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DEPARTMENT OF EDUCATION

34 CFR Parts 75 and 77

RIN 1855-AA13

Definitions and Selection Criteria that Apply to Direct Grant Programs

AGENCY: Department of Education.

ACTION: Final rule.

SUMMARY: On July 31, 2017, the Department of Education (Department) issued a new rule in order to better align the Education Department General Administrative Regulations (EDGAR) with the definition of "evidence-based" in the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act (ESEA). Through this document, we are adding a selection factor that was inadvertently omitted and removing an outdated definition.

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

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If you use a telecommunications device for the deaf (TDD) or text telephone (TTY), call the Federal Relay

Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Final Regulatory Changes

Background:

On July 31, 2017, the Department published in the *Federal Register* a final rule (82 FR 35445) (2017 Rule) revising 34 CFR parts 75 and 77 to better align the regulations with the definition of "evidence-based" in the ESEA. In that rule, we inadvertently removed a selection factor and maintained an outdated definition. Therefore, the purpose of this document is to amend §§ 75.210(h) and 77.1(c) in order to correct those errors.

34 CFR Part 75

Section 75.210 General selection criteria.

Current Regulations: Section 75.210(h) includes 13 factors under the "Quality of the Project Evaluation" selection criterion.

Final Regulations and Reasons: We are reinserting the selection factor under the "Quality of the Project Evaluation" criterion (§ 75.210(h)) focused on the extent to which the methods of evaluation will provide valid and reliable performance data on relevant outcomes. This factor was inadvertently omitted from § 77.210(h), and we are making this revision to add it back in. We believe

this factor continues to be an important one to include in the menu of selection criteria and factors available for use in discretionary grant programs. As noted in the 2017 Rule, the final regulations do not change the way the Secretary uses selection criteria and factors. The Secretary will continue to use selection criteria that are consistent with the purpose of the program and permitted under the applicable statutes and regulations.

34 CFR Part 77

Section 77.1 Definitions that apply to all Department programs.

Current Regulations: Section 77.1(c) establishes definitions that, unless a statute or regulation provides otherwise, apply to the regulations in title 34 of the Code of Federal Regulations and can be used in Department grant competitions.

Final Regulations and Reasons: We are removing the term "randomized controlled trial" from § 77.1(c). We are removing this definition because, as noted in the 2017 Rule, it was our intent to replace it with the term "experimental study," to align with the definition of "evidence-based," in section 8101(21), specifically with regard to "strong evidence." In the new definition of "strong evidence," we clarified the types of studies that

can qualify as experimental studies--including, but not limited to, randomized controlled trials--as provided in the applicable What Works Clearinghouse (WWC) Handbook.

Waiver of Proposed Rulemaking and Delayed Effective Date

Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed regulations. However, these regulations make technical changes only and do not establish substantive policy. The regulations are, therefore, exempt from notice and comment rulemaking under 5 U.S.C. 553(b) (3) (B).

The APA also generally requires that regulations be published at least 30 days before their effective date, unless the agency has good cause to implement its regulations sooner (5 U.S.C. 553(d) (3)). Again, because these final regulations are merely technical, there is good cause to make them effective on the day they are published.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive

Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

Under Executive Order 13771, for each new regulation that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866 and that imposes total

costs greater than zero, it must identify two deregulatory actions. For Fiscal Year 2018, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. However, Executive Order 13771 does not apply to "transfer rules" that cause only income transfers between taxpayers and program beneficiaries, such as those regarding discretionary grant programs. The final regulations pertain to the Department's discretionary grant programs and, therefore, Executive Order 13771 is not applicable.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their 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 and taking into account--among other things and to the

extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select 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 the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these final regulations only on a reasoned determination that their benefits justify their

costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on an analysis of anticipated costs and benefits, the Department believes that these final regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

Potential Costs and Benefits

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action and have determined that these regulations would not impose additional costs. We believe any additional costs imposed by these final regulations will be negligible, primarily because they reflect technical changes that do not impose additional burden. Moreover, we believe any costs will be significantly outweighed by the potential benefits of making necessary clarifications and ensuring consistency among the Education Department General Administrative Regulations and section 8101(21) of ESEA, as amended by the ESSA.

Regulatory Flexibility Act Certification

The Secretary certifies that these regulations do not have a significant economic impact on a substantial number of small entities.

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List of Subjects

34 CFR Part 75

Accounting, Copyright, Education, Grant programs-education, Inventions and patents, Private schools, Reporting and recordkeeping requirements, Youth organizations.

34 CFR Part 77

Education, Grant programs-education, Incorporation by reference.

Dated: April 24, 2018.

Betsy DeVos,
Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends parts 75 and 77 of title 34 of the Code of Federal Regulations as follows:

PART 75--DIRECT GRANT PROGRAMS

1. The authority citation for part 75 continues to read as follows:

AUTHORITY: 20 U.S.C. 1221e-3 and 3474, unless otherwise noted.

2. Section 75.210 is amended by adding paragraph (h) (2) (xiv) to read as follows:

§ 75.210 General selection criteria.

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(h) * * *

(2) * * *

(xiv) The extent to which the methods of evaluation will provide valid and reliable performance data on relevant outcomes.

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PART 77--DEFINITIONS THAT APPLY TO DEPARTMENT REGULATIONS

3. The authority citation for part 77 continues to read as follows:

AUTHORITY: 20 U.S.C. 1221e-3 and 3474, unless otherwise noted.

§ 77.1 [Amended]

4. Section 77.1(c) is amended by removing the definition of "randomized controlled trial."

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