



# MANUAL TRANSMITTAL

Department of the Treasury  
Internal Revenue Service

32.1.5

NOVEMBER 18, 2019

## EFFECTIVE DATE

(11-18-2019)

## PURPOSE

- (1) This transmits revised CCDM 32.1.5, Regulation Handbook, Required Format for Regulations.

## BACKGROUND

- (1) CCDM 32.1.5, Required Format for Regulations, is being revised to provide updated formatting and provide additional information regarding the Regulatory Flexibility Act.

## MATERIAL CHANGES

- (1) CCDM 32.1.5.4.5.1 is revised to remove the option to hand deliver public comments.
- (2) CCDM 32.1.5.4.7 and 32.5.4.7.5.4 are revised to move the Paperwork Reduction Act analysis to the special analysis section in preambles.
- (3) CCDM 32.1.5.4.7 is also revised to add a paragraph regarding headings in the Special Analysis section.
- (4) CCDM 32.1.5.4.7.5.3 is revised to add a paragraph on the memorandum of agreement entered into by Treasury and the Office of Information and Regulatory Affairs in the Office of Management and Budget regarding the application of E.O. 12866 to tax regulatory actions.
- (5) CCDM 32.1.5.4.7.5.5 is revised to reflect the mandatory requirement to provide a factual basis to certify that a Regulatory Flexibility Act analysis is not required.

## EFFECT ON OTHER DOCUMENTS

This section supersedes CCDM 32.1.5 dated August 21, 2018.

## AUDIENCE

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32.1.5

Required Format for Regulations

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32.1.5.1  
(08-21-2018)  
**Overview of Format  
Required by the OFR**

- (1) The Office of the Federal Register (OFR) has adopted certain format and content rules for regulations that are to be published in the Federal Register. Regulations must include the following:
  - Billing Code
  - Headings
  - Preamble Requirements
  - List of Subjects
  - Regulatory Text
  - Signature Block
- (2) **Double-space** the text of regulations, except for the following, which are **single-spaced**:
  - Titles
  - Tables of Content
  - Quotations
  - Examples
- (3) When using “section” or “chapter” in the regulation preamble to refer to provisions of the Internal Revenue Code, the drafting team should include “of the Internal Revenue Code” only the first time. For example, the drafting team should use the phrase “section 382 of the Internal Revenue Code” for the first reference, and then use “section 382” for subsequent references. (A different rule, described in CCDM 32.1.5.7.3, applies to the regulation text.)
- (4) The drafting team should use the section symbol, “§ ”, to refer to a regulation section, unless it would be the first character in a sentence. When the section symbol would be the first character in a sentence, the drafting team should spell it out “Section.” Do not put a space between the “§” and the regulation section number. For example, “See §1.401(k)-1(a)(7) for rules applicable to collectively bargained plans.”
- (5) When citing a statute, the drafting team should spell out the word “section” (as opposed to using the section symbol, §), unless the drafting team is using a citation form such as “26 U.S.C. 7805,” in which case no words or symbol is used.
- (6) OFR document formatting and content requirements may be found in the Federal Register Document Drafting Handbook. It is available on-line at the OFR web site.

32.1.5.2  
(08-11-2004)  
**Billing Code**

- (1) The Government Printing Office (GPO) assigns a billing code to each agency that publishes documents in the Federal Register. GPO uses this code to bill the agency for printing costs. The billing code must appear on each document submitted for publication.
- (2) The IRS billing code is 4830-01-p.
- (3) The billing code appears at the top of the first page, flush left, in brackets.

**Example:**  
[4830-01-p]

32.1.5.3  
(08-11-2004)  
**Headings**

- (1) The term “headings” refers to the general headings denoting sections and paragraphs (see CCDM 32.1.5.3.7), or the specific heading that must be included at the beginning of the document.
- (2) General headings for sections and paragraphs identify the subject matter of the section or paragraph. Section and paragraph headings in the text of the regulation are underlined. However, when published in the Federal Register, section headings appear in bold face and paragraph headings appear in italics.
- (3) The document containing the regulation must contain the following specific headings:
  - Name of the department,
  - Name of the agency within the department,
  - CFR title and part(s) affected by the regulation,
  - TD identification number or NPRM identification number,
  - Regulation Identifier Number (RIN), and
  - Subject.
- (4) Each specific heading is positioned flush left. Any specific heading that is over one line long is single-spaced.
- (5) Each required specific heading is discussed below, followed by examples.

32.1.5.3.1  
(08-21-2018)  
**Department Name**

- (1) The department name is: **DEPARTMENT OF THE TREASURY**.  
**Note:** This is the only heading that is typed in all capital letters and in bold font.

32.1.5.3.2  
(08-11-2004)  
**Agency Name**

- (1) The agency name is: Internal Revenue Service.

32.1.5.3.3  
(08-11-2004)  
**CFR Title and Part Number**

- (1) This item identifies, in numerical order, the part or parts of title 26 of the CFR that the regulation amends or proposes to amend. Even if the regulation affects only one paragraph within a part, that part must be identified.
- (2) The drafting team must determine the part in title 26 where the regulation belongs. For example, part 1 is income taxes, part 31 is employment taxes and collection of income tax at the source, part 52 is environmental taxes, and part 301 is procedure and administration.
- (3) Sometimes the same rule needs to be added to two or more parts or a cross-reference to the new rule needs to be added in a different part.
- (4) See *CCDM 32.1.1.3.2.3* The Code of Federal Regulations (CFR), for a list of the most commonly used CFR parts. See Exhibit 32.1.5-1 for a complete list of the CFR parts and part headings,

**Example:** 26 CFR Parts 1 and 52

32.1.5.3.4  
(08-21-2018)  
**TD, ANPRM, and NPRM  
Identification Number**

- (1) A Treasury decision (TD) number identifies final and temporary regulations. The FRL assigns the TD number after the Commissioner/Deputy Commissioner for Services and Enforcement and the Assistant Secretary of the Treasury (Tax Policy) sign the regulation document and before it is forwarded to the OFR. Until that time, **TD XXXX** should appear in the draft regulation document.
- (2) A CASE-MIS ID number that begins with “REG” identifies an ANPRM or an NPRM. See CCDM 32.1.2.2, Opening a Regulation Project, and CCDM 32.1.2.2.2, Project ID (available *here*).
- (3) The TD and CASE-MIS ID numbers are typed in brackets.

**Examples:**

[TD 7843]  
[REG-203796-96]

32.1.5.3.5  
(08-21-2018)  
**RIN**

- (1) See *CCDM 32.1.2.2.5*, Obtaining an OMB Regulation Identifier Number, for more information about the RIN.

**Example:** RIN 1545-AQ23

32.1.5.3.6  
(08-11-2004)  
**Subject**

- (1) The subject is the title of the regulation and briefly describes the subject matter of the regulation. It is typed single-spaced. The drafting team should capitalize the first letter of each word, other than articles, conjunctions, and prepositions.

**Example:** Exports of Ozone-Depleting Chemicals; Special Rules for Certain Medical Uses of Ozone-Depleting Chemicals

32.1.5.3.7  
(08-21-2018)  
**Examples of Headings**

- (1) Headings for ANPRMs, NPRMs, and TDs are illustrated by the following examples.

**ANPRM and NPRM**

[4830-01-p]

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Part 52**

[REG-203796-96]

**RIN 1545-AQ23**

**Exports of Ozone-Depleting Chemicals; Special Rules  
for Certain Medical Uses of Ozone-Depleting  
Chemicals**

TD

[4830-01-p]

**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 52****[TD 7843]****RIN 1545-AQ23****Exports of Ozone-Depleting Chemicals; Special Rules  
for Certain Medical Uses of Ozone-Depleting  
Chemicals**32.1.5.4  
(08-21-2018)  
**Preamble**

- (1) The preamble contains explanatory information that informs the reader of what is being proposed or adopted and enables the reader to determine whether it is affected by the regulation. The preamble contains no regulation text.
- (2) The following captions, in the order shown, are used for the preamble. The drafting team should type the captions in all capital letters, flush left, followed by a colon.
  - **AGENCY:**
  - **ACTION:**
  - **SUMMARY:**
  - **DATES:**
  - **ADDRESSES: (for ANPRMs and NPRMs)**
  - **FOR FURTHER INFORMATION CONTACT:**
  - **SUPPLEMENTARY INFORMATION:**

32.1.5.4.1  
(08-21-2018)  
**AGENCY Caption**

- (1) For IRS/Treasury regulations, this caption is:
  - **AGENCY:** Internal Revenue Service (IRS), Treasury.

32.1.5.4.2  
(08-21-2018)  
**ACTION Caption**

- (1) This caption identifies the type of regulation. It does not summarize the subject matter of a particular regulation. Frequently used ACTION captions include the following:
  - **ACTION:** Advance notice of proposed rulemaking.
  - **ACTION:** Notice of proposed rulemaking and notice of public hearing.
  - **ACTION:** Notice of proposed rulemaking.
  - **ACTION:** Temporary regulation.
  - **ACTION:** Notice of proposed rulemaking by cross-reference to temporary regulation.
  - **ACTION:** Final regulation.
  - **ACTION:** Final and temporary regulations.
  - **ACTION:** Withdrawal of notice of proposed rulemaking.



- **ACTION:** Notice of public hearing on proposed rulemaking.
- **ACTION:** Statement of procedural rules.

32.1.5.4.3  
(08-21-2018)  
**SUMMARY Caption**

- (1) The SUMMARY briefly answers the following three questions:
  - What action is the agency taking?
  - Why is this action necessary?
  - Who will be affected by this action?
- (2) When preparing the SUMMARY the drafting team should:
  - Be brief
  - Use language a nonexpert will understand
  - State what the regulation does, not how it affects the CFR
  - Refer to an act of Congress by its popular name
  - Not use legal citations
  - Not include regulatory history or extensive background
  - Not include qualifications, exceptions, or specific details
- (3) The drafting team should not use the SUMMARY to prove or argue a point. The drafting team should provide supporting information, details, discussion of the regulatory history, and precise legal citations under the SUPPLEMENTARY INFORMATION caption. See CCDM 32.1.5.4.7 for further information.

**Example 1: ANPRM**

**SUMMARY:** This document describes and explains rules and standards that Treasury and the IRS expect to propose in 2002 in a notice of proposed rulemaking that will clarify the application of section 263(a) of the Internal Revenue Code to expenditures incurred in acquiring, creating, or enhancing certain intangible assets or benefits. This document also invites comments from the public regarding these standards. All materials submitted will be available for public inspection and copying.

**Example 2: NPRM (with Notice of Public Hearing)**

**SUMMARY:** This document contains proposed regulations that provide guidance regarding the allowance of certain charitable contribution deductions, the substantiation requirements for charitable contributions of \$250 or more, and the disclosure requirements for quid pro quo contributions in excess of \$75. The regulations reflect changes to the law made by the Omnibus Budget Reconciliation Act of 1993. The regulations will affect certain charitable organizations and individuals and entities that make payments to those organizations. This document also provides a notice of a public hearing on these proposed regulations.

**Example 3: TEMP**

**SUMMARY:** This document contains temporary regulations that provide rules for obtaining and using IRS adoption taxpayer identification numbers. The regulations affect individuals who are in the process of adopting children and will be claiming certain tax benefits with respect to those children. The text of these temporary regulations also serves as the text of the proposed regulations set forth in the Proposed Rules section in this issue of the **Federal Register**.

**Example 4: FINAL**

**SUMMARY:** This document contains final regulations relating to certain adoptions, changes, and retentions of annual accounting periods. The final regulations are necessary to update, clarify, and reorganize the rules and procedures for adopting, changing, and retaining a taxpayer's annual accounting period. The final regulations primarily affect taxpayers that want to adopt an annual accounting period under section 441 or that must receive approval from the Commissioner to adopt, change, or retain their annual accounting periods under section 442.

32.1.5.4.4  
(08-21-2018)  
**DATES Caption**

- (1) The drafting team should insert a specific date or direct the OFR to compute and insert a date that is tied to the date the regulation is filed with, or published in, the Federal Register. In computing a date, the OFR begins counting on or after (as instructed) the date of filing or publication. If the date to be inserted falls on a weekend or a Federal holiday, the OFR uses the next Federal business day. See *CCDM 32.1.1.3.2.4*, Federal Register Liaison Officers, and *CCDM 32.1.6.11.2*, After Obtaining Filing and Publication Dates, for further information. For temporary regulations, if the expiration date falls on a weekend or a Federal holiday, the OFR uses the prior Federal business day.
- (2) To direct the OFR to compute and insert a date, the drafting team should bracket, capitalize, bold, and underline the date instructions.

**Example:**

**DATES:** Written or electronic comments must be received by [INSERT DATE 90 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*].

32.1.5.4.4.1  
(08-21-2018)  
**ANPRM and NPRM**

- (1) When setting deadlines for comments on regulations or scheduling public hearings regarding regulations, the drafting team must consider the requirements of Executive Order 12866, as supplemented by Executive Order 13563. Executive Orders 12866 and 13563 provide the following guidance
  - a. Before issuing an NPRM, an agency should, where appropriate and feasible, seek the involvement of those who are intended to benefit from, and those expected to be burdened by, any regulation (including specifically, State, local, and tribal officials).

- b. An agency should afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, which, in most cases, should include a comment period of at least 60 days.
  - c. An agency, to the extent feasible and permitted by law, must provide, for both proposed and final rules, timely online access to the rulemaking docket on *regulations.gov*. For proposed rules, such access includes an opportunity to comment on all pertinent parts of the rulemaking docket.
- (2) The DATES caption of an ANPRM provides the deadline for submitting comments.
  - (3) The DATES caption of an NPRM provides the:
    - Deadline for submitting comments
    - Date of the public hearing, if one has been scheduled, or deadline for requesting a public hearing, if one has not been scheduled (see *CCDM 32.1.7.3*, Public Hearings)
    - Deadline for submitting outlines of topics, if a public hearing has been scheduled (see *CCDM 32.1.7.3*)
  - (4) The deadline for submitting comments (and for requesting a public hearing if one has not been scheduled) is usually 90 days (but not less than 60 days) after the date of publication in the Federal Register. If a public hearing has been scheduled, the deadline for outlines of topics is usually three weeks prior to the hearing date. See *CCDM 32.1.7.3.1*, Teleconferenced Public Hearings, for specific information regarding teleconferenced public hearings.
  - (5) If the preamble to the NPRM discusses the proposed effective date of a regulation, the drafting team should set out that discussion under the SUPPLEMENTARY INFORMATION caption, in a paragraph designated as “Proposed Effective Date.” The drafting team should not discuss the proposed effective date of a regulation in the DATES section of an NPRM.

## **Examples:**

**DATES:** Comments must be received by [INSERT DATE 90 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*].  
Outlines of topics to be discussed at the public hearing scheduled for Tuesday, June 3, 2003, at 10 a.m. must be received by Tuesday, May 13, 2003.

**DATES:** Comments and requests for a public hearing must be received by [INSERT DATE 90 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*].

### 32.1.5.4.4.2 (08-21-2018) **TD**

- (1) The DATES caption of a TD provides the
  - Effective Date (mandatory)
  - Date(s) of Applicability (optional)
- (2) The OFR defines “effective date” as the date on which the amendments in the TD would be added to the CFR, if the OFR updated the CFR daily. This date is mandatory and applies to all final and temporary regulations.

- (3) Some IRS/Treasury regulations apply only on or after a certain date (for example, final regulations may provide that substantive rules apply on or after a particular date or to taxable years beginning on or after a particular date). This date is known as the “date of applicability.” The date of applicability appears in the regulatory text in the “Applicability date” section.
- (4) In many cases, the effective and applicability dates are identical.
- (5) For purposes of the Administrative Procedure Act and section 7805(b) of the Code, the applicability date, and not the effective date, is used to determine when the regulations have force and effect.
- (6) If adding the date of applicability to the DATES caption, the drafting team may either:
  - a. Repeat the applicability date section of the regulation, or
  - b. Provide a cross-reference to the applicability date section of the regulation.

**Example:**

The TD is published in the Federal Register on November 1, 1999.  
The regulatory text provides for a January 1, 2000, applicability date.

(g) *Applicability date.* This section applies to qualified escrow accounts and qualified trusts established after December 31, 1999.

**Note:**

The DATES section of the preamble may read as one of the following:

**DATES:** Effective Date:  
These regulations are effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Applicability Date:  
These regulations apply to qualified escrow accounts and qualified trusts established after December 31, 1999.

**DATES:** Effective Date:  
These regulations are effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Applicability Date: For dates of applicability, *see* §1.468B-6(g).

32.1.5.4.4.3  
(08-11-2004)  
**Table of Effective Dates  
and Time Periods**

- (1) The OFR uses the Table of Effective Dates and Time Periods (Table) to compute certain dates such as effective dates (see CCDM 32.1.5.4.4.2) and comment deadlines (see CCDM 32.1.5.4.4.1) that appear in regulations. In computing these dates, the day after publication is counted as the first day. If a date falls on a weekend or holiday, use the next Federal business day. The OFR publishes the Table in the first Federal Register issued each month.

32.1.5.4.5  
(08-11-2004)  
**ADDRESSES Caption**

- (1) The ADDRESSES caption is always plural. This caption always appears in an ANPRM and an NPRM and appears in a TD that requests comments on issues discussed in the preamble. Under this caption, addresses are provided where to
  - a. Mail, hand deliver, or electronically submit public comments and other submissions, such as a request to speak at a public hearing,
  - b. Attend a public hearing, and
  - c. Examine any material available for public inspection.

32.1.5.4.5.1  
(11-18-2019)  
**Addresses for Submitting Comments**

Electronic comments	<i>www.regulations.gov</i>
U.S. Mail Address	Internal Revenue Service CC:PA:LPD:PR (REG-XXXXXX-XX) Room 5203 Post Office Box 7604 Ben Franklin Station Washington, DC 20044

**Example:**

**ADDRESSES:** Submit electronic submissions via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–118425–18) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment received to its public docket, whether submitted electronically or in hard copy. Send hard copy submissions to: CC:PA:LPD:PR (REG–118425–18), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

32.1.5.4.5.2  
(08-11-2004)  
**Public Hearing Address, Including Hearing Room**

- (1) Public hearings are held in several rooms in the National Office at 1111 Constitution Avenue. The Publications and Regulations Branch will reserve a hearing room and will furnish the drafting attorney with the hearing room information.

32.1.5.4.6  
(08-21-2018)  
**FOR FURTHER INFORMATION CONTACT Caption**

- (1) This caption identifies the individual or individuals who will receive telephone inquiries and answer questions about the regulation, submission of comments, and hearing.
- (2) In rare circumstances, a phone number may be provided without identifying a specific individual. Contact Procedure and Administration if this circumstance arises.
- (3) The name, telephone number, and a statement that the telephone number is not a toll-free number must be included.

**Example 1: FOR FURTHER INFORMATION CONTACT:** Drafting Attorney, (202) 317-XXXX (not a toll-free number).

**Example 2: FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Drafting Attorney, (202) 317-XXXX; concerning submissions of comments, the hearing, or to be placed on the building access list to attend the hearing, Publications and Regulations Branch Specialist, (202) 317-XXXX (not toll-free numbers).

32.1.5.4.7  
(11-18-2019)

#### **SUPPLEMENTARY INFORMATION Caption**

- (1) In the SUPPLEMENTARY INFORMATION caption, the drafting team should provide the history of the regulation, other background information, and an explanation of the basis and purpose of the regulation. This section also includes information about compliance with Federal administrative laws (such as the Paperwork Reduction Act, Administrative Procedure Act, and Regulatory Flexibility Act), IRS policies, and Executive Orders (such as Executive Order 12866).
- (2) The SUPPLEMENTARY INFORMATION caption generally includes the following descriptive, first level headings. The drafting team should type first level headings capitalizing the first letter of each word, except articles and prepositions consisting of less than five letters (for example “for,” “to,” “and,” “Under”) in bold font, printed flush left. The drafting team should present first level headings in the following order:
  - **Background**
  - **Explanation of Provisions** (for ANPRMs, NPRMs, and TEMPs) or **Summary of Comments** or **Explanation and Summary of Comments** (for final regulations)
  - **Effect on Other Documents** (if applicable)
  - **Special Analyses**
  - **Comments and Public Hearing** (if applicable)
  - **Drafting Information**
  - **List of Subjects**
- (3) The following headings may appear under Special Analyses:
  - Regulatory Planning and Review
  - Paperwork Reduction Act
  - Regulatory Flexibility Act
  - Unfunded Mandates Reform Act (in case of a major rule)
  - Executive Order 13132: Federalism (in case of a major rule)

32.1.5.4.7.1  
(08-21-2018)

#### **Background**

- (1) In the Background section, the drafting team should briefly discuss the history of the project. For example, if the IRS issues proposed, final, or temporary regulations in response to legislation, the drafting team should identify the legislation addressed. Also, the drafting team should discuss any significant case law that is contrary to the regulation or that informed the text of the regulation. Also, if the IRS issues a final regulation, the drafting team should provide a citation to the underlying NPRM and any ANPRM. If the agency issues an NPRM cross-referenced to temporary regulations, the drafting team should provide the citation to the temporary regulations. Do not provide a Federal Register citation to the cross-referenced NPRM in the corresponding temporary regulation.

**Example 1: NPRM****Background**

This document contains proposed amendments to 26 CFR part 1 under section 468B of the Internal Revenue Code (Code). Section 468B was added to the Code by section 1807(a)(7)(A) of the Tax Reform Act of 1986 (Public Law 99-514, 100 Stat. 2814) and was amended by section 1018(f) of the Technical and Miscellaneous Revenue Act of 1988 (Public Law 100-647, 102 Stat. 3582). Section 468B(g) provides that nothing in any provision of law shall be construed as providing that an escrow account, settlement fund, or similar fund is not subject to current income tax. Section 468B(g) further provides that the Secretary shall prescribe regulations providing for the taxation of such accounts or funds as a grantor trust or otherwise.

Final regulations (TD 8459) under section 468B(g) were published in the **Federal Register** on December 23, 1992 (57 FR 60983) to provide guidance concerning qualified settlement funds but not with respect to other types of escrow accounts, settlement funds, or similar funds. These proposed regulations provide guidance concerning section 1031 qualified escrow accounts, pre-closing and post-closing escrows, and disputed ownership funds.

**Example 2: NPRM by cross-reference to temporary regulations****Background**

Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** (64 FR 43910) amend 26 CFR part 1. The temporary regulations provide that an income tax return preparer who is an individual may furnish either a social security number or an alternative identifying number to satisfy the requirements of section 6109(a)(4). The text of those temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.



**Example 3: Temporary regulation****Background**

This document contains amendments to 26 CFR part 1. Section 6109(a)(4) of the Internal Revenue Code (Code) provides that any return or claim for refund prepared by an income tax return preparer must bear the identifying number of the preparer as required by regulations prescribed by the Secretary. Prior to its amendment by the Internal Revenue Service Restructuring and Reform Act of 1998 (Public Law 105-206, 112 Stat. 685 (RRA '98)), section 6109(a) provided that the identifying number of an individual preparer was that preparer's social security number (SSN).

Section 3710 of RRA '98 amended section 6109(a) by removing the requirement that an individual preparer's identifying number be the preparer's SSN. Instead, the Secretary may prescribe alternatives to the SSN for purposes of identifying individual preparers.

**Example 4: Final regulation****Background**

This document contains amendments to 26 CFR part 52. On September 6, 1990, a temporary regulation (TD 8311) relating to returns, payments, and deposits of tax under sections 4681 and 4682 (relating to the tax imposed on ozone-depleting chemicals) were published in the **Federal Register** (55 FR 36612). A notice of proposed rulemaking (REG-120200-87) cross-referencing the temporary regulations was published in the **Federal Register** on the same day (55 FR 36659). No public hearing was requested or held. Comments responding to the notice of proposed rulemaking were received. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision, and the corresponding temporary regulations are removed. The revisions are discussed below.

**Example 5: Final regulation (no change TD)****Background**

This document contains amendments to 26 CFR part 1. On January 22, 1999, a notice of proposed rulemaking (REG-XXXXXX-XX) relating to the taxation of capital gains on installment sales of depreciable real property was published in the **Federal Register** (64 FR 3457). No comments were received from the public in response to the notice of proposed rulemaking. No public hearing was requested or held. The proposed regulations are adopted by this Treasury decision.



32.1.5.4.7.2  
(08-21-2018)  
**Explanation of  
Provisions**

- (1) In the Explanation of Provisions section, the drafting team should describe the substantive provisions of the regulation in clear, concise, plain language without restating particular rules contained in the regulatory text.
- (2) If the regulation is of a length or complexity that the Explanation of Provisions section itself is lengthy or complex, the drafting team may include a short, straightforward executive summary at the beginning of the section. OMB issued a January 4, 2012 memorandum encouraging use of executive summaries. See Memorandum on Clarifying Regulatory Requirements: Executive Summaries, Office of Mgmt. & Budget, Exec. Office of the President (Jan. 4, 2012), available at [http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/clarifying-regulatory-requirements\\_executive-summaries.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/clarifying-regulatory-requirements_executive-summaries.pdf) In the infrequent case of a significant regulation under Executive Order 12866, as supplemented by Executive Order 13563, a major rule under the Congressional Review Act, or a lengthy, highly technical rule, it may be appropriate to make additional efforts to provide a concise summary of the rule particularly when the preamble itself is lengthy, or difficult to read because of the technical subject matter. A general guideline to be used when deciding whether a condensed executive summary is necessary is to favor inclusion when the document (preamble and regulatory text) exceeds 100 pages. A separate executive summary, however, is not automatically required for every 100+ page document. Merely because a regulation is in excess of 100 pages or it is a multiagency regulation is not determinative that another executive summary, which is more concise than the executive summary prepared in conformance with our normal procedures, is required. Overall, the drafting team should consider whether this additional concise executive summary will be helpful in understanding the preamble and regulations, or if it will just be repetitive.
- (3) For final regulations, the drafting team should use the heading title Summary of Comments or Summary of Comments and Explanation of Revisions, if appropriate. In this section, the drafting team should identify and describe the significant differences, if any, between the rules adopted in the final regulation and those proposed in the underlying NPRM. Do not repeat material stated in the preamble to the NPRM. If the final regulation primarily adopts the text of the NPRM without change, a statement should be added to the preamble of the final regulation that incorporates the explanation provided in the preamble to the NPRM. Also, the drafting team should address the public comments submitted in writing and the oral comments presented at the public hearing on the NPRM (generally, including late comments). The drafting team may choose to explain in the Summary of Comments where the comments can be found. If so, the explanation should state that all comments are available at [www.regulations.gov](http://www.regulations.gov) or upon request. The drafting team should explain why the agency found some comments persuasive, and others not, in issuing the final regulations. When discussing public comments, the IRS generally does not identify the parties submitting them. However, the drafting team should identify and discuss the comments submitted by the Chief Counsel for Advocacy of the Small Business Administration. See CCDM 32.1.5.4.7.5.2 for further information.
- (4) The drafting team should use 2<sup>nd</sup> level through 5<sup>th</sup> level headings, as necessary, to organize the text of the Explanation of Provisions, highlight individual rules or issues, explain particularly complicated issues, or identify issues on which the agency would like to receive public comments. Second through 5<sup>th</sup> level headings are printed flush left and single-spaced. The first word may be a symbol (for example “§”). These headings may be numbered or unnum-

bered. If numbered, OFR does not require any particular numbering convention (as it does for headings in the regulation text). When the Explanation of Provisions contains 2<sup>nd</sup> level through 5<sup>th</sup> level headings, the correct format is as follows:

- 2<sup>nd</sup> level heading: Capitalize the first letter of each word, except articles and prepositions with less than five letters (for example, “for,” “to,” and “Under”), underlined and not in bold font.
- 3<sup>rd</sup> level heading: Capitalize the first letter of the first word, underlined and not in bold font.
- 4<sup>th</sup> level heading: Capitalize the first letter of each word, except articles and prepositions that are less than five letters, not underlined and not in bold font.
- 5<sup>th</sup> level heading: Capitalize the first letter of the first word, not underlined and not in bold font.

**Example:**

**Summary of Comments and Explanation of Revisions**

1. Comments and Changes Relating to §1.441 of the Proposed Regulations

A. Definition of 52-53-week taxable year

\*\*\*\*\*

B. Changes to or from a 52-53-week taxable year

\*\*\*\*\*

C. Short periods of 6 days or less

\*\*\*\*\*

2. Comments and Changes Relating to §1.442 of the Proposed Regulations  
Time and Manner for Filing an Application

3. **Comments and Changes Relating to Partnerships, S Corporations, and Personal Service Corporations (PSCs)**

32.1.5.4.7.3  
(08-21-2018)  
**Effect on Other Documents**

- (1) A regulation is the highest form of published guidance and has the force and effect of law unless invalidated. A regulation may be used to affect a lower form of published guidance (i.e., revenue ruling, revenue procedure, or notice). However, a lower form of published guidance may not be used to affect a regulation.
- (2) If the regulation obsoletes, clarifies, or modifies a revenue ruling, revenue procedure, or notice, describe the change in the **Effect on Other Documents** section. The drafting team must notify the Internal Revenue Bulletin Unit of any effect the regulation has on other documents to ensure that the information is printed in the Internal Revenue Bulletin and the effect on other documents is made available to the public.

**Example:**

**Effect on Other Documents**

The following publications are obsolete as of [INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE **FEDERAL REGISTER**]:

Notice 90-8 (1990-1 CB 305).

Notice 90-9 (1990-1 CB 312).

32.1.5.4.7.4  
(08-21-2018)  
**Special Analyses**

- (1) The drafting team should use the Special Analyses section to describe compliance with (or the inapplicability of) Federal statutory (including the Code), regulatory, and Executive Branch mandates governing the regulatory process. The Administrative Procedure Act, the Regulatory Flexibility Act, Executive Order 12866, and sections 7805(e) and (f) of the Code contain some of these mandates.

32.1.5.4.7.4.1  
(08-21-2018)  
**Administrative Procedure Act**

- (1) The Administrative Procedure Act (APA) generally requires agencies that promulgate rules to provide public notice of a proposed rulemaking in the Federal Register, permit the public to submit written comments, and include a general statement of the rule's basis and purpose when publishing the final rule. 5 U.S.C. § 553(b), (c). Regulations required to follow the APA's notice and comment procedure are referred to as legislative rules or substantive rules.
  - a. The APA excepts from these requirements interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice. 5 U.S.C. § 553(b)(A).
  - b. The APA also excepts from notice and comment those regulations that an agency, for good cause, finds that notice and public comment are "impracticable, unnecessary, or contrary to the public interest" and incorporates the good cause finding and a brief statement of the reasons therefore in the rule it issues. 5 U.S.C § 553(b)(B). Good cause also excepts the application of the APA rule that requires regulations to be published 30 days before the effective date issues.
- (2) Under the guidelines in *CCDM 32.1.1.2.8*, How to Determine If a Rule Is Interpretative or Legislative, most IRS/Treasury regulations will be interpretative regulations because they fill gaps in legislation or have a prior existence in the law. Generally, the underlying Internal Revenue Code section imposing the tax or providing for collection of a tax will provide an adequate legislative basis for the action in the regulations. The regulations provide a mechanism to implement the Internal Revenue Code provision passed by Congress.
- (3) Although most IRS/Treasury regulations are interpretative, and therefore not subject to the notice-and-comment provisions of the APA, the Service usually solicits public comment when it promulgates a rule.
- (4) Section 553(d) of the APA requires agencies to publish regulations at least 30 days before their effective date. This provision does not apply to regulations
  - That adopt a substantive rule that grants or recognizes an exemption, or relieves a restriction, or
  - For which the agency has good cause.
- (5) Notice and comment are "impracticable" when the agency cannot "both follow section 553 and execute its statutory duties" and "unnecessary" when "the regulation is technical or minor." *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983). The public interest exception recognizes that "public rule-making procedures shall not prevent an agency from operating" and that "lack of public interest may warrant an agency to dispense with public procedure." 5 U.S.C. § 553(b)(B) (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945)).
- (6) The preamble should discuss and describe the circumstances causing the need for immediate guidance. The following considerations may support the conclusion that immediate guidance is necessary:

- The need to avoid confusion,
- The complexity of the regulatory framework addressed by the regulation,
- Congressional authorization for the issuance of the rule,
- The temporary or interim effect of the rule during which the agency devises a final rule incorporating notice and comment, and
- Agency diligence in seeking notice and comment and promulgating a final rule incorporating those comments in accordance with the APA.

- (7) In addition to a description of the need for immediate guidance, any regulation relying on the good cause exception should include language similar to the following:

“These regulations are necessary to provide taxpayers with immediate guidance. Accordingly, good cause is found for dispensing with notice and public comment pursuant to 5 U.S.C. 553(b) and (c) and with a delayed effective date pursuant to 5 U.S.C. 553(d).”

- (8) IRS/Treasury temporary regulations are generally issued when there is a need to provide taxpayers with immediate guidance. The need for immediate guidance should be explained.
- (9) IRS/Treasury regulations have the force and effect of law even though they are interpretative regulations.

32.1.5.4.7.4.2  
(08-11-2004)

**Section 7805(e) and (f)  
of the Code**

- (1) Section 7805(e) of the Code provides that any temporary regulation issued must also be issued as an NPRM.
- (2) Section 7805(f) provides that after publishing NPRMs and temporary regulations, the IRS will submit the regulations to the Chief Counsel for Advocacy (CCA) of the Small Business Administration (SBA) for comment on the impact of the regulations on small business. (The Publications and Regulations Branch is responsible for submitting regulations to the SBA after publication in the Federal Register.)
- a. IRS will consider the comments of the CCA when issuing final regulations and will respond to those comments in the preamble (see *CCDM 32.1.8.3*), Preamble to the Final Regulation, and
  - b. At least four weeks prior to publication in the Federal Register, the Publications and Regulations Branch will submit to the CCA for comment final regulations not preceded by an NPRM. The drafting team must consider any comments received in drafting the final regulations and must discuss the comments in the preamble to the final regulations.
- (3) If the regulation is an NPRM or temporary regulation, the drafting team should include the following statement:

“Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. ”

- (4) If the regulation is a final regulation that supersedes an NPRM or temporary regulation, the drafting team should include the following statement:

“Pursuant to section 7805(f) of the Internal Revenue Code, the NPRM preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.” OR “The Chief Counsel for Advocacy submitted comments on the regulation, which are discussed elsewhere in this preamble.”

- (5) If the regulation is a final regulation without a prior NPRM, the drafting team should include the following statement:

“Pursuant to section 7805(f) of the Internal Revenue Code, this regulation was submitted to the Chief Counsel for Advocacy of the SBA for comment on its impact on small business.” OR “The Chief Counsel for Advocacy submitted comments on the regulation, which are discussed elsewhere in this preamble.”

32.1.5.4.7.4.3  
(11-18-2019)  
**Executive Order 12866,  
as supplemented by  
Executive Order 13563**

- (1) The drafting team should state in the Special Analyses section whether the regulation is a significant regulatory action pursuant to E.O. 12866, as supplemented by Executive Order 13563.
- (2) Treasury and the Office of Information and Regulatory Affairs in the Office of Management and Budget entered into a *memorandum of agreement* regarding the application of E.O. 12866 to tax regulatory actions. See Exhibit 32.1.5-1 .
- (3) Section 3(a)(4)(B) of E.O. 12866 requires agencies to prepare a regulatory assessment for “significant regulatory actions.”
- (4) Section 3(f) of E.O. 12866 defines “significant regulatory action” as any regulatory action that is likely to result in a rule that may:
  - Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;
  - Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
  - Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
  - Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles of the Executive Order.

**Note:** Regulations that qualify as significant under the first bullet are often referred to as economically significant regulations.

- (5) Most IRS/Treasury regulations are not significant regulatory actions for two key reasons. First, the economic effect of a regulation under E.O. 12866 is not determined by the amount of taxes imposed or collected under the regulation. Federal taxes raise revenue to fund government operations and are not considered in determining economic effect. Second, most IRS/Treasury regulations merely implement a statute. The underlying statute provides adequate legal authority to impose or collect a tax, or issue a payment to a taxpayer. IRS/ Treasury regulations provide a mechanism for the tax to be satisfied or collected, or payment to be issued to the taxpayer. The effect from a rule in most IRS/Treasury regulations is almost always a result of the underlying

statute, rather than the regulation itself. If the regulation is not a significant regulatory action, the Special Analysis section should use the following language:

“This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations.”

- (6) Notwithstanding paragraph (4), IRS/Treasury regulations that do not relate to the imposition of tax may have an economic effect that does not flow from the relevant statute. In these circumstances, the drafting team must determine whether the rule has an economic effect on the economy of \$100 million or adversely affects the economy in a material way.

**Note:** OMB currently interprets E.O. 12866 so that the \$100 million annual effect threshold is met if the rule results in a \$100 million effect on the economy in any particular year.

- (7) If the regulation is not significant, the drafting team should document in the file the reasons why the regulation is not significant, including, for most projects, how any economic impact flows from the statute and not the regulation.

- (8) If the regulation is a significant regulatory action, the drafting team should include in the preamble the following statement:

“Executive Order 12866 requires certain regulatory assessments and procedures for a significant regulatory action, defined as [insert applicable definition under E.O. 12866]. This rule has been designated as significant and has been reviewed by the Office of Management and Budget as required under the provisions of E.O. 12866.”

- (9) Every rule that is determined to be significant must be submitted to OMB’s Office of Information & Regulatory Affairs with a regulatory impact analysis for review under E.O. 12866. The goal of the analysis is to determine if the benefits of the action justify the costs and if there is a viable alternative that is more cost effective. See OMB Circular A-4. A regulatory analysis should include:

- A statement of the need for the proposed action,
- An examination of alternative approaches, and
- An evaluation of the benefits and costs — quantitative and qualitative — of the proposed action and the main alternatives identified by the analysis.

- (10) OMB recommends that a cost-benefit analysis contain the following information:

- The cost-benefit analysis should explain how the actions required by the rule are linked to the expected benefits.
- The cost-benefit analysis should identify a baseline. Benefits and costs are defined in comparison with a clearly stated alternative. This normally will be a “no action” baseline: what the world will be like if the rule is not adopted. Comparisons to a “next best” alternative are also especially useful.



- The cost-benefit analysis should identify the expected undesirable side-effects and ancillary benefits of the regulatory action and the alternatives. These should be added to the direct benefits and costs, as appropriate.
  - The cost-benefit analysis should include specific cost-benefit numbers when possible.
- (11) Early and consistent consultation with Treasury and OMB is critical to moving a regulation that potentially may be significant through the published guidance process.
- (12) For additional assistance in preparing a regulatory analysis, see OMB Circular A-4 and the associated checklist for preparing a regulatory analysis, available at [http://www.whitehouse.gov/sites/default/files/omb/info/reg/regpol/RIA\\_Checklist.pdf](http://www.whitehouse.gov/sites/default/files/omb/info/reg/regpol/RIA_Checklist.pdf).
- (13) Although not all of the requirements are relevant to all IRS/Treasury regulations, both Executive Order 12866 and 13563 provide that to the extent permitted by law, each agency must:
1. Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify);
  2. Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;
  3. Select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts, and equity);
  4. To the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and
  5. Identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. If these requirements are relevant, they should be discussed in the preamble.
- (14) Executive Order 13563 directs agencies to attempt to promote coordination, simplification, harmonization, and innovation when considering regulatory actions and approaches. Agencies should also identify and consider regulatory approaches to reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible. If these considerations are relevant, they should be discussed in the preamble.

32.1.5.4.7.4.4  
(11-18-2019)  
**Paperwork Reduction Act**

- (1) As discussed in *CCDM 32.1.2.5*, Applicability of Paperwork Reduction Act, regulations containing a collection of information requirement are subject to the Paperwork Reduction Act (PRA) (44 U.S.C. 3501-3520). Regulations not containing a collection of information requirement are not subject to the PRA, and thus, are not required to have a Paperwork Reduction Act heading. For regulations subject to the PRA, the regulations must include text for the Paperwork Reduction Act heading that:

- a. Notifies the public that the agency submitted the collection of information requirement to OMB;
- b. Provides the OMB address where taxpayers should send comments on the collection of information requirement and the IRS address where taxpayers may submit copies of the comments;
- c. Identifies specific collection of information matters on which the agency would like taxpayers to submit comments;
- d. Provides a description of and need for the collection of information requirement;
- e. Identifies likely respondents;
- f. Provides a burden estimate;
- g. Notifies taxpayers that the collection of information requirement is not enforceable unless it displays an OMB control number (see *CCDM 32.1.2.5, Applicability of Paperwork Reduction Act*); and

Instructs taxpayers to retain material related to the collection of information as long as it may be necessary to administer the internal revenue laws.

32.1.5.4.7.4.5  
(11-18-2019)

**Regulatory Flexibility  
Act**

- (1) Congress enacted the Regulatory Flexibility Act (5 U.S.C. 601) (RFA) in 1980 to reduce the regulatory burden on small entities. Section 603 of the RFA required agencies to prepare a regulatory flexibility analysis of proposed and final regulations (other than interpretive regulations), assessing their impact on small entities. Treasury took the position that most IRS/Treasury regulations were interpretative and therefore not subject to the RFA of 1980.
- (2) In 1996, Congress passed the Small Business Regulatory Fairness and Enforcement Act (SBRFEA) (5 U.S.C. 801), amending the RFA. Pursuant to sections 603 and 604, as amended by SBRFEA, the RFA became applicable to interpretative rules (proposed on or after March 29, 1996) involving the internal revenue laws of the United States, but only to the extent they impose a collection of information requirement on small entities.
- (3) Executive Order 13272, published in the Federal Register on August 16, 2002, requires each agency to establish procedures and policies to promote compliance with the RFA, as amended. In 2003, the Department of the Treasury issued an Attachment to Treasury Directive 28-01 (Preparation and Review of Regulations), titled "Department of the Treasury Policy and Procedures to Ensure Consideration of Potential Impacts of Regulations on Small Businesses and Entities," which provides guidance for complying with E.O. 13272. The attachment can be found in Exhibit 32.1.5-3.
- (4) The attachment articulates the Department of the Treasury policy regarding the RFA and provides that all Treasury offices and bureaus:
  - a. Seek to minimize, consistent with statutory requirements and sound regulatory policy, the compliance and paperwork burdens of all their regulations on small entities. Small entities include small entities, small not-for-profit enterprises, and small governmental jurisdictions.
  - b. Adhere to the requirements of the RFA and other applicable law when developing regulations subject to that Act.
- (5) In the Special Analyses section, the regulations must state (as applicable):
  - a. That the regulation is not subject to the RFA and why,
  - b. That a regulatory flexibility analysis is not required. Include a certification that the regulation will not have a significant economic impact on a sub-



stantial number of small entities. Follow the certification with an explanation of the basis for the certification (and, if appropriate ask for comment on the accuracy of the certification), or

- c. That the agency has prepared a[n] [initial/final] regulatory flexibility analysis. Include the full analysis under the [Initial/Final] Regulatory Flexibility Analysis heading, which follows the Special Analyses heading.
- (6) Pursuant to section 605(b) of the RFA, an agency is not required to prepare the regulatory flexibility analysis if the head of the agency certifies that the collection of information requirement (for interpretative regulations) or the regulation itself (for legislative regulations) will not impose a significant economic impact on a substantial number of small entities. If in doubt about the accuracy of the certification, the drafting team should request comment on the accuracy of the certification.
  - (7) Notwithstanding a certification that an NPRM will not have a significant economic impact on a substantial number of small entities, if at any time prior to issuing a final regulation the IRS/Treasury finds that the regulation is likely to have a significant economic impact, the drafting team should notify the Senior Advisor to the General Counsel for Regulatory Affairs. The drafting team may need to prepare an analysis that is published in the Federal Register independently of the NPRM or an analysis for the final rule.
  - (8) If a regulatory flexibility analysis is required under the RFA, the drafting team must prepare a regulatory flexibility analysis for the regulation both when the regulation is issued as a proposed regulation and when it is issued as a final regulation. The drafting team must include the information set forth in 5 U.S.C. 603(b) and (c) (for NPRMs) or 5 U.S.C. 604(a) (for final regulations). An example of the type of information required to be included in the analysis is a description and estimate, where feasible, of the number of small entities to which the regulations will apply. See 5 U.S.C. 603(b)(3).
  - (9) Executive Order 13272 requires that agencies notify the Chief Counsel for Advocacy of the Small Business Administration (SBA) of NPRMs that require the preparation of an initial regulatory flexibility analysis prior to publication of the NPRM.
  - (10) The RFA is available at <http://www.archives.gov/federal-register/laws/regulatory-flexibility/>.
  - (11) SBRFEA is available at <http://www.archives.gov/federal-register/laws/small-business/>.
  - (12) Additional information, including the Small Business Administration (SBA) RFA Guide, is available on the Small Business Administration's web site at <http://www.sba.gov/advocacy>.

## 32.1.5.4.7.4.5.1 (08-21-2018) RFA Definitions

- (1) The term "collection of information requirement," as defined in the RFA, is synonymous, in all meaningful respects, to the term as defined in the PRA. See *CCDM 32.1.2.5, Applicability of Paperwork Reduction Act*. Generally, a collection of information includes:
  - a. A requirement that a small entity report information to the Federal Government,

- b. A requirement that a small entity maintain specified records, regardless of whether the information in those records is reported to the Federal government, and
  - c. A requirement that a small entity disclose information to a third party or to the public in general. See Exhibit 32.1.5-3.
- (2) The RFA defines “small entities” to include small businesses, small organizations, and small governmental jurisdictions. Small businesses include businesses that satisfy the Small Business Administrations’ size standards (see 15 U.S.C. 632; 14 C.F.R. part 121). These size standards vary for different industries, but most businesses likely will be classified as “small” under those standards.
- (3) The RFA does not define “substantial number.” Whether a number of affected small entities is substantial is based on all relevant facts and circumstances. Tax regulations targeting a specific industry and affecting a large percentage of the small entities in that industry are likely to affect a “substantial number” of small entities. Treasury advises that tax regulations with a broad effect on business have an impact on a “substantial number” of small entities. Treasury does not include foreign entities or corporations filing consolidated returns when assessing the impact of a regulation. Obtain statistical and other data concerning the number of affected small entities from IRS Statistics of Income Division, the IRS Tax Forms and Publications Division, the SB/SE Operating Division, tax practitioners, trade associations, small businesses, other organizations, Treasury’s Office of Tax Analysis, other government agencies, revenue estimates and legislative history of the underlying statute, and other resources available in the Chief Counsel library.
- (4) The RFA also does not define “significant economic impact.” For interpretative regulations, the drafting team should estimate the economic impact of the collection of information requirement in a manner similar to determining the burden estimates under the PRA. The drafting team should calculate the annual economic impact based on all relevant facts and circumstances, including the hours necessary to comply with the collection of information and the costs of purchasing equipment that is necessary to comply with the collection of information. One common method of estimating the economic impact of a collection of information is to multiply the PRA burden estimate (stated in terms of total hours) by an appropriate hourly rate. Consider the purpose and complexity of the rule to determine whether its economic impact is “significant.”

32.1.5.4.7.4.5.2  
(09-30-2011)

**Applicability of RFA:  
General Criteria**

- (1) The RFA applies, in general, to:
  - a. Any NPRM, or final regulation preceded by an NPRM published after 12/31/80, for which 5 U.S.C. 553 or any other law requires the agency to publish general notice of proposed rulemaking for any proposed rule (primarily legislative regulations), and
  - b. Any interpretative NPRM, or final interpretative regulation preceded by an interpretative NPRM published after March 29, 1996, involving the internal revenue laws of the United States to the extent that the interpretative rule imposes (or a proposed rule would impose) a collection of information requirement on small entities.
- (2) The drafting team must determine who is affected by the regulation, and, if the regulation affects small entities, the nature (quantified to the extent practicable) of that effect.

- (3) To determine the effect of the RFA on the regulation, the drafting team should determine whether the regulation is an interpretative regulation or a legislative regulation. See *CCDM 32.1.1.2.6*, Interpretative Regulations, *CCDM 32.1.1.2.7*, Legislative Regulations, *CCDM 32.1.1.2.8*, How to Determine If a Rule Is Interpretative or Legislative, and *CCDM 32.1.5.4.7.5.1* for further discussion of whether a regulation is interpretative or legislative.

32.1.5.4.7.4.5.3  
(11-18-2019)

## **Applicability of RFA: Interpretative Regulations**

- (1) If the regulation is interpretative, but does not involve the internal revenue laws of the United States, it is not subject to the RFA. Include a statement in the Special Analyses section explaining that the RFA does not apply because it does not involve any internal revenue laws.
- (2) If a regulation is interpretative and involves the internal revenue laws of the United States, it is subject to the RFA if it imposes a collection of information requirement on small entities.
  - a. If the regulation does not impose any collection of information requirement on small entities, it is not subject to the RFA and, therefore, a regulatory flexibility analysis is not required. Include the following statement in the Special Analyses section:

“Because the regulation does not impose a collection of information on small entities a Regulatory Flexibility Act (5 U.S.C. chapter 6) analysis is not required. ”

- (3) If the regulation contains a collection of information requirement and if the regulation (rather than the statute) imposes the collection of information requirement, will the collection of information requirement have a significant economic impact on a substantial number of small entities?
  - a. If the regulation imposes a collection of information requirement that will not have a significant economic impact on a substantial number of small entities, the IRS may certify that the collection will not impose a significant economic impact on a substantial number of small entities. In this situation, a regulatory flexibility analysis is not required. Include the following certification in the Special Analyses section:

“It is hereby certified that the collection of information contained in this regulation will not have a significant economic impact on a substantial number of small entities..”

- b. The certification statement must be followed with a factual explanation of the basis for the certification. If the number of small entities affected is not substantial, the statement should explain why and include, to the extent practicable, a quantification of the number of small entities affected. If the economic impact on affected small entities is not significant, include a discussion of the burden (as reflected in the required submission to OMB) imposed on small entities by the collection of information. If in doubt about the accuracy of the certification, the drafting team should request comment on the accuracy of the certification.
- c. If the regulation imposes a collection of information requirement that will have a significant economic impact on a substantial number of small entities, a regulatory flexibility analysis is required. Prepare an initial or final regulatory flexibility analysis, depending on the stage of rulemaking, and include the analysis in the [Initial/Final] Regulatory Flexibility Analysis

section, which follows the Special Analyses section. Include the following statement in the Special Analyses section:

“An [initial/final] regulatory flexibility analysis has been prepared for the required collection of information in this [notice of proposed rulemaking/Treasury Decision] under 5 U.S.C. chapter 6. The analysis is set forth below under the heading **[Initial/Final] Regulatory Flexibility Analysis.**”

- (4) If the regulation contains a collection of information requirement and implements a statute or other legal authority that imposes a significant economic impact on a substantial number of small entities, to the extent the significant economic impact on a substantial number of small entities contained in the regulation flows directly from the underlying statute or other legal authority, a regulatory flexibility analysis is not required.
- (5) Any certification that the RFA analysis is not required must include an explanation. This explanation should not be summary boilerplate and must be appropriately detailed to show that the applicability of the RFA was thoroughly considered. The reasoning for the certification should be explained. For example, if a regulatory impact analysis is not required because the effect on small entities flows directly from the underlying statute, the certification should explain why the effect or impact flows from the statute or other legal authority being implemented.
- (6) If in doubt about the accuracy of the certification, the drafting team should request comment on the accuracy of the certification.

32.1.5.4.7.4.5.4  
(11-18-2019)

**Applicability of RFA:  
Legislative Regulations**

- (1) Legislative regulations are subject to the RFA. A regulatory flexibility analysis, however, may not be required for all legislative regulations.
- (2) A regulatory flexibility analysis is not required if the regulation either
  - a. Will not have a significant economic impact on a substantial number of small entities; or
  - b. Implements a statute or other legal authority that imposes a significant economic impact on a substantial number of small entities and all significant economic impact on a substantial number of small entities contained in the regulation flows directly from the underlying statute or authority.
- (3) If either of the conditions described in CCDM 32.1.5.4.7.5.4.4(2) above apply, include the following certification in the Special Analyses section:

“It is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities.”

- (4) The certification statement must be followed by a factual explanation of the basis for the certification. If the regulation does not affect small entities, explain who is affected by the regulation. If the number of small entities affected is not substantial, explain why and include, to the extent practicable, a quantification of the number of small entities affected. If the economic impact on affected small entities is not significant, include a discussion of the economic impact/burden. If the effect on small entities flows directly from the statute or other legal authority being implemented, the statement should explain why that is the case. If in doubt about the accuracy of the certification, the drafting team should request comment on the accuracy of the certification.

- (5) If the regulation (rather than the statute) will have a significant economic impact on a substantial number of small entities, a regulatory flexibility analysis is required. Prepare an initial or final regulatory flexibility analysis, depending on the stage of rulemaking, and include it in the [Initial/Final] Regulatory Flexibility Analysis section, which follows the Special Analyses section. Exhibit 32.1.5-7 contains a sample regulatory flexibility analysis. Include the following statement in the Special Analyses section:

“An [initial/final] regulatory flexibility analysis has been prepared for this [notice of proposed rulemaking/Treasury Decision] under 5 U.S.C. chapter 6. The analysis is set forth below under the heading [Initial/Final] Regulatory Flexibility Analysis.”

32.1.5.4.7.4.5.5  
(08-21-2018)

## **Applicability of the RFA to Temporary Regulations**

- (1) An RFA analysis is not required for Temporary Regulations. Include the following statement in the Special Analyses section:

“For applicability of the Regulatory Flexibility Act, please refer to the cross-reference notice of proposed rulemaking published elsewhere in this issue of the Federal Register.”

32.1.5.4.7.4.5.6  
(08-11-2004)

## **Waiver or Delay of Regulatory Flexibility Analysis When a Regulation Responds to an Emergency Situation or Statutory or Judicial Deadline**

- (1) For rules and procedures for waiver or delay of initial and final regulatory flexibility analyses when an NPRM or final regulation responds to an emergency situation or statutory or judicial deadline, see section 2(g) of Exhibit 32.1.5-3.

32.1.5.4.7.4.5.7  
(08-11-2004)

## **RFA Checklist**

- (1) The drafting team must prepare a RFA Checklist for both the NPRM and the final regulation, regardless of whether a regulatory flexibility analysis is required. See Exhibit 32.1.5-2, Regulatory Flexibility Checklist, and Exhibit 32.1.5-3, Department of the Treasury Policy and Procedures to Ensure Consideration of Potential Impacts of Regulations on Small Businesses and Entities.

32.1.5.4.7.5  
(10-20-2014)

## **Comments and Public Hearings**

- (1) For ANPRMs, the drafting team should use the heading Comments to notify the public that the IRS will consider comments before the agency issues proposed regulations and that comments will be available for public inspection.
- (2) For NPRMs, the drafting team should use the heading Comments and Public Hearing if the document includes a notice of public hearing (and location of the hearing). If the document invites the public to request a hearing, use the heading Comments and Requests for Public Hearing. Public comments on NPRMs may address all aspects of the proposed regulations. See Exhibit 32.1.5-4, Model Language for “Comments and Public Hearing” and Exhibit 32.1.5-5, Model Language for “Comments and Requests for Public Hearing.”

32.1.5.4.7.6  
(10-20-2014)

## **Drafting Information**

- (1) This heading identifies the principal author(s) of the regulation.

**Example:****Drafting Information**

The principal author of these proposed regulations is [Drafting Attorney Name] of the Office of Associate Chief Counsel (INSERT APPLICABLE ASSOCIATE CHIEF COUNSEL OFFICE).

32.1.5.5  
(08-21-2018)  
**List of Subjects**

- (1) In the List of Subjects section, the drafting team should list the index terms for each CFR part number cited in the **CFR Title and Part Number** section (see CCDM 32.1.5.3.3). If citing more than one CFR part, the drafting team should list them in numerical order. The drafting team should put the index terms within each CFR part in alphabetical order, separated by commas. (List all the index terms contained in a part even if some are not related to the regulation.) Capitalize only the first word of each term. See Exhibit 32.1.5-6, List of Subjects.

**Examples:**

Citing one CFR part      **List of Subjects in 26 CFR Part 1**  
Income taxes, Reporting and recordkeeping requirements.

Citing two or more CFR parts      **List of Subjects**  
**26 CFR Part 1**  
Income taxes, Reporting and recordkeeping requirements.

**26 CFR Part 602**  
Reporting and recordkeeping requirements.

- (2) The Federal Register Thesaurus of Indexing Terms contains the index terms and is available at <http://www.archives.gov/federal-register/cfr/thesaurus.html>.

32.1.5.6  
(08-11-2004)  
**Words of Issuance**

- (1) The words of issuance describe how the agency proposes to amend (in the case of an NPRM) or amends (in the case of a final or temporary regulation) the CFR and serves as a “bridge” between the preamble and the amendments proposed or adopted. The drafting team should state the words of issuance in the present tense.

**Examples:****NPRM    Proposed Amendments to the Regulations**

Accordingly, 26 CFR part 1 is proposed to be amended as follows:



**Examples:**

**TD Adoption of Amendments to the Regulations**

Accordingly, 26 CFR parts 1 and 602 are amended as follows:

32.1.5.7  
(08-11-2004)  
**Structure of Regulatory Text**

- (1) A regulation makes changes to the CFR. Therefore, the regulation must be drafted exactly as it is to appear in the CFR by conforming to the structure and nomenclature of the CFR. To ensure that a new regulation will conform to existing regulations in the CFR, the drafting team should check the existing regulations in the current CFR volume, the latest “List of CFR Sections Affected” (LSA), and the monthly List of CFR Sections Affected in the Reader Aids section in the latest Federal Register.
- (2) The current CFR printed volume and the most recent List of CFR Sections Affected are online at <http://www.gpoaccess.gov/cfr/>. The *Electronic Code of Federal Regulations (eCFR)* is a currently updated version of the CFR. The staff of the OFR has given their assurance that the site is accurate; however, it is not yet an official legal edition of the CFR.
- (3) For guidelines on numbering a regulation, see *CCDM 32.1.2.2.6, Numbering the Regulation*.

32.1.5.7.1  
(08-21-2018)  
**Paragraphs**

- (1) The text of a regulation must be in paragraphs. In general, all paragraphs must be designated with one of the following level designations that are used in the CFR:
  - Level 1 (a), (b), (c), etc.
  - Level 2 (1), (2), (3), etc.
  - Level 3 (i), (ii), (iii), etc.
  - Level 4 (A), (B), (C), etc.
  - Level 5 (1), (2), (3), etc.
  - Level 6 (i), (ii), (iii), etc.
- (2) If a paragraph numbering is not sequential (for example, to leave space for rules to be added later), the drafting team should designate and reserve the missing paragraph.
- (3) There are three exceptions to the requirement that a paragraph must be designated. A designation is not required:
  - a. If a regulation section consists of only one paragraph,
  - b. If the text is introductory text to a paragraph, and
  - c. If the paragraph is in a definition section and the definitions are listed in alphabetical order.
- (4) The drafting team should avoid paragraphs below level 3 (for example, the (a)(1)(i) level in §1.501(c)(3)-1(b)(i)). If the regulation requires 4 or more levels, the drafting team should limit the last level to lists of items that can be expressed in words or phrases. The drafting team should reduce the rules to

their simplest form, review the outline, and consider the spin-off technique illustrated in *CCDM 32.1.4.2(2)*, Outlining a Regulation before Drafting, Example 1.

- (5) The OFR does not permit paragraphs that contain succeeding flush material (which is concluding text or undesignated language following one or more lower level paragraphs).

THIS	NOT THIS
<p>(a) <b>Definition.</b> A <b>qualified agreement</b> is a written agreement between an employer and an employee that--</p> <ol style="list-style-type: none"> <li>1. Was entered into after 1989;</li> <li>2. Is binding under State law;</li> <li>3. Includes an arbitration procedure; and</li> <li>4. If entered into after 1991, satisfies section 1 of the Arbitration Agreements Act.</li> </ol> <p>(b) <i>Definitions.</i> The following definitions apply to this section--</p> <p><b>Employee</b> means...</p> <p><b>Employer</b> means...</p> <p><b>Fee</b> means...</p>	<p>(a) <b>Definition.</b> A <b>qualified agreement</b> is a written agreement between an employer and an employee that--</p> <ol style="list-style-type: none"> <li>1. Was entered into after 1989;</li> <li>2. Is binding under State law; and</li> <li>3. Includes an arbitration procedure.</li> </ol> <p>An agreement entered into after 1991, however, is not a qualified agreement unless it also satisfies section 1 of the Arbitration Agreements Act.</p>

32.1.5.7.2  
(08-21-2018)  
**Headings of Sections  
and Paragraphs**

- (1) General headings for sections and paragraphs identify the subject matter discussed. Each section must have a heading. Headings are optional for paragraphs but, if used for one paragraph in a section, headings must be used for all paragraphs at that same level. Because headings are beneficial to the reader, the drafting team should use them for at least all level 1 paragraphs.
- (2) Except as provided in paragraph 2 of CCDM 32.1.5.7.2, the drafting team should capitalize the first letter of the first word of a section or paragraph heading and end the heading with a period. The drafting team should underline the heading, but not the period. When published in the Federal Register, section headings appear in bold face and paragraph headings appear in italics.
- (3) If a paragraph heading is immediately followed by a heading for one or more lower level paragraphs, use a double dash (--) instead of a period and place a period after the heading of the last lower level paragraph.

**Example 1:**

- (a) **Introduction--(1) Overview .** Text.
- (2) **General approach.** Text

**Example 2:**

- (c) **Definitions and scope--(1) Notional principal contract--**  
(i) **In general.** Text.



**Example 2:**

(ii) **Excluded contracts.** Text.

- (4) Any change to a section or paragraph heading must be made by amending the regulation.

32.1.5.7.3  
(08-21-2018)  
**References to Code  
Sections and CFR  
Provisions**

- (1) The drafting team should state all references to regulations in terms of a specific part, section, or paragraph. The drafting team should not use “sub-paragraph”, “herein”, “supra”, and “infra.”
- (2) References to a specific section or chapter in the regulation text are understood to refer to that section or chapter in the Code. For example, “... any exchange described in section 367(b)” is understood to refer to section 367(b) of the Code.
- (3) When the regulation text refers to a section or chapter of the Internal Revenue Code and a section or chapter of another law/document, the drafting team should write the regulation’s text in a way that clearly distinguishes which law/document is being referenced.
- (4) The drafting team should use “§” to refer to another regulation section, unless it would be the first character in a sentence. In that case, “Section” must be spelled out. Do not type a space between the “§” symbol and the regulation section number. To refer to two or more sections, use “§§.” (For example, §1.461-4; §§1.446-1(e)(3) and 1.461-4.)
- (5) To refer to paragraph (b)(1) when in paragraph (a) of the same section, use “paragraph (b)(1) of this section.” To refer to a provision within the same paragraph (a), use “this paragraph (a).”
- (6) To refer to a regulation in a different part of the CFR, follow the reference with “of this chapter.” For example, to refer to the rules of §301.6109-1 in §1.461-4, write “See the rules in §301.6109-1 of this chapter.”

32.1.5.7.4  
(08-11-2004)  
**Language to Explain,  
Add, Amend, or Remove  
Text from the CFR**

- (1) The drafting team must use certain language to explain, add, amend, or remove text from the CFR. This language is described in this subsection.

32.1.5.7.4.1  
(08-11-2004)  
**CFR Part Heading**

- (1) Immediately following the words of issuance, the drafting team must state the CFR PART heading for the first part amended. Capitalize the heading and type it flush left.
- (2) If a regulation affects more than one CFR part, each subsequent CFR PART heading immediately precedes the text of the regulation for that part. Present the CFR parts in numerical order.

**Example:** PART 1--INCOME TAXES

32.1.5.7.4.2  
(08-11-2004)

#### Instructional Paragraphs

- (1) The drafting team must designate the first instructional paragraph in a regulation as “Paragraph 1”. Designate subsequent paragraphs as “Par. 2.”, “Par. 3.”, etc. The drafting team must continue this numbering, even with a change in Part numbers.
- (2) Following each PART heading, the drafting team must set out an instructional paragraph giving the CFR authority citation for the specific CFR part the text is amending.
- (3) After the instructional paragraph giving the CFR authority citation, the drafting team must set out one or more instructional paragraphs stating the text of the regulation as amendments to the CFR part. Use required terms (amendatory language) to identify each specific change that is to be made to the CFR. In these instructional paragraphs first set out the instructions for changing the CFR and then set out the text.
- (4) Use one instructional paragraph for one or more amendments to a single regulation section, or the addition of entire consecutive regulation sections.

#### **Example 1 (No change to the authority citation):**

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

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

Par. 2. In §1.451-2, paragraphs (g) and (h) are revised to read as follows:

[REGULATION TEXT]

Par. 3. In §1.451-4, paragraph (a)(1)(ii) is added to read as follows:

[REGULATION TEXT]

Par. 4. Sections 1.467-1 through 1.467-9 are added to read as follows:

[REGULATION TEXT]

#### **Example 2 (Additions to the authority citation):**

Paragraph 1. The authority citation for part 31 is amended by adding entries in numerical order to read in part as follows:

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

Section 31.6302-1 also issued under 26 U.S.C. 6302(a).

Section 31.6302-2 also issued under 26 U.S.C. 6302(a). \* \*

\*

Section 31.6704-1 also issued under 26 U.S.C. 6704. \* \* \*

**Example 2 (Additions to the authority citation):**

Par. 2. Section 31.6302-0 is amended by:

1. Removing the entry for §31.6302-1(i).
2. Redesignating the entry for §31.6302-1(h) as the entry for §31.6302-1(i).
3. Redesignating the entry for §31.6302-1(m) as the entry for §31.6302-1(n).
4. Redesignating the entry for §31.6302-1(k) as the entry for §31.6302-1(m).
5. Redesignating the entry for §31.6302-1(j) as the entry for §31.6302-1(k).
6. Adding an entry for §31.6302-1(h).
7. Adding an entry for §31.6302-1(j).

The revisions and additions read as follows:

[REGULATION TEXT]

Par. 3. Section 31.6302-1 is amended by:

1. Revising paragraph (k)(1).
2. Revising paragraph (m) (1).
3. Adding a new sentence at the end of paragraph (n).

The addition and revisions read as follows:

[REGULATION TEXT]

**PART 54 -- PENSION EXCISE TAXES**

Par. 4. The authority citation for part 54 continues to read as follows:

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

Par. 5. Section 54.4980F-1 is added to read as follows:

[REGULATION TEXT]

32.1.5.7.4.3  
(08-11-2004)  
**Amendatory Language**

- (1) Amendatory language describes the specific changes a regulation is making to the CFR. These are the instructions to the editors of the CFR. The most common changes are changes to sections and paragraphs. However, if it becomes necessary to change a part or add a part, the same drafting principles apply.
- (2) To determine the correct amendatory language to use, the drafting team should reference the most recent version of the regulations. First, the drafting team should review the regulations in the current CFR published by the OFR (not the CCH, PH, or RIA version). The drafting team should then review the "List of CFR Sections Affected," a cumulative monthly numerical index to regulations amended since the CFR was last updated. Finally, if there is the possibility that the regulations have been amended in the last month, the drafting team should check the "CFR Parts Affected" in the Reader Aids section of the most recent Federal Register.
- (3) The current CFR printed volume and the most recent List of CFR Sections Affected are online at <http://www.gpoaccess.gov/cfr/>. The *Electronic Code of*

*Federal Regulations (eCFR)* is a currently updated version of the CFR. . The staff of the OFR has given their assurance that it is accurate; however, eCFR is not yet an official legal edition of the CFR.

- (4) If the regulation describes a change to the CFR but does not set forth the text of the new provision, the drafting team should place the regulation section changed and the appropriate amendatory term on a separate line before the instructional paragraph. The drafting team should place the section and amendatory term flush left, in bold font, with the amendatory text in brackets. See CCDM 32.1.5.7.4.3.1, examples for CORRECT and NOMENCLATURE CHANGE.

32.1.5.7.4.3.1  
(08-21-2018)

#### Terms and Instructional Paragraphs

- (1) The drafting team should use only the following terms in an instructional paragraph to describe changes to the CFR.
- (2) **AMEND.** Existing CFR text is changed. This term is an introductory term and must be used with one or more amendatory terms.

#### **Example:**

Par. 2. Section 1.163-1 is amended by:

1. Adding paragraph (e)(2)(iii).
2. Revising paragraph (e)(4).

The addition and revision read as follows:

- (3) **ADD.** Use this term when adding new text (such as a section or paragraph) to the CFR.

#### **Example:**

Par. 3. Section 1.163-13 is added to read as follows:

- (4) **CORRECT.** Use this term when fixing a clerical or typographical error or oversight in a recently published regulation. The Publications and Regulations Branch generally fixes clerical and typographical errors.

#### **Example:**

§1.6045-4 [Corrected]

Par. 4. In §1.6045-4, paragraph (r), paragraph (i) of Example 4, line 1, the language “\$20,000” is corrected to read “\$10,000”.

- (5) **NOMENCLATURE CHANGE.** Use this term when changing a term or phrase throughout a regulation (or portion thereof).

#### **Example:**

§1.468B-4 [Amended]

Par. 5. Section 1.468B-4 is amended by removing the language “Assistant Chief Counsel (Income Tax & Accounting)” and adding “Associate Chief Counsel (Income Tax & Accounting)” in its place.

- (6) **REDESIGNATE.** Use this term when moving existing text to a vacant position and when assigning existing text a new designation.

**Example:**

Par. 6. Section 1.468B-0 is amended by:

1. Revising the introductory text.
2. Redesignating the entry in the table of contents for §1.468B-1(k) as the entry for §1.468B-1(l).
3. Adding a new entry in the table of contents for §1.468B-1(k), and adding entries for §§1.468B-5(c) and 1.468B-9.

The revisions and additions read as follows:

- (7) **REMOVE.** Use this term when taking existing text out of the CFR.

**Example:**

§40.6011(a)-1T [Removed]  
 Par. 7. Section 40.6011(a)-1T is removed.

- (8) **RESERVE.** Use this term when reserving a section, paragraph, or lower level of a paragraph. Use it to maintain the numerical continuity within a regulation and to indicate where future text will be added.

**Example 1:**

§1.904-1T(a) [Removed and Reserved]  
 Par. 8. In §1.904-1T, paragraph (a) is removed and reserved.

**Example 2:**

Par. 9. Section 1.274-5T is added to read as follows:  
**§1.274-5T Substantiation requirements (temporary).**  
 (a) Text.  
 (b) Text.  
 (c) [Reserved]  
 (d) Text.

- (9) **REVISE.** Use this term when replacing existing text and the new text is set forth in its entirety. Specifically identify the CFR text being revised.

**Example:**

Par. 10. In §1.274-5T, the last sentence of paragraph (c)(2) is revised to read as follows:  
**§1.274-5T Substantiation requirements (temporary)**  
 \* \* \* \* \*  
 (c) \* \* \*  
 (2) \* \* \* For purposes of this section, the term employer includes an agent of the employer or a third party payor who pays amounts to an employee under a reimbursement or other expense allowance arrangement.  
 \* \* \* \* \*

- (10) **WITHDRAW** (or partial withdrawal). Use the term “withdrawal” when the entire previously published NPRM will not be issued as a final regulation. Use the

term “partial withdrawal” when a portion of a previously published NPRM will not be issued as a final regulation. To withdraw an NPRM, draft the preamble with the following instructional paragraphs after the List of Subjects heading.

**Example 1: Withdrawal of Proposed Regulations**

Accordingly, under the authority of 26 U.S.C. 7805, the notice of proposed rulemaking (REG-XXXXXX-XX) that was published in the **Federal Register** on Thursday, April 25, 1991, (56 FR 19046) is withdrawn.

**Example 2: Partial Withdrawal of Proposed Regulations**

Accordingly, under the authority of 26 U.S.C. 7805, § X.XXX.X(X) of the notice of proposed rulemaking (REG-XXXXXX-XX) that was published in the **Federal Register** on Thursday, April 25, 1991, (56 FR 19046) is withdrawn.

32.1.5.7.4.3.2  
(08-21-2018)

**Specific Instructions if  
Amending Existing Text  
of Final Regulations by  
Temporary Regulations**

- (1) Existing final regulations may be amended by reference to temporary regulations in the same TD. In this situation, the general format for the notice of proposed rulemaking by cross-reference to temporary regulations (XREF NPRM) and the final and temporary regulations is modified. The format for the following parts of the regulations is modified:
  - The text of the XREF NPRM
  - The “ACTION” caption in the Treasury decision (TD)
  - The existing text of the final regulations
  - The existing text of or addition to the temporary regulations
- (2) The drafting attorney should always place the text of the regulations section amending the existing final regulations before the text of the regulation section amending or adding text to the temporary regulations. An example of each type of modification is set forth in the following examples:

**Scenario:** Amendments to the existing text in final regulations for §301.7701-2(c)(2)(iii) by reference to temporary regulations in the same document. The sample language reads as follows:

**Example 1: (XREF NPRM)**

Par. X. Section 301.7701-2 is amended by adding paragraph (c)(2)(iii) to read as follows:

**§301.7701-2 Business entities; definitions.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(iii) [The text of the proposed amendment to §301.7701-2(c)(2)(iii) is the same as the text of §301.7701-2T(c)(2)(iii) published elsewhere in this issue of the Federal Register].

\* \* \* \* \*

**Example 2: (“ACTION” caption for the TD)**

ACTION: Final and temporary regulations.

**Example 3: (Final Regulations)**

Par. X. Section 301.7701-2 is amended by adding paragraph (c)(2)(iii) to read as follows:

**§301.7701-2 Business entities; definitions**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(iii) [Reserved]. For further guidance, see §301.7701-2T(c)(2)(iii).  
\* \* \* \* \*

**Example 4: (Temporary Regulations)**

Par. X. Section 301.7701-2T is amended by adding paragraph (c)(2)(iii) to read as follows:

**§301.7701-2T Business entities; definitions (temporary)**

(a) through (c)(2)(iii) [Reserved]. For further guidance, see §301.7701-2(a) through (c)(2)(ii).

(c)(2)(iii) **Treatment of certain disregarded entities.** A disregarded entity is treated as a regarded entity with respect to any tax liability for which it may be held liable under Federal, state or local law.

\* \* \* \* \*

32.1.5.7.4.4  
(08-21-2018)  
**Applicability Date  
Paragraph**

- (1) After each regulation section amended, the drafting team should include an applicability date paragraph setting forth the date(s) of applicability or the proposed date(s) of applicability. If the regulation document is a TEMP also include the expiration date pursuant to section 7805(e)(2).

**Example 1: NPRM**

(g) *Applicability date.* The rules of this section apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the **Federal Register**.

**Example 2: Final Regulation**

(2) *Applicability date.* Paragraph (c) of this section applies to taxable years of a partnership beginning after December 31, 2003.

**Example 3: Temporary Regulation**

(f) *Applicability date.* This section applies to requests for an extension of time to file information returns due after [INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE *FEDERAL REGISTER*]. The applicability of this section expires on or before [INSERT DATE 3 YEARS AFTER DATE THIS DOCUMENT IS FILED WITH THE OFFICE OF THE **FEDERAL REGISTER**].

**Note:** If revisions are being made to an existing regulation, it may be possible to retain effective date language.

32.1.5.7.4.5  
(08-11-2004)  
**Use of Asterisks**

- (1) Asterisks indicate that existing text has been omitted. New regulation material is always shown in its entirety. Existing text that is being revised in part may also be shown in its entirety. In many cases, however, it is preferable to show only the new material and use asterisks to indicate omitted text.

32.1.5.7.4.5.1  
(08-21-2018)  
**5 Asterisks**

- (1) Five asterisks indicate that one or more whole paragraphs are omitted. Remember that each indented unit is considered a paragraph (for example, (d) as well as (d)(3)(i)). Position five asterisks flush left with a space between each asterisk.

**Example:**

In this example, the regulation revises paragraph (d) while paragraphs (a) through (c) and (e) to the end of the regulation, including any subordinate paragraphs, are unchanged.

Par. 2. In §48.4081-2, paragraph (d) is revised to read as follows:

***§48.4081-2 Taxable fuel; tax on removal at a terminal rack.***

\* \* \* \* \*

(d) **Rate of tax.** For the rate of tax generally, **see** section 4081(a). For the rate of tax on gasohol, **see** §48.4081-6.

\* \* \* \* \*

32.1.5.7.4.5.2  
(08-21-2018)  
**3 Asterisks**

- (1) Three asterisks are used in two situations:
- To indicate that one or more, but not all, sentences in a paragraph are not set out, and
  - To indicate that the text of the higher level paragraph is unchanged when the text of a subordinate paragraph is changed. In this situation, the use of 3 asterisks indicates that the text of the higher level paragraph is not set out. Set out the new text of the subordinate paragraph.
- (2) Three asterisks are positioned one space after the end of the text or the paragraph designation to which they relate. There is a space between each asterisk.

**Example:**

In this example, the regulation revises paragraph (c)(3)(i) while paragraphs (a) and (b), including any subordinate paragraphs, and paragraph (c) to the end of the regulation, including any subordinate paragraphs, except paragraph (c)(3)(i), remain unchanged.

Par. 2. In §1.6045-1, the first sentence in paragraph (c)(3)(i) is revised to read as follows:



**Example:**

**§1.6045-1 Returns of information of brokers and barter exchanges.**

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*(i) **Sales for exempt recipients.** No return of information is required with respect to a sale by a customer that is an exempt recipient described in section 3452(c)(2)(A) through (E) as determined under §35.3542(c)-1 of this chapter. \* \* \*

\* \* \* \* \*

32.1.5.7.5  
(08-21-2018)  
**Part 602 – Codification of OMB Control Numbers Under the Paperwork Reduction Act**

- (1) Pursuant to the PRA, OMB assigns a control number to collection of information requirements contained in agency regulations (see *CCDM 32.1.2.5.4*, OMB Control Numbers).
- (2) The IRS displays and codifies the OMB control numbers assigned to the collection of information requirements in a chart in 26 CFR 602.101(b). IRS/ Treasury temporary and final regulations subject to PRA amend section 602.101(b). Amend section 602.101(b) at the end of the regulation.
- (3) To amend § 602.101(b):
  - a. Place the CFR part heading for part 602 in the Regulatory Text (see *CCDM 32.1.5.7.4.1*),
  - b. Write a paragraph providing the authority citation for part 602 (see *CCDM 32.1.5.7.4.4*), and
  - c. Write the paragraph amending § 602.101(b). It is the last paragraph of the regulation.
- (4) When the IRS publishes a final regulation preceded by a temporary regulation and cross-reference NPRM, the drafting team must remove the OMB control number for the temporary regulation from section 602.101(b). Remove one or two OMB numbers by listing the sections in the instructional paragraph. To remove three or more OMB numbers, the drafting team must set out a single-spaced table in the instructional paragraph listing the sections containing the OMB numbers.

**Example 1:**

**PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT**

Par. 9 The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 10. In §602.101, paragraph (b) is amended by removing the entries for “46.6109-1” and “46.6151-1” from the table.

Example 2:

PART 602--OMB CONTROL NUMBERS UNDER THE  
PAPERWORK REDUCTION ACT

Par. 9. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 10. In §602.101, paragraph (b) is revised as follows:

1. The following entries to the table are removed:

§602.101 OMB Control Numbers.

\* \* \* \* \*

(b) \* \* \*

CFR part or section where identified and described	Current OMB Control No.
* * * * *	
46.6109-1 .....	1545-0003
46.6151-1 .....	1545-0257
* * * * *	
48.4051-1T .....	1545-0143
* * * * *	

2. The following entry is added in numerical order to the table:

§602.101 OMB Control Numbers.

\* \* \* \* \*

(b) \* \* \*

CFR part or  
section where  
identified and  
described

Current OMB  
Control No.

\* \* \* \* \*

48.4051-1 .....1545-0143

\* \* \* \*

- (5) If the NPRM or temporary regulation that preceded the final regulation had an OMB control number as a result of a collection of information contained in an IRS form, the drafting team must remove the OMB control number for the regulation from the table when issuing the final regulations. In this situation, the form, rather than the regulation, is the source of the collection of information.

32.1.5.8  
(08-21-2018)  
**Signature Page —  
Requirements and  
Signature Block**

- (1) The signature page is the last page of the regulation. Before circulating the signature package, and at all times thereafter, the drafting team should ensure that the requirements for the signature page are met. The drafting team should not number the signature page.
- (2) The Commissioner or a delegate (such as Deputy Commissioner for Services and Enforcement) signs ANPRMs, NPRMs, and TDs. The Assistant Secretary of the Treasury (Tax Policy) or a delegate also signs TDs. The drafting team must type the title followed by a period, but not the name of the person signing the document, directly beneath the area for the handwritten signature.
- (3) The signature must be in ink. The OFR recommends using blue ink to make it easier to distinguish the original from a photocopy.
- (4) After the regulation is signed, the drafting team or the FRL must type in the name of each person who actually signed the regulation, followed by a comma. Add “Acting” or “Deputy”, before the title of any individual who signed in one of those capacities, and end the title with a period. The OFR will not accept a regulation document signed by one individual “for”, “by”, or “on behalf of” another.
- (5) The Commissioner/Deputy Commissioner for Services and Enforcement signature is not dated. However, the Assistant Secretary of the Treasury (Tax Policy) signature requires a date. If the Assistant Secretary did not enter the date, the drafting attorney or FRL must type in the date the Assistant Secretary approved the regulation, as noted on the pink sheet. Use only the date of actual signature. The OFR will not accept a postdated document or change the signature date. The OFR will return to the agency any document with a signature date problem.
- (6) The signature block cannot be the only text on the signature page. There must be enough regulatory text on the last page to allow identification of the signature page as properly belonging to the package. Generally, two or three lines of text are sufficient, and more than that is not recommended. Use a

page break to ensure there is sufficient text on the signature page and that the amount of text on the page will not change even if revisions or corrections are made to the rest of the document.

***Example 1 (PRE-SIGNATURE): NPRM***

(h) *Applicability date.* This section applies to disputed ownership funds established after [INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE **FEDERAL REGISTER**]

Deputy Commissioner for Services and Enforcement.

***Example 2 (PRE-SIGNATURE): TD***

(h) *Applicability date.* This section applies to disputed ownership funds established after [INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE **FEDERAL REGISTER**]

Deputy Commissioner for Services and Enforcement.

Approved:

Assistant Secretary of the Treasury (Tax Policy).

**Exhibit 32.1.5-1 (08-11-2004)**  
**CFR Parts and Part Headings****CFR PARTS AND PART HEADINGS**

PART 1--INCOME TAXES

PART 2--MARITIME CONSTRUCTION RESERVE FUND

PART 3--CAPITAL CONSTRUCTION FUND

PART 5--TEMPORARY INCOME TAX REGULATIONS UNDER THE REVENUE ACT OF 1978

PART 5c--TEMPORARY INCOME TAX REGULATIONS UNDER THE ECONOMIC RECOVERY TAX ACT OF 1981

PART 5e--TEMPORARY INCOME TAX REGULATIONS, TRAVEL EXPENSES OF MEMBERS OF CONGRESS

PART 5f--TEMPORARY INCOME TAX REGULATIONS UNDER THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982

PART 6a--TEMPORARY REGULATIONS UNDER TITLE II OF THE OMNIBUS RECONCILIATION ACT OF 1980

PART 7--TEMPORARY INCOME TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1976

PART 8--TEMPORARY INCOME TAX REGULATIONS UNDER SECTION 3 OF THE ACT OF OCTOBER 26, 1974 (PUB. L. 93-483)

PART 9--TEMPORARY INCOME TAX REGULATIONS UNDER THE TAX REDUCTION ACT OF 1975

PART 11--TEMPORARY INCOME TAX REGULATIONS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

PART 12--TEMPORARY INCOME TAX REGULATIONS UNDER THE REVENUE ACT OF 1971

PART 13--TEMPORARY INCOME TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1969

PART 14a--TEMPORARY INCOME TAX REGULATIONS RELATING TO INCENTIVE STOCK OPTIONS

PART 15--TEMPORARY INCOME TAX REGULATIONS RELATING TO EXPLORATION EXPENDITURES IN THE CASE OF MINING

PART 15a--TEMPORARY INCOME TAX REGULATIONS UNDER THE INSTALLMENT SALES REVISION ACT

PART 16--TEMPORARY REGULATIONS UNDER THE REVENUE ACT OF 1962

PART 16A--TEMPORARY INCOME TAX REGULATIONS RELATING TO THE PARTIAL EXCLUSION FOR CERTAIN CONSERVATION COST SHARING PAYMENTS

PART 17--TEMPORARY INCOME TAX REGULATIONS UNDER 26 U.S.C. 103(c)

PART 18--TEMPORARY INCOME TAX REGULATIONS UNDER THE SUBCHAPTER S REVISION ACT OF 1982

PART 19--TEMPORARY REGULATIONS UNDER THE REVENUE ACT OF 1964

PART 20--ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

**Exhibit 32.1.5-1 (Cont. 1) (08-11-2004)**  
**CFR Parts and Part Headings**

PART 22--TEMPORARY ESTATE TAX REGULATIONS UNDER THE ECONOMIC RECOVERY TAX ACT OF 1981

PART 23--TEMPORARY ESTATE TAX REGULATIONS UNDER THE REVENUE ACT OF 1978

PART 24--TEMPORARY ESTATE TAX REGULATIONS UNDER SECTION 3 OF THE ACT OF OCTOBER 26, 1974 (PUB. L. 93-483)

PART 25--GIFT TAX; GIFTS MADE AFTER DECEMBER 31, 1954

PART 26--TEMPORARY GENERATION-SKIPPING TRANSFER TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1986

PART 27--TEMPORARY ESTATE, GIFT AND GENERATION-SKIPPING TRANSFER TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1984

PART 28 THROUGH PART 29--[RESERVED]

PART 31--EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT THE SOURCE

PART 32--TEMPORARY EMPLOYMENT TAX REGULATIONS UNDER THE ACT OF DECEMBER 29, 1981 (PUB. L. 97-123)

PART 33--TEMPORARY EMPLOYMENT TAX REGULATIONS UNDER THE ACT OF OCTOBER 19, 1976

PART 34--[RESERVED]

PART 35--TEMPORARY EMPLOYMENT TAX AND COLLECTION OF INCOME TAX AT THE SOURCE REGULATIONS UNDER THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982

PART 35a--TEMPORARY EMPLOYMENT TAX REGULATIONS UNDER THE INTEREST AND DIVIDEND TAX COMPLIANCE ACT OF 1983

PART 36--CONTRACT COVERAGE OF EMPLOYEES OF FOREIGN SUBSIDIARIES

PART 37--[RESERVED]

PART 38--TEMPORARY EMPLOYMENT TAX REGULATIONS UNDER THE REVENUE ACT OF 1978

PART 39--[RESERVED]

PART 40--EXCISE TAX PROCEDURAL REGULATIONS

PART 41--EXCISE TAX ON USE OF CERTAIN HIGHWAY MOTOR VEHICLES

PART 43--EXCISE TAX ON TRANSPORTATION BY WATER

PART 44--TAXES ON WAGERING; EFFECTIVE JANUARY 1, 1955

PART 46--EXCISE TAX ON POLICIES ISSUED BY FOREIGN INSURERS AND OBLIGATIONS NOT IN REGISTERED FORM

PART 47--FLOOR STOCKS TAXES

PART 48--MANUFACTURERS AND RETAILERS EXCISE TAXES

PART 49--FACILITIES AND SERVICES EXCISE TAXES

### Exhibit 32.1.5-1 (Cont. 2) (08-11-2004) CFR Parts and Part Headings

PART 50--REGULATIONS RELATING TO THE TAX IMPOSED WITH RESPECT TO CERTAIN  
HYDRAULIC MINING

PART 52--ENVIRONMENTAL TAXES

PART 53--FOUNDATION AND SIMILAR EXCISE TAXES

PART 54--PENSION EXCISE TAXES

PART 55--EXCISE TAX ON REAL ESTATE INVESTMENT TRUSTS AND REGULATED INVESTMENT  
COMPANIES

PART 56--PUBLIC CHARITY EXCISE TAXES

PART 141--TEMPORARY EXCISE TAX REGULATIONS UNDER THE EMPLOYEE RETIREMENT  
INCOME SECURITY ACT OF 1974

PART 143--TEMPORARY EXCISE TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1969

PART 145--TEMPORARY EXCISE TAX REGULATIONS UNDER THE HIGHWAY REVENUE ACT OF  
1982 (PUB. L. 97-424)

PART 148--CERTAIN EXCISE TAX MATTERS UNDER THE EXCISE TAX TECHNICAL CHANGES ACT  
OF 1958

PART 151 THROUGH PART 155--[RESERVED]

PART 156--EXCISE TAX ON GREENMAIL

PARTS 157 THROUGH 299--[RESERVED]

PART 300--USER FEES

PART 301--PROCEDURE AND ADMINISTRATION

PART 302--TAXES UNDER THE INTERNATIONAL CLAIMS SETTLEMENT ACT, AS AMENDED  
AUGUST 9, 1955

PART 303--TAXES UNDER THE TRADING WITH THE ENEMY ACT

PART 304--[RESERVED]

PART 305--TEMPORARY PROCEDURAL AND ADMINISTRATIVE TAX REGULATIONS UNDER THE  
INDIAN TRIBAL GOVERNMENTAL TAX STATUS ACT OF 1982

PART 306 THROUGH PART 399--[RESERVED]

PART 400--TEMPORARY REGULATIONS UNDER THE FEDERAL TAX LIEN ACT OF 1966

PART 401--TEMPORARY PROCEDURES AND ADMINISTRATION REGULATIONS UNDER THE TAX  
EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982 (PUB. L. 97-248)

PART 402--[RESERVED]

PART 403--DISPOSITION OF SEIZED PERSONAL PROPERTY

PART 404--TEMPORARY REGULATIONS ON PROCEDURE AND ADMINISTRATION UNDER THE  
TAX REFORM ACT OF 1976



**Exhibit 32.1.5-1 (Cont. 3) (08-11-2004)****CFR Parts and Part Headings**

PART 405 THROUGH PART 419--[RESERVED]

PART 420--TEMPORARY REGULATIONS ON PROCEDURE AND ADMINISTRATION UNDER THE  
EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

PART 421 THROUGH PART 501--[RESERVED]

PART 502--GREECE

PART 503--GERMANY

PART 504 THROUGH PART 507--[RESERVED]

PART 509--SWITZERLAND

PART 510 THROUGH PART 512--[RESERVED]

PART 513--IRELAND

PART 514--FRANCE

PART 515--[RESERVED]

PART 516--AUSTRIA

PART 517--PAKISTAN

PART 518 THROUGH PART 519--[RESERVED]

PART 520--SWEDEN

PART 521--DENMARK

PART 600--[RESERVED]

PART 601--STATEMENT OF PROCEDURAL RULES

PART 602--OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

PART 701--PRESIDENTIAL ELECTION CAMPAIGN FUND

PART 702--PRESIDENTIAL PRIMARY MATCHING PAYMENT ACCOUNT

PART 703 THROUGH END--[RESERVED]

**Exhibit 32.1.5-2 (08-11-2004)**  
**Regulatory Flexibility Checklist**

## REGULATORY FLEXIBILITY CHECKLIST

**Regulations Project** (number and title): \_\_\_\_\_

### 1. Legislative/Interpretative Regulations

Check one of the following, whichever is applicable:

- a. ☐ Legislative Regulations (RFA applies; go to 3. below)
- b. ☐ Interpretative Regulations (RFA applies to the extent a collection of information is imposed on small entities; go to 2. below)
- c. ☐ Other; explain

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### 2. Collections of Information (complete for interpretative regulations)

- a. Does the regulation contain a collection of information?
  - ☐ i. Yes. (Go to 2.b. below)
  - ☐ ii. No. The RFA does not apply. (Go to 4. below.)
- b. Is any collection of information in 2.a. imposed on "small entities"?
  - ☐ i. Yes. (Go to 3. below.)
  - ☐ ii. No. The RFA does not apply (Go to 4. below.)

### 3. Regulations Subject to RFA

If the regulations are legislative (see 1.a.) or are interpretative and impose a collection of information on small entities (see 2.b.i.), complete either a. or b. below, whichever applies.

- a. RegFlex Analysis Prepared. Has a regulatory flexibility analysis been prepared?

- ☐ i. Yes. (Go to 4. below.)
- ☐ ii. No. (Go to 3.b. below.)

- b. Certification. Do the regulations contain a certification that the regulations (if legislative) or the collection of information imposed by the regulations (if interpretative) do not impose a significant economic impact on a substantial number of small entities?

- ☐ i. Yes. (Go to 4. below.)
- ☐ ii. No. Explain why the regulations do not contain a regulatory flexibility analysis:

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**Exhibit 32.1.5-2 (Cont. 1) (08-11-2004)**  
**Regulatory Flexibility Checklist**

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**4. Alternative Approaches**

a. Regardless of whether the regulations are subject to the RFA, were other alternative regulatory approaches considered in an attempt to minimize the burden on small entities?

\_\_\_i. Yes. (Checklist is complete.)

\_\_\_ii. No. (Go to 4.b. below.)

b. Other alternatives were not considered because:

\_\_\_i. The statute and/or legislative history prevented consideration of other alternatives.

\_\_\_ii. Other. Explain.

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**Exhibit 32.1.5-3 (09-30-2011)****Department of the Treasury Policy and Procedures to Ensure Consideration of Potential Impacts of Regulations on Small Businesses and Entities**

## DEPARTMENT OF THE TREASURY

POLICY AND PROCEDURES TO ENSURE CONSIDERATION OF POTENTIAL  
IMPACTS OF REGULATIONS ON SMALL BUSINESSES AND ENTITIES1. STATEMENT OF POLICY

It is the policy of the Department of the Treasury that all offices and bureaus:

(a) Seek to minimize, consistent with statutory requirements and sound regulatory policy, the compliance and paperwork burdens of all their regulations on small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

(b) Adhere to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and other applicable law when developing regulations subject to that Act.

2. COMPLIANCE WITH THE REGULATORY FLEXIBILITY ACT

(a) In General. The Regulatory Flexibility Act (RFA) applies to all regulations except as provided in paragraph 2(b). The RFA directs each bureau or office that is required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking to consider the impact of the regulation on small entities.

(b) Nonapplicability. Except as may be otherwise required by law, the requirements set forth herein (other than paragraph 2(c)) do not apply to:

(1) Advance notices of proposed rulemaking (ANPRMs);

(2) Except as provided in paragraph 2(f)(1), regulations not required to be issued with notice and opportunity for public comment pursuant to 5 U.S.C. 553, or any other law, even if a NPRM is published at the discretion of an office or bureau;

(3) Final regulations for which the preceding NPRM was published before January 1, 1982;

(4) Regulations of particular applicability relating to rates, wages, corporate or financial structures, or reorganization thereof, prices, facilities, appliances, services, or allowances therefore, or to valuations, costs or accounting, or practices related to such rates, wages, structures, prices, appliances, services or allowances; and

(5) To the extent provided in paragraph 2(g), regulations that will have a significant economic impact on a substantial number of small entities that are issued in response to an emergency situation or a short-term deadline imposed by statute or judicial order.

Notwithstanding that the RFA may not apply to certain regulations, it is the policy of the Department of the Treasury that offices and bureaus seek to minimize, consistent with statutory requirements and sound regulatory policy, the compliance and paperwork burdens of such regulations on small entities.

(c) Certification or Statement of Nonapplicability:

(1) In General:

**Exhibit 32.1.5-3 (Cont. 1) (09-30-2011)****Department of the Treasury Policy and Procedures to Ensure Consideration of Potential Impacts of Regulations on Small Businesses and Entities**

(A) (i) The RFA provides that an agency may exempt a regulation from the requirement to prepare regulatory flexibility analyses upon certification that the regulation will not have a significant economic impact on a substantial number of small entities. In order to make this certification, an office or bureau needs to undertake a preliminary analysis of who is affected by the regulation and, if the regulation affects small entities, the nature (quantified to the extent practicable) of that effect.

(ii) In some instances the RFA may not apply to a regulation.

(B) Notwithstanding a certification that a NPRM will not have a significant economic impact on a substantial number of small entities, if a bureau or office, at any time prior to issuing a final regulation, finds that the regulation is likely to have such an impact, the bureau or office shall notify the Senior Advisor to the General Counsel for Regulatory Affairs. Offices and bureaus are advised that preparation of an analysis for the final rule may be required.

(2) Required Federal Register Certification or Statement : Offices and bureaus shall include in the preamble to each NPRM, temporary (interim), and final regulation, a statement as follows:

(A) Regulations Subject to the Act and Not Having a Significant Economic Impact on a Substantial Number of Small Entities: In the case of a regulation subject to the RFA that:

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

(ii) Implements a statute or other legal authority that imposes a significant economic impact on a substantial number of small entities, to the extent such impact flows directly from such statute or authority,

a certification substantially similar to the following:

“It is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.”

This statement must be followed by a factual explanation of the basis for the certification:

If the regulation does not affect small entities, the statement should explain who is affected by the regulation.

If the effect on small entities flows directly from the statute or other legal authority being implemented, the statement should explain why that is the case.

If the number of small entities affected is not substantial and/or the economic impact on affected small entities is not significant, the statement should explain why, and include, to the extent practicable, a quantification of the number of small entities affected and/or the economic impact.

## Exhibit 32.1.5-3 (Cont. 2) (09-30-2011)

### Department of the Treasury Policy and Procedures to Ensure Consideration of Potential Impacts of Regulations on Small Businesses and Entities

(B) Regulations Not Subject to the Act: In the case of a regulation not subject to the RFA, a statement explaining why the RFA does not apply.

(C) Regulations Subject to the Act and Having a Significant Economic Impact on a Substantial Number of Small Entities. These regulations require the preparation of an initial or final analysis, depending on the stage of rulemaking.

#### (d) Initial Regulatory Flexibility Analysis (IRFA):

(1) Content: In the case of a NPRM that is likely to have a significant economic impact on a substantial number of small entities, the initiating office or bureau shall prepare an IRFA. The analysis shall be approved by the head of the office or bureau and accompany the regulation through all review levels. The analysis shall contain:

(A) A description of the reasons why action by the agency is being considered;

(B) A succinct statement of the objectives of, and the legal basis for, the proposed rule;

(C) A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(D) A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to such requirements and the type of professional skills necessary for preparation of the report or record;

(E) An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the proposed rule; and

(F) A description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities, including a discussion of significant alternatives such as:

(i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(ii) The clarification, consolidation or simplification of compliance and reporting requirements for small entities;

(iii) If applicable, the use of performance standards rather than design standards; and

(iv) The exemption from the rule, or any part of the rule, for small entities.

(2) Publication: The originating office or bureau shall include the full IRFA, either in the preamble to the NPRM or as an appendix to the NPRM.

**Exhibit 32.1.5-3 (Cont. 3) (09-30-2011)****Department of the Treasury Policy and Procedures to Ensure Consideration of Potential Impacts of Regulations on Small Businesses and Entities**

(3) Public Participation: When an office or bureau publishes in the *Federal Register* a proposed rule for which it has prepared an IRFA, the office or bureau shall take steps to offer affected small entities additional opportunities to participate in the rulemaking through the reasonable use of techniques such as:

- (A) Publishing the NPRM in publications likely to be read by affected small entities;
- (B) Directly notifying interested small entities (or trade associations representing such small entities) of the rulemaking;
- (C) Holding open conferences or public hearings for affected small entities; and
- (D) Posting the NPRM on the Internet and receiving public comments by electronic mail.

(4) Transmittal to Small Business Administration: A copy of each NPRM that includes an IRFA shall be transmitted by the originating office or bureau to the Chief Counsel for Advocacy of the Small Business Administration.

(e) Final Regulatory Flexibility Analysis (FRFA):

(1) Content: In the case of a final regulation for which an IRFA was prepared or for which a FRFA is otherwise required, the originating office or bureau shall prepare a FRFA. The analysis shall be approved by the head of the office or bureau and shall accompany the regulation through all review levels. The analysis shall contain:

- (A) A succinct statement of the need for and the objectives of the rule;
- (B) A summary of the significant issues raised by the public comments in response to the IRFA, a summary of the assessment of the office or bureau of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- (C) A description of, and an estimate of the number of, small entities to which the final rule will apply, or an explanation of why no such estimate is available;
- (D) A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to such requirements and the type of professional skills necessary for preparation of the report or record; and
- (E) A description of the steps the office or bureau has taken to minimize the significant economic impact of the rule on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy and legal reasons for selecting the alternative adopted, and why each of the other significant alternatives to the rule considered by the agency that affects the impact on small entities was rejected.

(2) Public Availability: The originating office or bureau shall include the full FRFA either in the preamble to the final regulation or as an appendix to the final regulation:



## Exhibit 32.1.5-3 (Cont. 4) (09-30-2011)

### Department of the Treasury Policy and Procedures to Ensure Consideration of Potential Impacts of Regulations on Small Businesses and Entities

(f) Additional Requirements for the Internal Revenue Service (IRS) and the Alcohol and Tobacco Tax and Trade Bureau (TTB).

#### (1) Interpretative NPRMs that Contain a Collection of Information:

(A) In General: Section 241 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) amended RFA section 603 to include within the scope of the RFA interpret-tative NPRMs involving the internal revenue laws of the United States to the extent such NPRMs impose on small entities a “collection of information” that is subject to OMB review and approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501) and 5 CFR Part 1320. The amendment to RFA section 603 applies to NPRMs (and succeeding final rules) published after June 27, 1996. Generally, a collection of information includes:

(i) A requirement that a small entity report information to the Federal government;

(ii) A requirement that a small entity maintain specified records, whether or not the information in those records is reported to the Federal government; and

(iii) A requirement that a small entity disclose information to a third party or to the public in general.

(B) Certification or Analysis Required: In the case of a regulation described in paragraph 2(f)(1)(A), IRS or TTB shall either certify that the collection of information imposed on small entities will not have a significant economic impact on a substantial number of small entities or prepare the analyses required by the RFA.

(i) Certification: If a collection of information will not have a significant economic impact on a substantial number of small entities, the preamble to the NPRM and rule shall include a statement substantially similar to the following:

“It is hereby certified that the collection of information contained in this regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.”

This statement must be followed by a factual explanation of the basis for the certification:

If the number of small entities affected is not substantial, the statement should explain why and include, to the extent practicable, a quantification of the number of small entities affected.

If the economic impact on affected small entities is not significant, the statement should include a discussion of the burden (as reflected in the required submission to OMB) imposed on small entities by the collection of information.

#### (ii) RFA Analyses:

(I) If a collection of information will have a significant economic impact on a substantial number of small entities, IRS or TTB shall prepare the required regulatory flexibility analyses. See Paragraphs 2(d) and (e) for specific requirements for these analyses.

**Exhibit 32.1.5-3 (Cont. 5) (09-30-2011)****Department of the Treasury Policy and Procedures to Ensure Consideration of Potential Impacts of Regulations on Small Businesses and Entities**

(II) Public Participation: When IRS or TTB publishes in the *Federal Register* a proposed rule for which it has prepared an IRFA, IRS or TTB shall take steps to offer affected small entities additional opportunities to participate in the rulemaking through the reasonable use of techniques such as:

(a) Publishing the NPRM in publications likely to be read by affected small entities;

(b) Directly notifying interested small entities (or trade associations representing such small entities) of the rulemaking;

(c) Holding open conferences or public hearings for affected small entities; and

(d) Posting the NPRM on the Internet and receiving public comments by electronic mail.

(2) Submission of Certain Regulations to Chief Counsel for Advocacy:

(A) In General : Section 7805(f) of title 26, United States Code, prescribes additional requirements for notices of proposed rulemaking, temporary (interim) regulations, and final regulations not preceded by a notice of proposed rulemaking that are issued by the IRS or TTB. Section 7805(f) applies if any such regulation:

(i) Is issued pursuant to authority contained in title 26, United States Code; and

(ii) Is not subject to the Regulatory Flexibility Act.

(B) NPRMs and Temporary (Interim) Regulations:

(i) Submission to Chief Counsel for Advocacy, SBA: Immediately following the publication of a NPRM or temporary (interim) regulation in the *Federal Register*, the IRS or TTB shall transmit a copy of such regulation to the Chief Counsel for Advocacy of the SBA.

(ii) Federal Register Statement: With respect to each such regulation, the preamble to such regulation shall contain a statement substantially similar to the following:

“Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. ”

(C) Final Regulations Superseding NPRMs or Temporary (Interim) Regulations:

**Exhibit 32.1.5-3 (Cont. 6) (09-30-2011)****Department of the Treasury Policy and Procedures to Ensure Consideration of Potential Impacts of Regulations on Small Businesses and Entities**

(i) Comments Submitted by the Chief Counsel for Advocacy of the SBA: In developing any final regulation that supersedes a NPRM or temporary regulation, the IRS or TTB shall consider any comments submitted by the Chief Counsel for Advocacy of the SBA within four weeks of the submission and shall respond to such comments in the preamble to the final rule.

(ii) Federal Register Statement: With respect to each such final regulation, the preamble to such regulation shall contain a statement substantially similar to the following:

“Pursuant to section 7805(f) of the Internal Revenue Code, the [NPRM/temporary regulation] preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. [The Chief Counsel for Advocacy submitted comments on the regulation, which are discussed elsewhere in this preamble].”

(D) Final Rules Not Superseding NPRMs or Temporary (Interim)

Rules:

(i) Submission to Chief Counsel for Advocacy, SBA: The IRS or TTB shall transmit a copy of a final rule that does not supersede a NPRM or temporary (interim) rule to the Chief Counsel for Advocacy of the SBA at least four weeks prior to publication in the *Federal Register*.

(ii) Comments Submitted by the Chief Counsel for Advocacy of the SBA: The IRS or TTB shall consider any comments submitted by the Chief Counsel for Advocacy of the SBA within four weeks of the submission and shall discuss any response to such comments in the preamble to the final rule.

(iii) Federal Register Statement: With respect to each such regulation, the preamble to such regulation shall contain a statement substantially similar to the following:

“Pursuant to section 7805(f) of the Internal Revenue Code, this regulation was submitted to the Chief Counsel for Advocacy of the SBA for comment on its impact on small business. [The Chief Counsel for Advocacy submitted comments on the regulation, which are discussed elsewhere in this preamble].”

(g) Delay or Waiver of Initial and Final Regulatory Flexibility Analyses.

(1) Initial Regulatory Flexibility Analysis (IRFA):

**Exhibit 32.1.5-3 (Cont. 7) (09-30-2011)****Department of the Treasury Policy and Procedures to Ensure Consideration of Potential Impacts of Regulations on Small Businesses and Entities**

(A) When a NPRM responds to an emergency situation or statutory or judicial deadline, and if the NPRM otherwise would require a IRFA, the bureau or office head, with the concurrence of the appropriate policy official and the Senior Advisor to the General Counsel for Regulatory Affairs, may determine that the preparation of an IRFA is impracticable. In such case, the transmittal memorandum to the Executive Secretary shall explain why preparation of the analysis is impractical and the preamble to the NPRM shall include a finding and explanation that the NPRM is being issued in response to an emergency or statutory or judicial deadline and that compliance with the requirements of the RFA concerning preparation of an IRFA is impracticable.

(B) Unless the provisions of paragraph 2(g)(2) apply, the bureau or office is required to prepare a Final Regulatory Flexibility Analysis (FRFA) at the time the final rule is published.

(2) Final Regulatory Flexibility Analysis (FRFA):

(A) When a final rule responds to an emergency situation or statutory or judicial deadline, and if such rule otherwise requires a FRFA, the bureau or agency head may, with the concurrence of the appropriate policy official and the Senior Advisor to the General Counsel for Regulatory Affairs, delay preparation of the FRFA. In such case, the transmittal memorandum to the Executive Secretary shall explain the need to delay preparation of the analysis, and the preamble shall include a statement that the regulation is being issued in response to an emergency, or statutory or judicial deadline, which makes timely compliance with the requirement of a FRFA impracticable.

(B) The originating bureau or office may delay publication of the FRFA for a period of not more than 180 days after the date of publication of the final rule in the *Federal Register*.

(C) The bureau or office shall prepare and transmit a FRFA to the Senior Advisor to the Counsel for Regulatory Affairs for review not later than 120 days after publication of the final rule.

(D) Offices and bureaus are advised that the RFA provides that failure to publish the FRFA (or advise the public how copies may be obtained) within 180 days after publication of the final rule will cause the regulation to lapse and have no effect (5 U.S.C. 608(b)).

(h) Periodic Review of Rules.

(1) In General: Not later than 10 years after the date of publication of a final rule that was determined to have a significant economic impact on a substantial number of small entities, and not later than every 10 years thereafter, the issuing office or bureau shall complete a review of the rule to assess its impact on small entities and determine whether the rule should be continued without change, amended or rescinded. In making such a determination the office or bureau shall consider:

## Exhibit 32.1.5-3 (Cont. 8) (09-30-2011)

### Department of the Treasury Policy and Procedures to Ensure Consideration of Potential Impacts of Regulations on Small Businesses and Entities

(A) The continued need for the rule;

(B) The comments filed by the public pursuant to the notice required by paragraph 2(h)(2)(A) and other comments or complaints received from the public concerning the rule;

(C) The complexity of the rule;

(D) The extent to which the rule overlaps, duplicates or conflicts with other Federal rules and, to the extent feasible, with State or local government rules; and

(E) The length of time since the rule was previously reviewed pursuant to this paragraph or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

#### (2) Federal Register Publications :

(A) At least 9 months before the date a review required by paragraph 2(h)(1) must be completed, the issuing office or bureau shall publish a notice in the *Federal Register* soliciting comments on the continued need for the rule, its impact on small entities and whether the rule should be continued, amended or rescinded.

(B) Not later than the date a review required by paragraph 2(h)(1) must be completed, the issuing office or bureau shall publish in the *Federal Register*:

(i) A notice of its determination to continue the rule without change, together with an explanation of that determination; or

(ii) Consistent with the requirements of 5 U.S.C. 553, a proposed or final (or interim) rule to amend or rescind the rule.

These notices shall be forwarded to the Senior Advisor to the General Counsel for Regulatory Affairs for review prior to publication.

#### (i) Judicial Review.

(1) In General: Offices and bureaus are advised that section 242 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) amended RFA section 611 to provide for judicial review of agency compliance with the RFA provisions governing:

(A) Certifications that a proposed or final rule does not have a significant economic impact on a substantial number of small entities, and determinations that the RFA does not apply to all or part of a particular regulation;

(B) The content of a final regulatory flexibility analysis, including whether quantification of the effects on small business is practicable or reliable;

**Exhibit 32.1.5-3 (Cont. 9) (09-30-2011)****Department of the Treasury Policy and Procedures to Ensure Consideration of Potential Impacts of Regulations on Small Businesses and Entities**

(C) Determinations to waive or delay completion of an initial regulatory flexibility analysis, or to delay completion of a final analysis;

(D) The periodic review of rules determined to have a significant economic impact on a substantial number of small entities; and

(E) Office or bureau efforts to solicit public comments on a proposed rule that will have a significant economic impact on a substantial number of small entities from affected small entities by means other than publishing the proposed rule in the *Federal Register* for comment.

(2) Remedies: If a court finds that an office or bureau did not comply with the RFA, remedies available include remanding the rule to the agency and suspending enforcement of the rule with respect to small entities.

3. Prepublication Notification of Certain Rules to the Chief Counsel for Advocacy.

(a) In General. To facilitate the review by the Chief Counsel for Advocacy of proposed rules that require the preparation of an IRFA, EO 13272 (August 13, 2002) requires that agencies notify the Chief Counsel of such proposed rules prior to publication.

(b) Notification Procedures. As soon as an office or bureau determines that a proposed rule will require an IRFA, the office or bureau shall notify the Senior Advisor to the General Counsel for Regulatory Affairs, who will coordinate notification to the Chief Counsel for Advocacy.

4. Small Business Compliance Guides.

(a) In General: For each final rule (or group of final rules) that was determined to have a significant economic impact on a substantial number of small entities, the issuing office or bureau shall publish one or more guides to assist small entities in complying with the rule. These publications shall be designated "small entity compliance guides." (See section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121).)

(b) Contents: Each small entity compliance guide shall:

(1) Explain the actions a small entity is required to take to comply with the rule (or group of rules); and

(2) Be written in plain language, taking into account the subject matter of the rule and the language of applicable statutes.

**Exhibit 32.1.5-4 (10-20-2014)****Model Language for “Comments and Public Hearing”****Comments and Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the “Addresses” heading. Treasury and the IRS request comments on all aspects of the proposed rules. All comments will be available at [www.regulations.gov](http://www.regulations.gov) or upon request.

A public hearing has been scheduled for Month Day, Year, beginning at 10 a.m. in the Auditorium of the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For more information about having your name placed on the building access list to attend the hearing, see the “FOR FURTHER INFORMATION CONTACT” section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit an outline of the topics to be discussed and the time to be devoted to each topic by Month Day, Year. Submit a signed paper or electronic copy of the outline as prescribed in this preamble under the “Addresses” heading. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.



**Exhibit 32.1.5-5 (10-20-2014)****Model Language for “Comments and Requests for Public Hearing”****Comments and Requests for Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the “Addresses” heading. Treasury and the IRS request comments on all aspects of the proposed rules. All comments will be available at *www.regulations.gov* or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the Federal Register.

**Exhibit 32.1.5-6 (08-11-2004)****List of Subjects****LIST OF SUBJECTS**

## 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements

## 26 CFR Part 2

Income taxes, Maritime carriers, Reporting and recordkeeping requirements.

## 26 CFR Part 3

Income taxes, Maritime carriers, Reporting and recordkeeping requirements.

## 26 CFR Part 5

Income taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 5c

Income taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 5e

Income taxes, Reporting and recordkeeping requirements

## 26 CFR Part 5f

Income taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 6a

Income taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 7

Income taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 8

Income taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 9

Income taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 11

Income taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 12

Income taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 13

Income taxes, Reporting and recordkeeping requirements

**Exhibit 32.1.5-6 (Cont. 1) (08-11-2004)****List of Subjects**

## 26 CFR Part 14a

Income taxes, Reporting and recordkeeping requirements

## 26 CFR Part 15

Income taxes, Reporting and recordkeeping requirements

## 26 CFR.Part 15a

Income taxes, Reporting and recordkeeping requirements

## 26 CFR Part 16

Income taxes, Reporting and recordkeeping requirements

## 26 CFR Part 16a

Income taxes, Reporting and recordkeeping requirements

## 26 CFR Part 17

Income taxes, Reporting and recordkeeping requirements

## 26 CFR Part 18

Income taxes, Reporting and recordkeeping requirements

## 26 CFR Part 19

Income taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 22

Estate taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 23

Estate taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 24

Estate taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 25

Gift taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 26

Estate taxes, Reporting and recordkeeping requirements

## 26 CFR Part 27

Estate taxes, Gift taxes, Reporting and recordkeeping requirements.

**Exhibit 32.1.5-6 (Cont. 2) (08-11-2004)****List of Subjects**

## 26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

## 26 CFR Part 32

Employment taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 33

Employment taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 35

Employment taxes, Income taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 35a

Employment taxes, Income taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 36

Employment taxes, Foreign relations, Reporting and recordkeeping requirements, social security.

## 26 CFR Part 38

Employment taxes, Reporting and recordkeeping requirements

## 26 CFR Part 40

Excise taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 41

Excise taxes, Motor vehicles, Reporting and recordkeeping requirements.

## 26 CFR Part 42

Excise taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 43

Excise taxes, Gambling, Reporting and recordkeeping requirements, Vessels.

## 26 CFR Part 44

Excise taxes, Gambling, Reporting and recordkeeping requirements

## 26 CFR Part 46

Excise taxes, Insurance, Reporting and recordkeeping requirements.

## 26 CFR Part 47

Excise taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 48

Excise taxes, Reporting and recordkeeping requirements.

**Exhibit 32.1.5-6 (Cont. 3) (08-11-2004)****List of Subjects**

## 26 CFR Part 49

Excise taxes, Reporting and recordkeeping requirements, Telephone, Transportation.

## 26 CFR Part 50

Excise taxes, Mines, Reporting and recordkeeping requirements

## 26 CFR Part 52

Chemicals, Excise taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 53

Excise taxes, Foundations, Investments, Lobbying, Reporting and recordkeeping requirements,

## 26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

## 26 CFR Part 55

Excise taxes, Investments, Reporting and recordkeeping requirements.

## 26 CFR Part 56

Excise taxes, Lobbying, Nonprofit organizations, Reporting and recordkeeping requirements.

## 26 CFR Part 141

Excise taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 143

Excise taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 145

Excise taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 148

Excise taxes, Reporting and recordkeeping requirements

## 26 CFR Part 156

Excise taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 301

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

## 26 CFR Part 302

Alien property, Reporting and recordkeeping requirements, Taxes.

## 26 CFR Part 303

Alien property, Reporting and recordkeeping requirements, Taxes

**Exhibit 32.1.5-6 (Cont. 4) (08-11-2004)****List of Subjects**

## 26 CFR Part 305

Indians-tribal government, Reporting and recordkeeping requirements, Taxes.

## 26 CFR Part 400

Reporting and recordkeeping requirements, Taxes

## 26 CFR Part 401

Reporting and recordkeeping requirements, Taxes.

## 26 CFR Part 403

Administrative practice and procedure, Gambling, reporting and recordkeeping requirements, Seizure and forfeitures, Surplus Government property.

## 26 CFR Part 404

Reporting and recordkeeping requirements, Taxes.

## 26 CFR Part 420

Pensions, Reporting and recordkeeping requirements, Taxes.

## 26 CFR Part 502

Greece, Reporting and recordkeeping requirements, Tax treaties

## 26 CFR Part 503

Germany, Reporting and recordkeeping requirements, Tax treaties.

## 26 CFR Part 509

Reporting and recordkeeping requirements, Switzerland, Tax treaties.

## 26 CFR Part 513

Ireland, Reporting and recordkeeping requirements, Tax treaties.

## 26 CFR Part 514

France, Reporting and recordkeeping requirements, Tax treaties.

## 26 CFR Part 516

Austria, Reporting and recordkeepingn requirements, Tax treaties.

## 26 CFR Part 517

Pakistan, Reporting and recordkeeping requirements, Tax treaties.

## 26 CFR Part 520

Reporting and recordkeeping requirements, Sweeden, Tax treaties

## 26 CFR Part 521

Denmark, Reporting and recordkeeping requirements, Tax treaties.

**Exhibit 32.1.5-6 (Cont. 5) (08-11-2004)**

**List of Subjects**

26 CFR Part 601

Administrative practice and procedure, Freedom of information, Reporting and recordkeeping requirements, Taxes.

26 CFR Part 602

Reporting and recordkeeping requirements

26 CFR Part 701

Campaign funds

26 CFR Part 702

Campaign funds



**Exhibit 32.1.5-7 (09-30-2011)****Sample of Final Regulatory Flexibility Analysis****Final Regulatory Flexibility Analysis**

## Succinct Statement of the Need for, and Objectives of, the Final Regulations

These final regulations are issued under the authority of sections 7805, 468B(g), and 7872. Section 468B(g) provides that nothing in any provision of law shall be construed as providing that an escrow account, settlement fund, or similar fund is not subject to current income tax and that the Secretary shall prescribe regulations providing for the taxation of such accounts or funds whether as a grantor trust or otherwise.

The final regulations provide that exchange funds are treated, generally, as loaned by a taxpayer to an exchange facilitator, and the exchange facilitator takes into account all items of income, deduction, and credit. If, however, the escrow agreement, trust agreement, or exchange agreement specifies that all the earnings attributable to exchange funds are payable to the taxpayer, the exchange funds are not treated as loaned from the taxpayer to the exchange facilitator, and the taxpayer takes into account all items of income, deduction, and credit attributable to the exchange funds. The final regulations are intended to provide greater certainty, enhance administrability, and ensure consistent treatment of taxpayers. The final regulations contain amendments to ease the economic impact of the final regulations on small businesses.

## Summary of Significant Issues Raised by Public Comments in Response to the Initial Regulatory Flexibility Analysis, Assessment of Issues, and Statement of Changes Made to the Proposed Regulations as a Result of Comments

## a. Administrative burden resulting from loan characterization

Under the final regulations, if exchange funds are treated as loaned by the taxpayer to an exchange facilitator, interest generally is imputed to the taxpayer under section 7872 unless the exchange facilitator pays sufficient interest. If a loan between the taxpayer and the exchange facilitator does not provide for sufficient interest and the loan is not otherwise exempt from section 7872, interest income is imputed to the taxpayer. Therefore, exchange facilitators must keep records of the amount of income paid to a taxpayer and may be required to report the income on Forms 1099. The revised IRFA estimated that most small businesses subject to the proposed regulations currently maintain records of the amount of income paid to the taxpayer and report the payments on Forms 1099. The revised IRFA concluded that the proposed regulations should not increase significantly the compliance burden associated with keeping records and reporting income paid to the taxpayer, based on the expectation that the proposed regulations may have the effect of increasing the amount exchange facilitators report, but not result in a significant increase in the number of forms generated. The revised IRFA requested additional comments to assist in quantifying any additional recordkeeping burdens and accounting costs that may result.

A commentator responded that the proposed regulations impose new and different reporting requirements than those that currently apply to qualified intermediaries (QI) because QIs must determine if the regulations apply to a particular transaction and may be required to report imputed interest. The commentator provided a study (updated in a follow-up submission) that concludes that the incremental workload to comply with the proposed regulations is substantial and the software needed to comply with the recordkeeping requirements is not available at a cost affordable to many small businesses. The study offers suggestions to mitigate these effects that include providing an exception to section 7872 for certain transactions, revising the special AFR, and including a transition period. The final regulations incorporate all of these suggestions.

The study also suggested that the average daily balance calculations required under the proposed regulations create substantial administrative burdens and should be deleted. The final regulations do not adopt this comment. The final regulations do not require average daily balance calculations, but provide an example utilizing an average daily balance calculation as only one acceptable method to determine the earnings of a commingled account that are attributable to a taxpayer's exchange funds. No other comments were received quantifying a compliance burden resulting from the proposed regulations. A commentator advised that the

**Exhibit 32.1.5-7 (Cont. 1) (09-30-2011)****Sample of Final Regulatory Flexibility Analysis**

amount of additional time or expense that would result from the application of the proposed regulations could not be quantified yet. However, commentators requested that the applicability of the final regulations be delayed to allow exchange facilitators sufficient time to make required changes to accounting, control, and reporting systems and to revise exchange agreements. In response to these comments, the final regulations apply to transfers of relinquished property made, and to exchange facilitator loans issued, on or after October 8, 2008.

**b. Economic impact of loan characterization**

Commentators on the proposed regulations asserted that the loan characterization rules will cause a large number of small businesses to suffer a substantial revenue loss and to fail or reduce their workforces. They claimed that small business QIs would be disproportionately affected because these QIs predominantly apply a business model that would place them at a disadvantage under the proposed regulations. Commentators stated that if businesses are required to impute interest on exchange funds, taxpayers will demand that this interest be paid to them. To compensate for this loss of revenue, these commentators claim that small businesses will be required to change their business practices to pay all income to the taxpayer and to charge higher fees, while large, bank-affiliated QIs generally will be unaffected. The revised IRFA requested specific comments to assist in quantifying the number of businesses that would change their business model as a result of the proposed regulations and the effect a change in business model would have on revenues or profits. No comments quantifying this effect were received.

The revised IRFA also requested specific comments on the appropriateness and nature of a rule that would reduce the economic impact of the regulations on small businesses by exempting certain exchange transactions most likely to be engaged in by small businesses from loan treatment. For this purpose, the revised IRFA requested information on the average duration of exchange transactions and the average dollar amount of exchange funds.

A commentator responded that in its QI business 76 percent of exchange transactions closed within 60 days and 80 percent of exchange transactions involved less than \$250,000 of exchange funds. This commentator advocated rules that would exempt from section 7872 transactions that either involved exchange funds of less than \$250,000 or remained open for less than 60 days.

Another commentator cited the minimal revenue impact of allowing interest retained by a QI to escape income inclusion to the taxpayer as a reason supporting exempting certain deferred like-kind exchange transactions. Because compensation paid to a QI must be capitalized as an acquisition cost of the replacement property, the commentator asserted that there is only a timing mismatch for the taxpayer if current exclusion is not allowed, and that given the relatively short time period during which interest accrues in typical section 1031 transactions, any revenue impact of the proposed regulations would be outweighed by the increased compliance burden on taxpayers. This commentator suggested that two separate rules, one which exempts transactions of a certain amount (\$1 million) and another which exempts transactions of short duration (less than 90 days), are necessary because the available data suggests that there is no correlation between the size of the deposited exchange funds and the length of time the funds stay on deposit. This commentator also requested that any exemption amounts be adjusted for inflation.

In response to these comments, the final regulations provide an exemption from section 7872 for exchange transactions in which the amount of exchange funds treated as loaned does not exceed \$2 million and the funds are held for 6 months or less. This exemption amount may be increased in future published guidance. Based upon comments received the \$2 million amount is expected to exempt from the application of section 7872 most deferred exchange transactions handled by small business exchange facilitators.

**c. Special AFR**

The proposed regulations provide a special AFR, equal to the investment rate on a 182-day Treasury bill, to test whether an exchange facilitator loan pays sufficient interest as required by section 7872. The special AFR

**Exhibit 32.1.5-7 (Cont. 2) (09-30-2011)****Sample of Final Regulatory Flexibility Analysis**

was expected to result in fewer transactions requiring the imputation of interest to taxpayers than the short-term AFR, thus reducing the economic impact on small businesses. However, comments on the proposed regulations claimed that the special AFR is unrealistically high and inappropriate for these transactions. In order to determine an appropriate rate for testing exchange facilitator loans for sufficient interest, the revised IRFA requested specific comments identifying the rate of return typically earned by small business QIs on exchange funds and the interest rate QIs typically pay to taxpayers, and solicited suggestions for an appropriate rate.

A commentator responded that the rate of return earned by a QI will vary depending on the total amount of funds the QI aggregates, the market in which the QI operates, the QI's reputation and relationship with a depository institution, and the QI's choice of investment vehicle. Thus, the commentator advised that it is difficult to ascertain the rate of return earned by a small business QI on exchange funds. The commentator stated that quantifying the interest rate that QIs typically pay to taxpayers likewise is difficult because many factors influence it.

Another commentator responding to the revised IRFA argued that the 182-day rate is inappropriate to test whether exchange facilitator loans bear sufficient interest under section 7872 because exchange funds held by a depository institution are demand deposits and rarely are held for 180 days. This commentator identified three potential alternative rates to the 182-day rate for a special AFR: (1) a rate based on national demand deposit rates; (2) a rate that is 10 percent of an established rate such as the Federal Funds rate; and (3) an average of the minimum demand deposit savings rates offered by several banks in a QI's home office region. Although this commentator recognized the administrative burdens of publishing one of these alternative rates, the commentator believed these alternatives more readily reflected the economic reality of exchange fund transactions than the 182-day rate.

In response to these comments and comments on the proposed regulations, in lieu of the 182-day rate, the final regulations provide a special AFR that is the investment rate on a 13-week (generally, 91-day) Treasury bill. In addition, because the short-term AFR may be lower than the 91-day rate, the final regulations provide that taxpayers must apply the lower of the 91-day rate or the short-term AFR when testing for sufficient interest under section 7872.

d. Earnings attributable to exchange funds

The proposed regulations provide that a taxpayer's exchange funds are not treated as loaned if all the earnings attributable to the exchange funds are paid to the taxpayer but do not define the term "earnings attributable to the exchange funds." Commentators have asserted that the lack of specificity results in disparate treatment of bank-affiliated QIs and independent QIs because of their different business models and places the independent QIs, many of which are small businesses, at an economic disadvantage. Commentators advised that a portion of the earnings of a depository institution may be credited to an exchange facilitator based on the total amount of exchange funds the exchange facilitator deposits when the exchange facilitator and the depository institution (generally large businesses) are part of the same corporate group. The commentators opined that the proposed regulations do not, but should, treat this credit as earnings attributable to the exchange funds on which it is calculated.

Another commentator noted that depository institutions also may pay fees to unrelated exchange facilitators, including small businesses, for depositing exchange funds. Furthermore, other commentators described a business model used by some independent QIs, including some small businesses, in which a QI deposits the exchange funds of multiple taxpayers in sub-accounts under a master account that earns interest in addition to the interest credited to the sub-accounts. The amount of the additional interest credited to the QI is based on the total amount of exchange funds the QI deposits. Commentators have expressed concern that the proposed regulations treat this additional interest as earnings attributable to the individual taxpayers' exchange funds, but do not similarly treat earnings credited to a related QI based on total amount deposited.

**Exhibit 32.1.5-7 (Cont. 3) (09-30-2011)****Sample of Final Regulatory Flexibility Analysis**

The commentators claim that as a result of this treatment independent QIs will be forced to pay the additional interest that is attributable to exchange funds to taxpayers to avoid loan treatment, and thus will be required to correspondingly raise fees to compensate for lost profits. They assert that because bank-affiliated QIs earn profits by means of credits that are not attributed to exchange funds, bank-affiliated QIs will not be required to raise fees, creating an economic disparity between similarly situated bank-affiliated QIs and independent QIs.

In response to these comments, the final regulations provide a definitive test for determining earnings attributable to a taxpayer's exchange funds when an exchange facilitator holds all of the taxpayer's exchange funds in a separately identified account (or sub-account) under that taxpayer's name and TIN. Under this rule, the earnings attributable to the taxpayer's exchange funds include only the earnings on the separately identified account. This rule equalizes the treatment of independent, small business exchange facilitators and large exchange facilitators by providing that neither earnings of a depository institution that are credited to a related exchange facilitator nor the additional interest paid in connection with a master account are treated as earnings attributable to exchange funds when a taxpayer's exchange funds are held in a separately identified account (or sub-account).

**Description and Estimate of the Number of Small Businesses to Which the Final Regulations Will Apply**

The final regulations affect exchange facilitators that hold exchange funds for taxpayers engaging in deferred exchanges of like-kind property. The revised IRFA concludes that the applicable size standard for determining what constitutes a small business for purposes of the proposed regulations is \$2 million in annual gross receipts, the SBA's definition of a small business for North American Industry Classification System (NAICS) code 531390, and estimates that there are approximately 325 businesses (mostly QIs) that are full-time exchange facilitators.

The revised IRFA requested additional information on the number of small businesses engaged in the QI industry, and requested specific comments from QIs engaged exclusively in that business indicating whether their annual gross receipts are \$2 million or less, or more than \$2 million. A commentator advised that the number of QIs is very large, but many QIs do not identify themselves as such or engage in that business full-time. The commentator reported that the annual gross receipts of its QI business are well below \$2 million. Another commentator opined that the information requested could not be quantified. No other comments were received on the number of small businesses in the industry or the general appropriateness of the size standard. Therefore, the estimate of approximately 325 businesses that are full-time exchange facilitators, the applicable size standard for determining what constitutes a small business with respect to these regulations of \$2 million in annual gross receipts, and the conclusion that a significant portion of the QI industry consists of small businesses under this standard, are unchanged.

**Description of Compliance Requirements and Estimate of the Classes of Small Businesses That Will Be Subject to the Compliance Requirements**

As discussed, under current law exchange facilitators must keep records of the amount of income paid to taxpayers and may be required to report the income on Forms 1099. The final regulations provide that if the exchange funds are treated as loaned from the taxpayer to the QI and the loan is a below-market loan that does not qualify for an exemption from section 7872, income is deemed transferred to the exchange facilitator as compensation and retransferred to the taxpayer as interest. The exchange facilitator has income from the imputed compensation and an offsetting deduction for the interest deemed paid to the taxpayer.

The final regulations provide an exemption from section 7872 for exchange facilitator loans that do not exceed \$2 million and provide that this exemption amount may be increased in future published guidance. Based on available data, this exemption from section 7872 is expected to apply to the majority of exchange transactions engaged in by small business exchange facilitators. Additionally, the final regulations revise the special AFR that determines whether a loan pays sufficient interest, which should reduce the number of transac-

**Exhibit 32.1.5-7 (Cont. 4) (09-30-2011)****Sample of Final Regulatory Flexibility Analysis**

tions in which interest is imputed. Therefore, for most small businesses the final regulations are not expected to increase significantly the compliance burden associated with keeping records and reporting income paid to the taxpayer.

**Actions to Minimize the Significant Economic Impact on Small Businesses and Reasons for Selecting Alternatives Reflected in the Final Regulations and for Rejecting Other Significant Alternatives**

The final regulations provide a reasonable balance between the statutory requirements of sections 468B and 7872, the economic impact of a strict application of those provisions, and the need to provide clear and administrable rules. The inclusion of a \$2 million exemption from section 7872, the adjustment of the special AFR, and the delayed applicability date reflect a judgment that the revenue effects are small and are outweighed by the compliance burden and other economic impacts of the regulations on small businesses.

