



U.S. Department of Commerce

Agreements Training
for the
National Oceanic and Atmospheric Administration
National Weather Service

Office of the Assistant General Counsel for Administration
General Law Division
January 2011

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AGREEMENTS TRAINING

- The Legal Foundation
- Drafting Agreements
- Authorities
- Clearance Process
- Evaluation

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THE LEGAL FOUNDATION

- Initial Considerations
- Why Agreements are Needed
- Fiscal Law Considerations

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Initial Considerations

- **What is the difference between an “agreement” and other legal instruments?**
 - **Procurement Contract:** Where the principal purpose is to acquire from a non-Federal party services for the Government’s direct benefit
 - **Grant:** Where the principal purpose is to transfer something of value to a non-Federal party to carry out a public purpose without substantial Government involvement
 - **Cooperative Agreement:** Where the principal is to transfer something of value to a non-Federal party to carry out a public purpose with substantial Government involvement
 - **Agreement:** Where the principal purpose is for an agency to engage in collaborative activities with or to *provide* reimbursable goods or services to another party

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Initial Considerations

An Agreement is an Agreement

MIPR	MOU	Memoranda of Agreement
Memoranda of Understanding	Interagency Agreement	NIPR
IAA Order	MOA	Purchase Order

AGREEMENTS

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Why Agreements are Needed

- Documents the authority under which NOAA can retain funds it receives from other parties (an exception to the Miscellaneous Receipts Statute)
- Where the other party is a Federal agency, it serves as basis for that agency to record an obligation against currently available funds in its financial management system
 - To record obligations: must have documentary evidence of a binding commitment to disburse Government funds
 - To be binding, agreement must be *definite and specific*
- Documents what each party is responsible for doing

Fiscal Law Considerations

- **Agreements with Other Federal Agencies**
 - The use of funds appropriated/provided by Congress is limited by several statutory controls
 - Rule of thumb: these controls can be thought of as falling within three general categories:
 - **Purpose Restrictions**
 - **Time Restrictions**
 - **Amount Restrictions**

Fiscal Law Considerations

- **Purpose Restrictions on the Use of Federal Funds**
 - Available to be used by Federal agencies only for the purposes for which the funds were appropriated
 - Another agency may only request NOAA to perform work for that agency that is in furtherance of that agency's day-to-day mission
 - In other words, the work must fall within the scope of that agency's "programmatic" authority
 - An agency may not enter into an agreement to do indirectly what it could not do directly

Fiscal Law Considerations

- **Time Restrictions on use of Federal Funds**
 - An Appropriations Act defines the availability
 - One-year, multi-year, or no-year funds
 - May be used to meet an agency's needs only during the time the funds are made available for obligation
 - **Example:** Generally, an agency with one-year funds may use those funds only for the current year's needs, not the prior or future years' needs

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Fiscal Law Considerations

- **Bona Fide Needs Rule: Questions to Ask**
 - When will the requested services begin?
 - Must use currently available funds
 - If the services will start and end before the end of the funds' period of availability > no problem!
 - If the services continue beyond the end of the funds' period of availability:
 - The requesting agency must determine whether they are "**severable services**" or "**non-severable services**"

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Fiscal Law Considerations

- **Applying the Bona Fide Needs Rule**
 - A **severable service** is a service . . .
 - that is continuing or recurring in nature
 - that can be separated into identifiable deliverables
 - **Example:** NWS provides data on an ongoing basis to NASA, and NASA receives a discrete benefit from each periodic provision of data.
 - **Severable services** are a *bona fide* need of the year in which the services are performed

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Fiscal Law Considerations

- A **non-severable service** is a service that, from the time it starts to time it ends, is a single indivisible undertaking from which the requesting agency obtains no benefit until the entire undertaking has been completed
- **Non-severable services** are a *bona fide* need of the year in which the services started

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Fiscal Law Considerations

- **Example: Non-severable service**
- NOAA enters into an agreement to undertake research work for another Federal agency where the other agency will receive nothing of benefit until all of the research is completed and a final report that states NOAA's analysis and conclusions is delivered



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Fiscal Law Considerations

- **Exceptions to the Bona Fide Needs Rule**
 - Agencies have authority to enter into **procurement contracts** for **up to one year** for **severable services** that begin in one fiscal year and extend into the next fiscal year
 - **Non-severable services** can *generally* continue beyond the period of availability of the funds obligated by the requesting agency
 - **Exception: The Economy Act!**

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Fiscal Law Considerations

- **Applying the *Bona Fide Needs Rule*:**
Understanding Severable vs. Non-Severable
Requesting agency is appropriated one-year funds

The diagram shows a timeline from 1 Oct 2010 to 30 Sep 2012. Above the timeline, there are six icons of a person painting a wall, representing annual funding increments. A vertical line marks 'FY 11' and another marks 'FY 12'. Below the timeline, there is an icon of a person at a computer and a red book labeled 'Request'.

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Fiscal Law Considerations

- **Applying the *Bona Fide Needs Rule*:**
Incremental Funding
 - Incremental funding is often understood to mean just that . . . funding in increments
 - However, in a strict sense, it refers to obligating currently available funds to cover only part of the cost of **non-severable** work with the intention of obligating future year funds at a later time to cover the remainder of the cost
 - This is improper because for **non-severable services**, the requesting agency must obligate funds available for the year the services started to cover the entire cost of the service

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Fiscal Law Considerations

Another Federal agency wants NOAA to perform research services in-house. This research project consists of five parts: each part to be completed consecutively, to take one year to complete, and to begin on October 1 of each year. For each annual part of the project, NOAA will produce deliverables of discrete benefit to the other agency's mission.

Exercise 1

- If the other Federal agency has only one-year funds, can it obligate those funds to pay for all five years?
- Two-year funds?
- No-year funds?

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Fiscal Law Considerations



Another Federal agency wants NOAA to perform research services costing \$1 million. This project will take two years to complete. NOAA will deliver a final report with its analysis and conclusions at the end of the project. The other agency wants NOAA to start work today, October 1, and it plans to obligate currently available one-year funds.



- Can the other agency obligate \$500K now to pay for work to be undertaken in the first year and obligate another \$500K next year?
- Can the other agency obligate the entire \$1 million cost now?

Fiscal Law Considerations

• Time Restrictions on the Use of Federal Funds: Practical Applications

- An agreement, amendment or statement of work must clearly identify:

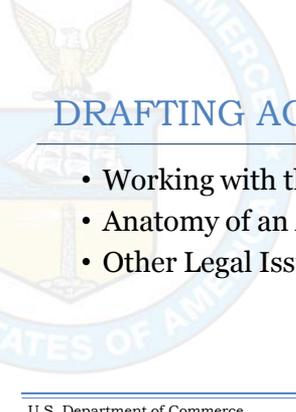
- The work to be done
- The deliverables
- The cost
- The time it will take to do the work



Fiscal Law Considerations

• Amount Restrictions on the Use of Federal Funds

- Cannot obligate funds *in excess* of its currently available appropriations or apportionments
- Cannot obligate funds *in advance* of having received appropriations from Congress
- These actions violate the **Anti-Deficiency Act**
 - ADA violations must be reported to the President, to Congress, and to GAO
 - Persons responsible for the violation are subject to appropriate administrative discipline and, potentially, criminal prosecution

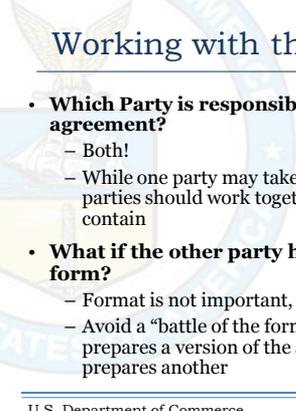


DRAFTING AGREEMENTS

- Working with the Other Party
- Anatomy of an Agreement
- Other Legal Issues

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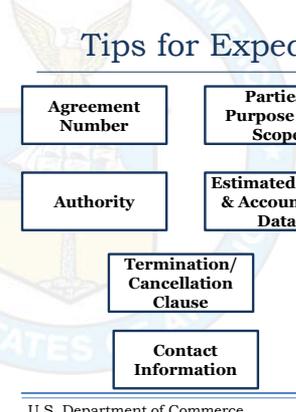


Working with the Other Party

- **Which Party is responsible for drafting an agreement?**
 - Both!
 - While one party may take the lead in drafting, both parties should work together on the provisions it will contain
- **What if the other party has a standardized form?**
 - Format is not important, but substance is critical
 - Avoid a “battle of the forms” where one party prepares a version of the agreement and NOAA prepares another

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Tips for Expedited Review

Agreement Number	Parties, Purpose and Scope	Responsibilities of the Parties
Authority	Estimated Costs & Accounting Data	Terms of Agreement
Termination/ Cancellation Clause	Resolution of Disagreements	
Contact Information	Approving Official Signature	

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Anatomy of an Agreement

- **Agreement Number**
 - Identification number unique to each agreement
- **Parties, Purpose, and Scope**
 - Briefly identify who is entering the agreement and the purpose and objective of the agreement
- **Responsibilities of the Parties**
 - The division of responsibilities and commitments of each side should be defined as precisely as possible. *The agreement should specify clear and discrete deliverable(s) and when they are due.*

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Anatomy of an Agreement

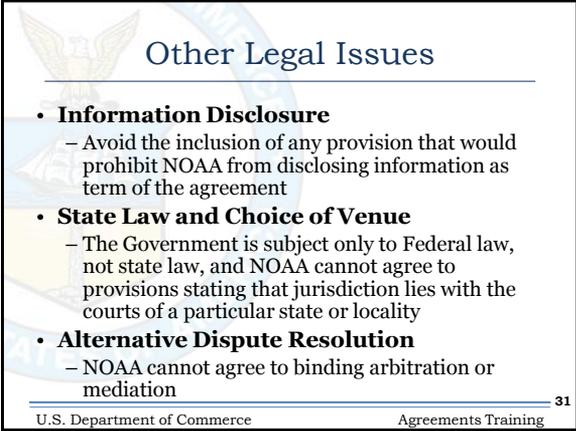
- **Authority**
 - If funds will be transferred, the agreement must cite the authority to do so ("**funds transfer**" authority)
 - In addition, the agreement must identify each Federal organization's authority to undertake the activities set forth in the agreement ("**programmatic**" authority)
- **Estimated Costs**
 - The agreement should specify the total estimated costs and, if appropriate, a budget
 - *Accounting data for Fed to Fed
- **Term of Agreement**
 - The agreement must include a specified start date and completion date. In most cases, five years is the limit.

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Anatomy of an Agreement

- **Termination/Cancellation Clause**
 - The agreement generally should include a provision whereby each party may terminate the agreement within a specified time if written prior notice is provided to all parties. If funds are transferred, language providing for cost collection upon cancellation should be included.
- **When both parties are Federal agencies, include:**
 - "If [buyer] cancels the order, [seller] is authorized to collect costs incurred prior to cancellation of the order plus any termination costs, up to the total payment amount provided for under this agreement."

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Other Legal Issues

- **Information Disclosure**
 - Avoid the inclusion of any provision that would prohibit NOAA from disclosing information as term of the agreement
- **State Law and Choice of Venue**
 - The Government is subject only to Federal law, not state law, and NOAA cannot agree to provisions stating that jurisdiction lies with the courts of a particular state or locality
- **Alternative Dispute Resolution**
 - NOAA cannot agree to binding arbitration or mediation

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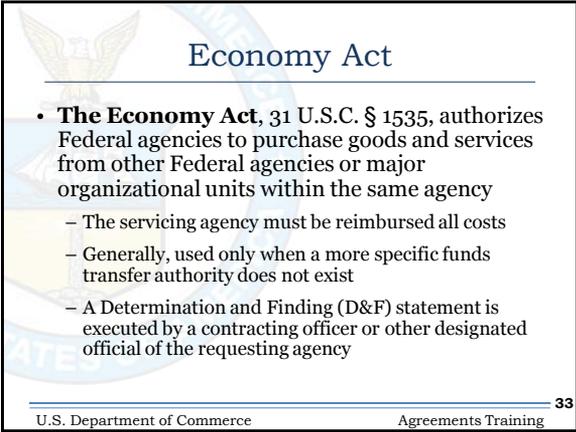


AUTHORITIES

- **Economy Act**
- **Other Dept-wide Authorities**
- **NOAA-Specific Authorities**
- **Other Agency-Specific Authorities**

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Economy Act

- **The Economy Act**, 31 U.S.C. § 1535, authorizes Federal agencies to purchase goods and services from other Federal agencies or major organizational units within the same agency
 - The servicing agency must be reimbursed all costs
 - Generally, used only when a more specific funds transfer authority does not exist
 - A Determination and Finding (D&F) statement is executed by a contracting officer or other designated official of the requesting agency

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Economy Act

- **Deobligation Requirement**
 - If the servicing agency does not incur obligations before the end of the period of availability of the funds obligated by the other agency, then the funds must be returned to the other agency for deobligation
 - NOAA must ensure that it will either:
 - **Properly** obligate the funds on a contract before the end of the period of availability of the funds for services for which the requesting agency has a legitimate *bona fide* need; or
 - For work performed in-house by NOAA, complete the work by the end of the period of availability of the funds (this is true even if the services are non-severable).

Department & NOAA Authorities

- **The Special Studies Authority**, 15 U.S.C. § 1525 (first paragraph), authorizes NOAA to provide special studies on matters within its authority. Advance payment is required.
- **The Joint Project Authority**, 15 U.S.C. § 1525 (second paragraph), authorizes NOAA to enter into projects of mutual interest to NOAA and a specifically defined partner. Costs must be equitably apportioned. Funds are generally not transferred.
- **The Intergovernmental Cooperation Act**, 31 U.S.C. § 6505, authorizes agencies to provide reimbursable services to state or local governments.

NOAA-Specific Authorities

- **The Coast and Geodetic Survey Act**, 33 U.S.C. § 883e . . . plus 883a, 883b, 883c, and/or 883d
 - Authorizes the Secretary to enter into agreements with other organizations and to receive and expend funds for work authorized under 33 U.S.C. § 883e
- **NOAA Programmatic Authorities**
 - 33 U.S.C. § 883a, 883b, 883c, and/or 883d
 - 15 U.S.C. § 313, provide weather forecasting and meteorological observations
 - 49 U.S.C. § 44720, meteorological services to promote safety and efficiency in air navigation

Other Agency-Specific Authorities

- Other agencies may have their own statutory authority to transfer funds to NOAA or to engage in collaborative activities with NOAA
- Whether these or other authorities can be used must be determined on a case-by-case basis
- **Examples:**
 - National Aeronautics and Space Act
 - National Science Foundation Act
 - Federal Aviation Act
 - Clean Air/Clean Water Act (EPA)

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Transfer Authorities

Under the Economy Act, another agency plans to pay NOAA \$1 million in funds that expire on September 30, 2011 for in-house research. The other agency has indicated that the work is non-severable and should take place between July 1, 2011 and June 30, 2012. 🤔

Exercise 3

- Can NOAA enter into this agreement?
- Could this arrangement be structured another way?

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CLEARANCE PROCESS

- Internal NOAA Responsibilities
- DOC OGC Clearance Process
- Standard IAA Form
- Tips for Expediting Legal Review

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Internal NOAA Responsibilities

- Coordinate with the other party to draft a proper agreement
- Comply with the requirements of Commerce Acquisition Manual Chapter 1317.570 when the agreement is with another Federal agency and it is expected to result in an assisted acquisition
- Undertake all appropriate internal-NOAA reviews (including legal review by NOAA GC if required)

Internal NOAA Responsibilities

- Obtain legal clearance from OGC/Admin's General Law Division
- Ensure that the agreement is executed for NOAA by an individual who has been delegated authority to do so
- Monitor performance and progress under the agreement
- For Economy Act agreements, ensure compliance with the Act's deobligation requirement
- Maintain an agreement file

DOC OGC Clearance Process

- NOAA, through NOAA Exec Sec, must seek legal clearance from OGC/Admin for all agreements unless a waiver is in place.
- If issues are identified by the assigned attorney, work with the attorney to address those issues. If you have questions about what to do, give the attorney a call!
- Clearance memoranda are issued to NOAA Exec Sec. Upon clearance, NOAA may execute an agreement.
- Work should not begin until NOAA Exec Sec has received legal clearance and a proper agreement is in place.

Standard IAA Form

- OMB, Office of Federal Financial Management and the Department of the Treasury (DOT), Federal Management Service have worked together to develop a standard Interagency Agreement (IAA) form.
- The IAA form was developed to facilitate communications between Federal agencies and to agree to terms before one Federal agency begins performing work for another Federal agency.

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Standard IAA Form

Basis Overview of IAA Form

- **Reimbursable agreements.** The IAA form is used to document reimbursable agreements, whereby one Federal agency pays another Federal agency. The IAA is **not used** for agreements that do not involve the transfer of funds from one party to the other.
- **Recommended.** DOT recommends that agencies use the standard IAA form for reimbursable agreements. However, at this time, the use of the IAA form is not mandatory.

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Standard IAA Form

Basis Overview of IAA Form

- **One agreement.** Importantly, the parties must rely on one agreement to document reimbursable arrangements. If one party wishes to use the IAA form and the other party wishes to use a different instrument to document the arrangement, the parties must determine which one they will use.
- **Flexibility.** The IAA form provides flexibility in how the parties document reimbursable arrangements.

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Standard IAA Form

The IAA form is comprised of two sections:

- (1) The General Terms and Conditions (GT&C) Section;** and
- (2) The Order Requirements and Funding Information (Order) Section.**

- The GT&C and Order Sections are comprised of numbered blocks requiring specific information.
- The GT&C and Order Sections permit parties to add attachments.

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Standard IAA Form

- The IAA form includes instructions, which provide guidance on completing the GT&C and Order Sections.
- The IAA Instructions must be reviewed in order to properly complete the GT&C and Order Sections.
- Supplemental Instructions!

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Standard IAA Form

- The IAA Instructions and fillable General Terms and Conditions (GT&C) Section and Order Requirements and Funding Information (Order) Section can be found on the following DOT website:
<http://www.fms.treas.gov/finstandard/reference.html>

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Tips for Expedited Review

- Send a *complete* agreement
- Fully identify the responsibilities of each party
 - Remember: The agreement must be definite and specific
 - Key Questions: What is being done, what is the time period during which it will be done, and how much will it cost to do it?
- *See Anatomy of an Agreement as a helpful checklist!



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Tips for Expedited Review

- If requesting clearance of an amendment, it is useful to include a reference to prior history
 - If we did not clear the underlying agreement/modifications, provide us with a copy of them
- Expired agreements cannot be amended
 - The new activities must be documented in a new agreement
- Use the General Law Division templates

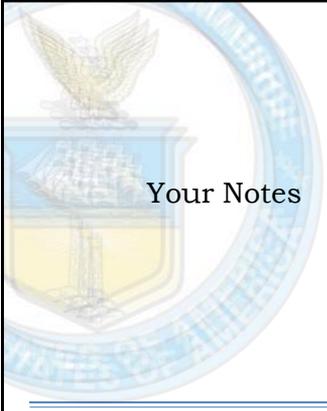
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The End

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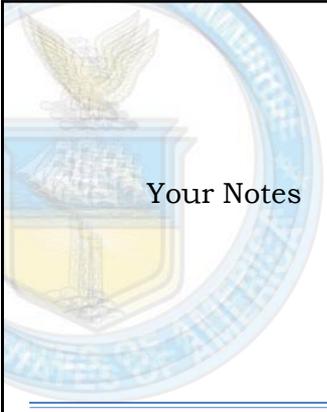


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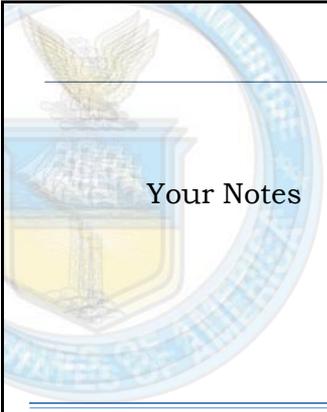
Your Notes

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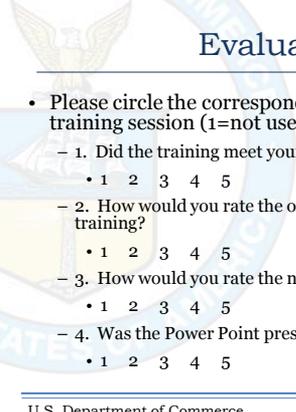
Your Notes

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Your Notes

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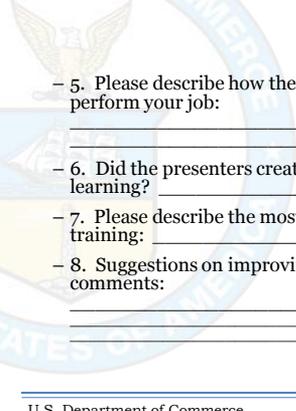


Evaluation

- Please circle the corresponding number to rate this training session (1=not useful; 5=very useful)
 - 1. Did the training meet your expectations?
• 1 2 3 4 5
 - 2. How would you rate the overall effectiveness of the training?
• 1 2 3 4 5
 - 3. How would you rate the need for the training?
• 1 2 3 4 5
 - 4. Was the Power Point presentation helpful?
• 1 2 3 4 5

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- 5. Please describe how the presentation will help you perform your job:

- 6. Did the presenters create an environment for learning?

- 7. Please describe the most valuable part of the training:

- 8. Suggestions on improving the training and other comments:

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Thank You!

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