph (g), see §1.861-9.

(2) *Adjustments to asset value*. For purposes of applying §1.861-9 to apportion interest expense in excess of the interest expense directly allocated under paragraph (g)(1) of this section, the value of the assets of the foreign banking branch for the year (as determined under §1.861-9T(g)(3)) is reduced (but not below zero) by an amount equal to the liabilities of that branch with respect to which the interest expense was directly allocated under paragraph (g)(1) of this section. For purposes of this paragraph (g), the amount of a liability with respect to a foreign currency hedge described in §1.861-9T(b)(2) or derivative financial product described in §1.861-9T(b)(6) is zero.

(3) *Definitions*. The following definitions apply for purposes of this paragraph (g).

(i) *Bank*. The term *bank* means a bank, as defined by section 2(c) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)) without regard to 12 U.S.C. 1841(c)(2)(C) and (G)), that is licensed or otherwise authorized to accept deposits, and accepts deposits in the ordinary course of business.

(ii) *Foreign banking branch*. The term *foreign banking branch* means a foreign branch as defined in §1.904-4(f)(3), other than a disregarded entity (as defined in §1.904-4(f)(3)), that is owned by a bank and gives rise to a taxable presence in a foreign country.

(iii) *Foreign banking branch income*. The term *foreign banking branch income* means gross income assigned to foreign branch category income (within the meaning of §1.904-4(f)(1)) that is attributable to a foreign banking branch. Foreign banking branch income also includes gross income attributable to a foreign banking branch that would be assigned to the foreign branch category but is assigned to a

separate category for foreign branch category income that is resourced under an income tax treaty. See §1.904-4(k).

(iv) *Foreign banking branch interest expense*. The term *foreign banking branch interest expense* means the interest expense that is regarded for Federal income tax purposes and that is recorded on the separate books and records (as defined in §1.989(a)-1(d)(1) and (2)) of a foreign banking branch.

(v) *Liability*. The term *liability* means a deposit or other debt obligation, transaction, or series of transactions resulting in expense or loss described in §1.861-9T(b)(1)(i).

(h) *Applicability dates*. Except as provided in this paragraph (h), this section applies to taxable years ending on or after December 4, 2018. Paragraph (e)(8)(v) of this section applies to taxable years ending on or after November 2, 2020, and paragraphs (f) and (g) of this section apply to taxable years beginning on or after [date final regulations are filed with the **Federal Register**].

Par. 20. Section 1.861-14, as amended in FR Doc. 2020-21819, published elsewhere in this issue of the **Federal Register**, is further amended by revising paragraphs (h) and (k) to read as follows:

§1.861-14 Special rules for allocating and apportioning certain expenses (other than interest expense) of an affiliated group of corporations.

* * * * *

(h) *Special rule for the allocation and apportionment of section 818(f)(1) items of a life insurance company*—(1) *In general*. Except as provided in paragraph (h)(2) of this section, life insurance company items specified in section 818(f)(1) ("section 818(f)(1) items") are allocated and apportioned as if all members of the life subgroup were a single corporation ("life subgroup method"). See also §1.861-8(e)(16) for rules on the allocation of reserve expenses with respect to dividends received by a life insurance company.

(2) *Alternative separate entity treatment*. A consolidated group may choose not to apply the life subgroup method and may instead allocate and apportion section 818(f)(1) items solely among items of the life insurance company that generated the section 818(f)(1) items ("separate entity method"). A consolidated group indicates its choice to apply the separate entity method by applying this paragraph (h)(2) for purposes of the allocation and apportionment of section 818(f)(1) items on its Federal income tax return filed for its first taxable year to which this section applies. A consolidated group's use of the separate entity method constitutes a binding choice to use the method chosen for that year for all members of the consolidated group and all taxable years of such members thereafter. The taxpayer's choice of a method may not be revoked without the prior consent of the Commissioner.

* * * * *

(k) *Applicability date*. Except as provided in this paragraph (k), this section applies to taxable years beginning after December 31, 2019. Paragraph (h) of this section applies to taxable years beginning on or after [date final regulations are filed with the **Federal Register**].

Par. 21. Section 1.861-20, as added in FR Doc. 2020-21819, published elsewhere in this issue of the **Federal Register**, is amended:

1. In paragraph (b)(4), by removing the language "301(c)(3)(A)" and adding in its place the language "301(c)(3)(A) or section 731(a)".

2. By revising paragraphs (b)(7), (19), and (23).

3. By revising the first and second sentences in paragraph (c) introductory text.

4. In paragraph (d)(2)(ii)(B), by adding the text ", and paragraph (d)(3)(ii)(B) of this section for rules regarding the assignment of foreign gross income arising from a distribution by a partnership" at the end of the paragraph.

5. By adding paragraph (d)(2)(ii)(D).

6. In paragraph (d)(3)(i)(A), by removing the text "or an inclusion of foreign law pass-through income" and adding the language ", an inclusion of foreign law pass-through income, or gain from a disposition under both foreign and Federal income tax law" in its place.

7. By adding paragraphs (d)(3)(i)(D), (d)(3)(ii) and (v), (g)(10) through (13), and (h).

8. By revising paragraph (i).

The additions and revisions read as follows:

§1.861-20 Allocation and apportionment of foreign income taxes.

* * * * *

(b) * * *

(7) *Foreign income tax*. The term *foreign income tax* has the meaning provided in §1.901-2(a).

* * * * *

(19) *U.S. capital gain amount*. The term *U.S. capital gain amount* means gain recognized by a taxpayer on the sale, exchange, or other disposition of stock or an interest in a partnership or, in the case of a distribution with respect to stock or a partnership interest, the portion of the distribution to which section 301(c)(3)(A) or 731(a)(1), respectively, applies. A U.S. capital gain amount includes gain that is subject to section 751 and §1.751-1, but does not include any portion of the gain recognized by a taxpayer that is included in gross income as a dividend under section 964(e) or 1248.

* * * * *

(23) *U.S. return of capital amount*. The term *U.S. return of capital amount* means, in the case of the sale, exchange, or other disposition of either stock or an interest in a partnership, the taxpayer's adjusted basis of the stock or partnership interest, or in the case of a distribution with respect to stock or a partnership interest, the portion of the distribution to which section 301(c)(2) or 733, respectively, applies.

* * * * *

(c) * * * A foreign income tax (other than certain in lieu of taxes described in paragraph (h) of this section) is allocated and apportioned to the statutory and residual groupings that include the items of foreign gross income included in the base on which the tax is imposed. Each such foreign income tax (that is, each separate levy) is allocated and apportioned separately under the rules in paragraphs (c) through (f) of this section. * * *

* * * * *

(d) * * *

(2) * * *

(ii) * * *

(D) *Foreign law transfers between taxable units*. An item of foreign gross income arising from an event that foreign law treats as a transfer of property, or as giving rise to an item of accrued income, gain, deduction, or loss with respect to

a transaction, between taxable units (as defined in paragraph (d)(3)(v)(E) of this section) of the same taxpayer, but that is not treated as a disregarded payment (as defined in paragraph (d)(3)(v)(E) of this section) for Federal income tax purposes in the same U.S. taxable year in which the foreign income tax is paid or accrued, is characterized and assigned to the grouping to which a disregarded payment in the amount of the item of foreign gross income (or the gross receipts giving rise to the item of foreign gross income) would be assigned under the rules of paragraph (d)(3)(v) of this section if the event giving rise to the foreign gross income resulted in a disregarded payment in the U.S. taxable year in which the foreign income tax is paid or accrued. For example, an item of foreign gross income that a taxpayer recognizes by reason of a foreign law distribution (such as a stock dividend or a consent dividend) from a disregarded entity is assigned to the same statutory or residual groupings to which the foreign gross income would be assigned if a distribution of property in the amount of the taxable distribution under foreign law were made for Federal income tax purposes on the date on which the foreign law distribution occurred.

* * * * *

(3) * * *

(i) * * *

(D) *Foreign gross income items arising from a disposition of stock*. An item of foreign gross income that arises from a transaction that is treated as a sale, exchange, or other disposition of stock in a corporation for Federal income tax purposes is assigned first, to the extent of any U.S. dividend amount that results from the disposition, to the same statutory or residual grouping (or ratably to the groupings) to which the U.S. dividend amount is assigned under Federal income tax law. If the foreign gross income item exceeds the U.S. dividend amount, the foreign gross income item is next assigned, to the extent of the U.S. capital gain amount, to the statutory or residual grouping (or ratably to the groupings) to which the U.S. capital gain amount is assigned under Federal income tax law. Any excess of the foreign gross income item over the sum of the U.S. dividend amount and the U.S. capital gain amount is assigned to the same statutory or residual grouping (or ratably to the groupings) to which earnings equal to such excess amount would be assigned if they were recognized for Federal income tax purposes in the U.S. taxable year in which the disposition occurred. These earnings are deemed to arise in the statutory and residual groupings in the same proportions as the proportions in which the tax book value of the stock is (or would be if the taxpayer were a United States person) assigned to the groupings under the asset method in §1.861-9 in the U.S. taxable year in which the disposition occurs. See paragraph (g)(10) of this section (*Example 9*).

(ii) *Items of foreign gross income included by a taxpayer by reason of its ownership of an interest in a partnership*—(A) *Scope*. The rules of this paragraph (d)(3)(ii) apply to assign to a statutory or residual grouping certain items of foreign gross income that a taxpayer includes in foreign taxable income by reason of its ownership of an interest in a partnership. See paragraphs (d)(1) and (2) of this section for rules that apply in characterizing items of foreign gross income that are attributable to a partner's distributive share of income of a partnership. See paragraph (d)(3)(iii) of this section for rules that apply in characterizing items of foreign gross income that are attributable to an inclusion under a foreign law inclusion regime.

(B) *Foreign gross income items arising from a distribution with respect to an interest in a partnership*. If a partnership makes a distribution that is treated as a distribution of property for both foreign law and Federal income tax purposes, the foreign gross income arising from the distribution (including foreign gross income attributable to a distribution from a partnership that foreign law classifies as a dividend from a corporation) is, to the extent of the U.S. capital gain amount, assigned to the statutory and residual groupings to which the U.S. capital gain amount is assigned under Federal income tax law. If the foreign gross income arising from the distribution exceeds the U.S. capital gain amount, such excess amount is assigned to the statutory and residual groupings to which earnings equal to such excess amount would be assigned if they were recognized in the U.S. taxable year in which the distribution is made. These earnings are deemed to arise in the statutory and residual groupings in the same proportions as the proportions in which the tax book value of the partnership interest or the partner's pro rata share of the partnership assets, as applicable, is assigned (or would be assigned if the partner were a United States person) for purposes of apportioning the partner's interest expense under §1.861-9(e) in the U.S. taxable year in which the distribution is made.

(C) *Foreign gross income items arising from the disposition of an interest in a partnership*. An item of foreign gross income arising from the sale, exchange, or other disposition of an interest in a partnership for Federal income tax purposes is assigned first, to the extent of the U.S. capital gain amount, to the statutory or residual grouping (or ratably to the groupings) to which the U.S. capital gain amount is assigned. Any excess of the foreign gross income item over the U.S. capital gain amount is assigned to the statutory and residual grouping (or ratably to the groupings) to which a distributive share of income of the partnership in the amount of such excess would be assigned if such income was recognized for Federal income tax purposes in the U.S. taxable year in which the disposition occurred. The items constituting this distributive share of income are deemed to arise in the statutory and residual groupings in the same proportions as the proportions in which the tax book value of the partnership interest, or the partner's pro rata share of the partnership assets, as applicable, is assigned (or would be assigned if the partner were a United States person) for purposes of apportioning the partner's interest expense under §1.861-9(e) in the U.S. taxable year in which the disposition occurred.

* * * * *

(v) *Disregarded payments*—(A) *In general*. This paragraph (d)(3)(v) applies to assign to a statutory or residual grouping a foreign gross income item that a taxpayer includes by reason of the receipt of a disregarded payment. In the case of a taxpayer that is an individual or a domestic corporation, this paragraph (d)(3)(v) applies to a disregarded payment made between a taxable unit that is a foreign branch, a foreign branch owner, or a non-branch taxable unit, and another such taxable unit of the same taxpayer. In the

case of a taxpayer that is a foreign corporation, this paragraph (d)(3)(v) applies to a disregarded payment made between taxable units that are tested units of the same taxpayer. For purposes of this paragraph (d)(3)(v), an individual or corporation is treated as the taxpayer with respect to its distributive share of foreign income taxes paid or accrued by a partnership, estate, trust or other pass-through entity. The rules of paragraph (d)(3)(v)(B) of this section apply to attribute U.S. gross income comprising the portion of a disregarded payment that is a reattribution payment to a taxable unit, and to associate the foreign gross income item arising from the receipt of the reattribution payment with the statutory and residual groupings to which that U.S. gross income is assigned. The rules of paragraph (d)(3)(v)(C) of this section apply to assign to statutory and residual groupings items of foreign gross income arising from the receipt of the portion of a disregarded payment that is a remittance or a contribution. The rules of paragraph (d)(3)(v)(D) of this section apply to assign to statutory and residual groupings items of foreign gross income arising from disregarded payments in connection with disregarded sales or exchanges of property. Paragraph (d)(3)(v)(E) of this section provides definitions that apply for purposes of this paragraph (d)(3)(v) and paragraph (g) of this section.

(B) *Reattribution payments*—(*1*) *In general*. This paragraph (d)(3)(v)(B) assigns to a statutory or residual grouping a foreign gross income item that a taxpayer includes by reason of the receipt by a taxable unit of the portion of a disregarded payment that is a reattribution payment. The foreign gross income item is assigned to the statutory or residual groupings to which one or more reattribution amounts that constitute the reattribution payment are assigned upon receipt by the taxable unit. If a reattribution payment comprises multiple reattribution amounts and the amount of the foreign gross income item that is attributable to the reattribution payment differs from the amount of the reattribution payment, foreign gross income is apportioned among the statutory and residual groupings in proportion to the reattribution amounts in each statutory and residual grouping. The statutory or residual grouping of a reattribution amount received by a taxable unit is the grouping that includes the U.S. gross income attributed to the taxable unit by reason of its receipt of the gross reattribution amount, regardless of whether, after taking into account disregarded payments made by the taxable unit, the taxable unit has an attribution item as a result of its receipt of the reattribution amount. See paragraph (g)(13) of this section (*Example 12*).

(*2*) *Attribution of U.S. gross income to a taxable unit*. This paragraph (d)(3)(v)(B)(*2*) provides attribution rules to determine the reattribution amounts received by a taxable unit in the statutory and residual groupings in order to apply paragraph (d)(3)(v)(B)(*1*) of this section to assign foreign gross income items arising from a reattribution payment to the groupings. In the case of a taxpayer that is an individual or a domestic corporation, the attribution rules in §1.904-4(f)(2) apply to determine the reattribution amounts received by a taxable unit in the separate categories (as defined in §1.904-5(a)(4)(v)) in order to apply paragraph (d)(3)(v)(B)(*1*) of this section for purposes of §1.904-6(b)(2)(i). In the case of a taxpayer that is a foreign corporation, the attribution rules in §1.954-1(d)(1)(iii) apply to determine the reattribution amounts received by a taxable unit in the statutory and residual groupings in order to apply paragraph (d)(3)(v)(B)(*1*) of this section for purposes of §§1.951A-2(c)(3), 1.954-1(c)(1)(i) and (d)(1)(iv), and 1.960-1(d)(3)(ii). For purposes of other operative sections (as described in §1.861-8(f)(1)), the principles of §1.904-4(f)(2)(vi) or §1.954-1(d)(1)(iii), as applicable, apply to determine the reattribution amounts received by a taxable unit in the statutory and residual groupings. The rules and principles of §1.904-4(f)(2)(vi) or §1.954-1(d)(1)(iii), as applicable, apply to determine the extent to which a disregarded payment made by the taxable unit is a reattribution payment and the reattribution amounts that constitute a reattribution payment, and to adjust the U.S. gross income initially attributed to each taxable unit to reflect the reattribution payments that the taxable unit makes and receives. The rules in this paragraph (d)(3)(v)(B)(*2*) limit the amount of a disregarded payment that is a reattribution payment to the U.S. gross income of the payor taxable unit that is recognized in the U.S. taxable year in which the disregarded payment is made.

(*3*) *Effect of reattribution payment on foreign gross income items of payor taxable unit*. The statutory or residual grouping to which an item of foreign gross income of a taxable unit is assigned is determined without regard to reattribution payments made by the taxable unit, and without regard to whether the taxable unit has one or more attribution items after taking into account such reattribution payments. No portion of the foreign gross income of the payor taxable unit is treated as foreign gross income of the payee taxable unit by reason of the reattribution payment, notwithstanding that U.S. gross income of the payor taxable unit that is used to assign foreign gross income of the payor taxable unit to statutory and residual groupings is reattributed to the payee taxable unit under paragraph (d)(3)(v)(B)(*1*) of this section by reason of the reattribution payment. See paragraph (e) of this section for rules reducing the amount of a foreign gross income item of a taxable unit by deductions allowed under foreign law, including deductions by reason of disregarded payments made by a taxable unit that are included in the foreign gross income of the payee taxable unit.

(C) *Remittances and contributions*—(*1*) *Remittances*—(*i*) *In general*. An item of foreign gross income that a taxpayer includes by reason of the receipt of a remittance by a taxable unit is assigned to the statutory or residual groupings of the recipient taxable unit that correspond to the groupings out of which the payor taxable unit made the remittance under the rules of this paragraph (d)(3)(v)(C)(*1*)(*i*). A remittance paid by a taxable unit is considered to be made ratably out of all of the accumulated after-tax income of the taxable unit. The accumulated after-tax income of the taxable unit that pays the remittance is deemed to have arisen in the statutory and residual groupings in the same proportions as the proportions in which the tax book value of the assets of the taxable unit are (or would be if the owner of the taxable unit were a United States person) assigned for purposes of apportioning interest expense under the asset method in §1.861-9 in the taxable year in which the remittance is made. See paragraph (g)(11) and (12) of this section (*Example 10* and *11*). If the

payor taxable unit is determined to have no assets under paragraph (d)(3)(v)(C)(*1*)(*ii*) of this section, then the foreign gross income that is included by reason of the receipt of the remittance is assigned to the residual grouping.

(*ii*) *Assets of a taxable unit*. The assets of a taxable unit are determined in accordance with §1.987-6(b), except that for purposes of applying §1.987-6(b)(2) under this paragraph (d)(3)(v)(C)(*1*)(*ii*), a taxable unit is deemed to be a section 987 QBU (within the meaning of §1.987-1(b)(2)) and assets of the taxable unit include stock held by the taxable unit and the portion of the tax book value of a reattribution asset that is assigned to the taxable unit. The portion of the tax book value of a reattribution asset that is assigned to a taxable unit is an amount that bears the same ratio to the total tax book value of the reattribution asset as the sum of the attribution items of that taxable unit arising from gross income produced by the reattribution asset bears to the total gross income produced by the reattribution asset. The portion of a reattribution asset that is assigned to a taxable unit under this paragraph (d)(3)(v)(C)(*1*)(*ii*) is not treated as an asset of the taxable unit making the reattribution payment for purposes of applying paragraph (d)(3)(v)(C)(*1*)(*i*) of this section.

(*2*) *Contributions*. An item of foreign gross income that a taxpayer includes by reason of the receipt of a contribution by a taxable unit is assigned to the residual grouping. See, however, §1.904-6(b)(2)(ii) (assigning certain items of foreign gross income to the foreign branch category for purposes of applying section 904 as the operative section).

(*3*) *Disregarded payment that comprises both a reattribution payment and a remittance or contribution*. If both a reattribution payment and either a remittance or a contribution result from a single disregarded payment, the foreign gross income is first attributed to the portion of the disregarded payment that is a reattribution payment to the extent of the amount of the reattribution payment, and any excess of the foreign gross income item over the amount of the reattribution payment is then to attributed to the portion of the disregarded payment that is a remittance or contribution.

(D) *Disregarded payments in connection with disregarded sales or exchanges of property*. An item of foreign gross income attributable to gain recognized under foreign law by reason of a disregarded payment received in exchange for property is characterized and assigned under the rules of paragraph (d)(2) of this section. If a taxpayer recognizes U.S. gross income as a result of a disposition of property that was previously received in exchange for a disregarded payment, any item of foreign gross income that the taxpayer recognizes as a result of that same disposition is assigned to a statutory or residual grouping under paragraph (d)(1) of this section, without regard to any reattribution of the U.S. gross income under §1.904-4(f)(2)(vi)(A) (or the principles of §1.904-4(f)(2)(vi)(A)) by reason of a disregarded payment described in §1.904-4(f)(2)(vi)(B)(*2*) (or by reason of §1.904-4(f)(2)(vi)(D)). See paragraph (d)(3)(v)(B)(*3*) of this section.

(E) *Definitions*. The following definitions apply for purposes of this paragraph (d)(3)(v) and paragraph (g) of this section.

(*1*) *Attribution item*. The term *attribution item* means the portion of an item of gross income, computed under Federal income tax law, that is attributed to a taxable unit after taking into account all reattribution payments made and received by the taxable unit.

(*2*) *Contribution*. The term *contribution* means:

(*i*) A transfer of property (within the meaning of section 317(a)) to a taxable unit that is disregarded for Federal income tax purposes and that would be treated as a contribution to capital described in section 118 or a transfer described in section 351 if the taxable unit were a corporation under Federal income tax law; or

(*ii*) The excess of a disregarded payment made by a taxable unit to another taxable unit that the first taxable unit owns over the portion of the disregarded payment that is a reattribution payment.

(*3*) *Disregarded entity*. The term *disregarded entity* means an entity described in §301.7701-2(c)(2) of this chapter that is disregarded as an entity separate from its owner for Federal income tax purposes.

(*4*) *Disregarded payment*. The term *disregarded payment* means an amount of property (within the meaning of section 317(a)) that is transferred to or from a taxable unit, including a payment in exchange for property or in satisfaction of an account payable, or a remittance or contribution, in connection with a transaction that is disregarded for Federal income tax purposes and that is reflected on the separate set of books and records of the taxable unit. A disregarded payment also includes any other amount that is reflected on the separate set of books and records of a taxable unit in connection with a transaction that is disregarded for Federal income tax purposes and that would constitute an item of accrued income, gain, deduction, or loss of the taxable unit if the transaction to which the amount is attributable were regarded for Federal income tax purposes.

(*5*) *Reattribution amount*. The term *reattribution amount* means an amount of gross income, computed under Federal income tax law, that is initially assigned to a single statutory or residual grouping that includes gross income of a taxable unit but that is, by reason of a disregarded payment made by that taxable unit, attributed to another taxable unit under paragraph (d)(3)(v)(B)(*2*) of this section.

(*6*) *Reattribution asset*. The term *reattribution asset* means an asset that produces one or more items of gross income, computed under Federal income tax law, to which a disregarded payment is allocated under the rules of paragraph (d)(3)(v)(B)(*2*) of this section.

(*7*) *Reattribution payment*. The term *reattribution payment* means the portion of a disregarded payment equal to the sum of all reattribution amounts that are attributed to the recipient of the disregarded payment.

(*8*) *Remittance*. The term *remittance* means:

(*i*) A transfer of property (within the meaning of section 317(a)) by a taxable unit that would be treated as a distribution by a corporation to a shareholder with respect to its stock if the taxable unit were a corporation under Federal income tax law; or

(*ii*) The excess of a disregarded payment made by a taxable unit to a second taxable unit (including a second taxable unit that shares the same owner as the payor taxable unit) over the portion of the disregarded payment that is a reattribution payment, other than an amount that is

treated as a contribution under paragraph (d)(3)(v)(E)(*2*)(*i*) of this section.

(*9*) *Taxable unit*. In the case of a taxpayer that is an individual or a domestic corporation, the term *taxable unit* means a foreign branch, a foreign branch owner, or a non-branch taxable unit, as defined in §1.904-6(b)(2)(i)(B). In the case of a taxpayer that is a foreign corporation, the term *taxable unit* means a tested unit, as defined in §1.954-1(d)(2).

* * * * *

(g) * * *

(10) *Example 9: Gain on disposition of stock*—(i) *Facts*. USP owns all of the outstanding stock of CFC, which conducts business in Country A. In Year 1, USP sells all of the stock of CFC to US2 for $1,000x. For Country A tax purposes, USP's basis in the stock of CFC is $200x. Accordingly, USP recognizes $800x of gain on which Country A imposes $80x of foreign income tax based on its rules for taxing capital gains of nonresidents. For Federal income tax purposes, USP's basis in the stock of CFC is $400x. Accordingly, USP recognizes $600x of gain on the sale of the stock of CFC, of which $150x is included in the gross income of USP as a dividend under section 1248(a) that, as provided in section 1248(j), is treated as a dividend eligible for the deduction under section 245A(a). Under paragraphs (b)(20) and (19) of this section, respectively, the sale of CFC stock by USP gives rise to a $150x U.S. dividend amount and a $450x U.S. capital gain amount. Under §§1.904-4(d) and 1.904-5(c)(4), the $150x U.S. dividend amount is general category section 245A subgroup income, and the $450x U.S. capital gain amount is passive category income to USP. For purposes of allocating and apportioning its interest expense under §§1.861-9(g)(2)(i)(B) and 1.861-13, USP's stock in CFC is characterized as general category stock in the section 245A subgroup.

(ii) *Analysis*. For purposes of allocating and apportioning the $80x of Country A foreign income tax, the $800x of Country A gross income from the sale of the stock of CFC is first assigned to separate categories. Under paragraph (d)(3)(i)(D) of this section, the $800x of Country A gross income is first assigned to the separate category to which the $150x U.S. dividend amount is assigned, to the extent thereof, and is next assigned to the separate category to which the $450x U.S. capital gain amount is assigned, to the extent thereof. Accordingly, $150x of Country A gross income is assigned to the general category in the section 245A subgroup, and $450x of Country A gross income is assigned to the passive category. Under paragraph (d)(3)(i)(D) of this section, the remaining $200x of Country A gross income is assigned to the statutory and residual groupings to which earnings of CFC in that amount would be assigned if they were recognized for Federal income tax purposes in the U.S. taxable year in which the disposition occurred. These earnings are all deemed to arise in the section 245A subgroup of the general category, based on USP's characterization of its stock in CFC. Thus, under paragraph (d)(3)(i)(D) of this section the $800x of foreign gross income, and therefore the foreign taxable income, is characterized as $350x ($150x + $200x) of income in the general category section 245A subgroup and $450x of income in the passive category. This is the result even though for Country A tax purposes all $800x of Country A gross income is characterized as gain from the sale of stock, which would be passive category income under section 904(d)(2)(B)(i), because the income is assigned to a separate category based on the characterization of the gain under Federal income tax law. Under paragraph (f) of this section, the $80x of Country A tax is ratably apportioned between the general category section 245A subgroup and the passive category based on the relative amounts of foreign taxable income in each grouping. Accordingly, $35x ($80x x $350x / $800x) of the Country A tax is apportioned to the general category section 245A subgroup, and $45x ($80x x $450x / $800x) of the Country A tax is apportioned to the passive category. See also §1.245A(d)-1 for rules that may disallow a foreign tax credit or deduction for the $35x of Country A tax apportioned to the general category section 245A subgroup.

(11) *Example 10: Disregarded transfer of built-in gain property*—(i) *Facts*. USP owns FDE, a disregarded entity that is treated for Federal income tax purposes as a foreign branch operating in Country A. FDE transfers Asset F, equipment used in FDE's trade or business in Country A, for no consideration to USP in a transaction that is a remittance described in paragraph (d)(3)(v)(E)(*8*)(*i*) of this section for Federal income tax purposes but is treated as a distribution of Asset F from a corporation to its shareholder, USP, for Country A tax purposes. At the time of the transfer, Asset F has a fair market value of $250x and an adjusted basis of $100x for both Federal and Country A income tax purposes. Country A imposes $30x of tax on FDE with respect to the $150x of built-in gain on a deemed sale of Asset F, which is recognized for Country A tax purposes by reason of the transfer to USP. If FDE had sold Asset F for $250x in a transaction that was regarded for Federal income tax purposes, FDE would also have recognized gain of $150x for Federal income tax purposes, and that gain would have been characterized as foreign branch category income as defined in §1.904-4(f). Country A also imposes $25x of withholding tax, a separate levy, on USP by reason of the distribution of Asset F, valued at $250x, to USP.

(ii) *Analysis*—(A) *Net income tax on built-in gain*. For purposes of allocating and apportioning the $30x of Country A foreign income tax imposed on FDE by reason of the deemed sale of Asset F for Country A tax purposes, under paragraph (c)(1) of this section the $150x of Country A gross income from the deemed sale of Asset F is first assigned to a separate category. Because the transaction is disregarded for Federal income tax purposes, there is no corresponding U.S. item. However, FDE would have recognized gain of $150x, which would have been a corresponding U.S. item, if the deemed sale had been recognized for Federal income tax purposes. Therefore, under paragraph (d)(2)(i) of this section, the item of foreign gross income is characterized and assigned to the grouping to which such corresponding U.S. item would have been assigned if the deemed sale were recognized under Federal income tax law. Because the sale of Asset F in a regarded transaction would have resulted in foreign branch category income, the foreign gross income is characterized as foreign branch category income. Under paragraph (f) of this section, the $30x of Country A tax is also allocated to the foreign branch category, the statutory grouping to which the $150x of Country A gross income is assigned. No apportionment of the $30x is necessary because the class of gross income to which the foreign gross income is allocated consists entirely of a single statutory grouping, foreign branch category income.

(B) *Withholding tax on distribution*. For purposes of allocating and apportioning the $25x of Country A withholding tax imposed on USP by reason of the transfer of Asset F, under paragraph (c)(1) of this section the $250x of Country A gross income from the distribution of Asset F is first assigned to a separate category. The transfer of Asset F is a remittance from FDE to USP, and thus there is no corresponding U.S. item. Under paragraph (d)(3)(v)(C)(*1*)(*i*) of this section, the item of foreign gross income is assigned to the groupings to which the income out of which the payment is made is assigned; the payment is considered to be made ratably out of all of the accumulated after-tax income of FDE, as computed for Federal income tax purposes; and the accumulated after-tax income of FDE is deemed to have arisen in the statutory and residual groupings in the same proportions as those in which the tax book value of FDE's assets in the groupings, determined in accordance with paragraph (d)(3)(v)(C)(*1*)(*ii*) of this section, are assigned for purposes of apportioning USP's interest expense. Because all of FDE's assets produce foreign branch category income, under paragraph (d)(3)(v)(C)(*1*) of this section the foreign gross income is characterized as foreign branch category income. Under paragraph (f) of this section, the $25x of Country A withholding tax is also allocated entirely to the foreign branch category, the statutory grouping to which the $250x of Country A gross income is assigned. No apportionment of the $25x is necessary because the class of gross income to which the foreign gross income is allocated consists entirely of a single statutory grouping, foreign branch category income.

(12) *Example 11: Disregarded payment that is a remittance*—(i) *Facts*. USP owns all of the outstanding stock of CFC1. CFC1, a tested unit within the meaning of §1.954-1(d)(2) (the "CFC1 tested unit"), owns all of the interests in FDE, a disregarded entity that is organized in Country B. CFC1's interests in FDE are also a tested unit within the meaning of §1.954-1(d)(2) (the "FDE tested unit"). The sole assets of FDE (determined in accordance with paragraph (d)(3)(v)(C)(*1*)(*ii*) of this section) consist of all of the outstanding stock of CFC3, a controlled foreign corporation organized in Country B. In Year 1, CFC3 pays a $400x dividend to FDE that is excluded from CFC1's foreign personal holding company income ("FPHCI") by reason of section 954(c)(6). FDE makes no payments to CFC1 and pays no Country B tax in Year 1. In Year 2, FDE makes a $400x payment to CFC1 that is a remittance (as defined in paragraph (d)(3)(v)(E) of this section). Under the laws of Country B, the remittance gives rise to a $400x dividend.

Country B imposes a 5% ($20x) withholding tax (which is an eligible current year tax as defined in §1.960-1(b)) on CFC1 on the dividend. In Year 2, CFC3 pays no dividends to FDE, and FDE earns no income. For Federal income tax purposes, the $400x payment from FDE to CFC1 is a disregarded payment and results in no income to CFC1. For purposes of this paragraph (g)(12) (*Example 11*), section 960(a) is the operative section and the income groups described in §1.960-1(d)(2) are the statutory and residual groupings. See §1.960-1(d)(3)(ii)(A) (applying §1.960-1 to allocate and apportion current year taxes to income groups). For Federal income tax purposes, in Year 2 the stock of CFC3 owned by FDE has a tax book value of $1,000x, $750x of which is assigned under the asset method in §1.861-9 (as applied by treating CFC1 as a United States person) to the general category tested income group described in §1.960-1(d)(2)(ii)(C), and $250x of which is assigned to a passive category FPHCI group described in §1.960-1(d)(2)(ii)(B)(*2*)(*i*).

(ii) *Analysis*. (A) The $20x Country B withholding tax on the remittance from FDE is imposed on a $400x item of foreign gross income that CFC1 includes in income by reason of its receipt of a disregarded payment. In order to allocate and apportion the $20x of Country B withholding tax under paragraph (c) of this section for purposes of §1.960-1(d)(3)(ii)(A), paragraph (d)(3)(v) of this section applies to assign the $400x item of foreign gross dividend income to a statutory or residual grouping. Under paragraph (d)(3)(v)(C)(*1*) of this section, the $400x item of foreign gross income is assigned to the statutory or residual groupings that include the U.S. gross income that is attributable to the CFC1 tested unit under the attribution rules in §1.954-1(d)(1)(iii) and that correspond to the statutory and residual groupings out of which FDE made the remittance.

(B) Under paragraph (d)(3)(v)(C)(*1*)(*i*) of this section, FDE is considered to pay the remittance ratably out of all of its accumulated after-tax income, which is deemed to have arisen in the statutory and residual groupings in the same proportions as the proportions in which the tax book value of FDE's assets would be assigned (if CFC1 were a United States person) for purposes of apportioning interest expense under the asset method in Year 2, the taxable year in which FDE made the remittance. Accordingly, $300x ($400x x $750x / $1,000x) of the remittance is deemed to be made out of the general category tested income of the FDE tested unit, and $100x ($400x x $250x / $1,000x) of the remittance is deemed to be made out of the passive category FPHCI of the FDE tested unit.

(C) Under paragraph (d)(3)(v)(C)(*1*)(*i*) of this section, $300x of the $400x item of foreign gross income from the remittance, and therefore an equal amount of foreign taxable income, is assigned to the income group that includes general category tested income attributable to the CFC1 tested unit, and $100x of this foreign gross income item, and therefore an equal amount of foreign taxable income, is assigned to the income group that includes passive category FPHCI attributable to the CFC1 tested unit. Under paragraph (f) of this section, the $20x of Country B withholding tax is ratably apportioned between the income groups based on the relative amounts of foreign taxable income in each grouping. Accordingly, $15x ($20x x $300x / $400x) of the Country B withholding tax is apportioned to the income group that includes general category tested income attributable to the CFC1 tested unit, and $5x ($20x x $100x / $400x) of the Country B withholding tax is apportioned to the income group that includes passive category FPHCI attributable to the CFC1 tested unit. See §1.960-2 for rules on determining the amount of such taxes that may be deemed paid under section 960(a) and (d).

(13) *Example 12: Disregarded payment that is a reattribution payment*—(i) *Facts*. (A) USP owns all of the outstanding stock of CFC1, a tested unit within the meaning of §1.954-1(d)(2) (the "CFC1 tested unit"). CFC1 owns all of the interests in FDE1, a disregarded entity organized in Country B. CFC1's interests in FDE1 are also a tested unit within the meaning of §1.954-1(d)(2) (the "FDE1 tested unit"). Country B imposes a 20 percent net income tax on its residents. CFC1 also owns all of the interests in FDE2, a disregarded entity organized in Country C. CFC1's interests in FDE2 are also a tested unit within the meaning of §1.954-1(d)(2) (the "FDE2 tested unit"). Country C imposes a 15 percent net income tax on its residents. Each of the taxes imposed by Countries B and C is a foreign income tax within the meaning of §1.901-2(a) and a separate levy within the meaning of §1.901-2(d). For purposes of this paragraph (g)(13) (*Example 12*), the operative section is the high-tax exception of §1.954-1(d), and the statutory groupings are the general gross item groupings of each tested unit, as defined in §1.954-1(d)(1)(ii)(A).

(B) FDE2 owns Asset A, which is intangible property that has a tax book value of $10,000x and is properly reflected on the separate set of books and records of FDE2. In Year 1, pursuant to a license agreement between FDE1 and FDE2 for the use of Asset A, FDE1 makes a disregarded royalty payment to FDE2 of $1,000x that would be a deductible royalty payment if regarded for Federal income tax purposes. Because it is disregarded for Federal income tax purposes, the $1,000x disregarded royalty payment by FDE1 to FDE2 results in no income to CFC1 for Federal income tax purposes. Also in Year 1, pursuant to a sub-license agreement between FDE1 and a third party for the use of Asset A, FDE1 earns $1,000x of royalty income for Federal income tax purposes (the "U.S. gross royalty") that is gross tested income (as defined in §1.951A-2(c)(1)) and properly reflected on the separate set of books and records of FDE1.

(C) Under the laws of Country B, the transaction that gives rise to the $1,000x item of U.S. gross royalty income causes FDE1 to include a $1,200x item of gross royalty income in its Country B taxable income (the "Country B gross royalty"). In addition, FDE1 deducts its $1,000x disregarded royalty payment to FDE2 for Country B tax purposes. For Country B tax purposes, FDE1 therefore has $200x ($1,200x - $1,000x) of taxable income on which Country B imposes $40x (20% x $200x) of net income tax.

(D) Under the laws of Country C, the $1,000x disregarded royalty payment from FDE1 to FDE2 causes FDE2 to include a $1,000x item of gross royalty income in its Country C taxable income (the "Country C gross royalty"). FDE2 makes no deductible payments under the laws of Country C. For Country C tax purposes, FDE2 therefore has $1,000x of taxable income on which Country C imposes $150x (15% x $1,000x) of net income tax.

(ii) *Analysis*—(A) *Country B net income tax*. (*1*) The Country B net income tax is imposed on foreign taxable income of FDE1 that consists of a $1,200x item of Country B gross royalty income and a $1,000x item of royalty expense. For Federal income tax purposes, the FDE1 tested unit has a $1,000x item of U.S. gross royalty income that is initially attributable to it under paragraph (d)(3)(v)(B)(*2*) of this section and §1.954-1(d)(1)(iii). The transaction that produced the $1,000x item of U.S. gross royalty income also produced the $1,200x item of Country B gross royalty income. Under paragraph (b)(2) of this section, the $1,000x item of U.S. gross royalty income is therefore the corresponding U.S. item for the $1,200x item of Country B gross royalty income of FDE1.

(*2*) The $1,000x disregarded royalty payment from FDE1 to FDE2 is allocated under paragraph (d)(3)(v)(B)(*2*) of this section and §1.954-1(d)(1)(iii) to the $1,000x of U.S. gross income of the FDE1 tested unit to the extent of that gross income. As a result, the $1,000x disregarded royalty payment causes the $1,000x item of U.S. gross royalty income to be reattributed from the FDE1 tested unit to the FDE2 tested unit, and results in a $1,000x reattribution amount that is also a reattribution payment.

(*3*) The $1,200x Country B gross royalty item that is included in the Country B taxable income of FDE1 is assigned under paragraph (d)(1) of this section to the statutory or residual grouping to which the $1,000x corresponding U.S. item is initially assigned under §1.954-1(d)(1)(iii), namely, the general gross item grouping of the FDE1 tested unit. This assignment is made without regard to the $1,000x reattribution payment from the FDE1 tested unit to the FDE2 tested unit or to the fact that the FDE1 tested unit has no attribution item arising from its $1,000x item of U.S. gross royalty income, which is all reattributed to the FDE2 tested unit; none of the FDE1 tested unit's $1,200x Country B gross royalty income is reattributed to the FDE2 tested unit for this purpose. See paragraph (d)(3)(v)(B)(*3*) of this section. Under paragraph (f) of this section, all of the $40x of Country B net income tax is allocated to the general gross item group of the FDE1 tested unit, the statutory grouping to which the $1,200x item of Country B gross royalty income of FDE1 is assigned. No apportionment of the $40x is necessary because the class of gross income to which the foreign gross income is allocated consists entirely of a single statutory grouping.

(B) *Country C net income tax*. The Country C net income tax is imposed on foreign taxable income of FDE2 that consists of a $1,000x item of Country C gross royalty income. For Federal income tax purposes, under paragraph (d)(3)(v)(B)(*2*) of this section and §1.954-1(d)(1)(iii), the FDE2 tested unit has a reattribution amount of $1,000x of

U.S. gross royalty income by reason of its receipt of the $1,000x reattribution payment from FDE1. The $1,000x item of U.S. gross royalty income that is included in the taxable income of the FDE2 tested unit by reason of the $1,000x reattribution payment is assigned under paragraph (d)(3)(v)(B)(*1*) of this section to the statutory or residual grouping to which the $1,000x reattribution amount of U.S. gross royalty income that constitutes the reattribution payment is assigned upon receipt by the FDE2 tested unit under §1.954-1(d)(1)(iii), namely, the general gross item group of the FDE2 tested unit. Under paragraph (d)(3)(v)(B)(*1*) of this section, the $1,000x item of Country C gross royalty income is assigned to the statutory grouping to which the $1,000x corresponding U.S. item is assigned. Accordingly, under paragraph (f) of this section, all of the $150x of Country C net income tax is allocated to the general gross item group of the FDE2 tested unit, the statutory grouping to which the $1,000x item of Country C gross royalty income of FDE2 is assigned. No apportionment of the $150x is necessary because the class of gross income to which the foreign gross income is allocated consists entirely of a single statutory grouping.

(h) *Allocation and apportionment of certain foreign in lieu of taxes described in section 903*. A tax that is a foreign income tax by reason of §1.903-1(c)(1) is allocated and apportioned to statutory and residual groupings in the same proportions as the foreign taxable income that comprises the excluded income (as defined in §1.903-1(c)(1)). See paragraph (f) of this section for rules on allocating and apportioning certain withholding taxes described in §1.903-1(c)(2).

(i) *Applicability date*. Except as provided in this paragraph (i), this section applies to taxable years beginning after December 31, 2019. Paragraphs (b)(19) and (23) and (d)(3)(i), (ii), and (v) of this section apply to taxable years that begin after December 31, 2019, and end on or after November 2, 2020. Paragraph (h) of this section applies to taxable years beginning after [date final regulations are filed with the **Federal Register**].

Par. 22. Section 1.901-1 is amended:

1. By revising the section heading and paragraphs (a) through (d).

2. In paragraph (e), by removing the language "a husband and wife" and adding the language "spouses" in its place.

3. By revising paragraphs (f) and (h)(1).

4. By removing paragraph (h)(2).

5. By redesignating paragraph (h)(3) as paragraph (h)(2).

6. By revising the heading and second sentence in paragraph (j).

The revisions and additions read as follows:

§1.901-1 Allowance of credit for foreign income taxes.

(a) *In general*. Citizens of the United States, domestic corporations, certain aliens resident in the United States or Puerto Rico, and certain estates and trusts may choose to claim a credit, as provided in section 901, against the tax imposed by chapter 1 of the Internal Revenue Code (Code) for certain taxes paid or accrued to foreign countries and possessions of the United States, subject to the conditions prescribed in this section.

(1) *Citizen of the United States*. An individual who is a citizen of the United States, whether resident or nonresident, may claim a credit for—

(i) The amount of any foreign income taxes, as defined in §1.901-2(a), paid or accrued (as the case may be, depending on the individual's method of accounting for such taxes) during the taxable year;

(ii) The individual's share of any such taxes of a partnership of which the individual is a member, or of an estate or trust of which the individual is a beneficiary; and

(iii) In the case of an individual who has made an election under section 962, the taxes deemed to have been paid under section 960 (see §1.962-1(b)(2)).

(2) *Domestic corporation*. A domestic corporation may claim a credit for—

(i) The amount of any foreign income taxes, as defined in §1.901-2(a), paid or accrued (as the case may be, depending on the corporation's method of accounting for such taxes) during the taxable year;

(ii) The corporation's share of any such taxes of a partnership of which the corporation is a member, or of an estate or trust of which the corporation is a beneficiary; and

(iii) The taxes deemed to have been paid under section 960.

(3) *Alien resident of the United States or Puerto Rico*. Except as provided in a Presidential proclamation described in section 901(c), an individual who is a resident alien of the United States (as defined in section 7701(b)), or an individual who is a bona fide resident of Puerto Rico (as defined in section 937(a)) during the entire taxable year, may claim a credit for—

(i) The amount of any foreign income taxes, as defined in §1.901-2(a), paid or accrued (as the case may be, depending on the individual's method of accounting for such taxes) during the taxable year;

(ii) The individual's share of any such taxes of a partnership of which the individual is a member, or of an estate or trust of which the individual is a beneficiary; and

(iii) In the case of an individual who has made an election under section 962, the taxes deemed to have been paid under section 960 (see §1.962-1(b)(2)).

(4) *Estates and trusts*. An estate or trust may claim a credit for:

(i) The amount of any foreign income taxes, as defined in §1.901-2(a), paid or accrued (as the case may be, depending on the estate or trust's method of accounting for such taxes) during the taxable year to the extent not allocable to and taken into account by its beneficiaries under paragraph (a)(1)(ii), (a)(2)(ii), or (a)(3)(ii) of this section (see section 642(a)); and

(ii) In the case of an estate or trust that has made an election under section 962, the taxes deemed to have been paid under section 960 (see §1.962-1(b)(2)).

(b) *Limitations*. Certain Code sections, including sections 245A(d) and (e)(3), 814, 901(e) through (m), 904, 906, 907, 908, 909, 911, 965(g), 999, and 6038, reduce, defer, or otherwise limit the credit against the tax imposed by chapter 1 of the Code for certain amounts of foreign income taxes.

(c) *Deduction denied if credit claimed*—(1) *In general*. Except as provided in paragraphs (c)(2) and (3) of this section, if a taxpayer chooses with respect to any taxable year to claim a foreign tax credit to any extent, such choice will be considered to apply to all of the foreign income taxes paid or accrued (as the case may be, depending on the taxpayer's method of accounting for such taxes) in such taxable year, and no portion of any such taxes is allowed as a deduction from gross income in any taxable year. See section 275(a)(4).

(2) *Exception for taxes not subject to section 275*. Foreign income taxes for which a credit is disallowed and to which section 275 does not apply may be al-

lowed as a deduction under section 164(a)(3). See, for example, sections 901(f), 901(j)(3), 901(k)(7), 901(l)(4), 901(m)(6), and 908(b). For rules on the year in which a deduction for foreign income taxes is allowed under section 164(a)(3), see §§1.446-1(c)(1)(ii), 1.461-2(a)(2), and 1.461-4(g)(6)(iii)(B).

(3) *Exception for additional taxes paid by an accrual basis taxpayer that relate to a prior year for which the taxpayer deducted foreign income taxes*. In a taxable year in which a taxpayer chooses to claim a credit for foreign income taxes accrued in that year (including a cash method taxpayer who has made an election under section 905(a) to claim credits in the year the taxes accrue), additional foreign income taxes that are finally determined and paid as a result of a foreign tax redetermination in that taxable year may be claimed as a deduction in such taxable year, if the additional foreign income taxes relate to a prior taxable year in which the taxpayer chose to claim a deduction, rather than a credit, for foreign income taxes paid or accrued (as the case may be, depending on the taxpayer's overall method of accounting) in that prior year.

(4) *Example*. The following example illustrates the application of paragraph (c)(3) of this section.

(i) *Facts*. USC is a domestic corporation that is engaged in a trade or business in Country X through a branch. USC uses an accrual method of accounting and uses the calendar year as its taxable year for U.S. and Country X tax purposes. For taxable years 1 through 3, USC chooses to deduct foreign income taxes, including Country X income taxes, for Federal income tax purposes in the U.S. taxable year in which the taxes accrue. In years 4 through 6, USC chooses to claim a credit under section 901 for foreign income taxes that accrued in those years. In year 6, USC pays an additional $50x in tax to Country X with respect to year 1 as a result of a Country X tax audit.

(ii) *Analysis*. The additional $50x of Country X tax for year 1 that is paid by USC in year 6 cannot be claimed as a deduction on an amended return for year 1, because those taxes did not accrue until year 6. See section 461(f) (flush language); §§1.461-1(a)(2)(i) and 1.461-2(a)(2). In addition, because the additional $50x of Country X tax liability relates to and is considered to accrue in year 1 for foreign tax credit purposes, USC cannot claim a credit for the $50x on its Federal income tax return for year 6. See §1.905-1(d)(1). However, pursuant to paragraph (c)(3) of this section, USC can claim a deduction for the additional $50x of year 1 Country X tax on its Federal income tax return for year 6, in addition to claiming a credit for foreign income taxes that accrued in year 6.

(d) *Period during which election can be made or changed*—(1) *In general*. The taxpayer may, for a particular taxable year, elect to claim the benefits of section 901 (or claim a deduction in lieu of electing a foreign tax credit) at any time before the expiration of the period within which a claim for credit or refund of Federal income tax for such taxable year that is attributable to such credit or deduction, as the case may be, may be made or, if longer, the period prescribed by section 6511(c) if the refund period for that taxable year is extended by an agreement to extend the assessment period under section 6501(c)(4). Thus, an election to claim a credit for foreign income taxes paid or accrued (as the case may be, depending on the taxpayer's method of accounting for such taxes) in a particular taxable year can be made within the period prescribed by section 6511(d)(3)(A) for claiming a credit or refund of Federal income tax for that taxable year that is attributable to a credit for the foreign income taxes paid or accrued in that particular taxable year or, if longer, the period prescribed by section 6511(c) with respect to that particular taxable year. A choice to claim a deduction under section 164(a)(3), rather than a credit, for foreign income taxes paid or accrued in a particular taxable year can be made within the period prescribed by section 6511(a) or 6511(c), as applicable, for claiming a credit or refund of Federal income tax for that particular taxable year.

(2) *Manner in which election is made or changed*. A taxpayer claims a deduction or elects to claim a credit for foreign income taxes paid or accrued in a particular taxable year by filing an original or amended return for that taxable year within the relevant period specified in paragraph (d)(1) of this section. A claim for credit shall be accompanied by Form 1116 in the case of an individual, estate or trust, and by Form 1118 in the case of a corporation (and an individual, estate or trust making an election under section 962). See §§1.905-3 and 1.905-4 for rules requiring the filing of amended returns for all affected years when a timely change in the taxpayer's election results in U.S. tax deficiencies.

* * * * *

(f) *Taxes against which credit not allowed*. The credit for foreign income taxes is allowed only against the tax imposed by chapter 1 of the Code, except that it is not allowed against tax that, under section 26(b)(2), is treated as a tax not imposed under such chapter.

* * * * *

(h) * * *

(1) Except as provided in paragraphs (c)(2) and (3) of this section, a taxpayer who deducts foreign income taxes paid or accrued (as the case may be, depending on the taxpayer's method of accounting for such taxes) for that taxable year (see sections 164 and 275); and

* * * * *

(j) *Applicability date*. * * * This section applies to foreign taxes paid or accrued in taxable years beginning on or after [date final regulations are filed with the **Federal Register**].

Par. 23. Section 1.901-2 is amended:

1. By revising paragraphs (a) heading and (a)(1).

2. By removing the undesignated paragraph following paragraph (a)(1).

3. By revising paragraphs (a)(3), (b) heading, (b)(1), (b)(2) heading, and (b)(2)(i).

4. By removing the undesignated paragraph following paragraph (b)(2)(i) and paragraph (b)(2)(ii).

5. By redesignating paragraphs (b)(2)(iii) and (iv) as paragraphs (b)(2)(ii) and (iii), respectively.

6. By revising paragraphs (b)(3), (b)(4) heading, and (b)(4)(i).

7. By removing the undesignated paragraph following paragraph (b)(4)(i).

8. By revising paragraph (b)(4)(iv).

9. By adding paragraph (b)(5).

10. By revising paragraphs (c) and (d)(1).

11. By removing the last sentence of paragraph (d)(2).

12. By revising paragraphs (e) heading, (e)(1), and (e)(2)(i).

13. By redesignating paragraph (e)(2)(ii) as paragraph (e)(2)(iv).

14. By adding a new paragraph (e)(2)(ii) and paragraph (e)(2)(iii).

15. By removing the undesignated sentence after paragraph (e)(3)(iii)(C) and paragraph (e)(3)(v).

16. By revising paragraphs (e)(4) and (e)(5)(i).

17. By redesignating paragraph (e)(5)(ii) as paragraph (e)(5)(iii).

18. By adding a new paragraph (e)(5)(ii) and paragraph (e)(6).

19. In paragraph (f)(3)(ii)(A), by removing the language "§1.909-2T(b)(2)(vi)" and adding the language "§1.909-2(b)(2)(vi)" in its place.

20. In paragraph (f)(3)(iii)(B)(*2*), by removing the language "§1.909-2T(b)(3)(i)" and adding the language "§1.909-2(b)(3)(i)" in its place.

21. By revising paragraph (f)(4).

22. By redesignating paragraphs (f)(5) and (6) as paragraphs (f)(6) and (7), respectively.

23. By adding a new paragraph (f)(5).

24. By revising newly redesignated paragraph (f)(6).

25. In newly redesignated paragraph (f)(7) introductory text, by removing the language "paragraphs (f)(3) and (f)(4)" and adding the language "paragraphs (f)(3) through (6)" in its place.

26. In newly redesignated paragraph (f)(7), by removing *Example 3*.

27. By revising paragraphs (g) and (h).

The revisions and additions read as follows:

§1.901-2 Income, war profits, or excess profits tax paid or accrued.

(a) *Definition of foreign income tax*—(1) *Overview and scope*. Paragraphs (a), (b), and (c) of this section define a foreign income tax for purposes of section 901. Paragraph (d) of this section contains rules describing what constitutes a separate levy. Paragraph (e) of this section provides rules for determining the amount of foreign income tax paid by a person. Paragraph (f) of this section contains rules for determining by whom foreign income tax is paid. Paragraph (g) of this section defines the terms used in this section. Paragraph (h) of this section provides the applicability date for this section.

(i) *In general*. Section 901 allows a credit for the amount of income, war profits, and excess profits taxes paid during the taxable year to any foreign country, and section 903 provides that for purposes of Part III of subchapter N of the Code and sections 164(a) and 275(a), such taxes include a tax paid in lieu of a tax on income, war profits or excess profits that is otherwise generally imposed by a foreign country (collectively, for purposes of this section, a "foreign income tax"). Whether a foreign levy is a foreign income tax is determined independently for each separate levy. A foreign tax either is or is not a foreign income tax, in its entirety, for all persons subject to the foreign tax.

(ii) *Requirements*. A foreign levy is a foreign income tax only if—

(A) It is a foreign tax; and

(B) Either:

(*1*) The foreign tax is a net income tax, as defined in paragraph (a)(3) of this section; or

(*2*) The foreign tax is a tax in lieu of an income tax, as defined in §1.903-1(b).

* * * * *

(3) *Net income tax*. A foreign tax is a net income tax only if the foreign tax meets the net gain and jurisdictional nexus requirements in paragraphs (b) and (c) of this section.

(b) *Net gain requirement*—(1) *In general*. A foreign tax satisfies the net gain requirement only if the tax satisfies the realization, gross receipts, and cost recovery requirements in paragraphs (b)(2), (3), and (4) of this section, respectively, or if the foreign tax is a surtax described in paragraph (b)(5) of this section. Paragraphs (b)(2) through (5) of this section are applied with respect to a foreign tax solely on the basis of the foreign tax law governing the calculation of the foreign taxable base, unless otherwise provided, and without any consideration of the rate of tax imposed on the foreign taxable base.

(2) *Realization requirement*—(i) *In general*. A foreign tax satisfies the realization requirement if it is imposed upon one or more of the events described in paragraphs (b)(2)(i)(A) through (C) of this section. If a foreign tax meets the realization requirements in paragraphs (b)(2)(i)(A) through (C) of this section except with respect to one or more specific and defined classes of nonrealization events (such as, for example, imputed rental income from a personal residence used by the owner), and as judged based on the application of the foreign tax to all taxpayers subject to the foreign tax, the incidence and amounts of gross receipts attributable to such nonrealization events is insignificant relative to the incidence and amounts of gross receipts attributable to events covered by the foreign tax that do meet the realization requirement, then the foreign tax is treated as meeting the realization requirement in paragraph (b)(2) of this section (despite the fact that the foreign tax is also imposed on the basis of some nonrealization events, and that some persons subject to the foreign tax may only be taxed on nonrealization events).

(A) *Realization events*. The foreign tax is imposed upon or after the occurrence of events ("realization events") that result in the realization of income under the income tax provisions of the Internal Revenue Code.

(B) *Pre-realization recapture events*. The foreign tax is imposed upon the occurrence of an event before a realization event (a "pre-realization event") that results in the recapture (in whole or part) of a tax deduction, tax credit, or other tax allowance previously accorded to the taxpayer (for example, the recapture of an incentive tax credit if required investments are not completed within a specified period).

(C) *Pre-realization timing difference events*. The foreign tax is imposed upon the occurrence of a pre-realization event, other than one described in paragraph (b)(2)(i)(B) of this section, but only if the foreign country does not, upon the occurrence of a later event, impose tax under the same or a separate levy (a "second tax") on the same taxpayer (for purposes of this paragraph (b)(2)(i)(C), treating a disregarded entity as defined in §301.7701-3(b)(2)(i)(C) of this chapter as a taxpayer separate from its owner), with respect to the income on which tax is imposed by reason of such pre-realization event (or, if it does impose a second tax, a credit or other comparable relief is available against the liability for such a second tax for tax paid on the occurrence of the pre-realization event) and—

(*1*) The imposition of the tax upon such pre-realization event is based on the difference in the fair market value of property at the beginning and end of a period;

(*2*) The pre-realization event is the physical transfer, processing, or export of readily marketable property (as defined in paragraph (b)(2)(ii) of this section) and the imposition of the tax upon the pre-realization event is based on the fair market value of such property; or

(*3*) The pre-realization event relates to a deemed distribution (for example, by a corporation to a shareholder) or inclusion (for example, under a controlled foreign corporation inclusion regime) of amounts (such as earnings and profits) that meet the realization requirement in paragraph (b)(2) of this section in the hands of the person that, under foreign tax law, is deemed to distribute such amounts.

* * * * *

(3) *Gross receipts requirement*—(i) *Rule*. A foreign tax satisfies the gross receipts requirement if it is imposed on the basis of actual gross receipts, on the basis of the amount of deemed gross receipts arising from pre-realization timing difference events described in paragraph (b)(2)(i)(C) of this section, or on the basis of gross receipts from an insignificant non-realization event that is described in the second sentence of paragraph (b)(2) of this section. A taxpayer's actual gross receipts are determined taking into account the gross receipts that are properly allocated to such taxpayer under a foreign tax meeting the jurisdictional nexus requirements of paragraph (c)(1)(i) or (c)(2) of this section.

(ii) *Examples*. The following examples illustrate the rules of paragraph (b)(3)(i) of this section.

(A) *Example 1: Cost-plus tax*—(*1*) *Facts*. Country X imposes a "cost-plus tax" on country X corporations that serve as regional headquarters for affiliated nonresident corporations, and this tax is a separate levy (within the meaning of paragraph (d) of this section). A headquarters company for purposes of this tax is a corporation that performs administrative, management or coordination functions solely for nonresident affiliated entities. Due to the difficulty of determining on a case-by-case basis the arm's length gross receipts that headquarters companies would charge affiliates for such services, gross receipts of a headquarters company are deemed, for purposes of this tax, to equal 110 percent of the business expenses incurred by the headquarters company.

(*2*) *Analysis*. Because the cost-plus tax is based on costs and not on gross receipts, under paragraph (b)(3)(i) of this section the cost-plus tax does not satisfy the gross receipts requirement.

(B) *Example 2: Petroleum taxed on extraction*—(*1*) *Facts*. Country X imposes a tax that is a separate levy (within the meaning of paragraph (d) of this section) on income from the extraction of petroleum. Under the terms of that tax, gross receipts from extraction income are deemed to equal 105 percent of the fair market value of petroleum extracted.

(*2*) *Analysis*. Because it is imposed on deemed gross receipts that exceed the fair market value of the petroleum extracted, the tax on extraction income does not satisfy the gross receipts requirement of paragraph (b)(3)(i) of this section.

(4) *Cost recovery requirement*—(i) *In general*—(A) *Requirement*. A foreign tax satisfies the cost recovery requirement if the base of the tax is computed by reducing gross receipts (as described in paragraph (b)(3) of this section) to permit recovery of the significant costs and expenses (including significant capital expenditures) attributable, under reasonable principles, to such gross receipts. In addition, a foreign tax satisfies the cost recovery requirement if the foreign tax law permits recovery of an amount that by its terms may be greater, but can never be less, than the actual amounts of such significant costs and expenses (for example, under a provision identical to percentage depletion allowed under section 613). A foreign tax whose base is gross receipts or gross income for which no reduction is allowed under foreign tax law for costs and expenses does not satisfy the cost recovery requirement, even if in practice there are few costs and expenses attributable to all or particular types of gross receipts included in the foreign tax base. See paragraph (b)(4)(iv) of this section (*Example 3*).

(B) *Significant costs and expenses*—(*1*) *Timing of recovery*. A foreign tax law permits recovery of significant costs and expenses even if such costs and expenses are recovered earlier or later than they are recovered under the Internal Revenue Code, unless the time of recovery is so much later (for example, after the property becomes worthless or is disposed of) as effectively to constitute a denial of such recovery. The amount of costs and expenses that are considered to be recovered under the foreign tax law is neither discounted nor augmented by taking into account the time value of money attributable to any acceleration or deferral of a tax benefit resulting from the foreign law cost recovery method compared to when tax would be paid under the Internal Revenue Code. Therefore, the cost recovery requirement is satisfied where items deductible under the Internal Revenue Code are capitalized under the foreign tax law and recovered either immediately, on a recurring basis over time, or upon the occurrence of some future event, or where the recovery of items capitalized under the Internal Revenue Code occurs more or less rapidly than under the foreign tax law.

(*2*) *Amounts that must be recovered*. Whether a cost or expense is significant for purposes of this paragraph (b)(4)(i) is determined based on whether, for all taxpayers in the aggregate to which the foreign tax applies, the item of cost or expense constitutes a significant portion of the taxpayers' total costs and expenses. However, costs and expenses related to capital expenditures, interest, rents, royalties, services, or research and experimentation are always treated as significant costs or expenses for purposes of this paragraph (b)(4)(i). Foreign tax law is considered to permit recovery of significant costs and expenses even if recovery of all or a portion of certain costs or expenses is disallowed, if such disallowance is consistent with the types of disallowances required under the Internal Revenue Code. For example, foreign tax law is considered to permit recovery of significant costs and expenses if such law disallows interest deductions equal to a certain percentage of adjusted taxable income similar to the limitation under section 163(j), disallows interest and royalty deductions in connection with hybrid transactions similar to those described in section 267A, or disallows certain expenses based on public policy considerations similar to those disallowances contained in section 162. A foreign tax law that does not permit recovery of one or more significant costs or expenses does not meet the cost recovery requirement, even if it provides alternative allowances that in practice equal or exceed the amount of nonrecovered costs or expenses. However, in determining whether a foreign tax (the "tested foreign tax") meets the cost recovery requirement, it is immaterial whether the tested foreign tax allows a deduction for other taxes that would qualify as foreign income taxes (determined without regard to whether such other tax allows a deduction for the tested foreign tax). See paragraph (b)(4)(iv) of this section (*Example 5*).

(*3*) *Attribution of costs and expenses to gross receipts*. Principles used in the foreign tax law to attribute costs and expenses to gross receipts may be reasonable even if they differ from principles that apply under the Internal Revenue Code (for example, principles that apply under section 265, 465 or 861(b) of the Internal Revenue Code).

* * * * *

(iv) *Examples*. The following examples illustrate the rules of this paragraph (b)(4).

(A) *Example 1: Tax on gross interest income of certain residents; no deductions allowed—*(*1*) *Facts.* Country X imposes a net income tax on corporations resident in Country X; however, that income tax is not applicable to banks. Country X also imposes a tax (the "bank tax") of 1 percent on the gross amount of interest income derived by banks resident in Country X; no deductions are allowed. Banks resident in Country X incur substantial costs and expenses (for example, interest expense) attributable to their interest income.

(*2*) *Analysis*. Because the terms of the bank tax do not permit recovery of significant costs and expenses attributable to the gross receipts included in the tax base, under paragraph (b)(4)(i) of this section the bank tax does not satisfy the cost recovery requirement.

(B) *Example 2: Tax on gross interest income of nonresidents; no deductions allowed—*(*1*) *Facts*. Country X imposes a net income tax on nonresident persons engaged in a trade or business in Country X. Country X also imposes a tax (the "bank tax") of 1 percent on the gross amount of interest income earned by nonresident banks from loans to residents of Country X if such banks are not engaged in a trade or business in Country X or if such interest income is not considered attributable to a trade or business conducted in Country X. Under Country X tax law, no deductions are allowed in determining the base of the bank tax. Banks incur substantial costs and expenses (for example, interest expense) attributable to their interest income.

(*2*) *Analysis*. Because no deductions are allowed in determining the base of the bank tax, under paragraph (b)(4)(i) of this section the bank tax does not satisfy the cost recovery requirement.

(C) *Example 3: Payroll tax—*(*1*) *Facts.* A foreign country imposes payroll tax at the rate of 10 percent on the amount of gross wages realized by resident employees; no deductions are allowed in computing the base of the payroll tax.

(*2*) *Analysis.* Because the foreign tax law does not allow for the recovery of any costs and expenses attributable to gross receipts included in the taxable base, under paragraph (b)(4)(i) of this section the payroll tax does not satisfy the cost recovery requirement.

(D) *Example 4: Tax on gross wages reduced by allowable deductions–*(*1*) *Facts.* A foreign country imposes a tax at the rate of 40 percent on the realized gross receipts of its residents, including gross income from wages, reduced by deductions for significant costs and expenses attributable to the gross receipts included in the taxable base.

(*2*) *Analysis.* Because foreign tax law allows for the recovery of significant costs and expenses attributable to gross receipts included in the taxable base, under paragraph (b)(4)(i) of this section the tax satisfies the cost recovery requirement.

(E) *Example 5: No deduction for another net income tax—*(*1*) *Facts.* Each of Country X and Province Y (a political subdivision of Country X) imposes a tax on resident corporations, called the "Country X income tax" and the "Province Y income tax," respectively. Each tax has an identical base, which is computed by reducing a corporation's realized gross receipts by deductions that, based on the laws of Country X and Province Y, generally permit recovery of the significant costs and expenses (including significant capital expenditures) that are attributable under reasonable principles to such gross receipts. However, the Country X income tax does not allow a deduction for the Province Y income tax for which a taxpayer is liable, nor does the Province Y income tax allow a deduction for the Country X income tax for which a taxpayer is liable.

(*2*) *Analysis.* Under paragraph (d)(1)(i) of this section, each of the Country X income tax and the Province Y income tax is a separate levy. Without regard to whether the Province Y income tax may allow a deduction for the Country X income tax, and without regard to whether the Country X income tax may allow a deduction for the Province Y income tax, both taxes would qualify as net income taxes under paragraph (a)(3) of this section. Therefore, under paragraph (b)(4)(i)(B)(*2*) of this section the fact that neither levy's base allows a deduction for the other levy is immaterial, and both levies satisfy the cost recovery requirement.

(5) *Surtax on net income tax*. A foreign tax satisfies the net gain requirement in this paragraph (b) if the base of the foreign tax is the amount of a net income tax. For example, if a tax (surtax) is computed as a percentage of a separate levy that is itself a net income tax, then such surtax is considered to satisfy the net gain requirement.

(c) *Jurisdictional nexus requirement*. A foreign tax meets the jurisdictional nexus requirement only if the tax satisfies the requirements of paragraph (c)(1) of this section (with respect to a separate levy imposed on nonresidents of the foreign country) or paragraph (c)(2) of this section (with respect to a separate levy imposed on residents of the foreign country).

(1) *Tax on nonresidents*. Each of the items of income of nonresidents of a foreign country that is subject to the foreign tax must satisfy the requirements of paragraph (c)(1)(i), (ii), or (iii) of this section.

(i) *Income attribution based on activities nexus*. The income that is taxable in the foreign country is limited to income that is attributable, under reasonable principles, to the nonresident's activities within the foreign country (including the nonresident's functions, assets, and risks located in the foreign country), without taking into account as a significant factor the location of customers, users, or any other similar destination-based criterion. For purposes of the preceding sentence, attribution of income under reasonable principles includes rules similar to those for determining effectively connected income under section 864(c).

(ii) *Nexus based on source of income*. The amount of income (other than income from sales or other dispositions of property) that is taxable in the foreign country on the basis of source (instead of on the basis of activities as described in paragraph (c)(1)(i) of this section) is based on income arising from sources within the foreign country that imposes the tax, but only if the sourcing rules of the foreign tax law are reasonably similar to the sourcing rules that apply for Federal income tax purposes. In particular, a foreign tax on income from services must be sourced based on where the services are performed, and not based on the location of the service recipient.

(iii) *Nexus based on situs of property*. The amount of income from sales or dispositions of property that is taxable in the foreign country on the basis of the situs of real or movable property (instead of on the basis of activities as described in paragraph (c)(1)(i) of this section) includes only gains that are attributable to the disposition of real property situated in the foreign country or movable property forming part of the business property of a taxable presence in the foreign country (including, for purposes of this paragraph (c)(1)(iii), interests in a company or other entity to the extent attributable to such real property or business property).

(2) *Tax on residents*. A foreign tax imposed on residents of the foreign country imposing the foreign tax may be imposed on the worldwide income of the resident, but must provide that any allocation to or from the resident of income, gain, deduction, or loss with respect to transactions between such resident and organizations, trades, or businesses owned or controlled directly or indirectly by the same interests (that is, any allocation made pursuant to the foreign country's transfer pricing rules) is determined under arm's length principles, without taking into account as a significant factor the location of customers, users, or any other similar destination-based criterion.

(3) *Example*. The following example illustrates the rules of this paragraph (c).

(i) *Facts*. Country X imposes a separate levy on nonresident companies that furnish specified types of electronically supplied services to users located in Country X (the "ESS tax"). The base of the ESS

tax is computed by taking the nonresident company's overall net income (determined under rules consistent with paragraph (b) of this section) related to supplying electronically supplied services, and deeming a portion of such net income to be attributable to a deemed permanent establishment of the nonresident company in Country X. The amount of the nonresident company's net income attributable to the deemed permanent establishment is determined on a formulary basis based on the percentage of the nonresident company's total users that are located in Country X.

(ii) *Analysis*. The taxable base of the ESS tax is not computed based on a nonresident company's activities located in Country X, but instead takes into account the location of the nonresident company's users. Therefore, the ESS tax does not meet the requirement in paragraph (c)(1)(i) of this section. The ESS tax also does not meet the requirement in paragraph (c)(1)(ii) of this section because it is not imposed on the basis of source, and it does not meet the requirement in paragraph (c)(1)(iii) of this section because it is not imposed on the sale or other disposition of property.

(iii) *Alternative facts*. Instead of imposing the ESS tax by deeming nonresident companies to have a permanent establishment in Country X, Country X treats gross income from electronically supplied services provided to users located in Country X as sourced in Country X. The gross income sourced to Country X is reduced by costs that are reasonably attributed to such gross income, to arrive at the taxable base of the ESS tax. The amount of the nonresident's gross income that is sourced to Country X is determined by multiplying the nonresident's total gross income by the percentage of its total users that are located in Country X.

(iv) *Analysis*. Country X tax law's rule for sourcing electronically supplied services is not based on where the services are performed, but is based on the location of the service recipient. Therefore, the ESS tax, which is imposed on the basis of source, does not meet the requirement in paragraph (c)(1)(ii) of this section. The ESS tax also does not meet the requirement in paragraph (c)(1)(i) of this section because it is not imposed on the basis of a nonresident's activities located in Country X, and it does not meet the requirement in paragraph (c)(1)(iii) of this section because it is not imposed on the sale or other disposition of property.

(d) * * *

(1) *In general*. Each foreign levy must be analyzed separately to determine whether it is a net income tax within the meaning of paragraph (a)(3) of this section and whether it is a tax in lieu of an income tax within the meaning of §1.903-1(b)(2). Whether a single levy or separate levies are imposed by a foreign country depends on U.S. principles and not on whether foreign tax law imposes the levy or levies pursuant to a single or separate statutes. A foreign levy is a separate levy described in this paragraph (d)(1) if it is described in paragraph (d)(1)(i), (ii), or (iii) of this section. In the case of levies that apply to dual capacity taxpayers, see also §1.901-2A(a).

(i) *Taxing authority*. A levy imposed by one taxing authority (for example, the national government of a foreign country) is always separate from a levy imposed by another taxing authority (for example, a political subdivision of that foreign country), even if the base of the levy is the same.

(ii) *Different taxable base*. Where the base of a foreign levy is computed differently for different classes of persons subject to the levy, the levy is considered to impose separate levies with respect to each such class of persons. For example, foreign levies identical to the taxes imposed by sections 1, 11, 541, 871(a), 871(b), 881, 882, 3101 and 3111 of the Internal Revenue Code are each separate levies, because the levies are imposed on different classes of taxpayers, and the base of each of those levies contains different items than the base of each of the others. A taxable base of a separate levy may consist of a particular type of income (for example, wage income, investment income, or income from self-employment). The taxable base of a separate levy may also consist of an amount unrelated to income (for example, wage expense or assets). A separate levy may provide that items included in the base of the tax are computed separately merely for purposes of a preliminary computation and are then combined as a single taxable base. Income included in the taxable base of a separate levy may also be included in the taxable base of another levy (which may or may not also include other items of income); separate levies are considered to be imposed if the taxable bases are not combined as a single taxable base. For example, a foreign levy identical to the tax imposed by section 1 is a separate levy from a foreign levy identical to the tax imposed by section 1411, because tax is imposed under each levy on a separate taxable base that is not combined with the other as a single taxable base. Where foreign tax law imposes a levy that is the sum of two or more separately computed amounts of tax, and each such amount is computed by reference to a different base, separate levies are considered to be imposed. Levies are not separate merely because different rates apply to different classes of taxpayers that are subject to the same provisions in computing the base of the tax. For example, a foreign levy identical to the tax imposed on U.S. citizens and resident alien individuals by section 1 of the Internal Revenue Code is a single levy notwithstanding that the levy has graduated rates and applies different rate schedules to unmarried individuals, married individuals who file separate returns, and married individuals who file joint returns. In addition, in general, levies are not separate merely because some provisions determining the base of the levy apply, by their terms or in practice, to some, but not all, persons subject to the levy. For example, a foreign levy identical to the tax imposed by section 11 of the Internal Revenue Code is a single levy even though some provisions apply by their terms to some but not all corporations subject to the section 11 tax (for example, section 465 is by its terms applicable to corporations described in sections 465(a)(1)(B), but not to other corporations), and even though some provisions apply in practice to some but not all corporations subject to the section 11 tax (for example, section 611 does not, in practice, apply to any corporation that does not have a qualifying interest in the type of property described in section 611(a)).

(iii) *Tax imposed on nonresidents*. A foreign levy imposed on nonresidents is always treated as a separate levy from that imposed on residents, even if the base of the tax as applied to residents and nonresidents is the same, and even if the levies are treated as a single levy under foreign tax law. In addition, a withholding tax (as defined in section 901(k)(1)(B)) that is imposed on gross income of nonresidents is treated as a separate levy as to each separate class of income described in section 61 (for example, interest, dividends, rents, or royalties) subject to the withholding tax.

* * * * *

(e) *Amount of foreign income tax that is creditable*—(1) *In general*. Credit is allowed under section 901 for the amount of foreign income tax that is paid by the taxpayer. The amount of foreign income tax paid by the taxpayer is determined separately for each taxpayer.

(2) * * *

(i) *Refundable amounts*. An amount remitted to a foreign country is not an amount of foreign income tax paid to the extent that it is reasonably certain that the amount will be refunded, rebated, abated, or forgiven. It is reasonably certain that an amount will be refunded, rebated, abated, or forgiven to the extent the amount exceeds a reasonable approximation of final foreign income tax liability to the foreign country. See section 905(c) and §1.905-3 for the required redeterminations if amounts claimed as a credit (on either the cash or accrual basis) exceed the amount of the final foreign income tax liability.

(ii) *Credits*. Except as provided in paragraph (e)(2)(iii) of this section, an amount of foreign income tax liability is not an amount of foreign income tax paid to the extent the foreign income tax is reduced, satisfied or otherwise offset by a tax credit, regardless of whether the amount of the tax credit is refundable in cash to the extent it exceeds the taxpayer's liability for foreign income tax.

(iii) *Overpayments of tax applied as a credit*. An amount of foreign income tax paid is not reduced (or treated as constructively refunded) solely by reason of the fact that the amount paid is allowed (or may be allowed) as a credit to reduce the amount of a different separate levy owed by the taxpayer. See paragraphs (e)(2)(ii) and (e)(4) of this section. However, under paragraph (e)(2)(i) of this section (and taking into account any redetermination required under section 905(c) and §1.905-3), an amount remitted with respect to a separate levy for a foreign taxable period that constitutes an overpayment of the taxpayer's final liability for that levy for that period, and that is refundable in cash at the taxpayer's option, is not an amount of tax paid. Therefore, if such an overpayment of one tax is applied as a credit against a different foreign income tax liability owed by the taxpayer for the same or a different taxable period, the credited amount may qualify as an amount of that different foreign income tax paid, if it does not exceed a reasonable approximation of the taxpayer's final foreign income tax liability for the taxable period to which the overpayment is applied.

* * * * *

(4) *Multiple levies*—(i) *In general*. If, under foreign law, a taxpayer's tentative liability for one levy (the "reduced levy") is or can be reduced by the amount of the taxpayer's liability for a different levy (the "applied levy"), then the amount considered paid by the taxpayer to the foreign country pursuant to the applied levy is an amount equal to its entire liability for that applied levy (not limited to the amount applied to reduce the reduced levy), and the remainder of the total amount paid is considered paid pursuant to the reduced levy. See also paragraphs (e)(2)(ii) and (iii) of this section.

(ii) *Examples*. The following examples illustrate the rules of paragraphs (e)(2)(ii) and (iii) and (e)(4)(i) of this section.

(A) *Example 1: Tax reduced by credits—(1) Facts*. A's tentative liability for foreign income tax imposed by Country X is 100u (units of Country X currency). However, under Country X tax law, in determining A's final foreign income tax liability its tentative liability is reduced by a 15u credit for a separate Country X levy that does not qualify as a foreign income tax and that A accrued and paid on its gross services income, and is also reduced by a 5u credit for charitable contributions. Under Country X tax law, the amount of the charitable contributions credit is refundable in cash to the extent the credit exceeds the taxpayer's Country X income tax liability after applying the credit for the tax on gross services income. A timely remits the 80u due to Country X.

(*2*) *Analysis*. Under paragraphs (e)(2)(ii) and (e)(4) of this section, the amount of Country X income tax paid by A is 80u (100u tentative liability – 20u tax credits), and the amount of Country X tax on gross services income paid by A is 15u.

(B) *Example 2: Tax paid by credit for overpayment—(1) Facts*. The facts are the same as in paragraph (e)(4)(ii)(A)(*1*) of this section (the facts in *Example 1*), except that A's final Country X income tax liability of 80u is satisfied by applying a credit for an otherwise refundable 60u overpayment from the previous taxable year of A's liability for a separate levy imposed by Country X that is also a foreign income tax and remitting the balance due of 20u.

(*2*) *Analysis*. The result is the same as in paragraph (e)(4)(ii)(A)(*2*) of this section (the analysis in *Example 1)*. Under paragraph (e)(2)(iii) of this section, the portion of A's Country X income tax liability that was satisfied by applying the 60u overpayment of A's different foreign income tax liability for the previous taxable year qualifies as an amount of Country X income tax paid, because that refundable overpayment exceeded (and so is not treated as a payment of) A's different foreign income tax liability for the previous taxable year.

(5) * * *

(i) *In general*. An amount remitted to a foreign country (a "foreign payment") is not a compulsory payment, and thus is not an amount of foreign income tax paid, to the extent that the foreign payment exceeds the amount of liability for foreign income tax under the foreign tax law (as defined in paragraph (g) of this section). A foreign payment does not exceed the amount of such liability if the foreign payment is determined by the taxpayer in a manner that is consistent with a reasonable interpretation and application of the substantive and procedural provisions of foreign tax law (including applicable tax treaties) in such a way as to reduce, over time, the taxpayer's reasonably expected liability under foreign law for foreign income tax, and if the taxpayer exhausts all effective and practical remedies, including invocation of competent authority procedures available under applicable tax treaties, to reduce, over time, the taxpayer's liability for foreign income tax (including liability pursuant to a foreign tax audit adjustment). See paragraph (e)(5)(ii) of this section for the effect of options and elections under foreign tax law. An interpretation or application of foreign law is not reasonable if there is actual notice or constructive notice (for example, a published court decision) to the taxpayer that the interpretation or application is likely to be erroneous. In interpreting foreign tax law, a taxpayer may generally rely on advice obtained in good faith from competent foreign tax advisors to whom the taxpayer has disclosed the relevant facts. Whether a taxpayer has satisfied its obligation to minimize the aggregate amount of its liability for foreign income taxes over time is determined without regard to the present value of a deferred tax liability or other time value of money considerations. In determining whether a taxpayer has exhausted all effective and practical remedies, a remedy is effective and practical only if the cost of pursuing it (including the risk of incurring an offsetting or additional tax liability) is reasonable in light of the amount at issue and the likelihood of success. An available remedy is considered effective and practical if an economically rational taxpayer would pursue it whether or not a compulsory payment of the amount at issue would be eligible for a U.S. foreign tax credit. A settlement by a taxpayer of two or more issues will be evaluated on an overall basis, not on an issue-by-issue basis, in determining whether an amount is a compulsory payment. A taxpayer is not required to alter its form of doing business, its business conduct, or the form of any business transaction in or-

der to reduce its liability under foreign law for foreign income tax.

(ii) *Effect of foreign tax law elections*—(A) *In general*. Where foreign tax law includes options or elections whereby a taxpayer's foreign income tax liability may be shifted, in whole or part, to a different year or years, the taxpayer's use or failure to use such options or elections does not result in a foreign payment in excess of the taxpayer's liability for foreign income tax. Except as provided in paragraph (e)(5)(ii)(B) of this section, where foreign tax law provides for options or elections whereby a taxpayer's foreign income tax liability may be permanently decreased in the aggregate over time, the taxpayer's failure to use such options or elections results in a foreign payment in excess of the taxpayer's liability for foreign income tax.

(B) *Exception for certain options or elections*—(*1*) *Entity classification elections*. If foreign tax law provides an option or election to treat an entity as fiscally transparent or non-fiscally transparent, a taxpayer's decision to use or not use such option or election is not considered to increase the taxpayer's liability for foreign income tax over time for purposes of this paragraph (e)(5).

(*2*) *Foreign consolidation, group relief, or other loss sharing regime*. If foreign tax law provides an option or election for one foreign entity to join in the filing of a consolidated return with another foreign entity, or to surrender its loss in order to offset the income of another foreign entity pursuant to a foreign group relief or other loss-sharing regime, a taxpayer's decision whether to file a consolidated return, whether to surrender a loss, or whether to use a surrendered loss, is not considered to increase the taxpayer's liability for foreign income tax over time for purposes of this paragraph (e)(5).

* * * * *

(6) *Soak-up taxes*—(i) *In general*. An amount remitted to a foreign country is not an amount of foreign income tax paid to the extent that liability for the foreign income tax is dependent (by its terms or otherwise) on the availability of a credit for the tax against income tax liability to another country. Liability for foreign income tax is dependent on the availability of a credit for the foreign income tax against income tax liability to another country only if and to the extent that the foreign income tax would not be imposed on the taxpayer but for the availability of such a credit.

(ii) [Reserved]

(f) * * *

(4) *Taxes imposed on partnerships and disregarded entities*—(i) *Partnerships*. If foreign law imposes tax at the entity level on the income of a partnership, the partnership is considered to be legally liable for such tax under foreign law and therefore is considered to pay the tax for Federal income tax purposes. The rules of this paragraph (f)(4)(i) apply regardless of which person is obligated to remit the tax, which person actually remits the tax, or which person the foreign country could proceed against to collect the tax in the event all or a portion of the tax is not paid. See §§1.702-1(a)(6) and 1.704-1(b)(4)(viii) for rules relating to the determination of a partner's distributive share of such tax.

(ii) *Disregarded entities*. If foreign law imposes tax at the entity level on the income of an entity described in §301.7701-2(c)(2)(i) of this chapter (a *disregarded entity*), the person (as defined in section 7701(a)(1)) who is treated as owning the assets of the disregarded entity for Federal income tax purposes is considered to be legally liable for such tax under foreign law. Such person is considered to pay the tax for Federal income tax purposes. The rules of this paragraph (f)(4)(ii) apply regardless of which person is obligated to remit the tax, which person actually remits the tax, or which person the foreign country could proceed against to collect the tax in the event all or a portion of the tax is not paid.

(5) *Allocation of taxes in the case of certain ownership changes*—(i) *In general*. If a partnership, disregarded entity, or corporation undergoes one or more covered events during its foreign taxable year that do not result in a closing of the foreign taxable year, then a portion of the foreign income tax (other than a withholding tax described in section 901(k)(1)(B)) paid or accrued by a person under paragraphs (f)(1) through (4) of this section with respect to the continuing foreign taxable year in which such change or changes occur is allocated to and among all persons that were predecessor entities or prior owners during such foreign taxable year. The allocation is made based on the respective portions of the taxable income (as determined under foreign law) for the continuing foreign taxable year that are attributable under the principles of §1.1502-76(b) to the period of existence or ownership of each predecessor entity or prior owner during the continuing foreign taxable year. Foreign income tax allocated to a person that is a predecessor entity is treated (other than for purposes of section 986) as paid or accrued by the person as of the close of the last day of its last U.S. taxable year. Foreign income tax allocated to a person that is a prior owner, for example a transferor of a disregarded entity, is treated (other than for purposes of section 986) as paid or accrued by the person as of the close of the last day of its U.S. taxable year in which the covered event occurred.

(ii) *Covered event*. For purposes of this paragraph (f)(5), a covered event is a partnership termination under section 708(b)(1), a transfer of a disregarded entity, or a change in the entity classification of a disregarded entity or a corporation.

(iii) *Predecessor entity and prior owner*. For purposes of this paragraph (f)(5), a predecessor entity is a partnership or a corporation that undergoes a covered event as described in paragraph (f)(5)(ii) of this section. A prior owner is a person that either transfers a disregarded entity or owns a disregarded entity immediately before a change in the entity classification of the disregarded entity as described in paragraph (f)(5)(ii) of this section.

(iv) *Partnership variances*. In the case of a change in any partner's interest in the partnership (a variance), except as otherwise provided in section 706(d)(2) (relating to certain cash basis items) or 706(d)(3) (relating to tiered partnerships), foreign tax paid or accrued by the partnership during its U.S. taxable year in which the variance occurs is allocated between the portion of the U.S. taxable year ending on, and the portion of the U.S. taxable year beginning on the day after, the day of the variance. The allocation is made under the principles of this paragraph (f)(5) as if the variance were a covered event.

(6) *Allocation of foreign taxes in connection with elections under section 336(e) or 338 or §1.245A-5(e).* For rules relating to the allocation of foreign taxes

in connection with elections made pursuant to section 336(e), see §1.336-2(g)(3)(ii). For rules relating to the allocation of foreign taxes in connection with elections made pursuant to section 338, see §1.338-9(d). For rules relating to the allocation of foreign taxes in connection with elections made pursuant to §1.245A-5(e)(3)(i), see §1.245A-5(e)(3)(i)(B).

* * * * *

(g) *Definitions*. For purposes of this section and §§1.901-2A and 1.903-1, the following definitions apply.

(1) *Foreign country and possession (territory) of the United States*. The term *foreign country* means any foreign state, any possession (territory) of the United States, and any political subdivision of any foreign state or of any possession (territory) of the United States. The term *possession* (or *territory*) *of the United States* includes American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.

(2) *Foreign levy*. The term *foreign levy* means a levy imposed by a foreign country.

(3) *Foreign tax*. The term *foreign tax* means a foreign levy that is a tax as defined in paragraph (a)(2) of this section.

(4) *Foreign tax law*. The term *foreign tax law* means the laws of the foreign country imposing a foreign tax, as modified by applicable tax treaties. The foreign tax law is construed on the basis of the foreign country's statutes, regulations, case law, and administrative rulings or other official pronouncements, as modified by applicable income tax treaties.

(5) *Paid, payment, and paid by*. The term *paid* means "paid" or "accrued"; the term *payment* means "payment" or "accrual"; and the term *paid by* means "paid by" or "accrued by or on behalf of," depending on whether the taxpayer claims the foreign tax credit for taxes paid (that is, remitted) or taxes accrued (as determined under §1.905-1(d)) during the taxable year.

(6) *Resident and nonresident*. The terms *resident* and *nonresident*, when used in the context of the foreign tax law of a foreign country, have the meaning provided in paragraphs (g)(6)(i) and (ii) of this section.

(i) *Resident*. An individual is a resident of a foreign country if the individual is liable to income tax in such country by reason of the individual's residence, domicile, citizenship, or similar criterion under such country's foreign tax law. An entity (including a corporation, partnership, trust, estate, or an entity that is disregarded as an entity separate from its owner for Federal income tax purposes) is a resident of a foreign country if the entity is liable to tax on its income (regardless of whether tax is actually imposed) under the laws of the foreign country by reason of the entity's place of incorporation or place of management in that country (or in a political subdivision or local authority thereof), or by reason of a criterion of similar nature, or if the entity is of a type that is specifically identified as a resident in an income tax treaty with the United States to which the foreign country is a party. If an individual or entity is a resident of more than one country, a single country of residence will be determined based upon applicable rules for resolving dual residency under the foreign tax law of the foreign country or countries; if no resolution is reached, the individual or entity is treated as a resident of each country.

(ii) *Nonresident*. A nonresident with respect to a foreign country is any individual or entity that is not a resident of such foreign country.

(h) *Applicability date*. This section applies to foreign taxes paid or accrued in taxable years beginning on or after [date final regulations are filed with the **Federal Register**].

* * * * *

Par. 24. Section 1.903-1 is revised to read as follows:

§1.903-1 Taxes in lieu of income taxes.

(a) *Overview*. Section 903 provides that the term "income, war profits, and excess profits taxes" includes a tax paid in lieu of a tax on income, war profits, or excess profits that is otherwise generally imposed by any foreign country. Paragraphs (b) and (c) of this section define a tax described in section 903. Paragraph (d) of this section provides examples illustrating the application of this section. Paragraph (e) of this section sets forth the applicability date of this section. For purposes of this section and §§1.901-2 and 1.901-2A, a tax described in section 903 is referred to as a "tax in lieu of an income tax" or an "in lieu of tax"; and the definitions in §1.901-2(g) apply for purposes of this section. Determinations of the amount of a tax in lieu of an income tax that is paid by a person and determinations of the person by whom such tax is paid are made under §1.901-2(e) and (f), respectively. Section 1.901-2A contains additional rules applicable to dual capacity taxpayers (as defined in §1.901-2(a)(2)(ii)(A)).

(b) *Definition of tax in lieu of an income tax*—(1) *In general*. Paragraphs (b)(2) and (c) of this section provide the requirements for a foreign levy to qualify as a tax in lieu of an income tax. The rules of this section are applied independently to each separate levy (within the meaning of §§1.901-2(d) and 1.901-2A(a)). A foreign tax either is or is not a tax in lieu of an income tax in its entirety for all persons subject to the tax. It is immaterial whether the base of the in lieu of tax bears any relation to realized net gain. The base of the foreign tax may, for example, be gross income, gross receipts or sales, or the number of units produced or exported. The foreign country's reason for imposing a foreign tax on a base other than net income (for example, because of administrative difficulty in determining the amount of income that would otherwise be subject to a net income tax) is immaterial, although paragraph (c)(1) of this section generally requires a showing that the foreign country made a deliberate and cognizant choice to impose the in lieu of tax instead of a net income tax (see paragraph (c)(1)(iii) of this section).

(2) *Requirements*. A foreign levy is a tax in lieu of an income tax only if—

(i) It is a foreign tax; and

(ii) It satisfies the substitution requirement of paragraph (c) of this section.

(c) *Substitution requirement*—(1) *In general*. A foreign tax (the "tested foreign tax") satisfies the substitution requirement if, based on the foreign tax law, the requirements in paragraphs (c)(1)(i) through (iv) of this section are satisfied with respect to the tested foreign tax, or the tested foreign tax is a covered withholding tax described in paragraph (c)(2) of this section.

(i) *Existence of generally-imposed net income tax*. A separate levy that is a net income tax (as described in §1.901-2(a)(3)) is generally imposed by the same for-

eign country (the "generally-imposed net income tax") that imposes the tested foreign tax.

(ii) *Non-duplication*. Neither the generally-imposed net income tax nor any other separate levy that is a net income tax is also imposed, in addition to the tested foreign tax, by the same foreign country on any persons with respect to any portion of the income to which the amounts (such as sales or units of production) that form the base of the tested foreign tax relate (the "excluded income"). Therefore, a tested foreign tax does not meet the requirement of this paragraph (c)(1)(ii) if a net income tax imposed by the same foreign country applies to the excluded income of any persons that are subject to the tested foreign tax, even if not all of the persons subject to the tested foreign tax are subject to the net income tax.

(iii) *Close connection to excluded income*. But for the existence of the tested foreign tax, the generally-imposed net income tax would otherwise have been imposed on the excluded income. The requirement in the preceding sentence is met only if the imposition of such tested foreign tax bears a close connection to the failure to impose the generally-imposed net income tax on the excluded income; the relationship cannot be merely incidental, tangential, or minor. A close connection exists if the generally-imposed net income tax would apply by its terms to the income, but for the fact that the excluded income is expressly excluded. Otherwise, a close connection must be established with proof that the foreign country made a cognizant and deliberate choice to impose the tested foreign tax instead of the generally-imposed net income tax. Such proof must be based on foreign tax law, or the legislative history of either the tested foreign tax or the generally-imposed net income tax that describes the provisions excluding taxpayers subject to the tested foreign tax from the generally-imposed net income tax. If one tested foreign tax meets the requirements in this paragraph (c)(1), and another tested foreign tax that applies to the same class of taxpayers and relates to the same excluded income as the first tested foreign tax is enacted later in time (and not contemporaneously with the first tested foreign tax), there is a rebuttable presumption that such second tested foreign tax does not meet the close connection requirement in this paragraph (c)(1)(iii). Not all income derived by persons subject to the tested foreign tax need be excluded income, as long as the tested foreign tax applies only to amounts that relate to the excluded income.

(iv) *Jurisdiction to tax excluded income*. If the generally-imposed net income tax were applied to the excluded income, the generally-imposed net income tax would either continue to qualify as a net income tax described in §1.901-2(a)(3), or would constitute a separate levy from the generally-imposed net income tax that would itself be a net income tax described in §1.901-2(a)(3).

(2) *Covered withholding tax*. A tested foreign tax is a covered withholding tax if, based on the foreign tax law, the requirements in paragraphs (c)(1)(i) and (c)(2)(i) through (iii) of this section are met with respect to the tested foreign tax. See also §1.901-2(d)(1)(iii) for rules treating withholding taxes as separate levies with respect to each class of income subject to the tax.

(i) *Withholding tax on nonresidents*. The tested foreign tax is a withholding tax (as defined in section 901(k)(1)(B)) that is imposed on gross income of persons who are nonresidents of the foreign country imposing the tested foreign tax. It is immaterial whether the tested foreign tax is withheld by the payor or is imposed directly on the nonresident taxpayer.

(ii) *Non-duplication*. The tested foreign tax is not in addition to any net income tax that is imposed by the foreign country on any portion of the net income attributable to the gross income that is subject to the tested foreign tax. Therefore, a tested foreign tax does not meet the requirement of this paragraph (c)(2)(ii) if by its terms it applies to gross income of nonresidents that are also subject to a net income tax imposed by the same foreign country on the same income, even if not all nonresidents subject to the tested foreign tax are also subject to the net income tax.

(iii) *Source-based jurisdictional nexus*. The income subject to the tested foreign tax satisfies the source requirement described in §1.901-2(c)(1)(ii).

(d) *Examples*. The following examples illustrate the rules of this section.

(1) *Example 1: Tax on gross income from services; non-duplication requirement*—(i) *Facts.* Country X imposes a tax at the rate of 3 percent on the gross receipts of companies, wherever resident, from furnishing specified types of electronically supplied services to customers located in Country X (the "ESS tax"). No deductions are allowed in determining the taxable base of the ESS tax. In addition to the ESS tax, Country X imposes a net income tax within the meaning of §1.901-2(a)(3) on resident companies (the "net income tax") and also imposes a net income tax within the meaning of §1.901-2(a)(3) on the income of nonresident companies that is attributable, under reasonable principles, to the nonresident's activities within Country X (the "permanent establishment tax"). Both the net income tax and the permanent establishment tax, which are each separate levies under §1.901-2(d)(1)(iii), qualify as generally-imposed net income taxes. The ESS tax applies to both resident and nonresident companies regardless of whether the company is also subject to the net income tax or permanent establishment tax, respectively.

(ii) *Analysis.* Under §1.901-2(d)(1)(iii), the ESS tax comprises two separate levies, one imposed on resident companies (the "resident ESS tax"), and one imposed on nonresident companies (the "nonresident ESS tax"). Under paragraph (c)(1)(ii) of this section, neither the resident ESS tax nor the nonresident ESS tax satisfies the substitution requirement, because by its terms the income subject to the ESS tax is also subject to a generally-imposed net income tax imposed by Country X. Similarly, under paragraph (c)(2)(ii) of this section, the nonresident ESS tax is not a covered withholding tax because it is imposed in addition to the permanent establishment tax. It is immaterial that some nonresident taxpayers that are subject to the nonresident ESS tax are not also subject to the permanent establishment tax on the gross receipts included in the base of the nonresident ESS tax. Therefore, neither the resident ESS tax nor the nonresident ESS tax is a tax in lieu of an income tax.

(2) *Example 2: Tax on gross income from services; jurisdictional nexus*—(i) *Facts*. The facts are the same as in paragraph (d)(1)(i) of this section (the facts in *Example 1*), except that under Country X tax law, the nonresident ESS tax is imposed only if the nonresident company does not have a permanent establishment in Country X under domestic law or an applicable income tax treaty. In addition, the text of and legislative history to the nonresident ESS tax demonstrate that Country X made a cognizant and deliberate choice to impose the nonresident ESS tax instead of the permanent establishment tax with respect to the gross receipts that are subject to the nonresident ESS tax.

(ii) *Analysis*—(A) *General application of substitution requirement*. The nonresident ESS tax meets the requirements in paragraphs (c)(1)(i) and (ii) of this section because Country X has a generally-imposed net income tax, the permanent establishment tax, and neither the permanent establishment tax nor any other separate levy is imposed by Country X on a nonresident's gross income that forms the base of the nonresident ESS tax (which is the excluded income) in addition to the nonresident ESS tax. The text of and legislative history to the nonresident ESS tax demonstrate that Country X made a cognizant and

deliberate choice to exclude the excluded income from the base of the generally-imposed permanent establishment tax. Therefore, the nonresident ESS tax meets the requirement in paragraph (c)(1)(iii) of this section because but for the existence of the tested foreign tax, the generally-imposed permanent establishment tax would otherwise have been imposed on the excluded income. However, if Country X had modified the permanent establishment tax to also apply to the excluded income, the modified permanent establishment tax would not qualify as a net income tax described in §1.901-2(a)(3), because it would fail the jurisdictional nexus requirement in §1.901-2(c)(1). First, the modified tax would not satisfy §1.901-2(c)(1)(i) because the modified tax would not apply to income attributable under reasonable principles to the nonresident's activities within the foreign country, since the modified tax is determined by taking into account the location of customers. Second, the modified tax would not satisfy §1.901-2(c)(1)(ii) because the excluded income is from services performed outside of Country X. Third, the modified tax would not satisfy the property nexus in §1.901-2(c)(1)(iii) because the excluded income is not from sales of property located in Country X. Because if the Country X generally-imposed net income tax applied to excluded income it would not qualify as a net income tax described in §1.901-2(a)(3), the nonresident ESS tax does not meet the requirement in paragraph (c)(1)(iv) of this section. Therefore, the nonresident ESS tax does not satisfy the substitution requirement in paragraph (c)(1) of this section.

(B) *Covered withholding tax analysis*. The nonresident ESS tax meets the requirement in paragraph (c)(1)(i) of this section, because there exists a generally-imposed net income tax (the permanent establishment tax), and it also meets the requirements in paragraphs (c)(2)(i) and (ii) of this section, because it is a withholding tax on gross income of nonresidents that is not also subject to the permanent establishment tax. However, the nonresident ESS tax does not meet the requirement in paragraph (c)(2)(iii) of this section because the services income subject to the nonresident ESS tax is from electronically supplied services performed outside of Country X. See §1.901-2(c)(1)(ii). Therefore, the nonresident ESS tax is not a covered withholding tax under paragraph (c)(2) of this section. Because the nonresident ESS tax does not meet the substitution requirement of paragraph (c) of this section, it is not a tax in lieu of an income tax.

(e) *Applicability date*. This section applies to foreign taxes paid or accrued in taxable years beginning on or after [date final regulations are filed with the **Federal Register**].

§1.904-2 [AMENDED]

Par. 25. Section 1.904-2(j)(1)(iii)(D) is amended by removing the language "§1.904(f)-12(j)(5)" and adding the language "§1.904(f)-12(j)(6)" in its place.

Par. 26. Section 1.904-4, as amended in FR Doc. 2020-21819, published elsewhere in this issue of the **Federal Register**, is further amended:

1. By revising paragraph (b)(2)(i)(A).

2. By revising the third sentence of paragraph (c)(4).

3. By revising paragraphs (e)(1)(ii) and (e)(2) and (3).

4. In paragraph (f)(1)(i) introductory text, by removing the language "paragraph (f)(1)(ii) of this section" and adding in its place the language "paragraph (f)(1)(ii), (iii), or (iv) of this section".

5. By adding paragraphs (f)(1)(iii) and (iv).

6. By removing and reserving paragraphs (f)(2)(ii) and (iii).

7. By revising paragraphs (f)(2)(vi)(A) and (f)(2)(vi)(B)(*1*)(*ii*).

8. By adding paragraph (f)(2)(vi)(G).

9. By revising paragraph (f)(3)(v).

10. By redesignating paragraphs (f)(3)(viii) and (ix) as paragraphs (f)(3)(ix) and (xii), respectively.

11. By adding a new paragraph (f)(3)(viii).

12. In newly redesignated paragraph (f)(3)(ix), by removing the language "paragraph (f)(3)(viii)" and adding the language "paragraph (f)(3)(ix)" in its place.

13. By redesignating paragraph (f)(3)(x) as paragraph (f)(3)(xiii).

14. By adding a new paragraph (f)(3)(x) and paragraph (f)(3)(xi).

15. In paragraphs (f)(4)(i)(B)(*1*) and (*2*), by removing the language "paragraph (f)(3)(viii)" and adding the language "paragraph (f)(3)(ix)" in its place.

16. In paragraphs (f)(4)(iv)(B)(*1*) and (f)(4)(v)(B)(*2*), by removing the language "paragraph (f)(3)(x)" and adding the language "paragraph (f)(3)(xiii)" in its place.

17. By adding paragraphs (f)(4)(xiii) through (xvi) and (q)(3).

The additions and revisions read as follows:

§1.904-4 Separate application of section 904 with respect to certain categories of income.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(A) Income received or accrued by any person that is of a kind that would be foreign personal holding company income (as defined in section 954(c), taking into account any exceptions or exclusions to section 954(c), including, for example, section 954(c)(3), (c)(6), (h), or (i)) if the taxpayer were a controlled foreign corporation, including any amount of gain on the sale or exchange of stock in excess of the amount treated as a dividend under section 1248;

* * * * *

(c) * * *

(4) * * * The grouping rules of paragraphs (c)(3)(i) through (iv) of this section also apply separately to income attributable to each tested unit described in §1.954-1(d)(2)(i) of a controlled foreign corporation, and to each foreign QBU of a noncontrolled 10-percent owned foreign corporation or any other look-through entity defined in §1.904-5(i), or of any United States person.

* * * * *

(e) * * *

(1) * * *

(ii) *Definition of financial services income*. The term *financial services income* means income derived by a financial services entity, as defined in paragraph (e)(3) of this section, that is:

(A) Income derived in the active conduct of a banking, insurance, financing, or similar business (active financing income) as defined in paragraph (e)(2) of this section; or

(B) Passive income as defined in section 904(d)(2)(B) and paragraph (b) of this section as determined before the application of the exception for high-taxed income but after the application of the exception for export financing interest, but not including payments from a related person that is not a financial services entity (determined after the application of the financial services group rule of paragraph (e)(3)(ii) of this section) that are attributable to passive category income under the look-through rules of §1.904-5.

(2) *Active financing income*—(i) *Income included*. For purposes of paragraph (e)(1) and (3) of this section, income is active financing income only if it is income from –

(A) Regularly making personal, mortgage, industrial, or other loans to customers in the ordinary course of the corporation's trade or business;

(B) Factoring evidences of indebtedness for customers;

(C) Purchasing, selling, discounting, or negotiating for customers notes, drafts, checks, bills of exchange, acceptances, or other evidences of indebtedness;

(D) Issuing letters of credit and negotiating drafts drawn thereunder for customers;

(E) Performing trust services, including as a fiduciary, agent, or custodian, for customers, provided such trust activities are not performed in connection with services provided by a dealer in stock, securities or similar financial instruments;

(F) Arranging foreign exchange transactions for, or engaging in foreign exchange transactions with, customers;

(G) Arranging interest rate, currency or commodities futures, forwards, options or notional principal contracts for, or entering into such transactions with, customers;

(H) Underwriting issues of stock, debt instruments or other securities under best efforts or firm commitment agreements for customers;

(I) Engaging in finance leasing (that is, is any lease that is a direct financing lease or a leveraged lease for accounting purposes and is also a lease for tax purposes) for customers;

(J) Providing charge and credit card services for customers or factoring receivables obtained in the course of providing such services;

(K) Providing traveler's check and money order services for customers;

(L) Providing correspondent bank services for customers;

(M) Providing paying agency and collection agency services for customers;

(N) Maintaining restricted reserves (including money or securities) in a segregated account in order to satisfy a capital or reserve requirement imposed by a local banking or securities regulatory authority;

(O) Engaging in hedging activities directly related to another activity described in this paragraph (e)(2)(i);

(P) Repackaging mortgages and other financial assets into securities and servicing activities with respect to such assets (including the accrual of interest incidental to such activity);

(Q) Engaging in financing activities typically provided in the ordinary course by an investment bank, such as project financing provided in connection with construction projects, structured finance (including the extension of a loan and the sale of participations or interests in the loan to other financial institutions or investors), and leasing activities to the extent incidental to such financing activities;

(R) Providing financial or investment advisory services, investment management services, fiduciary services, or custodial services to customers;

(S) Purchasing or selling stock, debt instruments, interest rate or currency futures or other securities or derivative financial products (including notional principal contracts) from or to customers and holding stock, debt instruments and other securities as inventory for sale to customers, unless the relevant securities or derivative financial products are not held in a dealer capacity;

(T) Effecting transactions in securities for customers as a securities broker;

(U) Investing funds in circumstances in which the taxpayer holds itself out as providing a financial service by the acceptance or the investment of such funds, including income from investing deposits of money and income earned investing funds received for the purchase of traveler's checks or face amount certificates;

(V) Investments by an insurance company of its unearned premiums or reserves ordinary and necessary to the proper conduct of the insurance business (as defined in paragraph (e)(2)(ii) of this section);

(W) Activities generating income of a kind that would be insurance income as defined in section 953(a)(1) (including related person insurance income as defined in section 953(c)(2) and without regard to the exception in section 953(a)(2) for income that is exempt insurance income under section 953(e)), but with respect to investment income includible in section 953(a)(1) insurance income, only to the extent ordinary and necessary to the proper conduct of the insurance business (as defined in paragraph (e)(2)(ii) of this section); or

(X) Providing services as an insurance underwriter, insurance brokerage or agency services, or loss adjuster and surveyor services.

(ii) *Ordinary and necessary investment income of an insurance company*. For purposes of paragraphs (e)(2)(i)(V) and (W) of this section, income from investments by an insurance company is not ordinary and necessary to the proper conduct of the insurance business to the extent that the investment income component of paragraphs (e)(2)(i)(V) and (W) of this section exceeds the insurance company's investment income limitation. Any item of investment income falling under both paragraphs (e)(2)(i)(V) and (W) of this section is only counted once.

(A) *Insurance company investment income limitation*. An insurance company's investment income limitation for a taxable year is equal to the company's passive category income (as defined in section 904(d)(2)(B) and paragraph (b) of this section, but including income excluded from foreign personal holding company income under section 954(i)) multiplied by the proportion that the company's investment asset limitation (as determined under paragraph (e)(2)(ii)(B) of this section) bears to the value of the company's passive category assets (as determined under §1.861-9(g)(2)) for such taxable year. For purposes of this paragraph (e)(2)(ii), the term *passive category asset* means an asset that is characterized as a passive category asset, under the rules of §§1.861-9 through 1.861-13.

(B) *Insurance company investment asset limitation*. For purposes of paragraph (e)(2)(ii)(A) of this section, the investment asset limitation equals the applicable percentage of the company's total insurance liabilities. The applicable percentage is—

(*1*) 200 percent of total insurance liabilities, for a domestic corporation taxable under part I of subchapter L of the Code or a foreign corporation that would be taxable under part I of subchapter L if it were a domestic corporation.

(*2*) 400 percent of total insurance liabilities, for a domestic corporation taxable under part II of subchapter L or a foreign corporation that would be taxable under part II of subchapter L if it were a domestic corporation.

(C) *Total insurance liabilities*. For purposes of paragraph (e)(2)(ii)(B) of this section—

(*1*) *Corporations taxable under part I of subchapter L*. In the case of a corporation taxable under part I of subchapter L (including a foreign corporation that is a section 953(d) company), the term to-

tal insurance liabilities means the sum of the total reserves (as defined in section 816(c)) plus (to the extent not included in total reserves) the items referred to in paragraphs (3), (4), (5), and (6) of section 807(c).

(*2*) *Corporations taxable under part II of subchapter L*. In the case of a corporation taxable under part II of subchapter L (including a foreign corporation that is a section 953(d) company), the term *total insurance liabilities* means the sum of unearned premiums (determined under §1.832-4(a)(8)) and unpaid losses.

(*3*) *Controlled foreign insurance corporations*. In the case of a controlled foreign corporation that would be taxable under subchapter L if it were a domestic corporation, the term *total insurance liabilities* means the reserve determined in accordance with section 953(b)(3).

(D) *Example*. The following example illustrates the application of this paragraph (e)(2)(ii).

(*1*) *Facts*. X is a domestic nonlife insurance company taxable under part II of subchapter L. X has passive category assets valued under §1.861-9(g)(2) at $1,000x, total insurance liabilities of $200x, and passive category income of $100x.

(*2*) *Analysis—Investment income limitation*. Pursuant to paragraph (e)(2)(ii)(B) of this section, the applicable percentage for nonlife insurance companies is 400 percent, and X has an investment asset limitation of $800x, which is equal to its total insurance liabilities of $200x multiplied by 400 percent. The proportion of its investment asset limitation ($800x) to its passive category assets ($1,000x) is 80 percent. Pursuant to paragraph (e)(2)(ii)(A) of this section, X has an investment income limitation equal to its passive category income ($100x) multiplied by 80 percent, or $80x. Under paragraph (e)(2)(ii) of this section, no more than $80x of X's $100x of income from investments qualifies as ordinary and necessary to the proper conduct of X's insurance business.

(3) *Financial services entities*—(i) *Definition of financial services entity*—(A) *In general*. The term *financial services entity* means an individual or corporation that is predominantly engaged in the active conduct of a banking, insurance, financing, or similar business (active financing business) for any taxable year. Except as provided in paragraph (e)(3)(ii) of this section, a determination of whether an individual or corporation is a financial services entity is done on an individual or entity-by-entity basis. An individual or corporation is predominantly engaged in the active financing business for any year if for that year more than 70 percent of its gross income is derived directly from active financing income under paragraph (e)(2) of this section with customers, or counterparties, that are not related to such individual or corporation under section 267(b) or 707 (except in the case of paragraph (e)(2)(i)(W) of this section which permits related party insurance).

(B) *Certain gross income included and excluded*. For purposes of applying the rules in paragraph (e)(3)(i)(A) of this section (including by reason of paragraph (e)(3)(ii) of this section), gross income includes interest on State and local bonds described in section 103(a), but does not include income from a distribution of previously taxed earnings and profits described in section 959(a) or (b). In addition, total gross income (for purposes of the denominator of the 70-percent test) includes income received from related persons.

(C) *Treatment of partnerships and other pass-through entities*. For purposes of applying the rules in paragraph (e)(3)(i)(A) of this section (including by reason of paragraph (e)(3)(ii) of this section) with respect to an individual or corporation that is a direct or indirect partner in a partnership, the partner's distributive share of partnership income is characterized as if each partnership item of gross income were realized directly by the partner. For example, in applying section 954(h)(2)(B) under paragraph (e)(3)(i)(A) of this section, a customer with respect to a partnership is treated as a related person with respect to an individual or corporation that is a partner in the partnership if the customer is related to the individual or corporation under section 954(d)(3). The principles of this paragraph (e)(3)(i)(C) apply for an individual or corporation's share of income from any other pass-through entities.

(ii) *Financial services group*. A corporation that is a member of a financial services group is deemed to be a financial services entity regardless of whether it is a financial services entity under paragraph (e)(3)(i) of this section. For purposes of this paragraph (e)(3)(ii), a financial services group means an affiliated group as defined in section 1504(a) (but determined without regard to paragraphs (2) or (3) of section 1504(b)) if more than 70 percent of the affiliated group's gross income is active financing income under paragraph (e)(2) of this section. For purposes of determining whether an affiliated group is a financial services group under the previous sentence, only the income of group members that are domestic corporations, or foreign corporations that are controlled foreign corporations in which U.S. members of the affiliated group own, directly or indirectly, at least 80 percent of the total voting power and value of the stock, is included. In addition, indirect ownership is determined under section 318, and the income of the group does not include any income from transactions with other members of the group. Passive income will not be considered to be active financing income merely because that income is earned by a member of the group that is a financial services entity without regard to the rule of this paragraph (e)(3)(ii).

* * * * *

(f) * * *

(1) * * *

(iii) *Income arising from U.S. activities excluded from foreign branch category income*. Gross income that is attributable to a foreign branch and that arises from activities carried out in the United States by any foreign branch, including income that is reflected on a foreign branch's separate books and records, is not assigned to the foreign branch category. Instead, such income is assigned to the general category or a specified separate category under the rules of this section. However, under paragraph (f)(2)(vi) of this section, gross income (including U.S. source gross income) attributable to activities carried on outside the United States by the foreign branch may be assigned to the foreign branch category by reason of a disregarded payment to a foreign branch from a foreign branch owner or another foreign branch that is allocable to income recorded on the books and records of the payor foreign branch or foreign branch owner.

(iv) *Income arising from stock excluded from foreign branch category income*—(A) *In general*. Except as provided in paragraph (f)(1)(iv)(B) of this section, gross income that is attributable to a foreign branch and that comprises items of income arising from stock of a corporation (whether foreign or domestic), including gain from the disposition of such stock or any inclusion under section 951(a),

951A(a), 1248, or 1293(a), is not assigned to the foreign branch category. Instead, such income is assigned to the general category or a specified separate category under the rules of this section.

(B) *Exception for dealer property*. Paragraph (f)(1)(iv)(A) of this section does not apply to gain recognized from dispositions of stock in a corporation, if the stock would be dealer property (as defined in §1.954-2(a)(4)(v)) if the foreign branch were a controlled foreign corporation.

* * * * *

(2) * * *

(vi) * * *

(A) *In general*. If a foreign branch makes a disregarded payment to its foreign branch owner or a second foreign branch, and the disregarded payment is allocable to gross income that would be attributable to the foreign branch under the rules in paragraphs (f)(2)(i) through (v) of this section, the gross income attributable to the foreign branch is adjusted downward (but not below zero) to reflect the allocable amount of the disregarded payment, and the gross income attributable to the foreign branch owner or the second foreign branch is adjusted upward by the same amount as the downward adjustment, translated (if necessary) from the foreign branch's functional currency to U.S. dollars (or the second foreign branch's functional currency, as applicable) at the spot rate (as defined in §1.988-1(d)) on the date of the disregarded payment. For rules addressing multiple disregarded payments in a taxable year, see paragraph (f)(2)(vi)(F) of this section. Similarly, if a foreign branch owner makes a disregarded payment to its foreign branch and the disregarded payment is allocable to gross income attributable to the foreign branch owner, the gross income attributable to the foreign branch owner is adjusted downward (but not below zero) to reflect the allocable amount of the disregarded payment, and the gross income attributable to the foreign branch is adjusted upward by the same amount as the downward adjustment, translated (if necessary) from U.S. dollars to the foreign branch's functional currency at the spot rate on the date of the disregarded payment. An adjustment to the attribution of gross income under this paragraph (f)(2)(vi) does not change the total amount, character, or source of the United States person's gross income; does not change the amount of a United States person's income in any separate category other than the foreign branch and general categories (or a specified separate category associated with the foreign branch and general categories); and has no bearing on the analysis of whether an item of gross income is eligible to be resourced under an income tax treaty.

(B) * * *

(*1*) * * *

(*ii*) Disregarded payments from a foreign branch to its foreign branch owner or to another foreign branch are allocable to gross income attributable to the payor foreign branch to the extent a deduction for that payment or any disregarded cost recovery deduction relating to that payment, if regarded, would be allocated and apportioned to gross income attributable to the payor foreign branch under the principles of §§1.861-8 through 1.861-14T and 1.861-17 (without regard to exclusive apportionment) by treating foreign source gross income and U.S. source gross income in each separate category (determined before the application of this paragraph (f)(2)(vi) to the disregarded payment at issue) each as a statutory grouping.

* * * * *

(G) *Effect of disregarded payments made and received by non-branch taxable units*—(*1*) *In general*. For purposes of determining the amount, source, and character of gross income attributable to a foreign branch and its foreign branch owner under paragraph (f)(2) of this section, the rules of paragraph (f)(2) of this section apply to a non-branch taxable unit as though the non-branch taxable unit were a foreign branch or a foreign branch owner, as appropriate, to attribute gross income to the non-branch taxable unit and to further attribute, under this paragraph (f)(2)(vi)(G), the income of a non-branch taxable unit to one or more foreign branches or to a foreign branch owner. See paragraph (f)(4)(xvi) of this section (*Example 16*).

(*2*) *Foreign branch group income*. The income of a foreign branch group is attributed to the foreign branch that owns the group. The income of a foreign branch group is the aggregate of the U.S. gross income that is attributed, under the rules of this paragraph (f)(2), to each member of the foreign branch group, determined after taking into account all disregarded payments made and received by each member.

(*3*) *Foreign branch owner group income*. The income of a foreign branch owner group is attributed to the foreign branch owner that owns the group. The income of a foreign branch owner group income is the aggregate of the U.S. gross income that is attributed, under the rules of this paragraph (f)(2), to each member of the foreign branch owner group, determined after taking into account all disregarded payments made and received by each member.

(3) * * *

(v) *Disregarded payment*. A disregarded payment includes an amount of property (within the meaning of section 317(a)) that is transferred to or from a non-branch taxable unit, foreign branch, or foreign branch owner, including a payment in exchange for property or in satisfaction of an account payable, or a remittance or contribution, in connection with a transaction that is disregarded for Federal income tax purposes and that is reflected on the separate set of books and records of a non-branch taxable unit (other than an individual or domestic corporation) or a foreign branch. A disregarded payment also includes any other amount that is reflected on the separate set of books and records of a non-branch taxable unit (other than an individual or a domestic corporation) or a foreign branch in connection with a transaction that is disregarded for Federal income tax purposes and that would constitute an item of accrued income, gain, deduction, or loss of the non-branch taxable unit (other than an individual or a domestic corporation) or the foreign branch if the transaction to which the amount is attributable were regarded for Federal income tax purposes.

* * * * *

(viii) *Foreign branch group*. The term *foreign branch group* means a foreign branch and one or more non-branch taxable units (other than an individual or a domestic corporation), to the extent that the foreign branch owns the non-branch taxable unit directly or indirectly through one or more other non-branch taxable units.

* * * * *

(x) *Foreign branch owner group*. The term *foreign branch owner group* means a foreign branch owner and one or more non-branch taxable units (other than an individual or a domestic corporation), to the extent that the foreign branch owner owns the non-branch taxable unit directly or indirectly through one or more other non-branch taxable units.

(xi) *Non-branch taxable unit*. The term *non-branch taxable unit* has the meaning provided in §1.904-6(b)(2)(i)(B).

* * * * *

(4) * * *

(xiii) *Example 13: Disregarded payment from domestic corporation to foreign branch*—(A) *Facts*. P, a domestic corporation, owns FDE, a disregarded entity that is a foreign branch. FDE's functional currency is the U.S. dollar. In Year 1, P accrues and records on its books and records for Federal income tax purposes $400x of gross income from the license of intellectual property to unrelated parties that is not passive category income, all of which is U.S. source income. P also accrues $600x of foreign source passive category interest income. P compensates FDE for services that FDE performs in a foreign country with an arm's length payment of $350x, which FDE records on its books and records; the transaction is disregarded for Federal income tax purposes. Absent the application of paragraph (f)(2)(vi) of this section, the $400x of gross income earned by P from the license would be general category income that would not be attributable to FDE. If the payment were regarded for Federal income tax purposes, the deduction for the payment of $350x from P to FDE would be allocated and apportioned entirely to P's $400x of general category gross licensing income under the principles of §§1.861-8 and 1.861-8T (treating U.S. source general category gross income and foreign source passive category gross income each as a statutory grouping). There are no other expenses incurred by P or FDE.

(B) *Analysis*. The disregarded payment from P, a United States person, to FDE, its foreign branch, is not recorded on FDE's separate books and records (as adjusted to conform to Federal income tax principles) under paragraph (f)(2)(i) of this section because it is disregarded for Federal income tax purposes. The disregarded payment is allocable to gross income attributable to P because a deduction for the payment, if it were regarded, would be allocated and apportioned to the $400x of P's U.S. source licensing income. Accordingly, under paragraphs (f)(2)(vi)(A) and (f)(2)(vi)(B)(*3*) of this section, the amount of gross income attributable to the FDE foreign branch (and the gross income attributable to P) is adjusted in Year 1 to take the disregarded payment into account. Accordingly, $350x of P's $400x U.S. source general category gross income from the license is attributable to the FDE foreign branch for purposes of this section. Therefore, $350x of the U.S. source gross income that P earned with respect to its license in Year 1 constitutes U.S. source gross income that is assigned to the foreign branch category and $50x remains U.S. source general category income. P's $600x of foreign source passive category interest income is unchanged.

(xiv) *Example 14: Regarded payment from non-consolidated domestic corporation to a foreign branch*—(A) *Facts*. The facts are the same as in paragraph (f)(4)(xiii)(A) of this section (the facts of *Example 13*), except P wholly owns USS, and USS (rather than P) owns FDE. P and USS do not file a consolidated return. USS has no gross income other than the $350x foreign source services income it receives from P, through FDE, for Federal income tax purposes.

(B) *Analysis*. P has $400x of U.S. source general category gross income from the license and $600x of foreign source passive category interest income. The $350x services payment from P, a United States person, to FDE, a foreign branch of USS, is not a disregarded payment because the transaction is regarded for Federal income tax purposes. Under §§1.861-8 and 1.861-8T, P's $350x deduction for the services payment is allocated and apportioned to its U.S. source general category gross income. The payment of $350x from P to USS is services income attributable to FDE, and foreign branch category income of USS under paragraph (f)(2)(i) of this section. Accordingly, USS has $350x of foreign source foreign branch category gross income. P has $600x of foreign source passive category income and $400x of U.S. source general category gross income and a $350x deduction for the services payment, resulting in $50x of U.S. source general category taxable income to P.

(xv) *Example 15: Regarded payment from a member of a consolidated group to a foreign branch of another member of the group*—(A) *Facts*. The facts are the same as in paragraph (f)(4)(xiv)(A) of this section (the facts of *Example 14*), except that P and USS are members of an affiliated group that files a consolidated return pursuant to section 1502 (P group).

(B) *Analysis*—(*1*) *Definitions under §1.1502-13*. Under §1.1502-13(b)(1), the $350x services payment from P, a United States person, to FDE, a foreign branch of USS, is an intercompany transaction between P and USS; USS is the selling member, P is the buying member, P has a corresponding deduction of $350x for the services payment, and USS has $350x of intercompany income. The payment is not a disregarded payment because the transaction is regarded for Federal income tax purposes.

(*2*) *Timing and attributes under §1.1502-13*—(*i*) *Separate entity versus single entity analysis*. Under a separate entity analysis, the result is the same as in paragraph (f)(4)(xiv)(B) of this section (the analysis in *Example 14*), whereby P has $600x of foreign source passive category income and $50x of U.S. source general category income, and USS has $350x of foreign source foreign branch category income. In contrast, under a single entity analysis, the result is the same as in paragraph (f)(4)(xiii)(B) of this section (the analysis in *Example 13*), whereby P has $600x of foreign source passive category income, $50x of U.S. source general category income, and $350x of U.S. source foreign branch category income.

(*ii*) *Application of the matching rule*. Under the matching rule in §1.1502-13(c), the timing, character, source, and other attributes of USS's $350x intercompany income and P's corresponding $350x deduction are redetermined to produce the effect of transactions between divisions of a single corporation, as if the services payment had been made to a foreign branch of that corporation. Accordingly, all of USS's foreign source income of $350x is redetermined to be U.S. source, rather than foreign source, income. Therefore, for purposes of §1.1502-4(c)(1), the P group has $600x of foreign passive category income, $50x of U.S. source general category income, and $350x of U.S. source foreign branch category income.

(xvi) *Example 16: Disregarded payment made from non-branch taxable unit*—(A) *Facts*. The facts are the same as in paragraph (f)(4)(xiii)(A) of this section (the facts of *Example 13*), except that P also wholly owns FDE1, a disregarded entity that is a non-branch taxable unit. In addition, FDE1 (rather than P) is the entity that properly accrues and records on its books and records the $400x of U.S. source general category income from the license of intellectual property and the $600x of foreign source passive category interest income, and FDE1 (rather than P) is the entity that makes the $350x payment, which is disregarded for Federal income tax purposes, to FDE in compensation for services.

(B) *Analysis*. Under paragraph (f)(2)(vi)(G) of this section, the rules of paragraph (f)(2) of this section apply to attribute gross income to FDE1, a non-branch taxable unit, as though FDE1 were a foreign branch. Under these rules, the $400x of licensing income and the $600 of interest income are initially attributable to FDE1. This income is adjusted in Year 1 to take into account the $350x disregarded payment, which is allocable to the $400x of licensing income of FDE1. Accordingly, $50x of the $400x of U.S. source general category licensing income is attributable to FDE1 and $350x of this income is attributable to the FDE foreign branch. In order to determine the income that is attributable to P, the foreign branch owner, and FDE, the foreign branch, the income that is attributed to FDE1, after taking into account all of the disregarded payments that it makes and receives, must be further attributed to one or more foreign branches or a foreign branch owner under paragraph (f)(2)(vi)(G) of this section. Under paragraph (f)(2)(vi)(G) of this section, the income of FDE1 is attributed to the foreign branch group or foreign branch owner group of which it is a member. Because FDE1 is wholly owned by P, FDE is a member solely of the foreign branch owner group that is owned by P. See definition of "foreign branch owner group" in §1.904-4(f)(3). All of the income that is attributed to FDE1 under paragraph (f)(2) of this section, namely, the $50x of U.S. source general category licensing income and the $600x of foreign source passive category interest income, is further attributed to P. See §1.904-4(f)(2)(vi)(G)(*3*). Therefore, the result is the same as in paragraph (f)(4)(xiii)(B) of this section (the analysis in *Example 13*).

* * * * *

(q) * * *

(3) Paragraphs (e)(1)(ii) and (e)(2) and (3) of this section apply to taxable years beginning on or after [date final regulations are filed with the **Federal Register**]. Paragraph (f) of this section applies to

taxable years that begin after December 31, 2019, and end on or after November 2, 2020.

Par. 27. Section 1.904-5 is amended by revising paragraphs (b)(2) and (o) as follows:

§1.904-5 Look-through rules as applied to controlled foreign corporations and other entities.

* * * * *

(b) * * *

(2) *Priority and ordering of look-through rules*. To the extent the look-through rules assign income to a separate category, the income is assigned to that separate category rather than the separate category to which the income would have been assigned under §1.904-4 (not taking into account §1.904-4(l)). See paragraph (k) of this section for ordering rules for applying the look-through rules.

* * * * *

(o) *Applicability dates*. Except as provided in this paragraph (o), this section is applicable for taxable years that both begin after December 31, 2017, and end on or after December 4, 2018. Paragraph (b)(2) of this section applies to taxable years beginning on or after [date final regulations are filed with the **Federal Register**].

Par. 28. Section 1.904-6, as amended in FR Doc. 2020-21819, published elsewhere in this issue of the **Federal Register**, is further amended by adding paragraph (b)(2) and revising paragraph (g) to read as follows:

§1.904-6 Allocation and apportionment of foreign income taxes.

* * * * *

(b) * * *

(2) *Disregarded payments*—(i) *In general*—(A) *Assignment of foreign gross income*. Except as provided in paragraph (b)(2)(ii) of this section, if a taxpayer that is an individual or a domestic corporation includes an item of foreign gross income by reason of the receipt of a disregarded payment by a foreign branch or foreign branch owner (as those terms are defined in §1.904-4(f)(3)), or a non-branch taxable unit, the foreign gross income item is assigned to a separate category under §1.861-20(d)(3)(v).

(B) *Definition of non-branch taxable unit*. The term *non-branch taxable unit* means a person or interest that is described in paragraph (b)(2)(i)(B)(*1*) or (*2*) of this section, respectively.

(*1*) *Persons*. A non-branch taxable unit described in this paragraph (b)(2)(i)(B)(*1*) means a person that is not otherwise a foreign branch owner and that is a U.S. individual, a domestic corporation, or a foreign or domestic partnership (or other pass-through entity, as defined in §1.904-5(a)(4)) an interest in which is owned, directly or indirectly through one or more other partnerships (or other pass-through entities), by a U.S. individual or a domestic corporation.

(*2*) *Interests*. A non-branch taxable unit described in this paragraph (b)(2)(i)(B)(*2*) means an interest of a foreign branch owner or an interest of a person described in paragraph (b)(2)(i)(B)(*1*) of this section that is not otherwise a foreign branch, and that is either a disregarded entity or a branch, as defined in §1.267A-5(a)(2), including a branch described in §1.954-1(d)(2)(i)(C) (modified by substituting the term "person" for "controlled foreign corporation").

(ii) *Foreign branch group contributions*—(A) *In general*. If a taxpayer includes an item of foreign gross income by reason of a foreign branch group contribution, the foreign gross income is assigned to the foreign branch category, or, in the case of a foreign branch owner that is a partnership, to the partnership's general category income that is attributable to the foreign branch. See, however, §§1.861-20(d)(3)(v)(C)(*2*) and 1.960-1(d)(3)(ii)(A) and (e) for rules providing that foreign income tax on a disregarded payment that is a contribution from a controlled foreign corporation to a taxable unit is assigned to the residual grouping and cannot be deemed paid under section 960.

(B) *Foreign branch group contribution*. A foreign branch group contribution is a contribution (as defined in §1.861-20(d)(3)(v)(E)) made by a member of a foreign branch owner group to a member of a foreign branch group that the payor owns, made by a member of a foreign branch group to another member of that group that the payor owns, or made by a member of a foreign branch group to a member of a different foreign branch group that the payor owns. For purposes of this paragraph (b)(2)(ii)(B), the terms *foreign branch group* and *foreign branch owner group* have the meanings provided in §1.904-4(f)(3).

* * * * *

(g) *Applicability date*. Except as otherwise provided in this paragraph (g), this section applies to taxable years that begin after December 31, 2019. Paragraph (b)(2) of this section applies to taxable years that begin after December 31, 2019, and end on or after November 2, 2020.

Par. 29. Section 1.904(f)-12 is amended by:

1. Removing paragraph (j)(6).

2. Redesignating paragraph (j)(5) as paragraph (j)(6).

3. Adding a new paragraph (j)(5) and paragraph (j)(7).

The additions read as follows:

§1.904(f)-12 Transition rules.

* * * * *

(j) * * *

(5) *Treatment of net operating losses incurred in post-2017 taxable years that are carried back to pre-2018 taxable years*—(i) *In general*. Except as provided in paragraph (j)(5)(ii) of this section, a net operating loss (NOL) incurred in a taxable year beginning after December 31, 2017 (a "post-2017 taxable year"), which is carried back, pursuant to section 172, to a taxable year beginning before January 1, 2018 (a "pre-2018 carryback year"), will be carried back under the rules of §1.904(g)-3(b). For purposes of applying the rules of §1.904(g)-3(b), income in a pre-2018 separate category in the taxable year to which the net operating loss is carried back is treated as if it included only income that would be assigned to the post-2017 general category. Therefore, any separate limitation loss created by reason of a passive category component of an NOL from a post-2017 taxable year that is carried back to offset general category income in a pre-2018 carryback year will be recaptured in post-2017 taxable years as general category income, and not as a combination of general, foreign branch, and section 951A category income.

(ii) *Foreign source losses in the post-2017 separate categories for foreign branch category income and section*

951A category income. Net operating losses attributable to a foreign source loss in the post-2017 separate categories for foreign branch category income and section 951A category income are treated as first offsetting general category income in a pre-2018 carryback year to the extent available to be offset by the net operating loss carryback. If the sum of foreign source losses in the taxpayer's separate categories for foreign branch category income and section 951A category income in the year the net operating loss is incurred exceeds the amount of general category income that is available to be offset in the carryback year, then the amount of foreign source loss in each of the foreign branch and section 951A categories that is treated as offsetting general category income under this paragraph (j)(5)(ii), is determined on a proportionate basis. General category income in the pre-2018 carryback year is first offset by foreign source loss in the taxpayer's post-2017 separate category for general category income in the year the net operating loss is incurred before any foreign source loss in that year in the separate categories for foreign branch category income and section 951A category income is carried back to reduce general category income. To the extent a foreign source loss in a post-2017 separate category for foreign branch category income or section 951A category income offsets general category income in a pre-2018 taxable year under the rules of this paragraph (j)(5)(ii), no separate limitation loss account is created.

* * * * *

(7) *Applicability date*. Except as otherwise provided in this paragraph (j)(7), this paragraph (j) applies to taxable years ending on or after December 31, 2017. Paragraph (j)(5) of this section applies to carrybacks of net operating losses incurred in taxable years beginning on or after January 1, 2018.

Par. 30. Section 1.905-1 is amended by:

1. Revising the section heading and paragraph (a).

2. Redesignating paragraph (b) as paragraph (g).

3. Adding a new paragraph (b) and paragraphs (c), (d), (e), and (f).

4. Revising the heading of newly redesignated paragraph (g).

5. Adding paragraph (h).

The revisions and additions read as follows:

§1.905-1 When credit for foreign income taxes may be taken.

(a) *Scope*. This section provides rules regarding when the credit for foreign income taxes (as defined in §1.901-2(a)) may be taken, based on a taxpayer's method of accounting for such taxes. Paragraph (b) of this section provides the general rule. Paragraph (c) of this section sets forth rules for determining the taxable year in which taxpayers using the cash receipts and disbursement method of accounting for income ("cash method") may claim a foreign tax credit. Paragraph (d) of this section sets forth rules for determining the taxable year in which taxpayers using the accrual method of accounting for income ("accrual method") may claim a foreign tax credit. Paragraph (e) of this section provides rules for taxpayers using the cash method to claim foreign tax credits on the accrual basis pursuant to the election provided under section 905(a). Paragraph (f) of this section provides rules for when foreign income tax expenditures of a pass-through entity can be taken as a credit by the entity's partners, shareholders, or owners. Paragraph (g) of this section provides rules for when a foreign tax credit can be taken with respect to blocked income. Paragraph (h) provides the applicability dates for this section.

(b) *General rule*. The credit for taxes provided in subpart A, part III, subchapter N, chapter 1 of the Code (the "foreign tax credit") may be taken either on the return for the year in which the taxes accrued or on the return for the year in which the taxes were paid, depending on whether the taxpayer uses the accrual or the cash receipts and disbursements method of accounting for purposes of computing taxable income and filing returns. However, regardless of the year in which the credit is claimed under the taxpayer's method of accounting for foreign income taxes, the foreign tax credit is allowed only to the extent the foreign income taxes are ultimately both owed and actually remitted to the foreign country (in the case of a taxpayer claiming the foreign tax credit on the accrual basis, within the time prescribed by section 905(c)(2)). See section 905(b) and §§1.901-1(a) and 1.901-2(e). Because the taxpayer's liability for foreign income tax may accrue (that is, become fixed and determinable) in a different taxable year than that in which the tax is paid (that is, remitted), the taxpayer's entitlement to the credit may be perfected, or become subject to adjustment, by reason of events that occur in a taxable year after the taxable year in which the credit is allowed. See section 905(c) and §1.905-3(a) for rules relating to changes to the taxpayer's foreign income tax liability that require a redetermination of the allowable foreign tax credit and the taxpayer's U.S. tax liability.

(c) *Rules for cash method taxpayers*—(1) *Credit allowed in year paid*. Except as provided in paragraph (e) of this section, a taxpayer who uses the cash method may claim a foreign tax credit only in the taxable year in which the foreign income taxes are paid. Generally, foreign income taxes are considered paid in the taxable year in which the taxes are remitted to the foreign country. However, foreign withholding taxes described in section 901(k)(1)(B), as well as foreign net income taxes described in §1.901-2(a)(3)(i) that are withheld from the taxpayer's gross income by the payor, are treated as paid in the year in which they are withheld. Foreign income taxes that have been withheld or remitted but which are not considered an amount of tax paid for purposes of section 901 under the rules of §1.901-2(e) (for example, because the amount withheld or remitted was not a compulsory payment), however, are not eligible for a foreign tax credit. See §§1.901-2(e) and 1.905-3(b)(1)(ii)(B) (*Example 2*).

(2) *Adjustments to taxes claimed as a credit in the year paid*. A refund of foreign income taxes for which a foreign tax credit has been claimed on the cash basis, or a subsequent determination that the amount paid exceeds the taxpayer's liability for foreign income tax, requires a redetermination of foreign income taxes paid and the taxpayer's U.S. tax liability pursuant to section 905(c) and §1.905-3. See §1.905-3(a) and (b)(1)(ii)(G) (*Example 7*). Additional foreign income taxes paid that relate back to a prior year in which foreign income taxes were claimed as a credit on the cash basis, including by rea-

son of the settlement of a dispute with the foreign tax authority, may only be claimed as a credit in the year the additional taxes are paid. The payment of such additional taxes does not result in a redetermination pursuant to section 905(c) or §1.905-3 of the foreign income taxes paid in any prior year, although a redetermination of U.S. tax liability may be required due, for example, to a carryback of unused foreign tax under section 904(c) and §1.904-2.

(d) *Rules for accrual method taxpayers*—(1) *Credit allowed in year accrued*—(i) *In general*. A taxpayer who uses the accrual method may claim a foreign tax credit only in the taxable year in which the foreign income taxes are considered to accrue for foreign tax credit purposes under the rules of this paragraph (d). Foreign income taxes accrue in the taxable year in which all the events have occurred that establish the fact of the liability and the amount of the liability can be determined with reasonable accuracy. See §§1.446-1(c)(1)(ii)(A) and 1.461-4(g)(6)(iii)(B). For purposes of the preceding sentence, a foreign income tax that is contingent on a future distribution of earnings does not meet the all events test until the earnings are distributed. A foreign income tax liability determined on the basis of a foreign taxable year becomes fixed and determinable at the close of the taxpayer's foreign taxable year. Therefore, foreign income taxes that are computed based on items of income, deduction, and loss that arise in a foreign taxable year accrue in the United States taxable year with or within which the taxpayer's foreign taxable year ends. Foreign withholding taxes that are paid with respect to a foreign taxable year and that represent advance payments of a foreign net income tax liability determined on the basis of that foreign taxable year accrue at the close of the foreign taxable year. Foreign withholding taxes imposed on a payment giving rise to an item of foreign gross income accrue on the date the payment from which the tax is withheld is made (or treated as made under foreign tax law).

(ii) *Relation-back rule for adjustments to taxes claimed as a credit in year accrued*. Additional tax paid as a result of a change in the foreign tax liability, including additional taxes paid when a contest with a foreign tax authority is resolved, relate back and are considered to accrue at the end of the foreign taxable year with respect to which the taxes were imposed (the "relation-back year"). Additional withholding tax paid as a result of a change in the amount of an item of foreign gross income (such as pursuant to a foreign transfer pricing adjustment), also relate back and are considered to accrue in the year in which the payment from which the additional tax is withheld is made (or considered to have been made under foreign tax law). Foreign income taxes that are not paid within 24 months after the close of the taxable year in which they were accrued are treated as refunded pursuant to §1.905-3(a); when subsequently paid, the foreign income taxes are allowed as a credit in the relation-back year. See §1.905-3(b)(1)(ii)(E) (*Example 5*). For special rules that apply to determine when foreign income tax is considered to accrue in the case of certain ownership and entity classification changes, see §§1.336-2(g)(3)(ii), 1.338-9(d), 1.901-2(f)(5), and 1.1502-76.

(2) *Special rule for 52-53 week U.S. taxable years*. If a taxpayer has elected pursuant to section 441(f) to use a U.S. taxable year consisting of 52-53 weeks, and such U.S. taxable year closes within six calendar days of the end of the taxpayer's foreign taxable year, the determination of when foreign income taxes accrue under paragraph (d)(1) of this section is made by deeming the taxpayer's U.S. taxable year to end on the last day of its foreign taxable year.

(3) *Accrual of contested foreign tax liability*. A contested foreign income tax liability is finally determined and accrues for purposes of paragraph (d)(1) of this section when the contest is resolved. However, pursuant to section 905(c)(2), no credit is allowed for any accrued tax that is not paid within 24 months of the close of the relation-back year until the tax is actually remitted and considered paid. Thus, except as provided in paragraph (d)(4) of this section, a foreign tax credit for a contested foreign income tax liability cannot be claimed until such time as both the contest is resolved and the tax is actually paid, even if the contested liability (or portion thereof) has previously been remitted to the foreign country. Once the contest is resolved and the foreign income tax liability is finally determined and paid, the tax liability accrues, and is considered actually to accrue in the relation-back year for purposes of the foreign tax credit. See paragraph (d)(1) of this section; see also section 6511(d)(3) and §301.6511(d)-3 of this chapter for a special 10-year period of limitations for claiming a credit or refund of U.S. tax that is attributable to foreign income taxes for which a credit is allowed under section 901, which runs from the unextended due date of the return for the taxable year in which the foreign income taxes are paid (within the meaning of paragraph (c) of this section, for taxpayers claiming credits on the cash basis) or accrued (within the meaning of this paragraph (d)), for taxpayers claiming credits on the accrual basis).

(4) *Election to claim a provisional credit for contested taxes remitted before accrual*—(i) *Conditions of election*. A taxpayer may, under the conditions provided in this paragraph (d)(4), elect to claim a foreign tax credit (but not a deduction) for a contested foreign income tax liability (or a portion thereof) in the relation-back year when the contested amount (or a portion thereof) is remitted to the foreign country, notwithstanding that the liability is not finally determined and so has not accrued. To make the election, a taxpayer must file an amended return for the taxable year to which the contested tax relates, together with a Form 1116 (Foreign Tax Credit (Individual, Estate, or Trust)) or Form 1118 (Foreign Tax Credit—Corporations), and the agreement described in paragraph (d)(4)(ii) of this section. In addition, the taxpayer must, for each subsequent taxable year up to and including the taxable year in which the contest is resolved, file the annual certification described in paragraph (d)(4)(iii) of this section. Any portion of a contested foreign income tax liability for which a provisional credit is claimed under this paragraph (d)(4) that is subsequently refunded by the foreign country results in a foreign tax redetermination under §1.905-3(a).

(ii) *Contents of provisional foreign tax credit agreement*. The provisional foreign tax credit agreement must contain the following:

(A) A statement that the document is an election and an agreement under the provisions of paragraph (d)(4) of this section;

(B) A description of contested foreign income tax liability, including the name of the foreign tax or taxes being contested, the name of the country imposing the tax, the amount of the contested tax, and the U.S. taxable year(s) and the income to which the contested foreign income tax liability relates;

(C) The amount of the contested foreign income tax liability in paragraph (d)(4)(ii)(B) of this section that has been remitted to the foreign country and the date of the remittance(s);

(D) An agreement by the taxpayer, for a period of three years from the later of the filing or the due date (with extensions) of the return for the taxable year in which the taxpayer notifies the Internal Revenue Service of the resolution of the contest, not to assert the statute of limitations on assessment as a defense to the assessment of additional taxes or interest related to the contested foreign income tax liability described in paragraph (d)(4)(ii)(B) of this section that may arise from a determination that the taxpayer failed to exhaust all effective and practical remedies to minimize its foreign income tax liability, so that the amount of the contested foreign income tax is not a compulsory payment and is not considered paid within the meaning of §1.901-2(e)(5);

(E) A statement that the taxpayer agrees to comply with all the conditions and requirements of paragraph (d)(4) of this section, including to provide notice to the Internal Revenue Service upon the resolution of the contest, and to treat the failure to comply with such requirement as a refund of the contested foreign income tax liability that requires a redetermination of the taxpayer's U.S. tax liability pursuant to §1.905-3(b); and

(F) Any additional information as may be prescribed by the Commissioner of Internal Revenue in Internal Revenue Service forms or instructions.

(iii) *Annual certification*. For each taxable year following the year in which an election pursuant to paragraph (d)(4) of this section is made up to and including the taxable year in which the contest is resolved, the taxpayer must include with its timely-filed return a certification containing the information described in paragraphs (d)(4)(iii)(A) through (C) of this section in the form or manner prescribed by the Commissioner of Internal Revenue in Internal Revenue Service forms or instructions.

(A) A description of the contested foreign income tax liability, including the name of the foreign tax or taxes, the country imposing the tax, the amount of the contested tax, and a description of the status of the contest.

(B) With the return for the taxable year in which the contest is resolved, notification that the contest has been resolved. Such notification must include the date of final resolution and the amount of the finally determined foreign income tax liability.

(C) Any additional information, which may include a copy of the final judgment, order, settlement, or other documentation of the contest resolution, as may be prescribed by the Commissioner of Internal Revenue in Internal Revenue Service forms or instructions.

(iv) *Signatory*. The provisional foreign tax credit agreement and the annual certification must be signed under penalties of perjury by a person authorized to sign the return of the taxpayer.

(v) *Failure to comply*. A taxpayer that fails to comply with the requirements for filing a provisional foreign tax credit agreement under paragraphs (d)(4)(i) and (ii) of this section will not be allowed a provisional credit for the contested foreign income tax liability. A taxpayer that fails to comply with the annual certification requirement of paragraph (d)(4)(iii) of this section will be treated as receiving a refund of the amount of the contested foreign income tax liability on the date the annual certification is required to be filed under paragraph (d)(4)(iii) of this section, resulting in a redetermination of the taxpayer's U.S. tax liability pursuant to §1.905-3(b).

(5) *Correction of improper accruals*—(i) *In general*. The accrual of a foreign income tax expense generally involves the determination of the proper timing for recognizing the expense for Federal income tax purposes. Thus, foreign income tax expense is a material item within the meaning of section 446. See §1.446-1(e)(2)(ii). As a material item, a change in the timing of accruing a foreign income tax expense is generally a change in method of accounting. See section 446(e). A change from an improper method of accruing foreign income taxes to the proper method of accrual described in this paragraph (d) is treated as a change in a method of accounting, regardless of whether the taxpayer (or a partner or beneficiary taking into account a distributive share of foreign income taxes paid by a partnership or other pass-through entity) chooses to claim a deduction or a credit for such taxes in any taxable year. For purposes of this paragraph (d)(5), an improper method of accruing foreign income taxes includes a method under which foreign income tax is accrued in a taxable year other than the taxable year in which the requirements of the all events test in §§1.446-1(c)(1)(ii)(A) and 1.461-4(g)(6)(iii)(B) are met, or which fails to apply the relation-back rule in paragraph (d)(1) of this section that applies for purposes of the foreign tax credit, but does not include corrections to estimated accruals or errors in computing the amount of foreign income tax that is allowed as a deduction or credit in any taxable year. Taxpayers must file a Form 3115, Application for Change in Accounting Method, in accordance with Revenue Procedure 2015-13 (or any successor administrative procedure prescribed by the Commissioner) to obtain the Commissioner's permission to change from an improper method of accruing foreign income taxes to the proper method described in this paragraph (d). In order to prevent a duplication or omission of a benefit for foreign income taxes that accrue in any taxable year (whether through the double allowance or double disallowance of either a deduction or a credit, the allowance of both a deduction and a credit, or the disallowance of either a deduction or a credit, for the same amount of foreign income tax), the rules in paragraphs (d)(5)(ii) through (iv) of this section, describing a modified cut-off approach, apply if the Commissioner grants permission for the taxpayer to change to the proper method of accrual. Under the modified cut-off approach, a section 481(a) adjustment is neither required nor permitted with respect to the amounts of foreign income tax that were improperly accrued (or improperly not accrued) under the taxpayer's improper method in taxable years before the taxable year of change.

(ii) *Adjustments required to implement a change in method of accounting for accruing foreign income taxes*. A change from an improper method of accruing foreign income taxes to the proper method described in this paragraph (d) is made under the modified cut-off approach described in this paragraph (d)(5)(ii). Under the modified cut-off approach, the amount of foreign income tax in a statutory or residual grouping (such as a separate category as defined in §1.904-5(a)(4)) that properly accrues in the taxable year of change (accounted for in the currency in which the foreign tax liability is denominated) is adjusted downward (but not below zero) by the amount of foreign income tax in the same grouping that the taxpayer improperly accrued in a prior taxable year and for which the taxpayer claimed a credit or a deduction in such prior taxable year, but only if the improperly-accrued amount of foreign income tax did not properly accrue in a taxable year before the taxable year of change. Conversely, under the modified cut-off approach, the amount of foreign income tax in any statutory or residual grouping that properly accrues in the taxable year of change (accounted for in the currency in which the foreign tax liability is denominated) is adjusted upward by the amount of foreign income tax in the same grouping that properly accrued in a taxable year before the taxable year of change but which, under the taxpayer's improper method of accounting, the taxpayer failed to accrue and claim as either a credit or a deduction in any taxable year before the taxable year of change. For purposes of the foreign tax credit, the adjusted amounts of accrued foreign income taxes, including any upward adjustment, are translated into U.S. dollars under §1.986(a)-1 as if those amounts properly accrued in the taxable year of change. To the extent that the downward adjustment in any grouping required under this modified cut-off approach exceeds the amount of foreign income tax properly accruing in that grouping in the year of change, such excess will carry forward to each subsequent taxable year and reduce properly-accrued amounts of foreign income tax in the same grouping to the extent of those properly-accrued amounts, until all improperly-accrued amounts included in the downward adjustment are accounted for. See §1.861-20 for rules that apply to assign foreign income taxes to statutory and residual groupings.

(iii) *Application of section 905(c)*—(A) *Two-year rule*. Except as otherwise provided in this paragraph (d)(5)(iii), if the taxpayer claimed a credit for improperly-accrued amounts in a taxable year before the taxable year of change, no adjustment is required under section 905(c)(2) and §1.905-3(a) solely by reason of the improper accrual. For purposes of applying section 905(c)(2) and §1.905-3(a) to improperly-accrued amounts of foreign income tax that were claimed as a credit in any taxable year before the taxable year of change, the 24-month period runs from the close of the U.S. taxable year(s) in which those amounts were accrued under the taxpayer's improper method and claimed as a credit. To the extent any improperly-accrued amounts remain unpaid as of the date 24 months after the close of the taxable year in which the amounts were improperly accrued and claimed as a credit, an adjustment is required under section 905(c)(2) and §1.905-3(a) as if the improperly-accrued amounts were refunded as of the date 24 months after the close of such taxable year. See §1.986(a)-1(c) (a refund or other downward adjustment to foreign income taxes paid or accrued on more than one date reduces the foreign income taxes paid or accrued on a last-in, first-out basis, starting with the amounts most recently paid or accrued).

(B) *Application of payments*. Amounts of foreign income tax that a taxpayer accrued and claimed as a credit or a deduction in a taxable year before the taxable year of change under the taxpayer's improper method, but that had properly accrued either in the taxable year the credit or deduction was claimed or in a different taxable year before the taxable year of change, are not included in the downward adjustment required by paragraph (d)(5)(ii) of this section. Remittances to the foreign country of such amounts (accounted for in the currency in which the foreign tax liability is denominated) are treated first as payments of the amounts of tax that had properly accrued in the taxable year claimed as a credit or deduction to the extent thereof, and then as payments of the amounts of tax that were improperly accrued in a different taxable year, on a last-in, first-out basis, starting with the most recent improperly-accrued amounts. Remittances to the foreign country of amounts of foreign income tax that properly accrue in or after the taxable year of change (accounted for in the foreign currency in which the foreign tax liability is denominated) but that are offset by the amounts included in the downward adjustment required by paragraph (d)(5)(ii) of this section are treated as payments of the amounts of tax that were improperly accrued before the taxable year of change and included in the downward adjustment on a last-in, first-out basis, starting with the most recent improperly-accrued amounts. Additional amounts of foreign income tax that first accrue in or after the taxable year of change but that relate to a taxable year before the taxable year of change are taken into account in the earlier of the taxable year of change or the taxable year or years in which they would have been considered to accrue based upon the taxpayer's improper method. Additional amounts of foreign income tax that first accrue in or after the taxable year of change and that relate to the taxable year of change or a taxable year after the year of change are taken into account in the proper relation-back year, but may then be subject to the downward adjustment required by paragraph (d)(5)(ii) of this section.

(iv) *Foreign income tax expense improperly accrued by a foreign corporation, partnership, or other pass-through entity*. Foreign income tax expense of a foreign corporation reduces both the corporation's taxable income and its earnings and profits, and may give rise to an amount of foreign taxes deemed paid under section 960 that may be claimed as a credit by a United States shareholder that is a domestic corporation or that is a person that makes an election under section 962. If the Commissioner grants permission for a foreign corporation to change its method of accounting for foreign income tax expense, the duplication or omission of those expenses (accounted for in the functional currency of the foreign corporation) and the associated foreign income taxes (translated into dollars in accordance with §1.986(a)-1) are accounted for by applying the rules in paragraph (d)(5)(ii) of this section as if the foreign corporation were itself eligible to, and did, claim a credit

under section 901 for such amounts. In the case of a partnership or other pass-through entity that is granted permission to change its method of accounting for accruing foreign income taxes to a proper method as described in this paragraph (d), such partnership or other pass-through entity must provide its partners or other owners with the information needed for the partners or other owners to properly account for the improperly-accrued or unaccrued amounts under the rules in paragraph (d)(5)(ii) of this section as if their proportionate shares of foreign income tax expense were directly paid or accrued by them.

(6) *Examples*. The following examples illustrate the application of paragraph (d) of this section. Unless otherwise stated, for purposes of these examples it is presumed that the local currency in each of Country X and Country Y and the functional currency of any foreign branch is the Euro (€), and at all relevant times the exchange rate is $1:€1.

(i) *Example 1: Accrual of foreign income tax*—(A) *Facts*. A, a U.S. citizen, resides and works in Country X. A uses the calendar year as the U.S. taxable year, and has made an election under paragraph (e) of this section to claim foreign tax credits on an accrual basis. Country X has a tax year that begins on April 1 and ends on March 31. A's wages are subject to net income tax, at graduated rates, under Country X tax law and are subject to withholding on a monthly basis by A's employer in Country X. In the period between April 1, Year 1, and March 31, Year 2, A earns $50,000x in Country X wages, from which A's employer withholds $10,000x in tax. On December 1, Year 1, A receives a dividend distribution from a Country Y corporation, from which the corporation withheld $500x of tax. Country Y imposes withholding tax on dividends paid to nonresidents solely based on the gross amount of the dividend payment; A is not required to file a tax return in Country Y.

(B) *Analysis*. Under paragraph (d)(1) of this section, A's liability for Country X net income tax accrues on March 31, Year 2, the last day of the Country X taxable year. The Country X net income tax withheld by A's employer from A's wages is a reasonable approximation of, and represents an advance payment of, A's final net income tax liability for the year, which becomes fixed and determinable only at the close of the Country X taxable year. Thus, A cannot claim a credit for any portion of the Country X net income tax on A's Federal income tax return for Year 1, and may claim a credit for the entire Country X net income tax that accrues on March 31, Year 2, on A's Federal income tax return for Year 2. A may claim a credit for the Country Y withholding tax on A's Federal income tax return for Year 1, because the withholding tax accrued on December 1, Year 1.

(ii) *Example 2: 52-53 week taxable year*—(A) *Facts*. USC, an accrual method taxpayer, is a domestic corporation that operates in branch form in Country X. USC uses the calendar year for Country X tax purposes. For Federal income tax purposes, USC elects pursuant to §1.441-2(a) to use a 52-53 week taxable year that ends on the last Friday of December. In Year 1, USC's U.S. taxable year ends on Friday, December 25; in Year 2, USC's U.S. taxable year ends Friday, December 31. For its foreign taxable year ending December 31, Year 1, USC earns $10,000x of foreign source income through its Country X branch and incurs Country X foreign income tax of $500x; for Year 2, USC earns $12,000x and incurs Country X foreign income tax of $600x.

(B) *Analysis*. Under paragraph (d)(1) of this section, the $500x of Country X foreign income tax becomes fixed and determinable at the close of USC's foreign taxable year, on December 31, Year 1, which is after the close of its U.S. taxable year (December 25, Year 1). The $600x of Country X foreign income tax becomes fixed and determinable on December 31, Year 2. Thus, both the Year 1 and Year 2 Country X foreign income taxes accrue in USC's U.S. taxable year ending December 31, Year 2. However, pursuant to paragraph (d)(2) of this section, for purposes of determining the amount of foreign income taxes accrued in each taxable year for foreign tax credit purposes, USC's U.S. taxable year is deemed to end on December 31, the end of USC's Country X taxable year. USC may therefore claim a foreign tax credit for $500x of Country X foreign income tax on its Federal income tax return for Year 1 and a credit for $600x of Country X foreign income tax on its Federal income tax return for Year 2.

(iii) *Example 3: Contested tax*—(A) *Facts*. USC is a domestic corporation that operates in branch form in Country X. USC uses an accrual method of accounting and uses the calendar year as its U.S. and Country X taxable year. In Year 1, when the average exchange rate described in §1.986(a)-1(a)(1) is $1:€1, USC earns €20,000x = $20,000x through its Country X branch for U.S. and Country X tax purposes and accrues Country X foreign income taxes of €500x = $500x, which USC claims as a credit on its Federal income tax return for Year 1. In Year 3, when the average exchange rate is $1:€1.2, Country X asserts that USC owes additional foreign income taxes of €100x with respect to USC's Year 1 income. USC contests the liability but remits €40x to Country X with respect to the contested liability in Year 3. USC does not make an election under paragraph (d)(4) of this section to claim a provisional credit with respect to the €40x. In Year 6, after exhausting all effective and practical remedies, it is finally determined that USC is liable for €50x of additional Country X foreign income taxes with respect to its Year 1 income. USC pays an additional €10x to Country X on September 15, Year 6, when the spot rate described in §1.986(a)-1(a)(2)(i) is $1:€2.

(B) *Analysis*. Pursuant to paragraph (d)(3) of this section, the additional liability asserted by Country X with respect to USC's Year 1 income does not accrue until the contest is resolved in Year 6. USC's remittance of €40x of contested tax in Year 3 is not a payment of accrued tax, and so is not a foreign tax redetermination. Both the €40x of Country X taxes paid in Year 3 and the €10x of Country X taxes paid in Year 6 accrue in Year 6, when the contest is resolved. Once accrued and paid, the €50x relates back for foreign tax credit purposes to Year 1, and can be claimed as a credit by USC on a timely-filed amended return for Year 1. Under §1.986(a)-1(a), for foreign tax credit purposes the €40x paid in Year 3 is translated into dollars at the average exchange rate for Year 1 (€40x x $1 / €1 = $40x), and the €10x paid in Year 6 is translated into dollars at the spot rate on the date paid (€10x x $1 / €2 = $5x). Accordingly, after the €50x of Country X income tax is paid in Year 6 USC may claim an additional foreign tax credit of $45x for Year 1.

(iv) *Example 4: Provisional credit for contested tax*—(A) *Facts*. The facts are the same as in paragraph (d)(6)(iii)(A) of this section (the facts of *Example 3*), except that USC pays the entire contested tax liability of €100x to Country X in Year 3 and elects under paragraph (d)(4) of this section to claim a provisional foreign tax credit on an amended return for Year 1. In Year 6, upon resolution of the contest, USC receives a refund of €50x from Country X.

(B) *Analysis*. In Year 3, USC may claim a provisional foreign tax credit for $100x (€100x translated at the average exchange rate for Year 1) of contested foreign tax paid to Country X by filing an amended return for Year 1, with Form 1118 attached, and a provisional foreign tax credit agreement described in paragraph (d)(4)(ii) of this section. In each year for Years 4 through 6, USC must attach the certification described in paragraph (d)(4)(iii) of this section to its timely-filed Federal income tax return. In Year 6, as a result of the €50x refund, USC must redetermine its U.S. tax liability for Year 1 and for any other affected year pursuant to §1.905-3, reducing the Year 1 foreign tax credit by $50x (from $600x to $550x), and comply with the notification requirements in §1.905-4. See §1.986(a)-1(c) (refunds of foreign income tax translated into U.S. dollars at the rate used to claim the credit).

(v) *Example 5: Improperly accelerated accrual*—(A) *Facts*—(*1*) *Foreign income tax accrued and paid*. USC is a domestic corporation that operates a foreign branch in Country X. All of USC's gross and taxable income is foreign source foreign branch category income, and all of its foreign income taxes are properly allocated and apportioned under §1.861-20 to the foreign branch category. USC uses the accrual method of accounting and uses the calendar year as its U.S. taxable year. For Country X tax purposes, USC uses a fiscal year that ends on March 31. USC accrued €200x = $200x of Country X net income tax (as defined in §1.901-2(a)(3)) for its foreign taxable year ending March 31, Year 2. It timely filed its Country X tax return and paid the €200x on January 15, Year 3. USC accrued and paid with its timely filed Country X tax returns €280x and €240x of Country X net income tax for its foreign taxable years ending on March 31 of Year 3 and Year 4, respectively, on January 15 of Year 4 and Year 5, respectively.

(*2*) *Improper accrual*. On its Federal income tax return for Year 1, USC improperly pro-rated and accelerated the accrual of Country X net income tax and claimed a credit for $150x, equal to three-fourths of the Country X net income tax of $200x that relates to USC's foreign taxable year ending March 31, Year 2. Continuing with this improper method of accruing foreign income taxes, USC claimed a foreign tax credit of $260x on its U.S. tax return for Year 2, comprising $50x (one-fourth of the $200x of net income tax relating to its foreign taxable year ending March 31, Year 2) plus $210x (three-fourths of the $280x

of net income tax relating to its foreign taxable year ending March 31, Year 3). Similarly, USC improperly accrued and claimed a foreign tax credit on its U.S. tax return for Year 3 for $250x of Country X net income tax, comprising $70x (one-fourth of the $280x that properly accrued in Year 3) plus $180x (three-fourths of the $240x that properly accrued in Year 4). In Year 4, USC realizes its mistake and, as provided in paragraph (d)(5)(i) of this section, files Form 3115 with the IRS to seek permission to change from an improper method to a proper method of accruing foreign income taxes.

Table 1 to paragraph (d)(6)(v)(A)(*2*)

Country X taxable year ending in U.S. calendar taxable year	Net income tax properly accrued ($1 = €1))	Net income tax accrued under improper method ($1 = €1))
3/31/Y1 ends in Year 1	0	¾ (200x) = 150x
3/31/Y2 ends in Year 2	200x	¼ (200x) + ¾ (280x) = 260x
3/31/Y3 ends in Year 3	280x	¼ (280x) + ¾ (240x) = 250x
3/31/Y4 ends in Year 4	240x	[year of change]

(B) *Analysis*—(*1*) *Downward adjustment*. Under paragraph (d)(5)(ii) of this section, in Year 4, the year of change, USC must reduce (but not below zero) the amount (in Euros) of Country X net income tax in the foreign branch category that properly accrues in Year 4, €240x, by the amount of foreign income tax that was accrued and claimed as either a deduction or a credit in a year before the year of change, and that had not properly accrued in either the year in which the tax was accrued under USC's improper method or in any other taxable year before the taxable year of change. For all taxable years before the taxable year of change, under its improper method USC had accrued and claimed as a credit a total of €660x = $660x of foreign income tax, of which only €480x = $480x had properly accrued. Therefore, the downward adjustment required by paragraph (d)(5)(ii) of this section is €180x (€660x - €480x = €180x). In Year 4, USC's foreign tax credit in the foreign branch category is reduced by $180x (€180x downward adjustment translated into dollars at $1:€1, the average exchange rate for Year 4), from $240x to $60x.

(*2*) *Application of section 905(c)*—(*i*) *Year 1*. Under paragraph (d)(5)(iii) of this section, the €200x USC paid on January 15, Year 3, that relates to its Country X taxable year ending on March 31, Year 2, is first treated as a payment of the €50x of that Country X net income tax liability that properly accrued and was claimed as a credit by USC in Year 2, and next as a payment of the €150x of that Country X net income tax liability that USC improperly accrued and claimed as a credit in Year 1. Because all €150x of the Country X net income tax that was improperly accrued and claimed as a credit in Year 1 was paid within 24 months of December 31, Year 1, no foreign tax redetermination occurs, and no redetermination of U.S. tax liability is required, for Year 1.

(*ii*) *Year 2*. Under paragraph (d)(5)(iii) of this section, the €280x USC paid on January 15, Year 4, that relates to its Country X taxable year ending on March 31, Year 3, is first treated as a payment of the €70x = $70x of that Country X net income tax liability that properly accrued and was claimed as a credit by USC in Year 3, and next as a payment of the €210x = $210x of that Country X net income tax liability that USC improperly accrued and claimed as a credit in Year 2. Together with the €50x = $50x of USC's Country X net income tax liability that properly accrued and was claimed as a credit in Year 2, all €260x of the Country X net income tax that was accrued and claimed as a credit in Year 2 under USC's improper method was paid within 24 months of December 31, Year 2. Accordingly, no foreign tax redetermination occurs, and no redetermination of U.S. tax liability is required, for Year 2.

(*iii*) *Year 3*. Under paragraph (d)(5)(iii) of this section, the €240x USC paid on January 15, Year 5, that relates to its Country X taxable year ending on March 31, Year 4, is first treated as a payment of the €60x = $60x of that Country X net income tax liability that properly accrued and was claimed as a credit by USC in Year 4, and next as a payment of the €180x = $180x of that Country X net income tax liability that USC improperly accrued and claimed as a credit in Year 3. Together with the €70x = $70x of USC's Country X net income tax liability that properly accrued and was claimed as a credit by USC in Year 3, all €250x of the Country X net income tax that was accrued and claimed as a credit in Year 3 under USC's improper method was paid within 24 months of December 31, Year 3. Accordingly, no foreign tax redetermination occurs, and no redetermination of U.S. tax liability is required, for Year 3.

(*iv*) *Year 4*. Under paragraph (d)(5)(iii) of this section, €60x = $60x of USC's January 15, Year 5 payment of €240x with respect to its Country X net income tax liability for Year 4 is treated as a payment of €60x = $60x of Country X net income tax that, after application of the downward adjustment required by paragraph (d)(5)(ii) of this section, was accrued and claimed as a credit in Year 4, the year of change.

(vi) *Example 6: Failure to pay improperly-accrued tax within 24 months*—(A) *Facts*. The facts the same as in paragraph (d)(6)(v) of this section (the facts in *Example 5*), except that USC does not pay its €240x tax liability for its Country X taxable year ending on March 31, Year 4, until January 15 of Year 6, when the spot rate described in §1.986(a)-1(a)(2)(i) is $1:€1.5.

(B) *Analysis*. The results are the same as in paragraphs (d)(6)(v)(B)(*2*)(*i*) and (*ii*) of this section (the analysis in *Example 5* for Year 1 and Year 2). With respect to Year 3, because the €180x = $180x of Year 4 foreign income tax that was improperly accrued and credited in Year 3 was not paid within 24 months of the end of Year 3, under section 905(c)(2) and §1.905-3(a) that €180x = $180x is treated as refunded on December 31, Year 5, requiring a redetermination of USC's Federal income tax liability for Year 3 (to reverse out the credit claimed). When in Year 6 USC pays the €240x of Country X income tax liability for Year 4, however, under paragraph (d)(5)(iii) of this section that payment is first treated as a payment of the €60x = $60x that was properly accrued and claimed as a credit in Year 4, and then as a payment of the €180x that was improperly accrued and claimed as a credit in Year 3 and that was treated as refunded in Year 5. Under section 905(c)(2)(B) and §1.905-3(a), that Year 6 payment of accrued but unpaid tax is a second foreign tax redetermination for Year 3 that also requires a redetermination of USC's U.S. tax liability. Under §1.986(a)-1(a)(2), the €180x of redetermined tax for Year 3 is translated into dollars at the spot rate on January 15, Year 6, when the tax is paid (€180x x $1 / €1.5 = $120x). Under §1.905-4(b)(1)(iv), USC may file one amended return accounting for both foreign tax redeterminations (which occur in two consecutive taxable years) with respect to Year 3, which taken together result in a reduction in USC's foreign tax credit for Year 3 from $250x to $190x ($250x originally accrued - $180x unpaid after 24 months + $120x paid in Year 6).

(vii) *Example 7: Additional payment of improperly-accrued tax*—(A) *Facts*. The facts are the same as in paragraph (d)(6)(v)(A) of this section (the facts in *Example 5*), except that in Year 6, Country X assessed additional net income tax of €100x with respect to USC's Country X taxable year ending March 31, Year 3, and after exhausting all effective and practical remedies to reduce its liability for Country X income tax, USC pays the additional assessed tax on September 15, Year 7, when the spot rate described in §1.986(a)-1(a)(2)(i) is $1:€0.5.

(B) *Analysis*. Under paragraph (d)(3) of this section, the additional €100x of Country X income tax USC paid in Year 7 with respect to its foreign taxable year that ended March 31, Year 3, relates back and is considered to accrue in Year 3. However, under its improper method of accounting USC had accrued and claimed foreign tax credits for Country X net income tax that related to Year 3 on its Federal income tax returns for both Year 2 and Year 3. Accordingly, under paragraph (d)(5)(iii)(B) of this section USC must redetermine its U.S. tax liability for both Year 2 and Year 3 (and any other affected years) to account for the additional €100x of Country X net income tax liability, using the improper method it used to accrue foreign income taxes before the year of change. Therefore, €75x = $150x of the €100x of additional tax is treated as if it accrued in Year 2, and €25x = $50x of the additional tax is treated as if it accrued in Year 3. Under §1.905-4(b)(1)(iii), USC may claim a refund for any resulting overpayment of U.S. tax

for Year 2 or Year 3 or any other affected year by filing an amended return within the period provided in section 6511.

(viii) *Example 8: Tax improperly accrued before year of change exceeds tax properly accrued in year of change*—(A) *Facts*. USC owns all of the stock in CFC, a controlled foreign corporation organized in Country X. Country X imposes net income tax on Country X corporations at a rate of 10% only in the year its earnings are distributed to its shareholders, rather than in the year the income is earned. Both USC and CFC use the calendar year as their taxable year for both Federal and Country X income tax purposes and CFC uses the Euro as its functional currency. In each of Years 1-3, CFC earns €1,000x for both Federal and Country X income tax purposes of general category foreign base company sales income (before reduction for foreign income taxes). CFC improperly accrues €100x of Country X net income tax with respect to €1,000x of income at the end of each of Years 1 and 2, even though no distribution is made in those years. In Year 1, for which the average exchange rate is $1:€1, USC computes and includes in income with respect to CFC $900x of subpart F income, claims a deemed paid foreign tax credit of $100x under section 960(a), and has a section 78 dividend of $100x. In Year 2, for which the average exchange rate is $1:€0.5, USC computes and includes in income with respect to CFC $1,800x of subpart F income, claims a deemed paid foreign tax credit of $200x under section 960(a), and has a section 78 dividend of $200x. In Year 2, CFC makes a distribution to USC of €400x of earnings and pays €40x of net income tax to Country X. In Year 3, for which the average exchange rate is $1:€1, CFC makes another distribution to USC of €500x of earnings and pays €50x in net income tax to Country X. In Year 3, USC realizes its mistake and seeks permission from the IRS for CFC to change to a proper method of accruing foreign income taxes. In Year 4, for which the average exchange rate is $1:€2, CFC makes a distribution of €700x of earnings and pays €70x of net income tax to Country X.

Table 2 to paragraph (d)(6)(viii)(A)

Taxable year ending:	Foreign income tax properly accrued	Foreign income tax accrued under improper method
12/31/Y1 ($1:€1)	0	€100x = $100x
12/31/Y2 ($1:€0.5)	€40x = $80x	€100x = $200x
12/31/Y3 ($1:€1)	€50x = $50x	[year of change]
12/31/Y4 ($1:€2)	€70x = $35x	

(B) *Analysis*—(*1*) *Downward adjustment*. Under paragraph (d)(5)(iv) of this section, CFC applies the rules of paragraph (d)(5) of this section as if it claimed a foreign tax credit under section 901 for Country X taxes. Under paragraph (d)(5)(ii) of this section, in Year 3, the year of change, CFC must reduce (but not below zero) the amount (in Euros) of Country X net income tax allocated and apportioned to its general category foreign base company sales income group that properly accrues in Year 3, €50x, by the amount of foreign income tax (in Euros) that was improperly accrued in that statutory grouping in a year before the year of change, and that had not properly accrued in either the year accrued or in another taxable year before the year of change. For all taxable years before the year of change, under its improper method CFC had accrued a total of €200x of foreign income tax with respect to its general category foreign base company sales income group, of which only €40x had properly accrued. Therefore, the downward adjustment required by paragraph (d)(5)(ii) of this section is €160x (€200x - €40x = €160x). In Year 3, CFC's €50x of eligible foreign income taxes in the general category foreign base company sales income group is reduced by €50x to zero. The €110x balance of the downward adjustment carries forward to Year 4, and reduces CFC's €70x of eligible foreign income taxes in the general category foreign base company sales income group by €70x to zero. The remaining €40x balance of the downward adjustment carries forward to later years and will reduce CFC's eligible foreign income taxes in the general category foreign base company sales income group until all improperly-accrued amounts are accounted for.

(*2*) *Application of section 905(c)*—(*i*) *Year 2*. Under paragraph (d)(5)(iii) of this section, CFC's payment in Year 2 of the €40x of Country X net income tax that properly accrued in Year 2, before the year of change, is treated as a payment of €40x of foreign income tax that CFC properly accrued in Year 2. The €60x of foreign income tax that CFC improperly accrued in Year 2 that remains unpaid at the end of Year 2 is not adjusted in Year 2. Under paragraph (d)(5)(iii) of this section, CFC's payment in Year 3 of €50x of Country X net income tax that properly accrued but was offset by the downward adjustment in Year 3 is treated as a payment of €50x of the €60x of Country X net income tax most recently improperly accrued in Year 2. In addition, CFC's payment in Year 4 of €70x of Country X net income tax that properly accrued but was offset by the downward adjustment in Year 4 is treated first as a payment of the remaining €10x of Country X net income tax that was improperly accrued in Year 2. Because all €100x of foreign income tax accrued in Year 2 under CFC's improper method of accounting is treated as paid within 24 months of December 31, Year 2, no foreign tax redetermination occurs, and no redetermination of CFC's foreign base company sales income, earnings and profits, and eligible foreign income taxes, or of USC's $1,800x subpart F inclusion, $200x deemed paid credit, and $200x section 78 dividend or its U.S. tax liability is required, for Year 2.

(*ii*) *Year 1*. Because all €100x of the tax CFC improperly accrued in Year 1 remained unpaid as of December 31, Year 3, the date 24 months after the end of Year 1, under section 905(c)(2) and §1.905-3(a) that €100x is treated as refunded on December 31, Year 3. Under §1.905-3(b)(2)(ii), USC must redetermine its Federal income tax liability for Year 1 to account for the foreign tax redetermination, increasing CFC's foreign base company sales income and earnings and profits by €100x, and decreasing its eligible foreign income taxes by $100x. However, under paragraph (d)(5)(iii)(B) of this section €60x = $30x of CFC's payment in Year 4 of €70x of Country X net income tax that properly accrued but was offset by the downward adjustment in Year 4 is treated as a payment of €60x of the €100x of Country X net income tax that was improperly accrued in Year 1 and treated as refunded in Year 3. Under §1.905-4(b)(1)(iv), USC may account for the two foreign tax redeterminations that occurred in Years 3 and 4 on a single amended Federal income tax return for Year 1. CFC's foreign base company sales income (taking into account the reduction for foreign income taxes) and earnings and profits for Year 1 are recomputed as €1,000x - €100x + €100x - €60x = €940x, and its eligible foreign income taxes are recomputed as $100x - $100x + $30x = $30x. USC's subpart F inclusion with respect to CFC for Year 1 (translated at the average exchange rate for Year 1 of $1:€1) is increased from $900x to $940x (€940x x $1 / €1), and the amount of foreign taxes deemed paid under section 960(a) and the amount of the section 78 dividend are reduced from $100x to $30x.

(*iii*) *Summary*. As of the end of Year 4, CFC and USC have been allowed a $30x foreign tax credit for Year 1, and a $200x foreign tax credit for Year 2. If in a later taxable year CFC distributes additional earnings to USC and accrues €40x of additional Country X net income tax that is offset by the balance of the €40x downward adjustment, CFC's payment of that €40x Country X net income tax liability will be treated as a payment of the remaining €40x of Country X net income tax that was improperly accrued in Year 1 and treated as refunded as of the end of Year 3.

(ix) *Example 9: Improperly deferred accrual*—(A) *Facts*—(*1*) *Foreign income tax accrued and paid*. USC is a domestic corporation that operates a foreign branch in Country X. All of USC's gross and taxable income is foreign source foreign branch category income, and all of its foreign income taxes are properly allocated and apportioned under §1.861-20 to the foreign branch category. USC uses the accrual method of accounting and uses the calendar year as its taxable year for both Federal and Country X income tax purposes. USC accrued €160x of Country X net income tax (as defined in §1.901-2(a)(3)) with respect to Year 1. USC filed its Country X tax return and paid the €160x on June 30, Year 2. USC accrued

€180x, €240x, and €150x of Country X tax for Years 2, 3, and 4, respectively, and paid with its timely filed Country X tax returns these tax liabilities on June 30 of Years 3, 4, and 5, respectively. The average exchange rate described in §1.986(a)-1(a)(1) is $1:€0.5 in Year 1, $1:€1 in Year 2, $1:€1.25 in Year 3, and $1:€1.5 in Year 4.

(*2*) *Improper accrual*. On its Federal income tax return for Year 1, USC claimed no foreign tax credit. On its Federal income tax return for Year 2, USC improperly accrued and claimed a credit for $160x (€160x of Country X tax for Year 1 that it paid in Year 2, translated into dollars at the average exchange rate for Year 2). Continuing with this improper method of accounting, USC improperly accrued and claimed a credit in Year 3 for $144x (€180x of Country X tax for Year 2 that it paid in Year 3, translated into dollars at the average exchange rate for Year 3). In Year 4, USC realizes its mistake and seeks permission from the IRS to change to a proper method of accruing foreign income taxes.

Table 3 to paragraph (d)(6)(ix)(A)(*2*)

Taxable year ending:	Foreign income tax properly accrued	Foreign income tax accrued under improper method
12/31/Y1 ($1:€0.5)	€160x = $320x	0
12/31/Y2 ($1:€1)	€180x = $180x	€160x = $160x
12/31/Y3 ($1:€1.25)	€240x = $192x	€180x = $144x
12/31/Y4 ($1:€1.5)	€150x = $100x	[year of change]

(B) *Analysis*—(*1*) *Upward adjustment*. Under paragraph (d)(5)(ii) of this section, in Year 4, the year of change, USC increases the amount of Country X net income tax allocated and apportioned to its foreign branch category that properly accrues in Year 4, €150x, by the amount of foreign income tax in that same grouping that properly accrued in a taxable year before the taxable year of change, but which, under its improper method of accounting, USC failed to accrue and claim as either a credit or deduction before the taxable year of change. For all taxable years before the taxable year of change, under a proper method, USC would have accrued a total of €580x of foreign income tax, of which it accrued and claimed a credit for only €340x under its improper method. Thus, in Year 4, USC increases its €150x of properly accrued foreign income taxes in the foreign branch category by €240x (€580x - €340x), and may claim a credit in that year for the total, €390x, or $260x (translated into dollars at the average exchange rate for Year 4, as if the total amount properly accrued in Year 4).

(*2*) *Application of section 905(c)*. Under paragraph (d)(5)(iii) of this section, USC's payment of the €160x of Year 1 tax that USC accrued and claimed as a credit in Year 2 under its improper method of accounting is first treated as a payment of the amount of that (Year 1) tax liability that properly accrued in Year 2. Since none of the €160x properly accrued in Year 2, the €160x is treated as a payment of that (Year 1) tax liability that USC improperly accrued and claimed as a credit in Year 2, €160x. Because all €160x of the Country X net income tax that was improperly accrued and claimed as a credit in Year 2 was paid within 24 months of the end of Year 2, no foreign tax redetermination occurs, and no redetermination of USC's $160x foreign tax credit and U.S. tax liability is required, for Year 2. Similarly, because all €180x of the Year 2 Country X net income tax that was improperly accrued and claimed as a credit in Year 3 was paid within 24 months of the end of Year 3, no foreign tax redetermination occurs, and no redetermination of USC's $144x foreign tax credit and U.S. tax liability is required, for Year 3.

(e) *Election by cash method taxpayer to take credit on the accrual basis*—(1) *In general*. A taxpayer who uses the cash method of accounting for income may elect to take the foreign tax credit in the taxable year in which the taxes accrue in accordance with the rules in paragraph (d) of this section. Except as provided in paragraph (e)(2) of this section, an election pursuant to this paragraph (e)(1) must be made on a timely-filed original return, by checking the appropriate box on Form 1116 (Foreign Tax Credit (Individual, Estate, or Trust)) or Form 1118 (Foreign Tax Credit—Corporations) indicating the cash method taxpayer's choice to claim the foreign tax credit in the year the foreign income taxes accrue. Once made, the election is irrevocable and must be followed for purposes of claiming a foreign tax credit for all subsequent years. See section 905(a).

(2) *Exception for cash method taxpayers claiming a foreign tax credit for the first time*. If the year with respect to which an election pursuant to paragraph (e)(1) of this section to claim the foreign tax credit on an accrual basis is made (the "election year") is the first year for which a taxpayer has ever claimed a foreign tax credit, the election to claim the foreign tax credit on an accrual basis can also be made on an amended return filed within the period permitted under §1.901-1(d)(1). The election is binding in the election year and all subsequent taxable years in which the taxpayer claims a foreign tax credit.

(3) *Treatment of taxes that accrued in a prior year*. In the election year and subsequent taxable years, a cash method taxpayer that claimed foreign tax credits on the cash basis in a prior taxable year may claim a foreign tax credit not only for foreign income taxes that accrue in the election year, but also for foreign income taxes that accrued (or are considered to accrue) in a taxable year preceding the election year but that are paid in the election year or subsequent taxable year, as applicable. Under paragraph (c) of this section, foreign income taxes paid with respect to a taxable year that precedes the election year may be claimed as a credit only in the year the taxes are paid and do not require a redetermination under section 905(c) or §1.905-3 of U.S. tax liability in any prior year.

(4) *Examples*. The following examples illustrate the application of paragraph (e) of this section.

(i) *Example 1*—(A) *Facts*. A, a U.S. citizen who is a resident of Country X, is a cash method taxpayer who uses the calendar year as the taxable year for both U.S. and Country X tax purposes. In Year 1 through Year 5, A claims foreign tax credits for Country X foreign income taxes on the cash method, in the year the taxes are paid. For Year 6, A makes a timely election to claim foreign tax credits on the accrual basis. In Year 6, A accrues $100x of Country X foreign income taxes with respect to Year 6. Also in Year 6, A pays $80x in foreign income taxes that had accrued in Year 5.

(B) *Analysis*. Pursuant to paragraph (e)(3) of this section, A can claim a foreign tax credit in Year 6 for the $100x of Country X taxes that accrued in Year 6 and for the $80x of Country X taxes that accrued in Year 5 but that are paid in Year 6.

(ii) *Example 2*—(A) *Facts*. The facts are the same as in paragraph (e)(4)(i)(A) of this section (the facts of *Example 1*), except that in Year 7, A is assessed an additional $10x of foreign income tax by Country X with respect to A's income in Year 3. After exhausting all effective and practical remedies, A pays the additional $10x to Country X in Year 8.

(B) *Analysis*. Pursuant to paragraph (e)(3) of this section, A can claim a foreign tax credit in Year 8 for the additional $10x of foreign income tax paid to Country X in Year 8 with respect to Year 3.

(f) *Rules for creditable foreign tax expenditures of partners, shareholders, or beneficiaries of a pass-through entity—*

(1) *Effect of pass-through entity's method of accounting on when foreign tax credit or deduction can be claimed*. Each partner that elects to claim the foreign tax credit for a particular taxable year may treat its distributive share of the creditable foreign tax expenditures (as defined in §1.704-1(b)(4)(viii)(*b*)) of the partnership that are paid or accrued by the partnership, under the partnership's method of accounting, during the partnership's taxable year ending with or within the partner's taxable year, as foreign income taxes paid or accrued (as the case may be, according to the partner's method of accounting for such taxes) by the partner in that particular taxable year. See §§1.702-1(a)(6) and 1.703-1(b)(2). Under §§1.905-3(a) and 1.905-4(b)(2), additional creditable foreign tax expenditures of the partnership that result from a change in the partnership's foreign tax liability for a prior taxable year, including additional taxes paid when a contest with a foreign tax authority is resolved, must be identified by the partnership as a prior year creditable foreign tax expenditure in the information reported to its partners for its taxable year in which the additional tax is actually paid. Subject to the rules in paragraphs (c) and (e) of this section, a partner using the cash method of accounting for foreign income taxes may claim a credit (or a deduction) for its distributive share of such additional taxes in the partner's taxable year with or within which the partnership's taxable year ends. Subject to the rules in paragraph (d) of this section, a partner using the accrual method of accounting for foreign income taxes may claim a credit for the partner's distributive share of such additional taxes in the relation-back year, or may claim a deduction in its taxable year with or within which the partnership's taxable year ends. The principles of this paragraph (f)(1) apply to determine the year in which a shareholder of a S corporation, or the grantor or beneficiary of an estate or trust, may claim a foreign tax credit (or a deduction) for its proportionate share of foreign income taxes paid or accrued by the S corporation, estate or trust. See sections 642(a), 671, 901(b)(5), and 1373(a) and §§ 1.1363-1(c)(2)(iii) and 1.1366-1(a)(2)(iv). See §§1.905-3 and 1.905-4 for notifications and adjustments of U.S. tax liability that are required if creditable foreign tax expenditures of a partnership or S corporation, or foreign income taxes paid or accrued by a trust or estate, are refunded or otherwise reduced.

(2) *Provisional credit for contested taxes*. Under paragraph (d)(3) of this section, a contested foreign tax liability does not accrue until the contest is resolved and the amount of the liability has been finally determined. In addition, under section 905(c)(2), a foreign income tax that is not paid within 24 months of the close of the taxable year to which the tax relates may not be claimed as a credit until the tax is actually paid. Thus, a partnership or other pass-through entity cannot take the contested tax into account as a creditable foreign tax expenditure until both the contest is resolved and the tax is actually paid. However, to the extent that a partnership or other pass-through entity remits a contested foreign tax liability to a foreign country, a partner or other owner of such pass-through entity that claims foreign tax credits on the accrual basis, may, by complying with the rules in paragraph (d)(4) of this section, elect to claim a provisional credit for its distributive share of such contested tax liability in the relation-back year.

(3) *Example*. The following example illustrates the application of paragraph (f) of this section.

(i) *Facts*. ABC is a U.S. partnership that is engaged in a trade or business in Country X. ABC has two U.S. partners, A and B. For Federal income tax purposes, ABC and partner A both use the accrual method of accounting and utilize a taxable year ending on September 30. ABC uses a taxable year ending on September 30 for Country X tax purposes. B is a calendar year taxpayer that uses the cash method of accounting. For its taxable year ending September 30, Year 1, ABC accrues $500x in foreign income tax to Country X; each partner's distributive share of the foreign income tax is $250x. In its taxable year ending September 30, Year 5, ABC settles a contest with Country X with respect to its Year 1 tax liability and, as a result of such settlement, accrues an additional $100x in foreign income tax for Year 1. ABC remits the additional tax to Country X in January of Year 6. A and B both elect to claim foreign tax credits for their respective taxable Years 1 through 6.

(ii) *Analysis*. For its taxable year ending September 30, Year 1, A can claim a credit for its $250x distributive share of foreign income taxes paid by ABC with respect to ABC's taxable year ending September 30, Year 1. Pursuant to paragraph (f)(1) of this section, B can claim its distributive share of $250x of foreign income tax for its taxable year ending December 31, Year 1, even if ABC does not remit the Year 1 taxes to Country X until Year 2. Although the additional $100x of Country X foreign income tax owed by ABC with respect to Year 1 accrued in its taxable year ending September 30, Year 5, upon conclusion of the contest, because ABC uses the accrual method of accounting, it does not take the additional tax into account until the tax is actually paid, in its taxable year ending September 30, Year 6. See section 905(c)(2)(B) and paragraph (f)(1) of this section. Pursuant to §1.905-4(b)(2), ABC is required to notify the IRS and its partners of the foreign tax redetermination. A's distributive share of the additional tax relates back, is considered to accrue, and may be claimed as a credit for Year 1; however, A cannot claim a credit for the additional tax until Year 6, when ABC remits the tax to Country X. See §1.905-3(a). B's distributive share of the additional tax does not relate back to Year 1 and is creditable in B's taxable year ending December 31, Year 6.

(g) *Blocked income*. * * *

(h) *Applicability dates*. This section applies to foreign income taxes paid or accrued in taxable years beginning on or after [date final regulations are filed in the **Federal Register**]. In addition, the election described in paragraph (d)(4) of this section may be made with respect to amounts of contested tax that are remitted in taxable years beginning on or after [date final regulations are filed in the **Federal Register**] and that relate to a taxable year beginning before [date final regulations are filed in the **Federal Register**].

Par. 31. Section 1.905-3, as amended in FR Doc. 2020-21819, published elsewhere in this issue of the **Federal Register**, is further amended:

1. In paragraph (a), by revising the first two sentences.

2. By adding paragraph (b)(4).

3. By revising paragraph (d).

The revisions and addition read as follows:

§1.905-3 Adjustments to U.S. tax liability and to current earnings and profits as a result of a foreign tax redetermination.

(a) * * * For purposes of this section and §1.905-4, the term *foreign tax redetermination* means a change in the liability for foreign income taxes (as defined in §1.901-2(a)) or certain other changes described in this paragraph (a) that may affect a taxpayer's U.S. tax liability, including by reason of a change in the amount of its foreign tax credit, a change to claim a foreign tax credit for foreign income taxes that it previously deducted, a change to claim a deduction for foreign income taxes that it previously credited, a change in the amount of its distributions or inclu-

sions under sections 951, 951A, or 1293, a change in the application of the high-tax exception described in §1.954-1(d), or a change in the amount of tax determined under sections 1291(c)(2) and 1291(g)(1)(C)(ii). In the case of a taxpayer that claims the credit in the year the taxes are paid, a foreign tax redetermination occurs if any portion of the tax paid is subsequently refunded, or if the taxpayer's liability is subsequently determined to be less than the amount paid and claimed as a credit. * * *

(b) * * *

(4) *Change in election to claim a foreign tax credit*. A redetermination of U.S. tax liability is required to account for the effect of a timely change by the taxpayer to claim a foreign tax credit or a deduction for foreign income taxes paid or accrued in any taxable year as permitted under §1.901-1(d).

* * * * *

(d) *Applicability dates*. Except as provided in this paragraph (d), this section applies to foreign tax redeterminations occurring in taxable years ending on or after December 16, 2019**,** and to foreign tax redeterminations of foreign corporations occurring in taxable years that end with or within a taxable year of a United States shareholder ending on or after December 16, 2019 and that relate to taxable years of foreign corporations beginning after December 31, 2017. The first two sentences of paragraph (a) of this section, and paragraph (b)(4) of this section, apply to foreign tax redeterminations occurring in taxable years beginning on or after [date final regulations are filed with the **Federal Register**].

§1.954-1 [AMENDED]

Par. 32. Section 1.954-1, as proposed to be amended in 85 FR 44650 (July 23, 2020), is further amended by removing the second sentence in paragraph (d)(1)(iv)(A).

Par. 33. Section 1.960-1, as amended in FR Doc. 2020-21819, published elsewhere in this issue of the **Federal Register**, is further amended:

1. By revising paragraph (b)(4).

2. By redesignating paragraphs (b)(5) through (37) as paragraphs (b)(6) through (38), respectively.

3. By adding a new paragraph (b)(5).

4. By revising newly redesignated paragraph (b)(6) and paragraph (c)(1)(ii).

5. By redesignating paragraphs (c)(1)(iii) through (vi) as paragraphs (c)(1)(iv) through (vii).

6. By adding a new paragraph (c)(1)(iii).

7. In newly redesignated paragraph (c)(1)(iv), by removing the language "Third, current year taxes" in the first sentence adding the language "Fourth, eligible current year taxes" in its place.

8. In newly redesignated paragraph (c)(1)(v), by removing the language "Fourth," from the first sentence and adding the language "Fifth," in its place.

9. In newly redesignated paragraph (c)(1)(vi), by removing the language "Fifth," from the first sentence and adding the language "Sixth," in its place.

10. In newly redesignated paragraph (c)(1)(vii), by removing the language "Sixth," from the first sentence and adding the language "Seventh," in its place.

11. In paragraph (d)(1), by removing the language "the U.S. dollar amount of current year taxes" from the first sentence and adding the language "the U.S. dollar amount of eligible current year taxes" in its place.

12. In paragraph (d)(3)(i) introductory text, by removing the language "current year taxes" from the second sentence and adding the language "eligible current year taxes" in its place.

13. In paragraph (d)(3)(ii)(A), by revising the last sentence.

14. In paragraph (d)(3)(ii)(B), by removing the language "a current year tax" from the first sentence and adding the language "an eligible current year tax" in its place.

15. In paragraph (f)(1)(ii), by removing the language "tax" from the fifth sentence and adding the language "eligible current year tax" in its place.

16. In paragraph (f)(2)(ii)(B)(*1*), by removing the language "current year taxes" from the last sentence and adding the language "eligible current year taxes" in its place.

17. In paragraph (f)(2)(ii)(B)(*2*), by removing the language "current year taxes" from the fifth sentence and adding the language "eligible current year taxes" in its place.

The additions and revisions read as follows:

§1.960-1 Overview, definitions, and computational rules for determining foreign income taxes deemed paid under section 960(a), (b), and (d).

* * * * *

(b) * * *

(4) *Current year tax*. The term *current year tax* means a foreign income tax that is paid or accrued by a controlled foreign corporation in a current taxable year (taking into account any adjustments resulting from a foreign tax redetermination (as defined in §1.905-3(a)). See §1.905-1 for rules on when foreign income taxes are considered paid or accrued for foreign tax credit purposes; see also §1.367(b)-7(g) for rules relating to foreign income taxes associated with foreign section 381 transactions and hovering deficits.

(5) *Eligible current year tax*. The term *eligible current year tax* means a current year tax, except that an eligible current year tax does not include a current year tax paid or accrued by a controlled foreign corporation for which a credit is disallowed or suspended at the level of the controlled foreign corporation. See, for example, sections 245A(e)(3), 901(k)(1), (l), and (m), 909, and 6038(c)(1)(B). Eligible current year tax, however, includes a current year tax that may be deemed paid but for which a credit is reduced or disallowed at the level of the United States shareholder. See, for example, sections 901(e), 901(j), 901(k)(2), 908, 965(g), and 6038(c)(1)(A).

(6) *Foreign income tax*. The term *foreign income tax* has the meaning provided in §1.901-2(a).

* * * * *

(c) * * *

(1) * * *

(ii) Second, deductions (other than for current year taxes) of the controlled foreign corporation for the current taxable year are allocated and apportioned to reduce gross income in the section 904 categories and the income groups within a section 904 category. See paragraph (d)(3)(i) of this section. Deductions for current year taxes (other than eligible current year taxes) of the controlled foreign corporation for the current taxable year are

allocated and apportioned to reduce gross income in the section 904 categories and the income groups within a section 904 category. Additionally, the functional currency amounts of eligible current year taxes are allocated and apportioned to reduce gross income in the section 904 categories and the income groups within a section 904 category, and to reduce earnings and profits in the PTEP groups that were increased as provided in paragraph (c)(1)(i) of this section. No deductions other than eligible current year taxes may be allocated and apportioned to PTEP groups. See paragraph (d)(3)(ii) of this section.

(iii) Third, for purposes of computing foreign taxes deemed paid, eligible current year taxes that were allocated and apportioned to income groups and PTEP groups in the section 904 categories are translated into U.S. dollars in accordance with section 986(a).

* * * * *

(d) * * *

(3) * * *

(ii) * * *

(A) * * * For purposes of determining foreign income taxes deemed paid under the rules in §§1.960-2 and 1.960-3, the U.S. dollar amount of eligible current year taxes is assigned to the section 904 categories, income groups, and PTEP groups (to the extent provided in paragraph (d)(3)(ii)(B) of this section) to which the eligible current year taxes are allocated and apportioned.

* * * * *

Par. 34. Section 1.960-2, as amended in FR Doc. 2020-21819, published elsewhere in this issue of the **Federal Register**, is further amended:

1. In paragraph (b)(2), by removing the language "current year taxes" and adding the language "eligible current year taxes" in its place.

2. In paragraph (b)(3)(i), by removing the language "current year taxes" each place it appears and adding the language "eligible current year taxes" in its place.

3. In paragraph (b)(5)(i), by revising the seventh sentence.

4. In paragraph (b)(5)(ii)(A), by revising the first and second sentences.

5. In paragraph (b)(5)(ii)(B), by revising the first and second sentences.

6. In paragraph (c)(4), by removing the language "current year taxes" and adding the language "eligible current year taxes" in its place.

7. In paragraph (c)(5), by removing the language "current year taxes" each place it appears and adding the language "eligible current year taxes" in its place.

8. In paragraph (c)(7)(i)(A), by revising the fifth sentence.

9. In paragraph (c)(7)(i)(B), by revising the first and second sentences.

10. In paragraph (c)(7)(ii)(A)(*1*), by revising the ninth and eleventh sentences.

11. In paragraph (c)(7)(ii)(B)(*1*)(*i*), by revising the first and second sentences.

12. In paragraph (c)(7)(ii)(B)(*1*)(*ii*), by removing the language "foreign income taxes" in the first sentence and adding the language "eligible current year taxes" in its place.

The additions and revisions read as follows:

§1.960-2 Foreign income taxes deemed paid under sections 960(a) and (d).

* * * * *

(b) * * *

(5) * * *

(i) * * * CFC has current year taxes, all of which are eligible current year taxes, translated into U.S. dollars, of $740,000x that are allocated and apportioned as follows: $50,000x to subpart F income group 1; $240,000x to subpart F income group 2; and $450,000x to subpart F income group 3. * * *

(ii) * * *

(A) * * * Under paragraphs (b)(2) and (3) of this section, the amount of CFC's foreign income taxes that are properly attributable to items of income in subpart F income group 1 to which a subpart F inclusion is attributable equals USP's proportionate share of the eligible current year taxes that are allocated and apportioned under §1.960-1(d)(3)(ii) to subpart F income group 1, which is $40,000x ($50,000x x 800,000u/1,000,000u). Under paragraphs (b)(2) and (3) of this section, the amount of CFC's foreign income taxes that are properly attributable to items of income in subpart F income group 2 to which a subpart F inclusion is attributable equals USP's proportionate share of the eligible current year taxes that are allocated and apportioned under §1.960-1(d)(3)(ii) to subpart F income group 2, which is $192,000x ($240,000x x 1,920,000u / 2,400,000u). * * *

(B) * * * Under paragraphs (b)(2) and (3) of this section, the amount of CFC's foreign income taxes that are properly attributable to items of income in subpart F income group 3 to which a subpart F inclusion is attributable equals USP's proportionate share of the eligible current year taxes that are allocated and apportioned under §1.960-1(d)(3)(ii) to subpart F income group 3, which is $360,000x ($450,000x x 1,440,000u / 1,800,000u). CFC has no other subpart F income groups within the general category. * * *

* * * * *

(c) * * *

(7) * * *

(i) * * *

(A) * * * CFC1 has current year taxes, all of which are eligible current year taxes, translated into U.S. dollars, of $400x that are all allocated and apportioned to the tested income group. * * *

(B) * * * Under paragraph (c)(5) of this section, USP's proportionate share of the eligible current year taxes that are allocated and apportioned under §1.960-1(d)(3)(ii) to CFC1's tested income group is $400x ($400x x 2,000u / 2,000u). Therefore, under paragraph (c)(4) of this section, the amount of foreign income taxes that are properly attributable to tested income taken into account by USP under section 951A(a) and §1.951A-1(b) is $400x. * * *

(ii) * * *

(A) * * *

(*1*) * * * CFC1 has current year taxes, all of which are eligible current year taxes, translated into U.S. dollars, of $100x that are all allocated and apportioned to CFC1's tested income group. * * * CFC2 has current year taxes, all of which are eligible current year taxes, translated into U.S. dollars, of $20x that are allocated and apportioned to CFC2's tested income group.

* * * * *

(B) * * *

(*1*) * * *

(*i*) * * * Under paragraphs (c)(5) and (6) of this section, US1's proportionate share of the eligible current year taxes that are allocated and apportioned under §1.960–1(d)(3)(ii) to CFC1's tested income group is $95x ($100x × 285u / 300u). Therefore, under paragraph (c)(4) of this section, the

amount of the foreign income taxes that are properly attributable to tested income taken into account by US1 under section 951A(a) and § 1.951A–1(b) is $95x. * * * * * * * *

Par. 35. Section 1.960-7, as amended in FR Doc. 2020-21819, published elsewhere in this issue of the Federal Register, is further amended by revising paragraph (b) to read as follows:

§1.960-7 Applicability dates.

* * * * *

(b) Section 1.960-1(c)(2) and (d)(3)(ii) apply to taxable years of a foreign corporation beginning after December 31, 2019, and to each taxable year of a domestic corporation that is a United States shareholder of the foreign corporation in which or with which such taxable year of such foreign corporation ends. For taxable years of a foreign corporation that end on or after December 4, 2018, and also begin before January 1, 2020, see §1.960-1(c)(2) and (d)(3)(ii) as in effect on December 17, 2019. Paragraphs (b)(4), (5), and (6), (c)(1)(ii), (iii), and (iv), and (d)(3)(ii)(A) and (B) of §1.960-1, and paragraphs (b)(2), (b)(3)(i), (b)(5)(i), (b)(5)(iv)(A), and (c)(4), (5), and (7) of §1.960-2, apply to taxable years of foreign corporations beginning on or after [date final regulations are filed in the **Federal Register**], and to each taxable year of a domestic corporation that is a United States shareholder of the foreign corporation in which or with which such taxable year of such foreign corporation ends. For taxable years of foreign corporations beginning before [date final regulations are filed in the **Federal Register**], with respect to the paragraphs described in the preceding sentence, see §§1.960-1 and 1.960-2 as in effect on November 12, 2020.

Sunita Lough,
Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on November 2, 2020, 11:15 a.m., and published in the issue of the Federal Register for November 12, 2020, 85 F.R. 72078)

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

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[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2019–27 through 2019–52 is in Internal Revenue Bulletin 2019–52, dated December 27, 2019.

Finding List of Current Actions on Previously Published Items[1]

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[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2019–27 through 2019–52 is in Internal Revenue Bulletin 2019–52, dated December 27, 2019.

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INTERNAL REVENUE BULLETIN

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