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## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

#### 23 CFR Part 924

[FHWA Docket No. FHWA-2008-0009]

RIN 2125-AF25

#### Highway Safety Improvement Program

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The purpose of this final rule is to revise Part 924 to incorporate changes to the Highway Safety Improvement Program (HSIP) that resulted from the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), as well as to reflect changes in the overall program that have evolved since the FHWA originally published 23 CFR Part 924.

**DATES:** *Effective Date:* This final rule is effective January 23, 2009.

**FOR FURTHER INFORMATION CONTACT:** Ms. Erin Kenley, Office of Safety, (202) 366-8556; or Raymond Cuprill, Office of the Chief Counsel, (202) 366-0791, Federal Highway Administration, 1200 New Jersey Ave., SE., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., *e.t.*, Monday through Friday, except Federal holidays.

#### SUPPLEMENTARY INFORMATION:

##### Electronic Access and Filing

This document, the notice of proposed rulemaking (NPRM), and all comments received may be viewed online through <http://www.regulations.gov>. Electronic submission and retrieval help and guidelines are available on the Web site. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: <http://www.archives.gov> and the Government Printing Office's Web page at: <http://www.access.gpo.gov/nara>.

##### Background

On April 24, 2008, at 73 FR 22092, the FHWA published a NPRM proposing to revise the regulations in 23 CFR Part 924 Highway Safety Improvement Program. The NPRM was published to

incorporate the new statutory requirements of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) and to provide State and local safety partners with information on the purpose, definitions, policy, program structure, planning, implementation, evaluation, and reporting of HSIP.

#### Summary of Comments

The FHWA received 15 letters submitted to the docket containing approximately 100 individual comments. Comments were received from State departments of transportation (DOTs), a county department of public works, private industry, and the American Automobile Association (AAA). The FHWA has reviewed and analyzed all the comments received. The significant comments and summaries of the FHWA's analyses and determinations are discussed below.

##### Section 924.1 Purpose

The FHWA received one comment from the Arkansas State Highway Commission requesting clarification of FHWA's proposal to add evaluation to the list of components of a comprehensive HSIP, since evaluation already exists under the current HSIP. While evaluation has always been a requirement of the HSIP, the FHWA includes this change to emphasize that evaluation is a critical element of the program. The FHWA believes that explicitly adding evaluation to section 924.1 makes this section consistent with the rest of the regulation and corrects an omission of the word “evaluation” from the existing regulation.

##### Section 924.3 Definitions

The FHWA received 14 comments from State DOTs and the AAA regarding some of the proposed definitions in this section. In particular, the Michigan and North Dakota State DOTs, as well as the Maryland State Highway Administration (SHA), expressed concern with the definition of “highway safety improvement project,” because they believed the definition required Strategic Highway Safety Plans (SHSP) to include specific projects. It is not the FHWA's intent for SHSPs to be project specific; therefore, FHWA revises the definition in the final rule to indicate that a highway safety improvement project is “consistent with” the State SHSP, rather than “described in” the SHSP. In addition, the Illinois, Minnesota, and Arizona DOTs and the AAA commented about the list of example projects included within the definition of “highway safety improvement project.” Because the

project list is consistent with 23 U.S.C. 148, and the intent is to keep the definition of eligible projects broad, rather than imply that it is an exhaustive list, the FHWA retains the list of projects as proposed in the NPRM. However, the FHWA does incorporate a minor revision to the definition of “highway safety improvement project,” project type 10, elimination of a roadside obstacle, to also include roadside hazards. This addresses comments by the Arizona DOT, who suggested that improvement of roadside slopes be included in this project type. The FHWA believes that “roadside hazards” is more general and addresses Arizona DOT's comment, while also being broad enough to cover other hazards. In addition, the FHWA removes the word “installation” from project type 21 in the final rule to be consistent with the language used in 23 U.S.C. 148. The AAA suggested that the term “crash rate,” as described in the definition of “high risk rural roads,” should include vehicle miles traveled, and a reference to fatalities and serious injuries, for consistency with the serious injury definition in the statutory language. The FHWA recognizes that not all crash rates are recorded with respect to vehicle miles travelled, and FHWA's desire is to allow States flexibility with how crash rates are defined. The definition for “high risk rural roads” is consistent with the 23 U.S.C. 148 definition in its reference to fatalities and incapacitating injuries. The Illinois DOT agreed with FHWA's proposed definition of “high risk rural roads” and suggested expanding the definition to include “locations on such roads that display similar roadway characteristics to warrant systematic safety improvements.” The FHWA is adopting the proposed definition without the suggested expansion because it is more consistent with the requirements of 23 U.S.C. 148, and the suggested expansion of the definition would extend the application of the rule beyond its statutory authority. This would need to be addressed in future legislation. The definitions for “high risk rural roads,” “highway safety improvement program,” “safety projects under any other section,” and “strategic highway safety plan,” which are based on the definitions in 23 U.S.C. 148(a), remain unchanged in the final rule. The definition of “highway safety improvement project” in the final rule reflects a slight editorial change as discussed above.

The FHWA incorporates a minor editorial revision to the definition for “road safety audit” in the final rule to

clarify that the audit teams that perform road safety audits are multidisciplinary teams. The FHWA also incorporates minor editorial changes in the final rule definition for “safety data” to correspond with similar changes in section 924.9. In the NPRM, the FHWA proposed including case or citation adjudication and injury data to the list of types of safety data; however, several State DOTs, including Arkansas, Michigan, and Oregon indicated that they currently do not have access to all of that data. While the FHWA believes that case or citation adjudication and injury data are elements of an ideal safety data system, the FHWA removes those items in order to prevent the list of safety data from appearing exhaustive.

The FHWA incorporates the definitions for the following terms into the final rule, unchanged from what was proposed in the NPRM: “Highway-rail grade crossing protective devices,” “integrated interoperable emergency communication equipment,” “interoperable emergency communications system,” “operational improvements,” “public road,” “hazard index formula,” “public grade crossing,” “safety stakeholder,” “serious injury,” and “transparency report.” These terms are used in the text of the regulations. The AAA suggested that the definition for “hazard index formula” was overly broad; however, the FHWA believes that the proposed definition provides sufficient Federal level regulatory requirements while also allowing States the appropriate flexibility to incorporate States’ methodologies. The Minnesota DOT agreed with the definition of “public grade crossing,” commenting that it provided a clearer definition than was previously available.

The Illinois DOT suggested removing pedestrian and bicycle facilities from the existing definition of “highway” in Part 924; however, the FHWA leaves the definition unchanged because these types of facilities are eligible for HSIP funding and therefore must be included in the definition. The Arizona DOT suggested adding a definition for the word “safety”; however, the FHWA believes that the definitions and other provisions of the final rule provide sufficient information on the safety projects it covers and therefore a definition of “safety” is not necessary.

#### *Section 924.5 Policy*

While the Washington State DOT and the San Diego County Department of Public Works agreed with the proposed revisions to the policy statement in section 924.5(a), the Oregon and North

Dakota DOTs submitted comments about the specific wording. The North Dakota DOT requested clarification of the phrase “evaluate on a continuing basis” and suggested the phrase “all public roads” would include roads outside of the State’s authority. The Oregon DOT commented that the proposed objective of “decreasing the potential for crashes” is not specifically addressed in SAFETEA-LU and that the overall objective of significantly reducing fatalities and serious injuries should be emphasized. As a result of these comments, the FHWA revises the text in section 924.5(a) of the final rule to indicate that States shall “\* \* \* evaluate on an annual basis a HSIP that has the overall objective of significantly reducing the occurrence of and the potential for fatalities and serious injuries resulting from crashes on all public roads.” The FHWA believes that this policy complements the systematic improvement characteristics of the SHSP and supports States in implementing safety countermeasures that target crash types rather than just high crash locations. The FHWA encourages States to fund projects that will have the largest impact on safety regardless of who owns and maintains the road.

In the NPRM, the FHWA proposed adding two additional paragraphs (b) and (c) to this section to provide information about highway safety improvement project eligibility, and to encourage agencies to use HSIP funding for projects that maximize opportunities to advance safety, and to indicate the period of availability for the funds. While the Washington State DOT supported the proposed language in section 924.5(b) emphasizing that States consider safety projects that maximize opportunities to advance safety by addressing locations and treatments with the highest potential for future crash reduction, Michigan and Illinois DOT and Maryland SHA expressed concern with the proposed language. Michigan DOT suggested that, in practice, it is very difficult to implement low cost treatment projects (as suggested in the NPRM) using Federal funding because of the requirement that such projects be competitively bid. The Maryland SHA also commented that these projects would be difficult to fund due to the policy requirement that the activity address locations and treatments with the highest potential for future crash reduction. The FHWA understands these concerns, and as a result, removes the phrase, “\* \* \* by addressing locations and treatments with the highest potential for crash

reduction” from the statement in the final rule. In response to Illinois DOT’s concern that the proposed language in section 924.5(b) suggests prioritization of projects, the FHWA clarifies that this statement does not require prioritization, rather the intent is that the program should fund projects that are considered priority projects, which are projects with maximum lifesaving potential.

Paragraph (b) reiterates that safety projects under any other section are eligible activities only when a State meets the requirements of 23 U.S.C. 148(e) to use or flex 10 percent of the amount apportioned under 23 U.S.C. 104(b)(5) for a fiscal year. This excludes minor activities that are incidental to a specific highway safety improvement project. The FHWA received a comment from the Maryland SHA stating that flexing the 10 percent of the funds apportioned under 23 U.S.C. 104(b)(5) into behavioral programs should be made easier for the States and the FHWA division offices. The FHWA believes that this regulation provides States with the maximum flexibility allowed under current law for implementing the 10 percent flexibility provision and that granting additional flexibility would exceed statutory authority, and therefore, it is outside of the scope of this rulemaking.

The FHWA received comments from the Illinois, Minnesota, and Oregon DOTs supporting the addition of paragraph (c) to this section. The paragraph clarifies that improvements to safety features that are routinely provided as part of broader Federal-aid projects should be funded by the same source as the broader project. The Florida, Michigan, and North Dakota DOTs commented that the proposed language would limit their abilities to dual-fund or split-fund projects. The FHWA emphasizes that this statement does not prohibit dual or split funding, rather it encourages use of other funding sources for safety improvements. States should consider safety in all infrastructure improvements and funding those improvements through all sources possible, not just through dedicated safety funding. States also should consider using HSIP funds for cost effective, high-impact projects in order to use available funding as efficiently and effectively as possible.

Finally, the FHWA adds a new paragraph (d) to this section to explain that eligibility for Federal funding of projects for traffic control devices under this Part is subject to a State and/or local jurisdiction’s substantial conformance with the National Manual on Uniform Traffic Control Devices

(MUTCD) or FHWA-approved State MUTCDs and supplements in accordance with Part 655, Subpart F, of this title. While the FHWA neglected to include this in the NPRM, the FHWA adds this paragraph in the final rule to clarify that traffic control devices that are installed using HSIP funding must be MUTCD compliant. This is not a new requirement.

The purpose of this policy section is to support States in implementing safety countermeasures that target crash types rather than just high crash locations.

#### Section 924.7 Program Structure

The FHWA received comments from Maryland SHA and Michigan DOT agreeing with the addition of paragraph (a), which requires that the HSIP in each State include a data-driven SHSP and resulting implementation through all roadway improvement projects, in addition to highway safety improvement projects. The language requires that the HSIP include projects for construction and operational improvements on high risk rural roads and the elimination of hazards at railway-highway grade crossings.

The FHWA received comments from Maryland SHA and the North Dakota DOT opposed to proposed modifications of the existing language that require that each State's HSIP include processes for the evaluation of the SHSP, HSIP, and highway safety improvement projects. Both suggested that evaluation on a programmatic level, rather than project specific level, be allowed. The FHWA agrees that evaluation should be based on a programmatic level, and removes the requirement in paragraph (a) for each State to have a process for evaluating highway safety improvement projects as a process requirement from this section, as well as from other related sections in the regulation.

The FHWA received comments from the South Dakota DOT opposing the language that requires FHWA approval of the State's processes for the planning, implementation, and evaluation of the HSIP and SHSP, as well as the requirement for States to develop the processes cooperatively with officials of the various units of local governments. In both cases, South Dakota suggested revising the language to read "in consultation with." In the first instance, the FHWA agrees with the suggested change and has revised the language to read, "These processes shall be developed by the States in consultation with the FHWA Division Administrator in accordance with this section." However, in the second instance, because the role of various units of local governments is different from the role of

the FHWA the word "cooperatively" was not changed to "in consultation."

#### Section 924.9 Planning

The FHWA revises this section in order to provide more information to States regarding the planning process for HSIPs. The FHWA reorganizes this section and adds more detail regarding individual elements of the planning process from what appears in the existing regulation.

The five main elements that the planning process of the HSIP States shall incorporate are:

- (1) A process for collecting and maintaining a record of crash, roadway, traffic, and vehicle data on all public roads, including the characteristics of both highway and train traffic for railway-highway grade crossings;
- (2) A process for advancing the State's capabilities for safety data collection and analysis;
- (3) A process for analyzing available safety data;
- (4) A process for conducting engineering studies (such as road safety audits and other safety assessments or reviews) of hazardous locations, sections, and elements to develop highway safety improvement projects; and
- (5) A process for establishing priorities for implementing highway safety improvement projects.

Maryland SHA agreed that each State should have a procedure to monitor crashes on State and local highway systems such as to identify those locations having extraordinary frequencies; however, they were concerned that the requirements of this section would be interpreted as requiring that there be a single process or system in the State to identify, analyze, and prioritize crash locations. The FHWA believes that local jurisdictions may have and use data systems of their choice and does not require that a single process or system be used. However, the capabilities of the processes or systems that are used by the State must adhere to the requirements in 23 U.S.C. 148.

While the first of the five elements resembles the first planning component in existing Part 924, the final rule includes collecting and maintaining a record of crash, roadway, traffic, and vehicle data on all public roads. In the NPRM, the FHWA proposed including case or citation adjudication and injury data to the list of items to be collected and maintained; however, several State DOTs, including Arkansas, Michigan, and Oregon, indicated that they currently do not have access to all of that data. While the FHWA believes that

case or citation adjudication and injury data are elements of an ideal safety data system, the FHWA removes the requirement for those data sources in order to prevent the list of safety data from appearing exhaustive. The FHWA incorporates this change to bring additional data sources into the planning process and to encourage States to make their databases more comprehensive. The requirement for comprehensive databases is also consistent with 23 U.S.C. 148 and 408.

The FHWA proposed paragraph (2) to advance States' improvement of capabilities for data collection and analysis, including the improvement of the timeliness, accuracy, completeness, uniformity, integration, and accessibility of safety data or traffic records. The Arizona DOT suggested adding comprehensiveness, efficiency, and consistency to the safety data qualifiers, with "consistency" replacing "uniformity." However, FHWA's desire is to be consistent with 23 U.S.C. 148 and 408 and list the desirable qualities of data, and, therefore, declines to incorporate the suggested change.

The FHWA expands paragraph (3) [formerly paragraph (2) of the existing regulation] to provide more detailed information regarding the processes involved in developing a data-driven program. The revision to this section also provides four paragraphs with additional information on the components of a data-driven program that States must develop. These components include:

- (i) Developing a HSIP in accordance with 23 U.S.C. 148(c)(2) that identifies highway safety improvement projects on the basis of crash experience, crash potential, or other data supported means as identified by the State and establishes the relative severity of those locations, considers the relative hazard of public railway-highway grade crossings based on a hazard index formula; and that analyzes the results achieved by highway safety improvement projects in setting priorities for future projects. The FHWA revises the wording in the final rule based on comments from North Dakota and Colorado DOTs, as well as the Maryland SHA. The North Dakota DOT and Maryland SHA suggested that identifying safety improvement projects on the basis of crash experience is not broad enough and addressing a common system crash type should be allowed. As a result, the FHWA revises section (a)(3)(i)(A) to include "other data supported means as identified by the State." The FHWA includes this item to require that the States develop a data-driven program where projects and priorities are based on crash data, crash

severity, and other relevant safety information. In section 924.9(a)(3)(i)(B), the Maryland SHA questioned whether the use of a hazard index formula for public railway-highway grade crossings would have an impact on safety. The FHWA believes that some means of ranking and prioritizing railway-highway crossing locations for improvements continues to be needed, and required by 23 U.S.C. 130, and a hazard index formula serves this purpose. The FHWA reminds agencies that FHWA provides guidance and technical support to States including recommendations on hazard index formulas and best practices. States have the flexibility to use the DOT formula or a State-developed and validated formula. As a result, States have the ability to develop a hazard index formula that has a positive impact on safety. Section 924.9(a)(3)(i)(C) requires that States use information from their evaluation processes to set priorities for future projects. The Colorado and North Dakota DOT, as well as the Maryland SHA, had comments regarding the interpretation of the proposed language. As a result, the FHWA revises the wording in the final rule to indicate that the information from the evaluation process is to be used where appropriate in setting priorities for future projects. It is the FHWA's intent for evaluation information to be considered, but not as the sole source for data. In addition, the FHWA desires evaluation on a programmatic level and revises the language in the final rule by replacing the term "highway safety improvement project" with "highway safety improvement program." Finally, the FHWA emphasizes that the evaluation process does not require States to create accident modification factors or crash reduction factors; rather, States must establish an evaluation process and use the information as another source of data for future project prioritization. Such information can be very useful in helping the State determine the effectiveness of countermeasures.

(ii) Developing and maintaining a data-driven SHSP in consultation with safety stakeholders that makes effective use of crash data, addresses engineering, management, operation, education, enforcement, and emergency services, and considers safety needs on all public roads. In addition, the SHSP should identify key emphasis areas, adopt performance-based goals, priorities for implementation and a process for evaluation, and obtain approval by the Governor of the State, or a responsible State agency that is delegated by the Governor of the State. The process by

which the State develops the SHSP shall be approved by the FHWA Division Administrator. The elements in this section implement the statutory requirements of 23 U.S.C. 148. The Maryland SHA and the Oregon and South Dakota DOTs each submitted comments about interpreting some of the language in this portion of the regulation. In particular, Maryland SHA and Oregon DOT thought that the proposed language in item (F) implied that the program of HSIP projects had to be listed in the SHSP. The FHWA reiterates that item (F) does not require that the program of HSIP projects be listed in the SHSP, rather the SHSP is to describe a program of projects, technologies, or strategies. Maryland SHA commented that item (G), related to performance-based goals, needed to be cognizant of the work being done by National Highway Traffic Safety Administration (NHTSA) on performance measures and that this regulation should not require States to use specific measures until there is a national consensus on such measures. The FHWA reiterates that item (G) does not require specific measures be used, only that the measures that are used be consistent among other types of safety plans in the State. The consistency of performance measures is an existing requirement of 23 U.S.C. 148. Further, FHWA believes that NHTSA's report on "Traffic Safety Performance Measures for States and Federal Agencies"<sup>1</sup> will not adversely affect this regulation because performance measures described in the report cover the major areas common to many State SHSPs, and States will set the specific goals for the core outcome measures. To clarify the term "low cost," the FHWA replaces the term with the word "cost effective" in item (H). Items (M) and (N) involve approvals by the Governor of a State and the FHWA Division Administrator, respectively. Consistent with stewardship and oversight responsibilities, and with 23 U.S.C. 315, FHWA has the authority to approve the processes that a State uses to administer a federally funded program. While the FHWA revises the reference to process approval in Section 924.7(b) to be "in consultation with," process approval for the SHSP development still remains a requirement.

(iii) Developing a High Risk Rural Roads program using safety data that

identifies eligible locations on State and non-State owned roads, and analyzes the highway safety problem to diagnose safety concerns, identify potential countermeasures, make project selections, and prioritize high risk rural roads projects. The elements in this section also implement the statutory requirements of 23 U.S.C. 148. While the San Diego County Department of Public Works agreed with this section, the Illinois DOT suggested that this requirement may require additional staffing and funding for their agency. Since this is already a statutory requirement under 23 U.S.C. 148, FHWA does not make any revisions to the language in the final rule.

(iv) Developing a Railway-Highway Grade Crossing Program. This item is contained in existing Part 924; however, the FHWA incorporates minor edits to clarify the content. Similar to their comment on Section 924.9(a)(3)(i)(B), the Maryland SHA suggested that the use of a hazard index formula for public railway-highway grade crossings would not be valid in their State. As stated above in Section 924.9(a)(3)(i)(B), the FHWA believes that some means of ranking and prioritizing railway-highway crossing locations for improvements is necessary (and required by 23 U.S.C. 130), and a hazard index formula serves this purpose.

The final rule expands paragraph (4) [formerly paragraph (3)] to include road safety audits and other safety assessments or reviews of hazardous locations as processes that may be used to develop highway safety improvement projects. The FHWA incorporates this change because road safety audits and other types of assessments and reviews, as suggested in comments by Minnesota and North Dakota DOTs, are valuable tools that have been developed to aid practitioners in enhancing highway/road safety.

The FHWA expands paragraph (5) [formerly paragraph (4)] to include additional language on the process for establishing priorities for implementing highway safety improvement projects to include consideration of the strategies in the SHSP, correction and prevention of hazardous conditions, and integration of safety in the transportation planning process in 23 CFR 450, including the statewide, and metropolitan where applicable, long-range plans, the Statewide Transportation Planning Improvement Program and the Metropolitan Transportation Improvement Program, where applicable. This additional information incorporates more key elements into the planning process and is designed to tie transportation systems planning to the

<sup>1</sup> NHTSA's report, "Traffic Safety Performance Measures for States and Federal Agencies" can be viewed at the following Web site: [http://www.nhtsa.dot.gov/portal/nhtsa\\_static\\_file\\_downloader.jsp?file=/staticfiles/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/811025.pdf](http://www.nhtsa.dot.gov/portal/nhtsa_static_file_downloader.jsp?file=/staticfiles/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/811025.pdf).

SHSP. Referencing 23 U.S.C. 134 and 135 reinforces the link between transportation planning and safety. This safety requirement was introduced in the Transportation Equity Act for the 21st Century (TEA-21) and is included in 23 U.S.C. 135(c)(1)(B). The Maryland SHA expressed concern over the selection of safety projects based solely or primarily on the potential reduction in fatalities and serious injuries; however, the FHWA emphasizes that the regulation does not dictate that projects be selected solely or primarily on the potential to reduce fatalities and serious injuries. This is just one of the six factors to be considered. The FHWA also relocates the last three sentences of former paragraph (4) in the existing regulation to subparagraph (3)(iv), because the sentences relate to Railway-Highway Grade Crossings.

The FHWA also relocates existing paragraph (b) regarding Railway-Highway grade crossings to subparagraph (a)(3)(iv)(D) in order to place all Railway-Highway Grade Crossing planning items in one area.

The FHWA expands paragraph (b) [formerly paragraph (c)] to include references to 23 U.S.C. 130, 133, 148, and 505. As part of this change, the final rule clarifies that funds made available through 23 U.S.C. 104(f) may be used to fund safety planning in metropolitan areas. While the Minnesota DOT suggested adding language about financing of safety planning to include rural areas, the FHWA retains the language in the final rule as proposed. The funding already includes rural areas, since outside of the metropolitan area specification, all other areas, including rural, are eligible for these funding resources.

The FHWA adds a new paragraph (c) to specify that highway safety improvement projects shall be carried out as part of the Statewide and Metropolitan Transportation Improvement Planning Processes consistent with the requirements of 23 U.S.C. 134 and 135 and 23 CFR part 450. The FHWA includes this item to incorporate the statutory requirements of section 148 and to link safety to the transportation planning process.

#### *Section 924.11 Implementation*

In the NPRM, the FHWA proposed to incorporate an editorial change to paragraph (a) and to relocate the reference to procedures set forth in 23 CFR Part 630, Subpart A to be a new paragraph (i). The Maryland SHA expressed concern that the scheduling requirement in paragraph (a) impedes the implementation of low-cost improvement projects and other safety

projects that can or should be undertaken quickly and simply. The Maryland SHA also suggested that this paragraph (a) and the last paragraph (i), along with the scheduling requirements under section 924.9 and other requirements in the rule make the HSIP more complex and burdensome than it should be. The FHWA believes that the scheduling components do not impede implementation of low-cost improvement projects. However, FHWA clarifies paragraph (a) by simplifying it to state that the HSIP shall be implemented in accordance with the requirements of section 924.9 of this part. In response to the comments, the FHWA also deletes the reference to scheduling in paragraph (i). The FHWA also corrects the reference in paragraph (i) to 23 CFR part 630 Subpart A to include its correct title: Preconstruction Procedures: Project Authorization and Agreements.

The FHWA modifies paragraph (d) [formerly paragraph (c)] to clarify the requirements for the use of funds set aside pursuant to 23 U.S.C. 130(e) for railway-highway grade crossings. The FHWA includes the reference to 23 U.S.C. 130(f) for funds that must be made available for the installation of grade crossing protective devices. The FHWA also includes reference to the special rule described in 23 U.S.C. 130(c)(2) because of the amendments made by section 101(1) of the SAFETEA-LU Technical Corrections Act of 2008 (Pub. L. 110-244, 122 Stat. 1572, 1575). In addition, the FHWA includes a reference to 23 U.S.C. 130(k), which specifies that no more than 2 percent of these apportioned funds may be used by the State for compilation and analysis of safety data in support of the annual report to the FHWA Division Administrator required by section 924.15(a)(2) of this part. The Minnesota DOT supports the reference to 23 U.S.C. 130(k) in this paragraph.

Paragraph (h) describes that the Federal share of the cost for most highway safety improvement projects carried out with funds apportioned to a State under 23 U.S.C. 104(b)(5) shall be a maximum of 90 percent. The insertion of the word "maximum" in the final rule is in response to a comment from the North Dakota DOT suggesting that projects using the funding should be allowed to use "up to 90 percent," rather than "shall be 90 percent." In accordance with 23 U.S.C. 120(a) or (b), the Federal share may be increased to a maximum of 95 percent by the sliding scale rates for States with a large percentage of Federal lands. Projects such as roundabouts, traffic control signalization, safety rest areas,

pavement markings, or installation of traffic signs, traffic lights, guardrails, impact attenuators, concrete barrier end treatments, breakaway utility poles, or priority control systems for emergency vehicles or transit vehicles at signalized intersections may be funded at up to a 100 percent Federal share, except not more than 10 percent of the sums apportioned under 23 U.S.C. 104 for any fiscal year shall be used at this Federal share rate. In addition, for railway-highway grade crossings, the Federal share may amount up to 100 percent for projects for signing, pavement markings, active warning devices and crossing closures, subject to the 10 percent limitation for funds apportioned under 23 U.S.C. 104 in a fiscal year. The Illinois and Minnesota DOTs agreed with the proposed changes, particularly enabling States to use Federal funds up to 100 percent on certain items. The FHWA advises States that this is not a new provision, rather it reiterates existing language in 23 U.S.C. 120(c).

#### *Section 924.13 Evaluation*

The FHWA revises this section to clearly describe the evaluation process of the HSIP, the information that is to be used, and the mechanisms to be used for financing evaluations. The Maryland SHA provided comments that apply to this section, as well as others in the NPRM, expressing concern over the need to evaluate the effectiveness of HSIP projects in addition to the overall HSIP and SHSP. As in the other sections, FHWA revises the final rule language in this section, deleting the requirement to evaluate the effectiveness of individual highway safety improvement projects. The regulation does require an overall program evaluation. The intent is to determine if the process produces effective projects and an effective program. The Maryland SHA indicated that its comments related to developing accident modification factors, performance factors, and implementing low-cost safety improvements in section 924.9(a)(3)(i)(C) applied to this section as well. Those comments are discussed in that section.

In paragraph (a) regarding the evaluation process, the FHWA proposed to require the States to evaluate the overall HSIP and the SHSP. Within paragraph (a), the FHWA restructured the existing paragraphs (a)(1) through (a)(3) into two paragraphs. Paragraph (a)(1) requires that the evaluation include a process to analyze and assess the results achieved by the HSIP in reducing the number of crashes, fatalities and serious injuries, or potential crashes, and in reaching the

performance goals identified in section 924.9(a)(3)(ii)(G). In the NPRM, the FHWA proposed to provide more specifics about the evaluation process, especially as it related to individual projects. However, the FHWA removes that language (paragraphs (i) through (iii)) in the final rule based on comments from the Illinois, North Dakota, and Colorado DOTs stating that the specifications were too specific for programmatic reviews. The FHWA also includes a new subparagraph (a)(2) in the final rule to require that States have a process to evaluate the overall SHSP on a regular basis as determined by each State and in consultation with the FHWA to: (i) Ensure the accuracy and currency of the safety data; (ii) identify factors that affect the priority of emphasis areas, strategies, and proposed improvements; and (iii) identify issues that demonstrate a need to revise or otherwise update the SHSP. The FHWA includes this evaluation of the SHSP because the strategies in the SHSP must be periodically assessed to ensure continued progress in reducing fatalities and serious injuries. In addition, evaluation of the SHSP is a requirement in 23 U.S.C. 148(c). The San Diego County Department of Public Works expressed support for this language; however, the AAA felt that the criteria should be expanded to require more sophisticated evaluation analysis. The FHWA believes that the States should have the flexibility to choose their analysis methods.

#### *Section 924.15 Reporting*

The FHWA expands paragraph (a) of this section in order to specify the requirements for States to submit annual reports. The language in the final rule reflects comments regarding this section, as well as revisions related to other sections in the regulation. Specifically, in paragraph (a), the FHWA had proposed in the NPRM that the reporting period would be the previous July 1 through June 30. However, the Arkansas, Illinois, Michigan, Minnesota, and Oregon DOTs, as well as Maryland SHA, expressed concern over the dates of the reporting period, primarily due to the time needed to gather the appropriate data from various sources. As a result, the FHWA revises the reporting period in the final rule to be "for the period of the previous year," thereby allowing States to use the most recent reporting year that best suits their needs, while still submitting reports to the FHWA Division Administrator by August 31. These reports include: (1) A report with a defined reporting period describing the progress being made to implement

the State HSIP; (2) a report describing progress being made to implement railway-highway grade crossing improvements and assess their effectiveness; and (3) a transparency report describing not less than 5 percent of a State's highway locations exhibiting the most severe safety needs. Based on comments from the Oregon, Illinois, and North Dakota DOTs, the FHWA revises the language in the final rule related to the HSIP report to clarify what is needed to describe the progress in implementing projects and evaluating the effectiveness of the improvements. As part of these changes in the final rule, the FHWA deletes the language proposed in section 924.15(a)(1)(iii) in the NPRM because it applied to the previous detailed requirements for project evaluation in section 924.13(a)(1)(i)–(iii), which have also been deleted. The FHWA received comments from Colorado DOT and Maryland SHA opposed to the transparency report, or at least requesting that the requirements of the report be minimized to reduce the effort needed for States to prepare the report. However, because the 5 percent transparency report is required by 23 U.S.C. 148, the FHWA keeps the requirements in this section. As suggested by Oregon DOT, the transparency report should also include potential remedies to those hazardous locations identified, as well as estimates of costs associated with the remedies and impediments to implementation. The FHWA adds this information to the language in the final rule in order to incorporate all of the requirements from 23 U.S.C. 148 regarding the transparency report in this regulation. The Illinois DOT noted that making the transparency report compatible with the requirements of 29 U.S.C. 794(d), Section 508 of the Rehabilitation Act may be an added cost. The FHWA believes that States will be able to provide the reports without incurring significant additional costs. The FHWA requires that the States submit their transparency reports in a manner that is Section 508 complaint so that such reports are accessible to all members of the public, including persons with disabilities. The AAA supported making the transparency report available to the public and even recommended that all of the annual HSIP reports be made public. However, at this time, the existing statute only requires that the transparency report be made available in a format accessible by the public.

#### **Rulemaking Analysis and Notices**

##### *Executive Order 12866 (Regulatory Planning and Review) and U.S. DOT Regulatory Policies and Procedures*

The FHWA has determined that this action will not be a significant regulatory action within the meaning of Executive Order 12866 or significant within the meaning of U.S. Department of Transportation regulatory policies and procedures. These changes are not anticipated to adversely affect, in any material way, any sector of the economy. The changes in Part 924 incorporate provisions outlined in 23 U.S.C. 148 and provide additional information regarding the purpose, definitions, policy, program structure, planning, implementation, evaluation, and reporting of HSIPs. The FHWA believes that this policy for the development, implementation, and evaluation of a comprehensive HSIP in each State will greatly improve roadway safety. These changes will not create a serious inconsistency with any other agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Therefore, a full regulatory evaluation is not required.

##### *Regulatory Flexibility Act*

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), the FHWA has evaluated the effects of these changes on small entities and has determined that this action will not have a significant economic impact on a substantial number of small entities.

##### *Unfunded Mandates Reform Act of 1995*

This final rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48, March 22, 1995). To the extent the revisions will require expenditures by the State and local governments for the planning, implementation, evaluation, and reporting of the HSIPs and Federal-aid projects, these activities will not be Unfunded Mandates because these activities are reimbursable. This action will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$128.1 million or more in any one year (2 U.S.C. 1532) period to comply with these changes.

##### *Executive Order 13132 (Federalism)*

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 dated August 4, 1999, and the FHWA has determined that this action

will not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA has also determined that this rulemaking will not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

*Executive Order 13175 (Tribal Consultation)*

The FHWA has analyzed this action under Executive Order 13175, dated November 6, 2000, and believes that it will not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal law. Therefore, a tribal summary impact statement is not required.

*Executive Order 13211 (Energy Effects)*

The FHWA has analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The FHWA has determined that it is not a significant energy action under that order because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects under Executive Order 13211 is not required.

*Executive Order 12372 (Intergovernmental Review)*

Catalog of Federal Domestic Assistance program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

*Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. Since this action does require States to write reports, the FHWA requested approval from OMB under the provisions of the PRA. The FHWA received approval from OMB through March 31, 2010. The OMB control number is 2125-0025.

*Executive Order 12988 (Civil Justice Reform)*

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation,

eliminate ambiguity, and reduce burden.

*Executive Order 13045 (Protection of Children)*

The FHWA has analyzed this action under Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks. The FHWA certifies that this action would not concern an environmental risk to health or safety that may disproportionately affect children.

*Executive Order 12630 (Taking of Private Property)*

The FHWA does not anticipate that this action would affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

*National Environmental Policy Act*

The FHWA has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347) and has determined that it would not have any effect on the quality of the environment.

*Regulation Identification Number*

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

**List of Subjects in 23 CFR Part 924**

Highway safety, Highways and roads, Motor vehicles, Railroads, Railroad safety, Safety, Transportation.

Issued on: December 11, 2008.

**Thomas J. Madison, Jr.,**

*Federal Highways Administrator.*

■ *In consideration of the foregoing, the FHWA revises part 924 to read as follows:*

**PART 924—HIGHWAY SAFETY IMPROVEMENT PROGRAM**

Sec.

924.1 Purpose.

924.3 Definitions.

924.5 Policy.

924.7 Program structure.

924.9 Planning.

924.11 Implementation.

924.13 Evaluation.

924.15 Reporting.

**Authority:** 23 U.S.C. 104(b)(5), 130, 148, 315, and 402; 49 CFR 1.48(b).

**§ 924.1 Purpose.**

The purpose of this regulation is to set forth policy for the development, implementation, and evaluation of a comprehensive highway safety improvement program (HSIP) in each State.

**§ 924.3 Definitions.**

Unless otherwise specified in this part, the definitions in 23 U.S.C. 101(a) are applicable to this part. In addition, the following definitions apply:

*Hazard index formula* means any safety or crash prediction formula used for determining the relative likelihood of hazardous conditions at railway-highway grade crossings, taking into consideration weighted factors, and severity of crashes.

*High risk rural road* means any roadway functionally classified as a rural major or minor collector or a rural local road—

(1) On which the crash rate for fatalities and incapacitating injuries exceeds the statewide average for those functional classes of roadway; or

(2) That will likely have increases in traffic volume that are likely to create a crash rate for fatalities and incapacitating injuries that exceeds the statewide average for those functional classes of roadway.

*Highway* means,

(1) A road, street, and parkway;

(2) A right-of-way, bridge, railroad-highway crossing, tunnel, drainage structure, sign, guardrail, and protective structure, in connection with a highway; and

(3) A portion of any interstate or international bridge or tunnel and the approaches thereto, the cost of which is assumed by a State transportation department, including such facilities as may be required by the United States Customs and Immigration Services in connection with the operation of an international bridge or tunnel; and

(4) Those facilities specifically provided for the accommodation and protection of pedestrians and bicyclists.

*Highway-rail grade crossing protective devices* means those traffic control devices in the Manual on Uniform Traffic Control Devices specified for use at such crossings; and system components associated with such traffic control devices, such as track circuit improvements and interconnections with highway traffic signals.

*Highway safety improvement program* means the program carried out under 23 U.S.C. 130 and 148.

*Highway safety improvement project* means a project consistent with the State strategic highway safety plan (SHSP) that corrects or improves a



hazardous road location or feature, or addresses a highway safety problem. Projects include, but are not limited to, the following:

- (1) An intersection safety improvement.
- (2) Pavement and shoulder widening (including addition of a passing lane to remedy an unsafe condition).
- (3) Installation of rumble strips or other warning devices, if the rumble strips or other warning devices do not adversely affect the safety or mobility of bicyclists, pedestrians and persons with disabilities.
- (4) Installation of a skid-resistant surface at an intersection or other location with a high frequency of crashes.
- (5) An improvement for pedestrian or bicyclist safety or for the safety of persons with disabilities.
- (6) Construction of any project for the elimination of hazards at a railway-highway crossing that is eligible for funding under 23 U.S.C. 130, including the separation or protection of grades at railway-highway crossings.
- (7) Construction of a railway-highway crossing safety feature, including installation of highway-rail grade crossing protective devices.
- (8) The conduct of an effective traffic enforcement activity at a railway-highway crossing.
- (9) Construction of a traffic calming feature.
- (10) Elimination of a roadside obstacle or roadside hazard.
- (11) Improvement of highway signage and pavement markings.
- (12) Installation of a priority control system for emergency vehicles at signalized intersections.
- (13) Installation of a traffic control or other warning device at a location with high crash potential.
- (14) Transportation safety planning.
- (15) Improvement in the collection and analysis of safety data.
- (16) Planning integrated interoperable emergency communications equipment, operational activities, or traffic enforcement activities (including law enforcement assistance) relating to work zone safety.
- (17) Installation of guardrails, barriers (including barriers between construction work zones and traffic lanes for the safety of road users and workers), and crash attenuators.
- (18) The addition or retrofitting of structures or other measures to eliminate or reduce crashes involving vehicles and wildlife.
- (19) Installation and maintenance of signs (including fluorescent yellow-green signs) at pedestrian-bicycle crossings and in school zones.

- (21) Construction and operational improvements on high risk rural roads.
- (22) Conducting road safety audits.

*Integrated interoperable emergency communication equipment* means equipment that supports an interoperable emergency communications system.

*Interoperable emergency communications system* means a network of hardware and software that allows emergency response providers and relevant Federal, State, and local government agencies to communicate with each other as necessary through a dedicated public safety network utilizing information technology systems and radio communications systems, and to exchange voice, data, or video with one another on demand, in real time, as necessary.

*Operational improvements* means a capital improvement for installation of traffic surveillance and control equipment; computerized signal systems; motorist information systems; integrated traffic control systems; incident management programs; transportation demand management facilities, strategies, and programs; and such other capital improvements to public roads as the Secretary may designate by regulation.

*Public grade crossing* means a railway-highway grade crossing where the roadway is under the jurisdiction of and maintained by a public authority and open to public travel. All roadway approaches must be under the jurisdiction of the public roadway authority, and no roadway approach may be on private property.

*Public road* means any highway, road, or street under the jurisdiction of and maintained by a public authority and open to public travel.

*Road Safety Audit* means a formal safety performance examination of an existing or future road or intersection by an independent multidisciplinary audit team.

*Safety data* includes, but is not limited to, crash, roadway, traffic, and vehicle data on all public roads including, for railway-highway grade crossings, the characteristics of both highway and train traffic.

*Safety projects under any other section* means safety projects eligible for funding under Title 23, United States Code, including projects to promote safety awareness, public education, and projects to enforce highway safety laws.

*Safety stakeholder* means

- (1) A highway safety representative of the Governor of the State;
- (2) Regional transportation planning organizations and metropolitan planning organizations, if any;

- (3) Representatives of major modes of transportation;

- (4) State and local traffic enforcement officials;

- (5) Persons responsible for administering section 130 at the State level;

- (6) Representatives conducting Operation Lifesaver;

- (7) Representatives conducting a motor carrier safety program under section 31102, 31106, or 31309 of title 49;

- (8) Motor vehicle administration agencies; and

- (9) Includes, but is not limited to, local, State, and Federal transportation agencies and tribal governments.

*Serious injury* means an incapacitating injury or any injury, other than a fatal injury, which prevents the injured person from walking, driving, or normally continuing the activities the person was capable of performing before the injury occurred.

*State* means any one of the 50 States and the District of Columbia.

*Strategic highway safety plan* means a comprehensive, data-driven safety plan developed, implemented, and evaluated in accordance with 23 U.S.C. 148.

*Transparency report* means the report submitted to the Secretary annually under 23 U.S.C. 148(c)(1)(D) and in accordance with § 924.15 of this part that describes, in a clearly understandable fashion, not less than 5 percent of locations determined by the State as exhibiting the most severe safety needs; and contains an assessment of potential remedies to hazardous locations identified; estimated costs associated with those remedies; and impediments to implementation other than cost associated with those remedies.

#### § 924.5 Policy.

(a) Each State shall develop, implement, and evaluate on an annual basis a HSIP that has the overall objective of significantly reducing the occurrence of and the potential for fatalities and serious injuries resulting from crashes on all public roads.

(b) Under 23 U.S.C. 148(a)(3), a variety of highway safety improvement projects are eligible for funding through the HSIP. In order for an eligible improvement to be funded with HSIP funds, States shall first consider whether the activity maximizes opportunities to advance safety. States shall fund safety projects or activities that are most likely to reduce the number of, or potential for, fatalities and serious injuries. Safety projects under any other section, and funded with 23 U.S.C. 148 funds, are only eligible



activities when a State is eligible to use up to 10 percent of the amount apportioned under 23 U.S.C. 104(b)(5) for a fiscal year in accordance with 23 U.S.C. 148(e). This excludes minor activities that are incidental to a specific highway safety improvement project.

(c) Other Federal-aid funds are eligible to support and leverage the safety program. Improvements to safety features that are routinely provided as part of a broader Federal-aid project should be funded from the same source as the broader project. States should address the full scope of their safety needs and opportunities on all roadway categories by using other funding sources such as Interstate Maintenance (IM), Surface Transportation Program (STP), National Highway System (NHS), and Equity Bonus (EB) funds in addition to HSIP funds.

(d) Eligibility for Federal funding of projects for traffic control devices under this Part is subject to a State and/or local jurisdiction's substantial conformance with National MUTCD or FHWA approved State MUTCDs and supplements in accordance with part 655, Subpart F, of this title.

#### **§ 924.7 Program structure.**

(a) The HSIP shall include a data-driven SHSP and the resulting implementation through highway safety improvement projects. The HSIP includes construction and operational improvements on high risk rural roads, and elimination of hazards at railway-highway grade crossings.

(b) The HSIP shall include processes for the planning, implementation, and evaluation of the HSIP and SHSP. These processes shall be developed by the States in consultation with the FHWA Division Administrator in accordance with this section. Where appropriate, the processes shall be developed cooperatively with officials of the various units of local and tribal governments. The processes may incorporate a range of procedures appropriate for the administration of an effective HSIP on individual highway systems, portions of highway systems, and in local political subdivisions, and when combined, shall cover all public roads in the State.

#### **§ 924.9 Planning.**

(a) The HSIP planning process shall incorporate:

(1) A process for collecting and maintaining a record of crash, roadway, traffic and vehicle data on all public roads including for railway-highway grade crossings inventory data that includes, but is not limited to, the

characteristics of both highway and train traffic.

(2) A process for advancing the State's capabilities for safety data collection and analysis by improving the timeliness, accuracy, completeness, uniformity, integration, and accessibility of the State's safety data or traffic records.

(3) A process for analyzing available safety data to:

(i) Develop a HSIP in accordance with 23 U.S.C. 148(c)(2) that:

(A) Identifies highway safety improvement projects on the basis of crash experience, crash potential, or other data supported means as identified by the State, and establishes the relative severity of those locations;

(B) Considers the relative hazard of public railway-highway grade crossings based on a hazard index formula; and

(C) Establishes an evaluation process to analyze and assess results achieved by the HSIP and uses this information, where appropriate, in setting priorities for future projects.

(ii) Develop and maintain a data-driven SHSP that:

(A) Is developed after consultation with safety stakeholders;

(B) Makes effective use of State, regional, and local crash data and determines priorities through crash data analysis;

(C) Addresses engineering, management, operation, education, enforcement, and emergency services;

(D) Considers safety needs of all public roads;

(E) Adopts a strategic safety goal;

(F) Identifies key emphasis areas and describes a program of projects, technologies, or strategies to reduce or eliminate highway safety hazards;

(G) Adopts performance-based goals, coordinated with other State highway safety programs, that address behavioral and infrastructure safety problems and opportunities on all public roads and all users, and focuses resources on areas of greatest need and the potential for the highest rate of return on the investment of HSIP funds;

(H) Identifies strategies, technologies, and countermeasures that significantly reduce highway fatalities and serious injuries in the key emphasis areas giving high priority to cost effective and proven countermeasures;

(I) Determines priorities for implementation;

(J) Is consistent, as appropriate, with safety-related goals, priorities, and projects in the long-range statewide transportation plan and the statewide transportation improvement program and the relevant metropolitan long-range transportation plans and

transportation improvement programs that are developed as specified in 23 U.S.C. 134, 135 and 402; and 23 CFR part 450;

(K) Documents the process used to develop the plan;

(L) Proposes a process for implementation and evaluation of the plan;

(M) Is approved by the Governor of the State or a responsible State agency official that is delegated by the Governor of the State; and

(N) Has been developed using a process approved by the FHWA Division Administrator.

(iii) Develop a High Risk Rural Roads program using safety data that identifies eligible locations on State and non-State owned roads as defined in § 924.3, and analyzes the highway safety problem to identify safety concerns; identify potential countermeasures, select projects, and prioritize high risk rural roads projects on all public roads.

(iv) Develop a Railway-Highway Grade Crossing program that:

(A) Considers the relative hazard of public railway-highway grade crossings based on a hazard index formula;

(B) Includes onsite inspection of public grade crossings;

(C) Considers the potential danger to large numbers of people at public grade crossings used on a regular basis by passenger trains, school buses, transit buses, pedestrians, bicyclists, or by trains and/or motor vehicles carrying hazardous materials; and

(D) Results in a program of safety improvement projects at railway-highway grade crossings giving special emphasis to the statutory requirement that all public crossings be provided with standard signing and markings.

(4) A process for conducting engineering studies (such as roadway safety audits and other safety assessments or reviews) of hazardous locations, sections, and elements to develop highway safety improvement projects.

(5) A process for establishing priorities for implementing highway safety improvement projects considering:

(i) The potential reduction in the number of fatalities and serious injuries;

(ii) The cost effectiveness of the projects and the resources available;

(iii) The priorities in the SHSP;

(iv) The correction and prevention of hazardous conditions;

(v) Other safety data-driven criteria as appropriate in each State; and

(vi) Integration with the statewide transportation planning process and statewide transportation improvement program, and metropolitan

transportation planning process and transportation improvement program where applicable, in 23 CFR part 450.

(b) The planning process of the HSIP may be financed with funds made available through 23 U.S.C. 130, 133, 148, 402, and 505 and, where applicable in metropolitan planning areas, through 23 U.S.C. 104(f).

(c) Highway safety improvement projects shall be carried out as part of the Statewide and Metropolitan Transportation Planning Process consistent with the requirements of 23 U.S.C. 134 and 135, and 23 CFR part 450.

#### **§ 924.11 Implementation.**

(a) The HSIP shall be implemented in accordance with the requirements of § 924.9 of this part.

(b) A State is eligible to use up to 10 percent of the amount apportioned under 23 U.S.C. 104(b)(5) for each fiscal year to carry out safety projects under any other section, consistent with the SHSP and as defined in 23 U.S.C. 148(a)(4), if the State can certify that it has met infrastructure safety needs relating to railway-highway grade crossings and highway safety improvement projects for a given fiscal year. In order for a State to obtain approval:

(1) A State must submit a written request for approval to the FHWA Division Administrator for each year that a State certifies that the requirements have been met before a State may use these funds to carry out safety projects under any other section; and

(2) A State must submit a written request that describes how the certification was made, the activities that will be funded, how the activities are consistent with the SHSP, and the dollar amount the State estimates will be used.

(c) If a State has funds set aside from 23 U.S.C. 104(b)(5) for construction and operational improvements on high risk rural roads, in accordance with 23 U.S.C. 148(a)(1), such funds:

(1) Shall be used for safety projects that address priority high risk rural roads as determined by the State.

(2) Shall only be used for construction and operational improvements on high risk rural roads and the planning, preliminary engineering, and roadway safety audits related to specific high risk rural roads improvements.

(3) May also be used for other highway safety improvement projects if the State certifies that it has met all infrastructure safety needs for construction and operational

improvements on high risk rural roads for a given fiscal year.

(d) Funds set aside pursuant to 23 U.S.C. 148 for apportionment under the 23 U.S.C. 130(f) Railway-Highway Grade Crossing Program, are to be used to implement railway-highway grade crossing safety projects on any public road. At least 50 percent of the funds apportioned under 23 U.S.C. 130(f) must be made available for the installation of highway-rail grade crossing protective devices. The railroad share, if any, of the cost of grade crossing improvements shall be determined in accordance with 23 CFR part 646, Subpart B (Railroad-Highway Projects). If a State demonstrates to the satisfaction of the FHWA Division Administrator that the State has met its needs for installation of protective devices at railway-highway grade crossings the State may use funds made available under 23 U.S.C. 130 for highway safety improvement program purposes. In addition, up to 2 percent of the section 130 funds apportioned to a State may be used for compilation and analysis of safety data for the annual report to the FHWA Division Administrator required under § 924.15(a)(2) on the progress being made to implement the railway-highway grade crossing program.

(e) Highway safety improvement projects may also be implemented with other funds apportioned under 23 U.S.C. 104(b) subject to the eligibility requirements applicable to each program.

(f) Award of contracts for highway safety improvement projects shall be in accordance with 23 CFR part 635 and part 636, where applicable, for highway construction projects, 23 CFR part 172 for engineering and design services contracts related to highway construction projects, or 49 CFR part 18 for non-highway construction projects.

(g) All safety projects funded under 23 U.S.C. 104(b)(5), including safety projects under any other section, shall be accounted for in the statewide transportation improvement program and reported on annually in accordance with § 924.15.

(h) The Federal share of the cost for most highway safety improvement projects carried out with funds apportioned to a State under 23 U.S.C. 104(b)(5) shall be a maximum of 90 percent. In accordance with 23 U.S.C. 120(a) or (b), the Federal share may be increased to a maximum of 95 percent by the sliding scale rates for States with a large percentage of Federal lands. In accordance with 23 U.S.C. 120(c), projects such as roundabouts, traffic control signalization, safety rest areas, pavement markings, or installation of

traffic signs, traffic lights, guardrails, impact attenuators, concrete barrier end treatments, breakaway utility poles, or priority control systems for emergency vehicles or transit vehicles at signalized intersections may be funded at up to 100 percent Federal share, except not more than 10 percent of the sums apportioned under 23 U.S.C. 104 for any fiscal year shall be used at this Federal share rate. In addition, for railway-highway grade crossings, the Federal share may amount up to 100 percent for projects for signing, pavement markings, active warning devices, and crossing closures, subject to the 10 percent limitation for funds apportioned under 23 U.S.C. 104 in a fiscal year.

(i) The implementation of the HSIP in each State shall include a process for implementing highway safety improvement projects in accordance with the procedures set forth in 23 CFR part 630, Subpart A (Preconstruction Procedures: Project Authorization and Agreements).

#### **§ 924.13 Evaluation.**

(a) The HSIP evaluation process shall include the evaluation of the overall HSIP and the SHSP. It shall:

(1) Include a process to analyze and assess the results achieved by the HSIP in reducing the number of crashes, fatalities and serious injuries, or potential crashes, and in reaching the performance goals identified in § 924.9(a)(3)(ii)(G).

(2) Include a process to evaluate the overall SHSP on a regular basis as determined by the State and in consultation with the FHWA to:

(i) Ensure the accuracy and currency of the safety data;

(ii) Identify factors that affect the priority of emphasis areas, strategies, and proposed improvements; and

(iii) Identify issues that demonstrate a need to revise or otherwise update the SHSP.

(b) The information resulting from the process developed in § 924.13(a)(1) shall be used:

(1) For developing basic source data in the planning process in accordance with § 924.9(a)(1);

(2) For setting priorities for highway safety improvement projects;

(3) For assessing the overall effectiveness of the HSIP; and

(4) For reporting required by § 924.15.

(c) The evaluation process may be financed with funds made available under 23 U.S.C. 104(b)(1), (3), and (5), 105, 402, and 505, and for metropolitan planning areas, 23 U.S.C. 104(f).

#### **§ 924.15 Reporting.**

(a) For the period of the previous year, each State shall submit to the FHWA

Division Administrator no later than August 31 of each year the following reports related to the HSIP in accordance with 23 U.S.C. 148(g):

(1) A report with a defined one year reporting period describing the progress being made to implement the State HSIP that:

(i) Describes the progress in implementing the projects, including the funds available, and the number and general listing of the types of projects initiated. The general listing of the projects initiated shall be structured to identify how the projects relate to the State SHSP and to the State's safety goals and objectives. The report shall also provide a clear description of the project selection process;

(ii) Assesses the effectiveness of the improvements. This section shall: Provide a demonstration of the overall effectiveness of the HSIP; include figures showing the general highway safety trends in the State by number and by rate; and describe the extent to which improvements contributed to performance goals, including reducing the number of roadway crashes leading to fatalities and serious injuries.

(iii) Describes the High Risk Rural Roads program, providing basic program implementation information, methods used to identify high risk rural roads, information assessing the High Risk Rural Roads program projects, and a summary of the overall High Risk Rural Roads program effectiveness.

(2) A report describing progress being made to implement railway-highway grade crossing improvements in accordance with 23 U.S.C. 130(g), and the effectiveness of these improvements.

(3) A transparency report describing not less than 5 percent of a State's highway locations exhibiting the most severe safety needs that:

(i) Identifies potential remedies to those hazardous locations; estimates costs associated with the remedies; and identifies impediments to implementation other than cost associated with those remedies;

(ii) Emphasizes fatality and serious injury data;

(iii) At a minimum, uses the most recent three to five years of crash data;

(iv) Identifies the data years used and describes the extent of coverage of all public roads included in the data analysis;

(v) Identifies the methodology used to determine how the locations were selected; and

(vi) Is compatible with the requirements of 29 U.S.C. 794(d), Section 508 of the Rehabilitation Act.

(b) The preparation of the State's annual reports may be financed with

funds made available through 23 U.S.C. 104(b)(1), (3), and (5), 105, 402, and 505, and for metropolitan planning areas, 23 U.S.C. 104(f).

[FR Doc. E8-30168 Filed 12-23-08; 8:45 am]

BILLING CODE 4910-22-P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[TD 9434]

RIN 1545-BC88

#### Creditor Continuity of Interest; Correction

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Correcting amendment.

**SUMMARY:** This document contains a correction to final regulations (TD 9434) that were published in the **Federal Register** on Friday, December 12, 2008 (73 FR 75566) providing guidance regarding when and to what extent creditors of a corporation will be treated as proprietors of the corporation in determining whether continuity of interest ("COI") is preserved in a potential reorganization. These final regulations are necessary to provide clarity to parties engaging in reorganizations of insolvent corporations, both inside and outside of bankruptcy. These final regulations affect corporations, their creditors, and their shareholders.

**DATES:** *Effective Date:* This correction is effective December 24, 2008 and is applicable on December 12, 2008.

**FOR FURTHER INFORMATION CONTACT:** Jean Brenner (202) 622-7790, Douglas Bates (202) 622-7550, or Bruce Decker (202) 622-7550 (not toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

##### Background

The final regulations that are the subject of this document are under section 368 of the Internal Revenue Code.

##### Need for Correction

As published, final regulations (TD 9434) contains an error that may prove to be misleading and is in need of clarification.

##### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

## Correction of Publication

■ Accordingly, 26 CFR part 1 is corrected by making the following correcting amendment:

### PART 1—INCOME TAXES

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

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

■ **Par. 2.** Section 1.368-1(e)(6)(ii)(A) is amended by revising the last sentence as follows:

#### § 1.368-1 Purpose and scope of exception to reorganization exchanges.

(e) \* \* \*

(6) \* \* \*

(ii) \* \* \*

(A) \* \* \*

When only one class (or one set of equal classes) of creditors receives issuing corporation stock in exchange for a creditor's proprietary interest in the target corporation, such stock will be counted for measuring continuity of interest provided that the stock issued by the issuing corporation is not de minimis in relation to the total consideration received by the insolvent target corporation, its shareholders, and its creditors.

\* \* \* \* \*

**LaNita Van Dyke,**

*Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).*

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[TD 9434]

RIN 1545-BC88

#### Creditor Continuity of Interest; Correction

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Correction to final regulations.

**SUMMARY:** This document contains a correction to final regulations (TD 9434) that were published in the **Federal Register** on Friday, December 12, 2008 (73 FR 75566) providing guidance regarding when and to what extent creditors of a corporation will be treated as proprietors of the corporation in determining whether continuity of interest ("COI") is preserved in a potential reorganization. These final