

*Making a Difference.* The Board will receive Committee reports and take action on Committee recommendations from 11:15 a.m. to 12 p.m. upon which the December 3, 2011 meeting will conclude.

Detailed minutes of the meeting, including summaries of the activities of the closed sessions and related matters that are informative to the public and consistent with the policy of section 5 U.S.C. 552b(c) will be available to the public within 14 days of the meeting. Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, Suite #825, 800 North Capitol Street NW., Washington, DC, from 9 a.m. to 5 p.m. Eastern Time, Monday through Friday.

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Dated: November 10, 2011.

**Cornelia S. Orr,**

*Executive Director, National Assessment Governing Board, U. S. Department of Education.*

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## DEPARTMENT OF EDUCATION

[Docket ID ED-2011-OS-0008]

RIN 1894-AA01

### Race to the Top Fund Phase 3

**AGENCY:** Department of Education.

**ACTION:** Notice of final requirements.

**SUMMARY:** The Secretary of Education (Secretary) announces requirements for Phase 3 of the Race to the Top program. In this phase the Department intends to make awards to States that were finalists but did not receive funding under the Race to the Top Fund Phase 2 competition held in fiscal year (FY)

2010. These States are Arizona, California, Colorado, Illinois, Kentucky, Louisiana, New Jersey, Pennsylvania, and South Carolina. We take this action to establish the information and assurances that applicants must provide in order to receive Race to the Top Fund Phase 3 awards.

**DATES:** *Effective Date:* These requirements are effective November 16, 2011.

**FOR FURTHER INFORMATION CONTACT:**

Meredith Farace, Implementation and Support Unit, 400 Maryland Avenue SW., Washington, DC 20202-6200. Telephone: (202) 453-6690 or by email: [phase3comments@ed.gov](mailto:phase3comments@ed.gov).

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-(800) 877-8339.

**SUPPLEMENTARY INFORMATION:**

*Purpose of Program:* The Race to the Top program, the largest competitive education grant program in U.S. history, is designed to provide incentives to States to implement system-changing reforms that result in improved student achievement, narrowed achievement gaps, and increased high school graduation and college enrollment rates.

*Program Authority:* American Recovery and Reinvestment Act of 2009 (ARRA), Division A, Section 14006, Public Law 111-5, as amended by section 310 of Division D, Title III of Public Law 111-117, the Consolidated Appropriations Act, 2010, and section 1832(a)(2) of Public Law 112-10, the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (FY 2011 Appropriations Act). (**Note:** In the ARRA, the Race to the Top program is referred to as "State Incentive Grants.")

We published a notice of proposed requirements for this program in the **Federal Register** on September 12, 2011 (76 FR 56183) and a notice correcting the notice of proposed requirements in the **Federal Register** on September 23, 2011 (76 FR 59124). For purposes of this notice, the notice of proposed requirements and correction notice collectively are referred to as the "NPR". The NPR contained background information and our reasons for proposing the particular requirements.

There are two significant differences between the requirements proposed in the NPR and these final requirements. In response to a comment, we have added an application requirement for performance measures for activities proposed for funding under Race to the Top Phase 3 for which there were no such measures included in a State's

Race to the Top Phase 2 application. We also have removed a requirement from the *Proposed Budget Requirements* that would have required States to include in Part II of their applications a description of their processes for allocating at least 50 percent of their Race to the Top Phase 3 funds to participating LEAs. These changes are described in greater detail below in the *Analysis of Comments and Changes* section.

*Public Comment:* In response to our invitation in the NPR, 10 parties submitted comments on the proposed requirements. In the following section, we have summarized and provided responses to the comments received. We group major issues addressed in these comments according to subject. Generally, we do not address technical and other minor changes.

*Analysis of Comments and Changes:* An analysis of the comments and any changes in the requirements since publication of the NPR follows.

### Eligible States

*Comment:* One commenter recommended opening the Race to the Top Phase 3 application process to all States. The commenter claimed that many States that were not finalists under the Race to the Top Phase 2 competition have made progress in the four ARRA assurance areas since the Phase 2 competition and would be in a stronger position to compete under a Phase 3 award process open to all applicants.

*Discussion:* The notice of proposed requirements included a discussion of the reasons for the Department's decision to use Race to the Top Phase 3 funds to make awards only to States that were finalists, but did not receive funding, under the 2010 Race to the Top Phase 2 competition. First, the Secretary stated that the number of competitive, high-quality applications submitted during the Phase 2 competition greatly exceeded the number that could be supported with available ARRA funds and indicated his hope that additional funding would be made available to fund those applications. Second, the FY 2011 Appropriations Act specifically authorizes the Secretary to make awards "on the basis of previously submitted applications," thus specifically allowing the Department to use FY 2011 Race to the Top Phase 3 funds for awards to unfunded finalists from the Phase 2 competition. And third, consistent with the Secretary's emphasis on making rewards and incentives an integral part of Federal education policy and programs, the Department views Race to the Top Phase 3 as a unique opportunity

to reward the efforts of all nine unfunded finalists from the Phase 2 competition while at the same time enabling them to make meaningful progress on key elements of their comprehensive statewide reform plans.

*Changes:* None.

#### Assurances

*Comment:* One commenter recommended limiting the number of assurances required in each Race to the Top Phase 3 application to only those that are relevant to the specific activities selected for funding in each application. The commenter also suggested modifying the assurances and other requirements of Race to the Top Phase 3 to incorporate the recently announced principles of Elementary and Secondary Education Act (ESEA) flexibility.

*Discussion:* A key goal of Race to the Top Phase 3 is to provide an incentive for the unfunded finalists from the Race to the Top Phase 2 competition to maintain their momentum for comprehensive reform and continue working to implement key elements of their Race to the Top Phase 2 plans even in the absence of full funding for those plans. The assurances included in section IV of these final requirements are intended to reinforce this goal by requiring eligible applicants to demonstrate a uniform, visible, ongoing commitment to the comprehensive set of conditions and reforms included in their Race to the Top Phase 2 plans. Limiting the assurances to those related to the specific activities proposed for funding under Race to the Top Phase 3 would undermine the comprehensive approach to education reform embodied in Race to the Top.

The principles of the Department's ESEA flexibility are intended to support individual State efforts to develop and implement college- and career-ready standards and aligned assessments; differentiated recognition, accountability, and support systems; and teacher and principal evaluation systems. The Department recognizes that while supporting similar strategies to improve academic achievement for all students, the requirements of the Race to the Top program and ESEA flexibility may not be possible in all instances. As discussed elsewhere in this notice, the Department is making Race to the Top Phase 3 awards on the basis of previously submitted Phase 2 applications and the activities proposed by eligible States in those applications in response to the requirements and priorities that applied to the Race to the Top Phase 2 application. Accordingly, we decline to alter those assurances in order to incorporate ESEA flexibility,

even though States receiving Race to the Top Phase 3 awards are also free to submit ESEA flexibility requests.

*Changes:* None.

*Comment:* One commenter expressed concern about the Education Jobs Fund maintenance-of-effort (MOE) requirement in assurance (a). This commenter asked for clarification as to whether funds provided by the State Fiscal Stabilization Fund and the Education Jobs Fund may be counted as "State support" for the purposes of meeting assurance (a) and whether a State would be required to meet the MOE requirement only for FY 2011. The commenter also recommended removing assurance (a) from the final requirements because it could prevent some eligible States from applying for Race to the Top Phase 3 funds. Another commenter recommended strengthening the fiscal requirements of Race to the Top Phase 3 through the addition of a supplement-not-supplant requirement.

*Discussion:* The Department included the Education Jobs Fund MOE requirement in the assurances for Race to the Top Phase 3 as a measure of a State's commitment to maintaining the fiscal support for education needed to create the conditions for education reform consistent with successful implementation of Race to the Top reform plans. The Department believes that a Race to the Top Phase 3 award is unlikely to contribute to meaningful change and improvement in a State that is reducing its overall financial support for schools and postsecondary institutions. In determining whether a State has met the Education Jobs Fund MOE requirement for the purpose of satisfying assurance (a), the data used must include only State support for education. Federal funds, including those received from the State Fiscal Stabilization Fund and the Education Jobs Fund, are not considered State support for education. However, State appropriations to local governments to support elementary and secondary education may be included as State support. The Department believes that the MOE requirement in this final notice is adequate to ensure continued State support for education and declines to limit State flexibility or add a supplement-not-supplant requirement.

*Changes:* None.

*Comment:* One commenter raised the possibility that a State legislature could create statutory barriers to the development of teacher and principal evaluation systems between the time a State submits Part I of its Race to the Top Phase 3 application and the time the State submits Part II of its application, potentially resulting in the

State not meeting assurance (c) regarding legal, statutory, or regulatory barriers at the State level to linking data on student achievement or student growth to teachers and principals for the purpose of teacher and principal evaluation. To account for this possibility, the commenter recommended that the language "[a]t the time the State submits its application" in assurance (c) be interpreted as applying only to the date on which a State submits Part I of the application.

*Discussion:* The Department interprets the language "[a]t the time the State submits its application" in assurance (c) to cover submission of both Parts I and II of the application for Race to the Top Phase 3 funds. Moreover, the Department notes that changes in State law, regulation, or policy after the receipt of a Race to the Top Phase 3 award that prevent full and effective implementation of Phase 3 activities would need to be reviewed and considered on a case-by-case basis by the Department, and could result in changes in or the possible partial or complete termination of a Phase 3 award.

*Changes:* None.

*Comment:* One commenter requested clarification as to whether assurance (d), regarding a State's commitment to improving the quality of its assessments, is intended to commit a State to adopting and implementing a particular set of assessments before it has the opportunity to review the completed assessments.

*Discussion:* Assurance (d) does not commit a State to adopt or implement a particular set of assessments in advance of the completion of those assessments. It merely reiterates and reinforces the commitment that the State made in its Race to the Top Phase 2 application to improve the quality of the State's assessments, as demonstrated by the State's participation in one or more consortia of States working to develop and implement common, high-quality assessments aligned with a common set of K-12 standards.

*Changes:* None.

*Comment:* One commenter requested clarification of assurance (e) regarding the maintenance of the conditions for reform described in the State's Race to the Top Phase 2 application. More specifically, the commenter asked whether the assurance was primarily focused on the statutory and regulatory framework for core reforms or whether it was focused on specific activities that would support that statutory and regulatory framework, but that a State may not be able to afford in the absence

of the funds sought as part of its Race to the Top Phase 2 application.

*Discussion:* Assurance (e) is primarily focused on the maintenance of the statutory and regulatory framework for the core reforms included in a State's Race to the Top Phase 2 application, not on the specific activities in the application.

*Changes:* None.

*Comment:* One commenter expressed concern that assurance (f), regarding a State's commitment to comprehensive reforms and innovation, could be interpreted as support for the full implementation of plans and strategies included in the State's Race to the Top Phase 2 application.

*Discussion:* The Department recognizes that States are not able to fully implement their Race to the Top Phase 2 plans absent the full amount of funding sought in their Phase 2 applications. Assurance (f) is simply meant to reinforce a State's commitment to its Race to the Top Phase 2 plan as the framework for State and local education reform efforts going forward, even in the absence of funding levels that would support full implementation of that plan.

*Changes:* None.

### Selection of Activities for Funding

*Comment:* One commenter asked whether a State must select, for funding under Race to the Top Phase 3, activities exactly as they were described in its Phase 2 application, or whether those activities could be modified, changed, or combined to ensure that Race to the Top Phase 3 funds have the greatest impact on advancing State reform plans.

*Discussion:* To meet assurance (g), States must select activities that are consistent with the commitment to comprehensive reform and innovation that the State demonstrated in its Race to the Top Phase 2 application, including activities that are most likely to improve science, technology, engineering, and mathematics (STEM) education. The Department intends for this assurance to require an eligible State to select activities from its Phase 2 application for funding under Race to the Top Phase 3, while permitting the State to adjust the scope, budget, timelines, and performance measures of those selected activities. A State is not permitted, however, to use Race to the Top Phase 3 funds for activities that were not included in its Phase 2 application.

*Changes:* None.

### Science, Technology, Engineering, and Mathematics (STEM) Education

*Comment:* One commenter proposed allowing States to include, as part of their Race to the Top Phase 3 STEM plans, activities related to one or more of the four core education reform areas that were not specifically included in their Phase 2 applications.

*Discussion:* As noted in response to a more general comment regarding the selection of activities for funding under Race to the Top Phase 3, assurance (g) requires States to limit their selection of activities, "including activities that are most likely to improve STEM education," to the activities from their Race to the Top Phase 2 applications. However, States have flexibility to select activities to support the STEM focus in Race to the Top Phase 3 that might not have been described as STEM-related in their Phase 2 applications. In addition, States may modify the scope, budget, and timelines of activities selected from their Phase 2 applications for funding under Race to the Top Phase 3.

*Changes:* None.

*Comment:* One commenter asked whether a State could elect to focus the STEM activities in its Race to the Top Phase 3 plan on just one of the four core ARRA education reform areas or whether a STEM focus is required in all four reform areas.

*Discussion:* As we stated in the NPR, an eligible applicant could demonstrate an emphasis on promoting STEM education by selecting activities "within one or more of the four core education reform areas."

*Changes:* None.

*Comment:* Two commenters requested a definition of the term "meaningful share" as it is used in section V. Budget Requirements to describe the amount of a State's Race to the Top Phase 3 award that must be allocated to advance STEM education.

*Discussion:* The proposed budget requirements, which are retained in these final requirements, were intended to give States flexibility in demonstrating how their detailed plans and budgets would make a meaningful contribution to advancing STEM education. In general, a "meaningful share" in the STEM context means funding for STEM-related activities at a level that would be likely to result in a measurable improvement in one or more STEM outcomes related to each activity. For example, a \$2 million investment in expanding the number of teachers qualified to teach Advanced Placement (AP) Calculus would be considered meaningful if the State could demonstrate that this level of funding

would lead to a significant increase in the number of students in high-poverty schools taking AP Calculus over a 3-year period.

*Changes:* None.

*Comment:* One commenter recommended the addition of new language to the competitive preference priority for STEM education that was included in the Race to the Top Phase 2 competition.

*Discussion:* The Department is making Race to the Top Phase 3 awards on the basis of previously submitted Phase 2 applications and the activities proposed by eligible States in those applications in response to the requirements and priorities that applied to the Race to the Top Phase 2 application. Modifying those existing priorities and requirements would not be consistent with this process, and the Department declines to make the change recommended by the commenter.

*Changes:* None.

### Participating Local Educational Agencies (LEAs)

*Comment:* One commenter asked whether a State could revise or replace previously negotiated memoranda of understanding (MOUs) with participating LEAs.

*Discussion:* In general, a State will not need to revise or replace the MOUs with participating LEAs included in its Race to the Top Phase 2 application. However, the Department expects that States will work with LEAs during the application process and at the beginning of the grant period to update and finalize local scopes of work.

*Changes:* None.

*Comment:* Two commenters asked whether a State receiving Race to the Top Phase 3 funds must allocate the LEA share of those funds to the LEAs that signed MOUs and were listed as participating LEAs in the State's Phase 2 application. Two commenters requested clarification as to whether participating LEAs listed on a State's Phase 2 application may "opt out" of participation in Race to the Top Phase 3 as well as whether previously non-participating LEAs may sign up to participate in Race to the Top Phase 3.

*Discussion:* The Department expects that a State receiving Race to the Top Phase 3 funds will allocate the LEA share of those funds to the participating LEAs listed in its Phase 2 application. However, the final identity and number of participating LEAs for Race to the Top Phase 3 will depend on the activities selected for funding and the final scopes of work developed for participating LEAs. In part, this is because participating LEAs may

withdraw from a State's Race to the Top reform plan, and States may sign up previously non-participating LEAs as participating LEAs for Race to the Top Phase 3.

*Changes:* None.

*Comment:* Several commenters requested that we add flexibility to the final requirements so that States would be permitted to select the LEAs that will participate in Race to the Top Phase 3 activities and receive at least 50 percent of their State's Race to the Top Phase 3 award. Commenters sought, for example, to modify the list of participating LEAs submitted as part of States' Phase 2 applications and to limit the number of participating LEAs in order to maximize the impact of available funding. Two commenters requested flexibility to delay selection of participating LEAs until the beginning of the grant period (instead of submitting a list of participating LEAs with the application, as was required in the Race to the Top Phase 1 and Phase 2 competitions).

*Discussion:* The Department recognizes that the limited scope of and funding available under Race to the Top Phase 3 may create challenges in ensuring the full and effective participation of the LEAs included on a State's Phase 2 list. However, the Department believes that the most appropriate way to meet this challenge will be for States to work carefully and thoughtfully with LEAs during the application process and at the beginning of the grant period to update the local scopes of work. States do not have the discretion to select participating LEAs or limit LEA participation by using certain demographic or geographic characteristics, setting new requirements for such participation, or employing a competitive process to determine which LEAs may participate. All LEAs in a State, including public charter schools identified as LEAs under State law, must have the opportunity to participate in the State's Race to the Top Phase 3 application if they commit to implementing "all or significant portions" of the State's plan. As described earlier in this preamble, the Department generally expects a State receiving Race to the Top Phase 3 funds to allocate the LEA share of those funds to the participating LEAs listed in its Phase 2 application, with adjustments resulting from decisions by some LEAs to drop out of Race to the Top Phase 3 and others to sign up for the first time.

*Changes:* None.

*Comment:* One commenter recommended requiring States to document the process by which they sign up participating LEAs, including

the request for such participation and any responses indicating the decisions of LEAs regarding participation.

*Discussion:* The Department believes that the process used by States to determine participating LEAs for the Race to the Top Phase 2 competition was adequate for ensuring that every LEA was provided a fair opportunity to sign up for Race to the Top. The Department declines to create new, potentially burdensome administrative requirements for this process as part of Race to the Top Phase 3.

*Changes:* None.

*Comment:* One commenter asked whether participating LEAs would be permitted to pool their Race to the Top Phase 3 allocations, such as through an educational service agency, in order to carry out the activities required by the State's Race to the Top Phase 3 plan.

*Discussion:* Participating LEAs have flexibility, consistent with the requirements of their State's plan, in how they spend their share of Race to the Top Phase 3 funds and will be permitted to pool resources with other participating LEAs to more effectively carry out the State's plan.

*Changes:* None.

### Race to the Top Phase 3 Allocations

*Comment:* One commenter expressed concern that the proposed amounts available to each of the nine eligible States under Race to the Top Phase 3 would be too small to have a meaningful impact in those States, particularly if a portion of the funds must be dedicated to STEM activities. The commenter recommended that the Department consider alternative funding strategies, such as funding fewer States, requiring States to provide matching funds in order to receive a Race to the Top Phase 3 award, or allowing States to select the reform areas most in need of funding.

*Discussion:* As discussed in the NPR and in the *Regulatory Alternatives Considered* section of this notice, the Department already has considered alternative methods of awarding Race to the Top Phase 3 funds, and believes that the approach described in the NPR and retained in these final requirements will result in the optimal use of available funding, fulfilling the twin goals of rewarding unfunded finalists from the 2010 Race to the Top Phase 2 competition and enabling them to make meaningful progress on key elements of their comprehensive statewide reform plans. The Department also notes that while these final requirements do require States to ensure that the activities selected for funding under Race to the Top Phase 3 make a meaningful contribution to advancing

STEM education, States will have considerable flexibility to select the mix of activities that best meets their needs. Finally, the Department believes that requiring matching funds for Race to the Top Phase 3 awards would be inconsistent with the decision, authorized by Congress, to make such awards on the basis of previously submitted applications, which did not include a matching requirement.

*Changes:* None.

*Comment:* One commenter requested that we modify the final requirements to allow States the flexibility to use, in view of reduced award levels, the LEA share of funds on behalf of participating LEAs without actually awarding funds to participating LEAs. One benefit of this approach, according to the commenter, would be to reduce reporting and other accountability burdens on participating LEAs.

*Discussion:* Retaining the LEA share of Race to the Top Phase 3 funds under State control, even if used for the benefit of participating LEAs, is not permitted under section 14006(c) of the ARRA, which requires States to subgrant at least 50 percent of their Race to the Top awards directly to LEAs based on their relative shares of funds made available under part A of Title I of the ESEA. Note, however, that LEAs must use their funding in a manner that is consistent with the State's plan and the MOU or other binding agreement between the LEA and the State. A State also may establish more detailed rules on uses of funds, provided they are consistent with the ARRA, and may require that participating LEAs use their funds to pay for certain activities that are required elements of the State's plan.

*Changes:* None.

*Comment:* One commenter recommended that the Department clarify options for funding charter schools that are not LEAs, as well as the flexibility of States to use their share of any Race to the Top award to include such schools in Race to the Top activities or for other purposes, such as to provide extra support to urban or rural areas or to promote specific reform strategies, such as STEM education.

*Discussion:* The Department has previously clarified in guidance provided during the Race to the Top Phase 1 and Phase 2 competitions that participating LEAs must include charter and non-charter schools in an equitable manner (see <http://www2.ed.gov/programs/racetothetop/faq-grantee.pdf>). That guidance also specifies that States have considerable flexibility in using Race to the Top funds to implement their approved reform plans. The State share of any Race to the Top award is

available for State-level activities, for allocation to LEAs or schools, including charter schools, under a formula or process of the State's own choosing, or for other purposes consistent with the State's plan. The Department believes this previously issued guidance sufficiently addresses the issues raised by the commenter.

*Changes:* None.

*Comment:* One commenter stated that the use of poverty data on children ages 5 to 17 to allocate Race to the Top funds to States should not be interpreted as limiting the use of those funds to serve children only in that age range.

*Discussion:* Guidance issued for the Race to the Top Phase 1 and Phase 2 competitions makes it clear that Race to the Top funds may be used for a wide range of activities and purposes consistent with a State's Race to the Top plan, and that these funds are not limited to particular age ranges or groups of children (see <http://www2.ed.gov/programs/racetothetop/faq.pdf>). The Department also notes that although LEAs receive subgrants from the State based on their relative shares of funding received through Title I, Part A of the ESEA, these subgrants are not subject to the restrictions on uses of funds that apply to Title I funds.

### Applications

*Comment:* One commenter recommended that the Department require Race to the Top Phase 3 applicants to update their Phase 2 applications in order to demonstrate, and permit an assessment of, progress in improving the conditions of education in each State.

*Discussion:* The Department notes that significant progress in implementing the Race to the Top Phase 2 plans of eligible applicants was predicated at least in part on the receipt of an award under the Phase 2 competition. Since none of the eligible applicants under Race to the Top Phase 3, by definition, was funded under the Phase 2 competition, the Department does not believe it would be fair to require those applicants to demonstrate progress in implementing their plans by updating their Phase 2 applications as a condition of receiving Race to the Top Phase 3 funds. The Department believes that the assurances required in section VI of these final requirements will provide a sufficient demonstration of the ongoing commitment to comprehensive reform and innovation to qualify an eligible State for a Race to the Top Phase 3 award. The Department also notes that the FY 2011 Appropriations Act specifically authorizes the Secretary to make awards

“on the basis of previously submitted applications” rather than new or updated applications.

*Changes:* None.

### Performance Measures

*Comment:* One commenter asked how the Department would measure the progress of a Race to the Top Phase 3 grantee in the implementation of activities for which the overall Race to the Top program does not include a performance measure.

*Discussion:* The Department agrees that the more limited scope of Race to the Top Phase 3 means that funded activities may not be covered by existing Race to the Top performance measures. In response to this comment, and to ensure meaningful evaluation of grantee performance under Race to the Top Phase 3, the Department has added an application requirement to these final requirements specifying that an eligible applicant must include in Part II of its application for Race to the Top Phase 3 funds performance measures by sub-criteria for any activities selected for funding under Race to the Top Phase 3 for which such measures were not included in the State's Phase 2 application.

*Changes:* The Department has added a new application requirement in section III.B of these final requirements stating that a State must include in Part II of its application performance measures, by sub-criteria, for any activities selected for funding under Race to the Top Phase 3 for which such measures were not included in the State's Phase 2 application.

### Evaluation

*Comment:* One commenter requested clarification of the amount of funding that a State could use for evaluation under Race to the Top Phase 3, both for internal evaluation purposes and for meeting assurance (i) regarding any evaluation of the program conducted and supported by the Department.

*Discussion:* A State receiving Race to the Top Phase 3 funding has discretion, consistent with the overall flexibility afforded to States in the use of State-level Race to the Top funds for any purpose related to the State's reform plan, to reserve funding for evaluation of the activities in their Phase 2 applications that are funded with Race to the Top Phase 3 awards. Note, however, that any evaluation conducted and supported by the Department will be paid for by the Department and the State would not be required to use any Race to the Top Phase 3 funds for such evaluations.

*Changes:* None.

### Race to the Top Amendment Process

*Comment:* One commenter recommended that the Department formalize and streamline the amendment process for State plans under the Race to the Top program. The commenter noted that with Race to the Top Phase 3 expected to raise the total number of Race to the Top grantees to 21, a more formal process for submitting, reviewing, and approving amendment requests would reduce paperwork burdens, lower costs, and reduce regulatory uncertainty.

*Discussion:* The Department declines to make any changes to the Race to the Top amendment process in these final requirements at this time because it does not believe such changes are necessary. That said, the Department continuously reviews all aspects of the administration of the Race to the Top program, as well as other Department education programs, to reduce burdens and costs and improve program effectiveness. If, as a part of this ongoing review process, the Department identifies changes that would reduce burdens and costs and improve the effectiveness of this program, the Department will certainly explore making those changes.

*Changes:* None.

### General Comments

*Comment:* One commenter recommended a wide range of changes to the requirements for the Race to the Top program, not only for Race to the Top Phase 3, but also for retroactive application to Phase 1 and Phase 2 grantees. Recommendations included the use of multiple sources of evidence to determine student academic growth, the use of multiple indicators of professional practice in teacher and principal evaluations, protecting the privacy of school personnel when publicizing performance ratings, requiring well-prepared and experienced teachers in struggling schools, greater flexibility in selecting interventions for struggling schools, supporting the adoption of college- and career-ready standards and assessments without participation in consortia, ensuring equity and adequacy in education funding, and the protection of collective bargaining rights.

*Discussion:* As noted elsewhere in this preamble, the FY 2011 Appropriations Act specifically authorizes the Secretary to make Race to the Top Phase 3 awards on the basis of previously submitted applications, and this is the approach provided for in these final requirements. The Department declines to retroactively

change program requirements where grantees previously received competitive awards on the basis of compliance with those requirements. Moreover, such action would undermine the progress under way in the current Race to the Top States because it would potentially require significant modifications to existing, approved Race to the Top reform plans. In addition, such an action could prevent nine additional States that previously submitted competitive, high-quality applications from implementing those plans with Race to the Top Phase 3 funds.

*Changes:* None.

*Comment:* One commenter suggested two modifications to the proposed requirements for Race to the Top Phase 3 to support improved achievement and assessment results. First, the commenter recommended revising the requirements so that they encourage a stronger emphasis on creating what the commenter described as equal conditions for education, through such actions as strengthening libraries in high-poverty school districts. Second, the commenter called for redesigning academic assessments to better capture deeper knowledge and higher-order thinking skills.

*Discussion:* The Department believes that the current Race to the Top program already supports the reforms recommended by the commenter. All Race to the Top applicants, including the nine unfunded Phase 2 finalists eligible for Race to the Top Phase 3, must demonstrate a strong commitment to and progress toward adopting and implementing college- and career-ready academic standards as well as to creating, adopting, and implementing new, comprehensive assessments aligned with those standards. These new standards and assessments, which by definition are linked closely to the knowledge and skills required to move successfully into higher education or a career, represent a concrete step in the direction of the more meaningful assessment system suggested by the commenter. In addition, while the reforms encouraged by the Race to the Top program are intended to leverage system-wide change and innovation, they also include a special emphasis on efforts to turn around struggling schools, many of them in high-poverty communities, through comprehensive interventions that may include activities to improve school climate and provide social-emotional and community-oriented services and supports for students.

*Changes:* None.

*Comment:* None.

*Discussion:* In addition to making technical and other minor edits to improve the clarity and readability of these final requirements, the Department made changes in two additional areas where the language in the NPR might have created confusion or was deemed unnecessary. First, the language in the *Application Assurances* section regarding standards and assessments did not consistently describe those standards and assessments as being linked to college- and career-readiness. The Department has clarified this link in these final requirements, specifically in assurances (d), (e), and (f). Second, the proposed *Budget Requirements* included a requirement for a description of the State's process for allocating 50 percent of its Race to the Top Phase 3 award to participating LEAs. The Department has determined that this proposed requirement is unnecessary because the underlying statutory requirement in section 140006(c) of the ARRA clearly specifies the process for allocation of Race to the Top funds to participating LEAs. Consequently, the Department has removed the requirement, described in the NPR under *Proposed Budget Requirements*, that the plan and budget required by Part II of a State's application include a description of the State's process for allocating at least 50 percent of Race to the Top Phase 3 funds to participating LEAs.

*Changes:* The Department has modified language in these final requirements to clarify that the references to common standards and assessments in assurances (d), (e), and (f) must be linked to college- and career-readiness. In addition, the Department has removed a requirement from the *Proposed Budget Requirements* that would have required States to include in Part II of their applications a description of their processes for allocating at least 50 percent of their Race to the Top Phase 3 funds to participating LEAs.

#### Final Requirements

The Secretary announces the following requirements for Race to the Top Phase 3 awards. Except where otherwise indicated in these final requirements, the applicable final requirements and definitions of key terms from the notice of final priorities, requirements, definitions, and selection criteria, published in the **Federal Register** on November 18, 2009 (74 FR 59688), apply to the Race to the Top Phase 3 application process.

I. *Award Process:* The Department will make awards through a two-part application process. States that meet the

eligibility requirements must submit Part I of the application. Part I must meet the requirements in part A of the *Application Requirements* section and provide the required assurances listed in the *Application Assurances* section.

The Department will notify eligible applicants that met the application requirements and provided the required application assurances and will provide an estimate of the Race to the Top Phase 3 funds available to each based on the number of qualified applicants.

Qualified applicants then must submit Part II of the application for review and approval by the Secretary. Part II must meet the requirements in Part B of the *Application Requirements* section. It must also include a detailed plan and budget describing the activities selected from the State's Race to the Top Phase 2 application that will be implemented with Race to the Top Phase 3 funding in accordance with the *Budget Requirements* in these final requirements.

II. *Eligibility Requirements:* States that were finalists, but did not receive grant awards, in the 2010 Race to the Top Phase 2 competition are eligible to receive Race to the Top Phase 3 awards. Therefore, only the States of Arizona, California, Colorado, Illinois, Kentucky, Louisiana, New Jersey, Pennsylvania, and South Carolina are eligible to apply for Race to the Top Phase 3 awards.

III. *Application Requirements:* To receive Race to the Top Phase 3 funding, an eligible applicant must meet two application requirements:

A. In Part I of the application, a State must submit the signatures of the Governor, the State's chief school officer, and the president of the State board of education, or their authorized representatives.

B. In Part II of the application, a State must include performance measures, by sub-criteria, for any activities selected for funding under Race to the Top Phase 3 for which such measures were not included in the State's Phase 2 application.

IV. *Application Assurances:* The Governor (or the Governor's authorized representative) must provide the following assurances in the State's Race to the Top Phase 3 application:

(a) The State is in compliance with the Education Jobs Fund maintenance-of-effort requirements in section 101(10)(A) of Public Law 111-226.

(b) The State is in compliance with the State Fiscal Stabilization Fund Phase 2 requirements with respect to Indicator (b)(1) regarding the State's statewide longitudinal data system. (See notice of final requirements, definitions, and approval criteria for the State Fiscal

Stabilization Fund Program published in the **Federal Register** on November 12, 2009 (74 FR 58436), and the interim final requirement for the State Fiscal Stabilization Fund Program published in the **Federal Register** on September 23, 2011 (76 FR 59036)).

(c) At the time the State submits its application, there are no legal, statutory, or regulatory barriers at the State level to linking data on student achievement or student growth to teachers and principals for the purpose of teacher and principal evaluation.

(d) The State will maintain its commitment to improving the quality of its assessments, evidenced by the State's participation in a consortium of States that—

(i) Is working toward jointly developing and implementing common, high-quality assessments aligned with a common set of K–12 standards that prepare students for college and careers; and

(ii) Includes a significant number of States.

(e) The State will maintain, at a minimum, the conditions for reform described in its Race to the Top Phase 2 application, including—

(i) The State's adoption and implementation of a common set of K–12 standards that prepare students for college and careers, as specified in section (B)(1)(ii) of the State's Race to the Top Phase 2 application;

(ii) The State's statutory and regulatory framework related to improving teacher and school leader effectiveness and ensuring an equitable distribution of effective teachers and leaders, as described in section D of the State's Race to the Top Phase 2 application;

(iii) The State's statutory and regulatory framework for implementing effective school and LEA turnaround measures, as described in section E of the State's Race to the Top Phase 2 application; and

(iv) The State's statutory and regulatory framework for supporting the creation and expansion of high-performing charter schools and other innovative schools, as described in section (F)(2) of its Race to the Top Phase 2 application.

(f) The State will maintain its commitment to comprehensive reforms and innovation designed to increase student achievement and to continued progress in the four reform areas specified in the ARRA, including the adoption and implementation of college- and career-ready standards and high-quality assessments, improving the collection and use of data, increasing teacher effectiveness and equity in the

distribution of effective teachers, and turning around the State's lowest achieving schools.

(g) The State will select activities for funding that are consistent with the commitment to comprehensive reform and innovation that the State demonstrated in its Race to the Top Phase 2 application, including activities that are most likely to improve STEM education.

(h) The State will comply with all of the accountability, transparency, and reporting requirements that apply to the Race to the Top program (*See* the notice of final priorities, requirements, definitions, and selection criteria for the Race to the Top Fund published in the **Federal Register** on November 18, 2009 (74 FR 59688)), with the exception of reporting requirements applicable solely to funds provided under the ARRA. (**Note:** The ARRA section 1512 reporting requirements do not apply to the funds we will award under the Race to the Top Phase 3 award process).

(i) A State will comply with the requirements of any evaluation of the program, or of specific activities pursued as part of the program, conducted and supported by the Department.

**V. Budget Requirements:** An eligible applicant must apply for a proportional share of the approximately \$200 million available for Race to the Top Phase 3 awards based primarily on its share of the population of children ages 5 through 17 across the nine States. The estimated amounts for which each eligible State could apply are shown in the following table. The amounts provided in this table are based on the assumption that all eligible States will apply for a share of available funding; the amounts will increase if one or more eligible States do not apply or do not meet the application requirements.

| State                | Amount       |
|----------------------|--------------|
| Colorado .....       | \$12,250,000 |
| Louisiana .....      | 12,250,000   |
| South Carolina ..... | 12,250,000   |
| Kentucky .....       | 12,250,000   |
| Arizona .....        | 17,500,000   |
| Illinois .....       | 28,000,000   |
| Pennsylvania .....   | 28,000,000   |
| New Jersey .....     | 28,000,000   |
| California .....     | 49,000,000   |

Once the Department notifies an applicant of the final amount of funds it is eligible to receive, the applicant must submit a Part II application that includes a detailed plan and budget. The plan and budget must describe the activities the applicant has selected from its Race to the Top Phase 2 application that it proposes to

implement with Race to the Top Phase 3 funding, including how the State will allocate a meaningful share of its Phase 3 award to advance STEM education in the State.

The plan and budget must also provide—

(a) An explanation of why the applicant has selected these activities; and

(b) An explanation of why the applicant believes these activities will have the greatest impact on advancing its overall statewide reform plan.

These final requirements do not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

**Note:** This notice does *not* solicit applications. In any year in which we choose to use one or more of these requirements we invite applications through a notice in the **Federal Register**.

**Executive Orders 12866 and 13563**

Under Executive Order 12866, the Secretary must determine whether a 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 local 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 set forth in the Executive order.

It has been determined that this regulatory action will have an annual effect on the economy of more than \$100 million because the amount of government transfers through the Race to the Top Phase 3 award process exceeds that amount. Therefore, this action is economically significant and subject to OMB review under section 3(f)(1) of Executive Order 12866. Notwithstanding this determination, we have assessed the potential costs and benefits—both quantitative and

qualitative—of this regulatory action and have determined that the benefits justify the costs.

The Department has also reviewed these final requirements pursuant to Executive Order 13563, published on January 21, 2011 (76 FR 3821). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor their 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) 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.

We emphasize as well that Executive Order 13563 requires agencies “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” In its February 2, 2011, memorandum (M–11–10) on Executive Order 13563, improving regulation and regulatory review, the Office of Information and Regulatory Affairs has emphasized that such techniques may include “identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.”

We are issuing these final requirements only upon a reasoned determination that their benefits justify their costs and we selected, in choosing among alternative regulatory approaches, those approaches that maximize net benefits. Based on the

analysis below, the Department believes that these final requirements are consistent with the principles in Executive Order 13563.

In this section we discuss the need for regulatory action, the costs and benefits, as well as regulatory alternatives we considered.

#### **Need for Federal Regulatory Action**

These requirements are needed to implement the Race to the Top Phase 3 award process in the manner that the Secretary believes will best enable the program to achieve its objectives of creating the conditions for effective reform and meaningful innovation in education while helping States that were finalists, but did not receive funding under the Race to the Top Phase 2 competition, to implement selected elements of their comprehensive reform proposals submitted as part of their Race to the Top Phase 2 applications.

#### **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 final requirements will not impose significant additional costs to State applicants or the Federal Government. Most of the requirements involve re-affirming the commitments and plans already completed as part of the 2010 Race to the Top Phase 2 competition or other Federal education programs. As an example of a requirement that will result in minimal additional burden and cost, we are requiring that States applying for Race to the Top Phase 3 funding provide an assurance that they are meeting the MOE requirements of the Education Jobs Fund program. Similarly, other final requirements, in particular those related to maintaining conditions for reform required under the Race to the Top Phase 2 competition, require continuation of existing commitments and investments rather than the imposition of additional burdens and costs. For example, States will be required to continue implementation of common K–12 academic content standards. The Department believes States will incur minimal costs in developing plans and budgets for implementing selected activities from their Race to the Top Phase 2 proposals, because in most cases such planning will entail revisions to existing plans and budgets already developed as part of the Race to the Top Phase 2 application process, and not the

development and implementation of entirely new plans and budgets. In all such cases, the Department believes that the benefits resulting from these requirements will exceed their costs.

#### **Regulatory Alternatives Considered**

An alternative to promulgation of the types of requirements announced in this notice would be for the Secretary to use FY 2011 Race to the Top funds to make awards to the one or two highest scoring unfunded applicants from the 2010 Race to the Top Phase 2 competition. However, the Department believes that the scores of the unfunded finalists from the Race to the Top Phase 2 competition are too closely grouped to support awarding all FY 2011 Race to the Top funds to the one or two States with the highest scores. Furthermore, the Department believes that the approximately \$200 million available from the FY 2011 Appropriations Act for the Race to the Top program would not support full implementation of the comprehensive reform plans submitted by any of the unfunded finalists from the 2010 Race to the Top Phase 2 competition. The Department also believes that making available meaningful amounts of FY 2011 Race to the Top funding to all of the unfunded finalists from the 2010 Race to the Top Phase 2 competition offers the greatest promise for sustaining the nationwide reform momentum created by the Race to the Top Phase 1 and Phase 2 competitions.

Finally, the Department believes that simply funding the one or two highest scoring applicants that did not win an award in the 2010 Race to the Top Phase 2 competition would result in a missed opportunity to reward the efforts of all nine unfunded finalists from that competition and to enable them to make meaningful progress on key elements of their comprehensive statewide reform plans.

#### **Accounting Statement**

As required by OMB Circular A–4 (available at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf>), in the following table, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this regulatory action. This table provides our best estimate of the Federal payments to be made to States under this program as a result of this regulatory action. Expenditures are classified as transfers to States.



## ACCOUNTING STATEMENT CLASSIFICATION OF ESTIMATED EXPENDITURES

| Category                             | Transfers                     |
|--------------------------------------|-------------------------------|
| Annualized Monetized Transfers ..... | \$200,000,000.                |
| From Whom To Whom? .....             | Federal Government to States. |

The Race to the Top Phase 3 award process will provide approximately \$200 million in competitive grants to eligible States.

#### Paperwork Reduction Act of 1995

As we mentioned in the NPR, these final requirements contain information collection requirements. However, because the eligible applicants for Race to the Top Phase 3 awards are fewer than 10, these collections are not subject to approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3502(3)(A)(i)).

#### Waiver of Delayed Effective Date and Congressional Review Act

The Administrative Procedure Act requires that a substantive rule be published at least 30 days before its effective date, except as otherwise provided for good cause (5 U.S.C. 553(d)(3)). The Secretary has determined that a delayed effective date for these final requirements is unnecessary and contrary to the public interest, and that good cause exists to waive the requirement for a delayed effective date.

These final requirements are needed to award the Race to the Top funds provided by the FY 2011 Appropriations Act to qualified applicants by December 31, 2011, or the funds will lapse. Even on an extremely expedited timeline, it is impracticable for the Department to adhere to a 30-day delayed effective date for the notice of final requirements and make grant awards to qualified applicants by the December 31, 2011 deadline. When the 30-day delayed effective date is added to the time the Department will need to receive applications (approximately 20 days), review the applications (approximately 20 days), and finally approve applications (approximately 21 days), the Department will not be able to award funds authorized under the FY 2011 Appropriations Act to applicants by December 31, 2011.

These requirements have been determined to be major for purposes of the Congressional Review Act (CRA) (5 U.S.C. 801, *et seq.*). However, for the reasons outlined in the preceding paragraph, the Department has determined that, pursuant to section 808(2) of the CRA, the delay in the effective date generally required for

congressional review is contrary to the public interest and waived for good cause.

#### Regulatory Flexibility Act Certification

The Secretary certifies that this regulatory action will not have a significant economic impact on a substantial number of small entities. The small entities that this regulatory action will affect are small LEAs receiving funds under this program.

This regulatory action will not have a significant economic impact on small LEAs because they will be able to meet the costs of compliance with this regulatory action using the funds provided under this program.

#### Effect on Other Levels of Government

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

#### Assessment of Educational Impact

In the NPR, in accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e-4, we requested comments on whether the proposed requirements would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPR and on our review, we have determined that these final requirements do not require transmission of information that any other agency or authority of the United States gathers or makes available.

#### Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

**Accessible Format:** Individuals with disabilities can obtain this document in an accessible format (*e.g.*, braille, large print, audiotope, or computer diskette) on request to the program contact

person listed under **FOR FURTHER INFORMATION CONTACT.**

**Electronic Access to This Document:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** is available via the Federal Digital System at <http://www.gpo.gov/fdsys>. At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at <http://www.federalregister.gov>. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: November 9, 2011.

**Arne Duncan,**

*Secretary of Education.*

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**BILLING CODE 4000-01-P**

## DEPARTMENT OF ENERGY

### Energy Efficiency and Renewable Energy

#### Proposed Agency Information Collection

**AGENCY:** Energy Efficiency and Renewable Energy, U.S. Department of Energy.

**ACTION:** Notice and Request for Comments.

**SUMMARY:** The Department of Energy (DOE) is submitting to the Office of Management and Budget (OMB) for clearance a proposal for collection of information under the provisions of the Paperwork Reduction Act of 1995. The proposed collection will support a National Evaluation of DOE's State Energy Program (SEP) for the year 2008 (pre-American Recovery and Reinvestment Act of 2009 (ARRA) funding) and the years 2009-2011 (ARRA funding).

A 60-day notice and request for comments was published in the **Federal**