

same home range as high as 60 to 80 percent overlap between types of abuse.

The purpose of these projects is to demonstrate ways of remediating the effects of violence on children by developing specialized services for abused and/or neglected children of battered women who come to shelters for assistance. Typically, these shelters have been able to provide few specialized services for children. These demonstration projects will develop and test approaches to providing treatment for children through the shelters themselves, as well as through close coordination with existing community resources such as the public child protective services agency.

Methodology: NCCAN/CB expects to award five grants for projects which will demonstrate the use of specific treatment approaches that are focused on the needs of abused and/or neglected children of families involved in spouse abuse. The projects must be lodged in and sponsored by shelters for battered women. Signed agreements to coordinate services with the local, public, mandated child protective service agencies will be required of all successful applications. The treatment approaches used by each project must have the following characteristics:

- a. Explicit recognition of the interrelationship of treatment for children and for parents in providing safe home environment for children and in overcoming the effects of previous trauma caused by intrafamily violence, and a clear philosophy of seeking treatment resources for perpetrators as well as victims of family violence;
- b. Linkages not only with public child protective services, but also where appropriate with civil and criminal courts, children and youth enrichment programs (such as Head Start) and other child abuse and neglect treatment resources within their communities; and
- c. Treatment approaches which recognize explicitly that child abuse and neglect are not single uniform entities but instead involves significant differences among different types of maltreatment such as physical abuse, emotional maltreatment, physical neglect and sexual abuse.

Expected Findings: NCCAN/CB expects that the efforts of these projects will significantly increase knowledge in the fields of child maltreatment and domestic violence with respect to childhood trauma as a result of multiple forms of family violence. Specific emphasis will be given applicants' plans for dissemination and utilization of project findings. NCCAN/CB will collaborate with ODV in carrying out an evaluation of these projects, focusing

specifically on the agency coordination issues involved in their implementation.

Utilization: NCCAN/CB will assure wide dissemination of the findings of this demonstration program to state and local child protective service agencies. It will collaborate with ODV to insure dissemination to shelters for battered women. The most obvious user of the findings will be local shelters with the capacities for improving their own care and remedial services for children who are brought to them by mothers seeking refuge from domestic violence.

(Catalog of Federal Domestic Assistance Program Number: 13.628, Child Develop—Child Abuse and Neglect Prevention and Treatment)

Dated: September 22, 1980.

John A. Calhoun,
Commissioner for Children, Youth, and Families.

Approved: September 30, 1980.

Cesar A. Perales,
Assistant Secretary for Human Development Services.

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Part VII

**Department of
Health and Human
Services**

Social Security Administration

Low Income Energy Assistance Program

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

45 CFR Part 260

Low Income Energy Assistance Program

AGENCY: Social Security Administration (SSA), HHS.

ACTION: Final regulations.

SUMMARY: These regulations set forth the requirements for States seeking allotments under the Home Energy Assistance Act of 1980. That Act authorizes grants in fiscal year 1981 to States for assistance to eligible low income households to offset rising costs of home energy. The regulations describe the procedures for administration of the program in States, Puerto Rico and the Insular Areas. They also describe the priorities for assistance and the ways in which States may assist eligible households.

EFFECTIVE DATE: These regulations are effective beginning October 7, 1980.

FOR FURTHER INFORMATION CONTACT: Ed Freel, Office of Family Assistance, Room G424 Transpoint Building, 2100 2nd Street, S.W., Washington, D.C. 20024, (202) 472-2400.

SUPPLEMENTARY INFORMATION: 1. *Nature of program:* The Home Energy Assistance Act of 1980 (Title III of Public Law 96-223) authorizes grants to the States "to provide assistance to eligible households to offset the rising costs of home energy that are excessive in relation to household income."

Under the Act, responsibility for Federal administration of the Low Income Energy Assistance Program funds for FY 1981 is assigned to the Department of Health, Education, and Welfare (now the Department of Health and Human Services). This document sets forth final regulations for the States seeking allocations under the Act. The States have the responsibility for local administration of the Low Income Energy Assistance Program subject to Federal laws. States are required to submit State plans to the Department of Health and Human Services (HHS), in accordance with procedures, timetables and standards established in these rules.

Provisions are also made for grants to Puerto Rico, Guam, American Samoa, the Virgin Islands, Northern Mariana Islands and the Trust Territory of the Pacific Islands, and for incentive grants to the States to pay up to 25% of some State-established fuel assistance programs for residential energy costs.

However, under existing appropriations we do not expect any money to be available for incentive grants.

2. *Timing and form of regulations:* On May 30, 1980, we published interim final regulations for the Low Income Energy Assistance Program. See Volume 45 of the *Federal Register*, pages 36810-36836. The interim final regulations were effective upon publication. This was because the Act required rules within 60 days of enactment, which was impossible to do if a Notice of Proposed Rulemaking were provided. In addition, it was in the public interest for the interim rules to be published quickly so that States could begin their program planning as early as possible in order that payments would be available when the heating season begins. This would not be possible without the high level of assurance provided by interim rules (rather than an NPRM) that few or no major changes would be made. We engaged in extensive consultations before publication of the interim final regulations. For all of these reasons, it was in the public interest for us to publish interim final regulations.

3. *Regulatory analysis:* We believe that a formal regulatory analysis of this program is not required under Executive Order 12044. Under the statute the Department has very little if any discretion with respect to the administrative responsibilities of the States as detailed in these regulations.

The Department has decided to allow States to expend from their allotments an amount not to exceed 7½ percent of the total cost of carrying out the plan without matching that amount from State funds. Beyond that point, the State must pay 100 percent of the administrative expenses. Therefore, any State expenditure for administrative expenses will fall well below the \$100 million threshold for conducting regulatory analyses.

4. *Response to comments:* The Department accepted all comments on the interim final regulations postmarked by June 30, 1980. They were read, catalogued and considered by the Department in preparation of these final regulations.

Approximately 310 letters of comment were received from States, agencies, organizations, and private citizens. The letters raised approximately 260 specific points and varied in length from one to fifty-two pages. Some were signed by more than one person or group. Most of the letters contained detailed criticisms and recommendations for many different sections of the regulation.

This preamble is intended to articulate the bases and purposes of significant changes from the interim

final regulations. It also responds to the majority of the comments received on the regulations. While the Department examined all relevant letters, in light of the fact that many comments were simply supportive of decisions made and reflected in the interim final regulation, not every comment is specifically acknowledged in this preamble. Some comments, such as the suggestion that we prohibit automatic payments to recipients of categorical programs, were clearly in violation of the Act. Others were so general as to be nearly impossible to implement. Still others revealed a misreading of the interim final regulations. We could not, of course, provide an answer or a rebuttal to every suggestion or criticism. We have tried to address the common areas of concern and the most substantive of the many comments we received. We have included a section titled *Comments and Responses* in subject areas that received comment. These sections indicate any changes we have made based on public comment.

5. *Departmental changes:* We have made a number of changes, most of which are technical, as the result of our own review of the interim final regulations.

We have also made changes relating to the submission of State plans, eligibility and assistance payments based on Congressional action subsequent to publication of the interim final regulations. We note these changes in this preamble. For ease of reference, we are republishing Part 260, as amended, in its entirety.

Low Income Energy Assistance Program Subpart A—Introduction

Section 260.1 gives a general summary of the intent of the Low Income Energy Assistance Program, who is eligible for assistance, the form that assistance can take and the factors to be considered in determining the amount of assistance provided.

The regulations are divided into eleven subparts, A through K and four appendices labeled A through D. We have placed a guide to the organization of these regulations in § 260.1(b).

Definitions of various terms used in the remainder of the regulations are identified in § 260.2.

Subpart B—State plans—General

In this subpart we provide a brief summary and overview of the requirements for State plan approval along with references to those sections of the regulations which contain further descriptions of these requirements.

Subpart C—Development of State Plans

1. *General procedures:* The State plan for energy assistance is a comprehensive statement of the nature and scope of the State's program and will allow us to determine if the plan can be approved and energy assistance program funds allotted to the individual State. State plan preprints will be distributed to States in time for their use in submitting plans.

2. *Public participation in the Development of the State plan:* We want to assure that the residents of each State have the opportunity to participate meaningfully in the State's decision-making process with respect to development of the State plan for energy assistance. The public participation process is intended to assure that each State, in development of the State plan, has provided for prior participation by eligible households, public and private organizations—including organizations which represent and serve elderly and handicapped persons, public officials, energy suppliers, housing operators, members of Indian tribes and organizations, and the general public in assessing need for assistance, identifying priorities and allocating resources.

States were required to submit a description of their public participation process to us by June 30, 1980. In this way we hope to help States avoid noncompliance with § 260.22, concerning essential elements of the public participation process. The public participation process followed by the State must also be included in its State plan.

The essential elements of the public participation process include publication of the plan provisions and eligibility requirements in local newspapers; wide availability of the plan and plan summary; a public comment period of at least 20 days; and of course, consideration of, and public access to, the written comments received.

States may choose to adopt procedures such as public hearings and advisory committees in addition to the required elements for public participation. We encourage the use of advisory committees with a balanced representation from recipient groups, energy suppliers, service providers, and government representatives as a good way to obtain input from a wide range of groups who will have important roles in the operation of a State's program. The choice of options is left to the State to insure maximum flexibility for States to meet local considerations in the development of their plan.

Any waivers that are being requested by the State at the time of plan submission must be available for review during the public participation process and comments on those waiver requests must be summarized and submitted to us, as described in § 260.26(c). Major amendments to the State plan are also subject to the public participation process.

Comments and Responses

Most of those who commented on the public participation regulations criticized them for not requiring public hearings or advisory committees or both. Six commenters suggested that the States should be required to solicit the views of specific groups such as community service organizations and farm worker organizations. Twelve commenters believed that the period for public participation is too short. In addition, there were eighteen respondents who favored increased public participation in general and four commenters who believed that the interim regulations require too much public participation.

In developing the interim final regulations we carefully considered what should be required of the States and what should be left to their judgment based on their past experience with energy programs and the constraints of time and limited resources.

Based on our review of their public participation plans, thirty-five States will use either public hearings or advisory committees or both in developing their plans. In addition, many States plan to solicit the views of organizations representing potential recipients of energy assistance. In light of these results, we do not believe the interim final regulations should be amended in these areas.

Seven commenters suggested that a summary of the comments the State received on its plan should be submitted to us along with the plan. We agree with this suggestion and have amended the regulations accordingly.

Three States believe that there should be an exception to the public participation requirements in emergency situations. As with other State plan requirements, public participation may be waived if the State can show the waiver is necessary for the administration of its plan and is likely to assist in promoting the objectives of the program.

One organization suggested that the States should set up a formal consultation process with local governments in the development of the State plan. We believe this is a matter

properly left to the States and local governments rather than to Federal regulation.

3. *Timetable for submitting and approving plans:* The timetable for submitting and approving plans is outlined in § 260.24. We have moved back the due date for the State plans. State plans must be submitted within 30 days after publication of these final regulations. States are encouraged to submit their plans as early as possible. We will begin our review of the plans as soon as we receive them. Since speedy action is essential if funds are to be made available to eligible recipients for winter heating needs, we will approve (subject to the availability of funding) or disapprove State plans submitted in accordance with these regulations as soon as possible and we will make every attempt to do so within 30 days after receipt of the plan.

One important exception to this timetable is our early need to know at the earliest time which States will ask us to make payments for them to SSI households. We must therefore have received notification by June 30, 1980 of a State's intention to enter into an agreement for Federal administration of energy assistance program payments to SSI households. A State which provided such notice or signs the required agreement for these payments may amend it or withdraw from it at any time. However, if it withdraws from the agreement it must reimburse us for our administrative costs in preparing to make payments on the State's behalf.

Amendments to State plans may be submitted at any time. We will make every effort to approve or disapprove a plan amendment within 30 days after it is received. Requirements for public review of plans and plan amendments prior to submittal are contained in § 260.22.

4. *Waiver of State plan requirements:* Where we determine, upon the request of a State or our own review, that a waiver is necessary for a State or all States to be able to administer the program and is likely to assist in promoting the objectives of the program we may waive compliance with any of the requirements for the State Plan to the extent and for a sufficient period of time to enable the State to carry out its energy assistance program. We will determine the time and extent when considering the waiver.

Waivers will *only* be granted when they are *actually necessary* to enable a State to operate the program and *only* when a waiver of a requirement will promote the objectives of the Act. We do not intend to waive items solely for the convenience of States or when they

would make entire population groups ineligible. We intend to review waiver requests carefully to assure that they further the intentions of Congress as identified in the Act.

States may submit request for waivers in writing to the SSA Associate Commissioner for Family Assistance with a copy to the Regional Commissioner at the same time the State plan is submitted. When submitting a waiver, the State must supply the following: (1) a statement of the requirement for which the waiver is being requested; (2) a statement of how the requested waiver will promote the objectives of the Act; (3) the time period for which the waiver will be in effect; (4) a description of the reasons why the State would be unable to operate its program without the waiver and the consequences to the State and to eligible households of approval and disapproval of the request; and, (5) the expected cost impact if the waiver is granted.

A waiver requested by a State are submitted as part of a State plan will be subject to the public participation requirement for State plans. Comments received as a result of public participation should be summarized and submitted to us as part of the waiver request.

If a waiver is requested by a State after plan submittal, the State must, before submitting the waiver request, give notice through local or State-wide media that it intends to request a waiver of a plan requirement and must make copies of the proposed waiver request available in accessible locations for a period of 10 days after notice is given. The State must then consider any comments received, identify how residents of the State had the opportunity to review the waiver request, and summarize those comments as part of the waiver request submitted to us.

Comments and Responses

One State believed that these procedures are too complicated. We are requiring only those steps necessary to enable us to carry out Congressional intent with respect to granting waivers. SSA regional offices will assist States that request assistance in preparing their waiver requests. Two States believe that the regulation should specify the plan requirements we would waive. We cannot state in advance which requirements we will waive. Our decision will be based on the facts in each case. As discussed below, we have determined that the State share of administrative costs and the 5 percent limit on Federal funds for administration will be waived for all States.

5. Plan approval and disapproval: The State plan should be submitted by the State agency administering the energy assistance program to the SSA Associate Commissioner for Family Assistance, and a copy should be submitted at the same time to the appropriate SSA Regional Commissioner. Federal statutes, these regulations and other issuances will be used to determine whether or not a State plan or plan amendment meets Federal requirements. The plan and amendments will be reviewed in the SSA Regional offices where staff will consult with State officials who prepared the plan to clarify questionable aspects of the plan or amendments. The regional staff will send recommendations to the SSA Associate Commissioner for Family Assistance on approval or disapproval of the State plans and amendments. The Associate Commissioner will rule on each plan and will notify the State of approval or intent to disapprove the State plan or amendment and, if disapproval is intended, of the opportunity for a hearing under § 260.30.

Comments and Responses

Several commenters suggested that States should be held harmless for payments made pursuant to an approved plan if the plan is subsequently disapproved but the payments were otherwise allowable under the Act and the regulations. This is already our policy. For example, the State may have made correct payments to eligible households but we subsequently discover its provisions regarding payments to building operators do not conform to the regulations. We would not disallow the payments to the eligible households.

6. Hearing on plan disapproval: A State may make a written request for a hearing within 10 days after receipt of notification of our intent to disapprove its plan or plan amendment according to the procedures outlined in § 260.30.

Upon receipt of the State's request for a hearing we will promptly send the State a list of all material that was used in making the decision to disapprove the plan or plan amendment and will notify the State of the date, time, and location of a hearing to be held in the State on the issues pertaining to our decision. The presiding officer at the hearing will be designated by us. The hearing will be held not less than 20 days after the date of the notice to the State in order to give the State time to prepare for the hearing.

The Commissioner will arrive at a decision within 30 days after the receipt of the hearing officer's record and recommendations. The Commissioner's

decision will be our final administrative action on the disapproval.

Attempts will be made before and after the hearing to aid the State in rectifying any plan deficiencies in order to allow its program to be approved.

Comments and Responses

Six commenters suggested that our hearings on plan disapproval or suspending funds should be public. We agree. We also believe that members of the public should be allowed to participate as parties in these hearings if the issues to be considered have caused them injury and their interest is within the zone of interests to be protected by the Home Energy Assistance Act. The regulations have been amended accordingly.

7. Withholding of payments for noncompliance with approved State plans: We will cite a State for noncompliance when it fails substantially to comply with the Home Energy Assistance Act, implementing Federal regulations and issuances or if the State's practices are not in compliance with its approved State plan.

We will notify the State by letter whenever a question of compliance exists. At the same time we will give notice of the intent to suspend the grant and inform the State of its right to a hearing. The State may, within 20 days, request a hearing which will be carried out in accordance with the procedures described in § 260.30.

If, after a hearing, a finding of substantial failure to comply is made, we will withhold payments from the State until we are satisfied that there is no longer any substantial failure to comply. We have clarified in the regulation that the provisions of 45 CFR 74.95 and 74.114 will apply during such period. This means that new obligations incurred by the State during the suspension period will not be allowed unless we expressly authorize them in the notice of suspension or an amendment to it. Because LIEAP is a one year program we must be able to make the suspension effective at once and not allow payment of any new obligations incurred by the grantee during the suspension period. On the other hand, since LIEAP is a new program we need the flexibility under certain circumstances to authorize payment of the obligations made during the suspension period. For these reasons, we believe it is appropriate to proceed under 45 CFR 74.95 and 74.114.

The suspension shall remain in effect until we are satisfied that the State is in substantial compliance.

Comments and Responses

One commenter suggested that we warn a State that it is out of compliance with Federal law before we withhold payments. We believe that the notice and hearings described above constitute such a warning. One commenter asked us to define "substantial non-compliance" in the regulations. A finding of substantial non-compliance must be made on a case-by-case basis with each case turning on its particular facts. Therefore, we do not believe that a regulatory definition would be proper. However, we are currently developing guidelines for the SSA regional offices on this issue.

Subpart D—Administration of the State Program

1. State Agency and local administrative arrangements: A single State agency must be designated in the State plan for the purpose of administering the energy assistance program. This designation will have to be made by the Governor or the Attorney General. Functions may be delegated to other agencies of the State and to local agencies unless these functions involve administrative or policy discretion. If the State agency decides to use another agency to perform any operational function of the program, the State plan must specify the division of responsibility between the agencies and how the designated single State agency retains control and supervision. The State plan must also specify what methods are available to the single State agency to achieve corrections if another agency performing functions pursuant to the plan either fails to carry them out or does so improperly or inadequately.

Comments and Responses

One organization suggested that the State agency responsible for administering the program should be allowed to delegate functions that involve administrative or policy discretion. We have not accepted this suggestion because we believe it is inconsistent with Congress' purpose in requiring a single State agency to administer the program.

As the regulations stand, States are allowed to contract with such organizations as community action agencies and utilities, as well as local governments, to accept and process applications. This flexibility permits the widest possible access by eligible households. However, some contracting organizations, such as utilities, may have a vested interest in finding applicants eligible. Accordingly, we

stress that the State agency must retain full responsibility for making eligibility determinations and must closely monitor organizations to which it delegates functions.

Another commenter suggested that public housing authorities be permitted to take applications for the program. The regulation already permits this.

2. Administrative procedures: Appendix B provides a description of the specific administrative requirements that the State must meet in its State plan. This information will be included in State plan preprints to be provided by us.

3. Maintenance of regular benefit levels: In § 260.56 we require, as a condition on receipt of funds under the Act, that States not reduce, before October 1, 1981, the level of benefits in any Federally assisted cash assistance program from the level in existence as of February 26, 1980. However, if benefits in a Federally assisted cash assistance program were increased solely to help pay for home energy, the State may reduce those increased benefits to an eligible household by the amount of such increase or the amount provided to the household under the low income energy assistance program whichever is less.

Comments and Responses

Four States commented that the regulations should allow a reduction in regular benefit levels when that reduction is motivated by factors unrelated to the low income energy assistance program, such as a depressed State economy. We are constrained by the Act which only allows a reduction of regular benefits from their February 26, 1980 levels when those benefits have previously been increased solely for the purpose of energy assistance. The State may, of course, ask for a waiver of this provision if it believes that its circumstances warrant it.

One Legal Services program suggested that the prohibition on reducing benefit levels should apply to the AFDC Emergency Assistance program. Another believes that the exception to the rule against reducing benefits should only apply to Federally assisted energy assistance programs.

We have not included AFDC Emergency Assistance because that program does not have regular benefit levels. Benefits vary according to the particular circumstances of the family and are in addition to the regular benefit level provided by the AFDC program. The Act allows a reduction in the regular benefit level of any Federally assisted cash assistance program if that benefit level was increased solely for

the purpose of providing energy assistance. We see no basis in the Act for limiting this exemption to programs that provide only energy assistance. Moreover, the program established by the Home Energy Assistance Act and these regulations would be the only program that met this commenter's definition, thereby making the exception meaningless.

One State suggested that the failure to pass through an SSI cost-of-living increase to recipients of SSI State supplements should not be treated as a reduction of the regular State supplement benefit level. We agree. The Act prohibits reductions in benefit levels, not reductions in the State's share of the benefit payment. Another Federal law controls that area. So long as the State retains the same benefit level for recipients of State supplements that was in effect on February 26, 1980 it is in conformity with the Act. We do not believe a change in the regulation is necessary.

4. Coordination with weatherization and energy conservation efforts: We require that the State plan must provide for effective coordination of the State's energy assistance program with energy conservation and weatherization efforts. In particular, we require the State to indicate its plans for coordination with government, voluntary agency and private industry weatherization and conservation programs, with a goal of reducing residential energy usage as well as costs.

This will require a description of: the procedures by which weatherization and conservation services for residential purposes are identified; information and instruction about such services provided by local agencies, particularly those participating in the State's energy assistance program; and referral of recipients of energy assistance to conservation and weatherization services where appropriate.

Comments and Responses

Seven respondents favored referral of individuals to weatherization programs; eight were opposed. Those who favored referral believe that weatherization and conservation programs are a necessary adjunct to our program which concentrates on the payment of fuel bills.

Those who oppose referral pointed out that waiting lists for weatherization programs are already long; some recipients of low income energy assistance benefits may be ineligible for weatherization programs; and, our requirements would duplicate efforts already being made to refer households for weatherization assistance.

The Act and our regulations require referral of individuals to Federal, State and local weatherization and conservation programs "to the maximum extent possible." The regulation does not call for the mindless referral of every eligible household to every weatherization or conservation program. Rather, it requires personnel administering the low income energy assistance program to have a basic understanding of the eligibility requirements and available services under weatherization and conservation programs that exist in the community, and to make referrals that are proper under the circumstances. Before the 1980-81 heating season, HHS will distribute material to the State agencies which explains the services and eligibility requirements of Federal weatherization and conservation programs and will establish procedures for referrals for participation in Federal weatherization programs after consultations with the Departments of Energy, Housing and Urban Development, Agriculture and the Community Services Administration.

5. *Outreach:* We want to assure that the greatest proportion of potentially eligible persons is made aware of the energy assistance program. Towards that end we require State plans to make provisions for outreach to meet this goal. Emphasis for outreach activities should be on those most vulnerable to the effects of rising energy costs either in terms of health needs or income levels. Specific groups include the elderly, the homebound, the handicapped, young children, low-income families, migrants, and those who are isolated from service programs by geographical conditions or language barriers.

We require that State plans provide for maximum effective use of both State-wide and local resources to reach these groups, such as community action agencies and local service providers, public and private organizations serving and representing elderly and handicapped persons, Federal government offices, home energy suppliers, the public education system, local law enforcement agencies, Indian tribes and off-reservation Indian community-based organizations, and, of course, the mass media. A fiscal plan may also provide reimbursement—as a proper expenditure under a State's administrative costs—to agencies used for outreach activities under the State plan. The State should consider working with Community Action Agencies, State and local area agencies on aging, and State chapters or member organizations of groups such as the National

Association of Farmworker Organizations, the National Council of Senior Citizens, the American Coalition of Citizens with Disabilities, and a wide range of governmental and voluntary service organizations which have experience in this area.

Comments and Responses

Most of those commenting on the outreach regulations believed that the regulations should be more explicit about the steps a State must take in performing outreach activities. A majority believed that the regulations should mandate the use of specific agencies and organizations for outreach. Other suggestions included requiring the States to specify the amount they will spend on outreach and requiring particular outreach techniques such as telephone hotlines, transportation to place where applications are taken and door-to-door canvassing. Six State agencies commented that the outreach regulations are already too burdensome.

We agree that outreach, especially to vulnerable groups such as the elderly and groups that might not otherwise participate such as migrant workers, is vital to the success of the program. We do not agree that the States need to be regulated to the extent of step-by-step instructions on how to conduct an acceptable outreach program. The States have had considerable experience in conducting outreach programs and technical assistance is available to them through our regional offices. We believe that allowing the States flexibility in their approach to outreach will produce better results than mandating, at the Federal level, a specific outreach program. We will carefully review each State's plan and monitor each State's outreach activities to make sure the program is reaching the target groups. This will also provide us a basis for determining what, if any, changes should be made in the regulations for future energy assistance programs.

Contrary to the view of several respondents, we do not view the Act as mandating the use of the agencies described in section 308(b)(16) of the Act. We believe the Act allows the States the flexibility to use the agencies that will be most effective at outreach to a given population in a given geographic area, rather than locking them in to using a specific list of agencies some of which may not be appropriate under the particular circumstances in the State.

One commenter recommended that local public and private non-profit child and family service agencies be included with the other organizations suggested as outreach resources. We have

amended the regulations to include these agencies.

Six commenters asked us not to include outreach as an administrative cost that the States must match. We believe that outreach is an administrative cost. However, under these regulations States are not required to match administrative costs that do not exceed 7½ percent of their cost of running the program.

Two commenters believed it would be difficult to explain eligibility for the program because income eligibility levels may vary within the State according to variations in the lower living standard income level. As we explain in the discussion of Subpart G, the State may standardize income eligibility throughout the State.

Five commenters agreed with our requiring special attention in outreach to migrant and seasonal farm workers and one commenter asked for special attention to aliens and Cuban refugees. We believe that aliens, including Cuban refugees, are covered by the requirement of priority in outreach to migrant workers, persons with limited English speaking proficiency and persons who, in general, lack knowledge about community service programs.

6. *Identification and certification of eligible households:* The State plan must describe how the State will identify and certify eligible households for the program and how records supporting these eligibility determinations will be kept.

7. *Monitoring:* The State must design a system for monitoring its program and must describe its monitoring system fully in the State plan. The plan must demonstrate how the State can identify and correct problems in a timely way, especially problems of compliance with the key requirements of this Part, including coordination, outreach, certification, data collection, levels of assistance, agreements with home energy suppliers, verification of income, and timeliness of assistance.

A schedule and format for reporting State monitoring information to us will be provided in a program instruction. Our regional offices will work closely with the States to assure compliance with the approved State plan.

We will conduct reviews of the State's program and monitoring system during FY 1981, including conformity with the State plan; the implementation of sampling techniques, if any; and the validity and reliability of the data collected. Where insufficiencies are identified, our review will include the records and documentation from which program monitoring information has been collected.

We will also review the State's implementation of its data collection system, as required in § 280.66 for the validity and reliability of data. This review may include spot checks of the State's records.

8. Data collection and reporting by the States: The Act requires that State plans describe energy usage and the average cost of home energy in the State by the type of fuel and by regions of the State.

States also are required to provide us with additional information on the operation of the energy assistance program. The data to be reported are either mandated specifically by the Act or are necessary to monitor and report on State programs in terms of Federal goals and requirements. However, Office of Management and Budget (OMB) clearance has not yet been obtained for any reporting instruments, and thus no reports will be required until such OMB clearance has been obtained and States notified.

We will provide technical assistance to the States in designing and implementing their data collection systems for the fiscal year 1981 energy assistance program. The State's expenses for collection and reporting of these program data are allowable administrative costs.

States must also cooperate with our efforts to develop from existing records additional information on home energy usage by the general population as required by the Act. This information will include, but might not be limited to, data on home energy consumption by the general population and the annual cost and types of fuel used by various income groups.

Comments and Responses

The final regulation does not include a requirement for States to complete a sample survey of households as described in the interim final regulation. Several States commented on the expense and burden involved in providing data on a sample of households. In light of these comments, OMB's concerns about the survey, and the lack of time available to allow States to do advance planning, we have decided to drop this requirement for this year. However, we regard State level surveys as an effective way to gather much of the program monitoring, compliance and evaluation data needed for administration of the program at the federal level, and we intend to work closely with States and OMB to prepare for a survey of assisted households in next year's program.

As a result of abandoning plans for a survey of assisted households this year, we have had to expand the periodic

Summary Report of aggregate counts of households assisted to gather information required by the authorizing statute, the Department of Justice, and specific commitments to the public to report on the target groups served by the program. The information requirements added to the periodic Summary Report are the income levels and heating fuels of assisted households, the race, ethnicity and sex of assisted applicants, and counts of priority, outreach and equity target groups determined by the statute.

The Summary Report is due quarterly. A few items concerning households receiving heating assistance are due also as of the end of January and February 1981 to serve the reallocation process. This schedule involves fewer reports than the monthly summary report described in the interim final regulation.

One commenter mentioned that, although our description of the monthly report seemed to require that States provide an unduplicated count of households assisted, that point was not made clearly. We have clarified this point in the final regulations.

9. Cooperation by States in Program Evaluations: States are required to cooperate in any evaluations of the energy assistance program which we may conduct. Such evaluation efforts will be designed to complement information collected as described in the above sections and to answer remaining questions about the program's effectiveness or efficiency. They will also be designed to impose a minimum burden on State and local program administrators.

We plan a major evaluation of all facets of the program operation in some of the larger States and a few smaller States. Data collection will be through a combination of existing administrative records and contractor contacts with participants, vendors, eligible nonparticipants and so on.

Subpart E—Fiscal Control and Accountability

1. Emergency Reserve: A State may reserve up to 3 percent of the amount allocated to it for use in weather-related or supply shortage emergencies as described in § 260.80. The regulations allow the States to define these emergencies. A State that chooses to have an emergency reserve must describe in its plan the emergencies or types of emergencies it will cover; the amount and kind of assistance it will provide; the procedures for carrying out its emergency program; and, what it will do with the funds if emergencies do not use up all of the funds. Funds reserved

under this section and combined with another State-funded program must not be used in a manner that would violate the provisions of the regulations.

Comments and Responses

Eight commenters asked for clarification of the term "weather-related and supply shortage emergencies" and asked what assistance may be provided in those emergencies. Weather-related emergencies could include, among other things:

- Unusually cold (or hot) weather requiring additional or higher assistance payments or resulting in a higher caseload than anticipated;

- Interruption of the normal energy supply due to weather conditions necessitating use of substitute fuel such as wood, coal or butane;

- Damage to dwellings that is caused by weather conditions and that prevents the heating or cooling of the dwellings.

Supply shortage emergencies could include, among other things:

- Interruption of the normal energy supply by nonweather related causes (earthquakes, volcanos, oil embargos, or a supplier going out of business);

- The need for home energy by a household that applied too late for the regular program or received payment under the regular program but now faces a crisis due to lack of heating.

In response to requests for clarification on the use of emergency funds, we have amended the regulations to state that in such emergencies the State may provide assistance in the form of repairs and consumer goods. We expect the States to limit themselves to making minor repairs, not major capital expenditures, and to consumer goods suitable to the emergency such as blankets or fans, not costly appliances such as furnaces or air conditioners.

One commentator believed that we should require the States to set aside funds for weather-related and supply shortage emergencies. Another believed that we should allow the State to set aside more than 3 percent of its allocation for these emergencies. Still another commentator agreed with the interim regulation on this subject. We have no discretion in this area. The Act permits the States to reserve no more than 3 percent of their allocations for weather-related and supply shortage emergencies. The Act does not require that any amount be set aside.

2. Fiscal Reports by States: (OMB clearance for any reporting instruments has not yet been obtained and therefore no reports will be required until such OMB clearance has been obtained and States notified.)

In order to make funds available to States when they need them, we will require two kinds of reports from States.

The State must submit an estimate of its need for Federal funds for each quarter of fiscal year 1981 and an estimate of its need for Federal funds for the fiscal year. We will use this report to assist us in determining quarterly grants and reallocation of funds.

Thirty days after the end of each quarter the State must submit a financial status report showing the amount, by type, of payments it has made for the past periods; e.g., direct payments to households, payments to home energy suppliers, and the like. The purpose of these reports is to facilitate the review of the State's need for Federal funds and the reallocation of funds.

3. *Administrative Costs:* A State may use a portion of its grant award for program administration. Under the Act the amount of Federal funds the State may use for administration from its allotment may not exceed 5 percent of the cost of carrying out the plan. This amount may be increased up to 7½ percent in circumstances.

The Act provides that in no case may the Federal funds used for administering the plan exceed 50 percent of the State's total cost of administration. The State must pay, from non-Federal sources, the remaining costs of administration.

We have determined that the administrative cost sharing requirement and the 5 percent limitation on the amount of Federal funds that can be used for administration should be waived for all States. Based on a thorough review of the comments we received on the interim final regulations, the communications we have received from many states as to the difficulties they would encounter absent this waiver, and other evidence, we believe that this waiver is necessary to allow them to administer their programs and likely to assist in promoting the objectives of the Act. This means that a State may expend from its allotment an amount not to exceed 7½ percent of the total cost of carrying out the plan without matching that amount from State funds. Beyond that point, the State must pay 100 percent of the administrative expenses.

Comments and Responses

We received sixty-eight comments criticizing the Federal share of administrative costs for being too small. These commenters suggested that we either pay all the administrative costs of the program or increase the Federal share of these costs. In addition, several governors advised us that they lack legislative authority to agree to the cost

sharing requirements of the Act and that their legislatures will not convene until January, 1981 or later. As described above we have waived administrative cost sharing and increased the Federal share of administrative costs.

One State agency suggested that the Federal share of administrative costs should be based on a percentage of the States allocation, not a percentage of the total cost of carrying out the plan. The Act, however, specifies that the amount the State may use from its allocation for planning and administration is a percentage "of the cost of carrying out the plan * * *"

A public welfare agency commented that the States should not be held liable for duplicate payments, given what it believes to be a minimal allowance for administrative expenditures. We disagree. We believe that the Department and the States have a duty to the taxpayers to make every reasonable effort to avoid duplicate payments.

4. *Financial Management System:* Section 260.80 of the interim final regulations has been deleted. This subject is now covered in Appendix B.

Subpart F—Federal Allotments and Payments

By its Continuing Resolution enacted on October 1, 1980, Congress made available \$1.85 billion for the Low Income Energy Assistance Program. In the Joint Explanatory Statement of the Committee of Conference, the House and Senate managers provided that this amount shall be available as follows:

- \$4 million for Federal administrative expenses;
- \$87.5 million for the CSA Crisis Intervention program;
- \$2.5 million for grants to the territories; and
- \$1.756 billion for energy assistance grants to the States.

1. *Computation of States' Allotments:* We will divide and assign the amount Congress provided for State energy assistance programs according to the formula required to be used by the Continuing Resolution enacted on October 1, 1980. In the near future we will provide to States, in a separate issuance, a chart showing the States' proportional allotments and the amount each State would receive.

2. *Grants to the States:* We will make quarterly grants to States with approved plans for expenditures. The amount of a State's quarterly grant will be determined on the basis of the State's estimate of its need for funds and its report of expenditures for the past period. Forms for these estimates and reports will be furnished to the States.

Because the need for energy assistance is significantly affected by seasonal factors, we believe that quarterly grants will best enable us to coordinate available funds with States' need for funds.

Comments and Responses

A farmworkers' organization stated that we should provide direct grants to farmworker organizations under the same conditions that apply to direct grants to Indian tribes. The Act does not allow us to make direct grants to farmworker organizations under any circumstances. States are encouraged to contract with farmworker organizations to conduct outreach and other operational functions such as intake or information and referral.

3. Apportionment for Other Programs Authorized by the Act:

After allocating the funds for State plans and for Federal administrative costs, we will distribute the balance of the funds in the following manner and order:

a. To the Commonwealth of Puerto Rico and the Insular Areas (Guam, American Samoa, the Virgin Islands, Northern Mariana Islands, and the Trust Territory of the Pacific Islands), \$2.5 million for programs described in item 4 below.

b. To the Community Services Administration, \$87,500,000 to carry out energy crisis activities under Section 222(a)(5) of the Economic Opportunity Act.

c. Any balance which remains (after (a) and (b)) will be made available as incentive grants to the States for fuel assistance programs. We describe these incentive grants in item 8 below.

d. If the programs qualifying for grants under paragraph (c) do not exhaust the funds available, any amounts remaining will be distributed to the States in accordance with the formula used in determining their original allotments.

4. *Energy Assistance Programs for the Commonwealth of Puerto Rico and the Insular Areas:* Congress recognized that while there is little need for heating in Puerto Rico and the Insular Areas, energy costs are increasing for refrigeration and other home uses.

Each of the jurisdictions, in order to receive funds, must submit a plan within 30 days after publication of these final regulations. The plans must be consistent with the requirements which States must meet for State plans. In lieu of heating assistance, plans submitted by Puerto Rico and the Insular Areas may provide for home energy uses such as refrigeration and for cooling when cooling is medically necessary.

Comments and Responses

In the preamble to the interim regulations we stated that we were considering three alternative methods for allocating funds to Puerto Rico and the Insular Areas: apportionment based on population; apportionment based on aggregate residential energy costs and low income population; and, apportionment based on the amounts needed to carry out the plans submitted by each jurisdiction. We specifically invited comments on these alternatives through the preamble and through letters to the Governor of each jurisdiction. We also asked the Governors to indicate State plan requirements that they believe should not be applied to their programs and, in the case of the Insular Areas, to indicate whether they would be interested in a consolidation of the energy grant with other HHS grants.

Two governors responded. One favored an allotment based on population. The other did not express a preference but noted that the amount of funds allocated must be sufficient to allow his territory to operate a viable program. A Congressional delegate and the energy agency of one of the jurisdictions suggested that we provide a floor allotment to each jurisdiction and allocate the remaining funds according to population. The Congressional delegate also recommended that we not require public participation or administrative cost sharing in the plans submitted by Puerto Rico and the Insular Areas. The delegate also favored a consolidation of appropriate HHS grants.

We believe that the most equitable allotment method is to distribute a portion of the available funds to Puerto Rico and the Insular Areas equally and then distribute the remainder of the funds according to the proportion each jurisdiction's population bears to the total population of all the jurisdictions. This method will assure that the smaller territories will receive an allotment great enough to make administering the program cost effective. At the same time this method recognizes that energy problems in Puerto Rico impact on a significantly larger number of people than in the territories.

We have allocated one-twentieth of the \$2.5 million to Puerto Rico and each of the territories in equal shares (\$20,833 per jurisdiction). In addition, each jurisdiction will receive an allocation based on its share of the total population as follows: Puerto Rico: \$2,147,002 (90.4 percent); Trust Territories of the Pacific: \$71,250 (3 percent); Guam: \$66,500 (2.8 percent);

Virgin Islands \$61,750 (2.6 percent); American Samoa: \$19,000 (0.8 percent); Northern Mariana Islands: \$9,500 (0.4 percent).

We allow Puerto Rico and the Insular Areas the option of including public participation and payments to operators of subsidized housing in their plans because circumstances in these jurisdictions could make it difficult to comply with these State plan requirements. We also recognize that these jurisdictions may have difficulty meeting the administrative cost sharing requirements imposed by the Act on the States. Therefore, we have waived these requirements as we have for the States. In determining the amount of assistance payments, the jurisdictions must use average home energy expenditures for households or a reasonable substitute for heating degree days.

5. *Equivalent benefits for Indians:* The Act requires that the States must provide members of an Indian tribe benefits that are equivalent to benefits provided to other eligible households in the State. For the purposes of this program, we employ the definitions of Indians, Indian tribes and Indian organizations that are established in our regulations for the Administration for Native Americans (45 CFR Part 1336.1).

Our preferable method of assuring equivalent benefits to Indians is through each State's plan for energy assistance. Other vehicles are possible, however. In order for Indians to be served by any method other than by a State via its plan for energy assistance, we must make two determinations. We must make a determination that (1) the Indians are not receiving equivalent benefits, or would not receive equivalent benefits under the State plan submitted, and (2) that the Indians would be better served through direct grants to a tribe or an Indian organization. In the event of a determination that equivalent benefits are not being provided by a State, we may require that the State make changes in its plan or we may make direct grants from the State's allotment to the tribe or organization. We intend to work with States to make those changes that are necessary to assure equivalent benefits, where possible. Alternatively, we will work through our Administration for Native Americans to guarantee that equitable treatment for Indians is provided.

We recognize that it may sometimes be necessary to agree beforehand that a grant should be made directly to a tribe where it can be predicted that to do otherwise would clearly yield inequitable treatment of members of the tribe. Therefore, in making our determination to provide a direct grant

to a tribe, we will take into consideration an agreement between the tribe and the State that the members of the tribe would be better served by a direct grant. We have provided States and tribes with guidelines on what the contents of an agreement should be. This provision for advance agreements does not apply to Indian organizations that are not tribes.

In the event that we decide to make a direct grant to an Indian tribe or organization, we will assure that the amount of that grant enables the tribe or organization to provide benefits equivalent to those provided under the State plan to non-Indian households.

The tribe or organization will be required to submit a plan that meet the same requirements as are required of the States, with some exceptions. Because of the unique circumstances of reservations, we have made payments to building operators optional and have permitted modifications to the public participation requirements which States must meet.

Comments and Responses

Two commenters emphasized the need for strong affirmative treatment of Indians. We fully concur with this recommendation. We believe we have gone as far as possible, within the statutory limits, to assure that Indians on and off reservations are given adequate outreach and equivalent benefits.

Three commenters asked that we set a time frame for determining whether or not Indians have been properly served under a State's program. We do not set a specific time frame because a charge of discrimination could conceivably arise at any point in the program year and could come from many different sources. We will investigate the claim and make a judgment in conjunction with other interested parties based upon the facts at that time.

6. *Reallotment:* If we determine that a portion of a State's allotment or Indian tribe's set-aside will not be required to carry out the State's or tribe's plan we will reallot that portion to other States or tribes based on their need and ability to expend the funds in a manner consistent with the provisions of this Part. We will make this determination based upon actual expenditures and commitments, the State's or tribe's timetable for providing assistance and their quarterly spending projections. Thus, we will not penalize a State or tribe which has spread the use of its funds over the course of the winter or has chosen to reserve funds for use in the summer to assist households with a medical need for cooling.

Each State and tribe will submit a timetable for providing assistance in its plan. In their periodic program reports States and tribes will provide information on households assisted and funds committed on their behalf which we will compare with their timetables.

Before the beginning of each quarter of FY 1981 each State must submit an estimate of its need for Federal funds in the forthcoming quarter as well as for the fiscal year. Except for the first quarter, this report will be due 45 days before the beginning of each quarter. The due date for the first quarter report will be announced when formal reporting instructions are issued to the States and tribes. These reports along with the quarterly report on actual expenditures, will assist us in determining which States and tribes have allotments greater or less than the amount needed to carry out their approved plans. We will consider the information in these reports in determining whether or not a reallocation should take place. In addition to these regular reports, a State or tribe must advise us whenever it knows that a portion of its allotment will not be required to carry out its approved plan.

Before we reallocate any funds away from a State or Indian tribe, we will notify the Governor of the State or tribal head by letter, and the general public by notice in the *Federal Register*, of our intent to reallocate a portion of the State's or tribe's funds.

Written comments on the proposed reallocation may be submitted to us during the 30 days following publication of the notice in the *Federal Register*. We will review and consider any comments we receive during the 30-day comment period and notify the Governor or tribal head by letter, and the public by notice in the *Federal Register*, of our final decision with regard to reallocation of the State's or tribe's funds.

We will reallocate any funds which become available under the above procedure to States and Indian tribes expressing a need for additional funds, taking into account the original allocations to those States and funds reserved for Indian tribes, and the States' and tribes' need and ability to expend the funds consistent with the provisions of the Act.

Comments and Responses

Those who commented on the reallocation regulations expressed support for our efforts in this area. Two commenters suggested that we should be very cautious about allowing States to protect funds from reallocation on the ground that they will be needed later for

cooling assistance. We will carefully scrutinize the States' and tribes' estimates and reports of expenditures to make sure that funds do not go unused in one State or tribe when there is an unmet need in another State or tribe. At the same time we will take care not to penalize States or tribes for spreading out their funds to assure that adequate resources are available for medically necessary cooling in the summer.

7. Reimbursement for expenditures by States in advance of an appropriation or State plan approval: To prepared for this winter's energy assistance programs, the States will have begun planning and administrative activities as early as this Spring, and certainly before the beginning of the 1981 fiscal year on October 1. In order to carry out these activities, States will have advanced the costs from their own sources. Thus, we provide in these regulations that any State which uses its own resources after April 2, 1980 for planning and administration, in substantial compliance with its subsequently approved State plan, may claim reimbursement retroactively (after the plan is approved) for those advance expenditures.

Reimbursement for State expenditures incurred before the start of FY 1981 is consistent with the Act which authorizes reimbursement for advance State expenditures when funds are provided to carry out the Act. Since the Act became law on April 2, 1980, we believe that a State could reasonably incur expenditures for planning and administration on or after that date.

Comments and Responses

In the preamble to the interim final regulations we stated that we were considering whether or not to reimburse States for advance assistance payments under the same conditions that apply to advance expenditures for planning and administration. We asked any State that believed it would be making advance assistance payments to comment on this issue. No State responded. Because our authority under the Act to make such payments is questionable, the final regulations do not provide for reimbursement for assistance payments made in advance of the 1981 fiscal year.

Two commenters stated that we should make allocations to the States before the heating season begins. Another commenter believes it is unfair to expect local governments to spend their own funds in advance of Federal funds being allocated. A State that advances its own funds for planning and administration of the program in substantial compliance with a subsequently approved plan may be

reimbursed after Federal funds are made available to the State for its program.

8. Incentive grants to States for residential energy assistance programs: After we have allocated funds to the States for the energy assistance program and to the Commonwealth of Puerto Rico, the Insular Areas and the Community Services Administration for their programs, we would make the remainder (if any) available to States as matching grants for up to 25% of some State-funded fuel assistance programs which serve some or all of the households eligible under this Act. However, under existing appropriations we do not expect any money to be available for incentive grants.

The purpose of these grants would be to provide an incentive to States which have State funded energy assistance programs to continue such programs and an incentive to other States, where there is a need, to begin such programs.

The regulations provide for distributing any incentive funds by means of discretionary grants. If any incentive funds become available, we will publish priorities and requirements for funding incentive grants in the *Federal Register*.

Subpart G—Furnishing Home Energy assistance

1. Who is eligible for Assistance: Federal law permits payments on behalf of households with incomes no greater than the Bureau of Labor Statistics Lower Living Standard Income Level (BLSLLS) and any single person household whose income is at or below 125 percent of the CSA Poverty Income Guidelines. It also permits payments for households with at least one person eligible for AFDC, SSI, Food Stamps or certain income-tested Veterans Administration benefits. The definitions in §§ 260.2 and 260.150 exclude certain categories of AFDC and SSI recipients who are protected from energy costs because of their living arrangements.

The State is not required to make payments to every household authorized as an eligible household under Federal law. It may limit its program to a smaller eligible population if it chooses. However, the regulations require that if the State does exclude any of the households eligible under Federal law it may do so only in accordance with the priority and required considerations which are defined in § 260.154. For example, highest income households would have to be excluded before lower income households. This issue is discussed further in the section on amounts of assistance. The regulations also require equitable treatment among households eligible under the State's

plan. This means that households that are similarly situated with respect to income, energy burden and other relevant considerations under the Act must receive similar amounts of assistance.

The crucial distinction is between eligibility and payment: eligibility is strictly defined by Congress, but each state has the flexibility, within the priorities of the act, to determine which of the pool of eligible households will receive payment and how much each will receive. If we required States to pay benefits to all eligible households, and thus serve the broadest possible population, the amount of assistance available to each household would be limited, and the States' ability to target their assistance on families with highest energy costs and lowest incomes would be hampered.

A State may use evidence of categorical eligibility, i.e., eligibility for SSI, AFDC, Food Stamps, or Veterans benefits, to determine eligibility for energy assistance. For example, a State could use our State Data Exchange (SDX) file of SSI payments to determine that a household contains a member eligible for SSI. This provision is intended to expedite eligibility determinations. A State may not rely on evidence of eligibility for a categorical program if obtaining such evidence would delay furnishing assistance to a household.

Comments and Responses

Forty-eight commenters wrote that the BLSLLS level for single person households is too low. Subsequent to the publication of our interim final regulations, Congress provided in the Continuing Resolution enacted on October 1, 1980, that eligible households include any single person household whose income does not exceed 125 percent of the CSA Poverty Income Guidelines. These final regulations contain this change.

Fourteen commenters said that the BLSLLS was a poor indicator of poverty because its levels are too high and suggested that we require use of 125 percent of the poverty level instead. Congress has clearly established the BLSLLS, (or 125 percent of poverty in the case of a single person household) as the maximum income eligibility standard for noncategorically eligible households. However, a State may set a payment standard at a level lower than this maximum. The only restriction is that the level it sets for any family size must not exceed the BLSLLS for that family size (or 125 percent of poverty for single person households). Consequently

we have made no changes in the regulations based on these comments.

Congress has also provided that categorically eligible households with incomes in excess of the BLSLLS, such as some SSI or AFDC recipients, may be included in a State program. Nine commenters objected to their inclusion and two favored it. We have no authority to change this statutory provision.

Forty-five comments asked that we prohibit States from favoring categorically eligible households over those who may be income eligible. This request was in contrast to that of four other commenters, who asked that we require categorical payments to SSI recipients. No regulatory change was made because we do not believe that we may either require coverage of categorical eligibles or prohibit it. A State may not make payments to categorically eligible households to the exclusion of other similarly situated households. Rather, benefits must be made available based upon the priorities which are intended to protect the lowest income households whether or not these households are categorically eligible.

Furthermore, three commenters asked that we prohibit States from requiring applicants to show shut-off notices or unpaid utility bills to qualify for assistance. Requiring unpaid bills or shut-off notices could serve as a disincentive for households to pay their bills as they are able. As a result of these comments we have added § 260.150(c) which prohibits States from requiring proof of unpaid fuel bills or shut-off notices except in the case of emergency assistance as described under § 260.80.

Several commenters said that our requirements for eligibility are too sketchy or brief. The intent of Congress was to establish a State-run program; we do not believe we have the authority to establish eligibility requirements beyond those already in Subpart G.

2. *To whom payments can be made:* Payments may be made directly to eligible households. In addition, payments may be made on behalf of eligible households to their home energy suppliers (see discussion under Subpart I). The Act requires that payments be made to eligible operators of subsidized housing (see discussion under Subpart H), but those payments may be made only on behalf of a specially-defined subgroup of eligible households, which we call "eligible tenants." We will discuss this special group further below.

A household must be economically at risk for rising costs of home energy in order for a payment to be made to it, or

to its energy supplier on its behalf. This means that no household which is fully protected by another government program from the impact of energy cost increases may be directly aided under this program. To receive an energy assistance payment, a household must pay some part of its energy cost increases from its own resources, either through increases in rent or utility bills. A household in some subsidized housing which permits some part of energy cost increases to be passed through to the tenants would be at least partially at risk. Tenants in non-subsidized apartments would be considered fully vulnerable to cost increases, even when utilities are included in the rent, because rental levels reflect utility levels when leases are renewed.

Other examples of households which are not vulnerable to energy costs include, but are not limited to, residents of some rent-controlled housing where increased energy costs cannot be added as rent increases and some persons living in congregate or domiciliary care facilities where living costs are subsidized by Federal, State or local governments. To aid States in screening out households that are not vulnerable to energy cost increases a list of more examples is included in Appendix D. In considering whether or not a household is economically at risk (i.e., vulnerable) for energy cost increases it is not relevant whether or not the household has actually experienced recent increases. What is relevant is whether or not the household has some formal or structural protection against increases. If there is none, it must be assumed that the costs of energy are being borne by the household. In addition, we do not mean that a family must be in an emergency situation to be economically at risk.

Those households that pay their energy costs as part of their rent must be treated in the same way as to those that pay energy costs directly to suppliers. This requirement will assure that households living in rented residential units where energy usage is not metered, and where the cost is included as an undesignated part of the rental payment, are not excluded from eligibility if all other eligibility criteria are met. In addition, the levels of assistance for this group must be comparable to those for households similarly situated in terms of income, priority, and burden of energy costs in relation to income.

Duplicate payments, i.e., more than one payment attributable to the same energy costs for the same household, are not permitted.

Comments and Responses

Two State agencies asked for a clarification of what constitutes a duplicate payment. One asked specifically whether or not it would be considered a duplicate payment if a person received an energy assistance payment in November and then, in January, moved into a dwelling with another eligible household and indirectly benefited from its energy assistance payment. The answer is no. A duplicate payment only occurs when the same eligible household receives more than one payment attributable to the same energy costs.

3. Amounts of Assistance Payments: Section 260.154 sets requirements for determining amounts of assistance according to the priorities and factors the Act requires for computing benefits.

As specified by Congress, lowest income households must receive priority and the highest level of assistance must be given to households with the lowest incomes and the highest energy costs in relation to income. States are left to define "lowest incomes" and to set income ranges.

After we published the interim final regulation, Congress established in the Continuing Resolution enacted on October 1, 1980, a ceiling of \$750 on assistance payments to any eligible household. We have amended the final regulations to reflect this legislative change. We will entertain requests by States for waiver of this ceiling where necessary for the State's operation of its program and likely to promote the objectives of the Act.

There are a number of other factors which States must take into account in computing the level of benefits for eligible households. The first of these is average home energy expenditure for households. Because it is extremely difficult to collect adequate direct energy cost information, we will allow both heating degree day data and cost by type of energy source to be substituted for average home energy expenditures where that information is inadequate or unavailable. Since use of energy source and, therefore, expenditures for energy depends heavily on the degree days in a location and since differential costs of energy sources can be great, we believe that these are reasonable measures for determining home energy costs.

The other factors which States must take into account in computing the level of benefits are: (1) the proportional burden of energy cost in relation to ranges of income; (2) the variation in degree days in regions of the State where this information is appropriate

and where variations do exist; and (3) the extent to which the household, or category of households, is economically at risk for or protected against rising costs of home energy. The State may also wish to take into account other relevant considerations that are in accordance with the purposes of this program and are not contrary to the priority requirements.

The criteria which we expect a State to use in determining whether different payment categories need to be established are contained in Appendix C to the regulations. This includes what we believe are reasonable standards for variations based on degree days and fuel type. Other criteria or interpretations of our suggested standards may be used where the State can justify the alternative measure.

We have left States flexibility in the area of establishing benefit levels particularly for those who pay for utilities indirectly. The legislative history indicates that benefit levels must be established so as to provide generally comparable relief to those who pay utilities directly and to those who pay them through rent. We believe that a common factor for both groups is the burden of energy costs in relation to income. A State would be expected to evaluate this factor in setting a benefit level. Since information concerning the burden factor of energy expenditures in relation to income may not be available for those who pay their utilities as undesignated portions of rent, it will be necessary for that factor to be "deemed" in their behalf. This suggests the use of a percentage of income or of rent, either of which could be based upon a reasonable comparison with energy costs of those who pay utilities directly. This suggestion has been inserted into the regulations.

The regulations also state that the amount of the payment should reflect the extent to which an eligible household is vulnerable, i.e., economically at risk.

In reviewing both the priority requirements and the Act's requirement on computing the level of benefits, we had to consider under what conditions an automatic grant (i.e., a payment made without application) to households categorically eligible for energy assistance would be acceptable. Adequate information regarding vulnerability to energy costs and heating burden is not generally available in the existing State program records for these families. Issuance of an automatic grant for recipients of entitlement programs (AFDC, Food Stamps, SSI, veterans' benefits—all subject to the definitions in §§ 260.2 and 260.150)—would be

acceptable as one part of a total State program. When an automatic grant is used, other parts of the State's program would have to be established to meet the requirements of § 260.154. The State plan will have to show how the priority and benefit level requirements of the statute and regulations are met in the State's total program. Further discussion of the use of automatic grants is contained in Appendix C.

Comments and Responses

Several questions were raised in the comments about how amounts of assistance to eligible households should be calculated. Section 260.154, *Amounts of Assistance Payments*, and Appendix C describe methods for making the necessary computations. In addition, we will be providing all States and tribes instructions and agreements which are designed to guide them in developing their payment levels. These instructions show how to take into account fuel types and energy costs, different climatic zones, and living situations. In response to several other comments, we wish to point out that it is also permissible for a State to build a factor for cooling costs into the tables or scales that are constructed in accordance with Appendix C. We reiterate, in response to several comments, that whether or not payments for cooling are provided is completely a State option.

One commenter asked how cooling and heating costs can be separated as a proportion of an energy bill. We do not require that a State make such a separation. To construct benefit levels in order to make payments for cooling costs when medically necessary the State will need to make a judgment about the cost of operating cooling equipment over the time periods for which it expects to make payments. The State can either pay a proportion of the total energy bill or a flat amount to any household that is eligible for cooling cost assistance.

Two respondents suggested that benefits should only be given to those who apply. It is up to the State to decide whether to use a totally application-based program or a mixed program under which some benefits are based upon pre-determined categorical eligibility.

There were eleven comments stating that the total system for issuance of assistance payments is too burdensome for the States. The writers referred to the factors that must be taken into account in determining eligibility and benefit calculation—income, energy expenditures, heating degree days, and vulnerability—and claimed that taking all these factors into account is

cumbersome and expensive. We have attempted to respond to these comments with additional technical information in the form of the program pre-print, a series of question and answer papers, and Appendix C. We are also making available technical assistance through meetings with State officials by our Regional and Central office staff. We believe that elimination of the requirements would undermine Congress' intent that the assistance be targeted to those who most need it.

Vulnerability for categorically eligible households is admittedly a difficult determination to make, and several commenters so indicated. We believe that each State must devise its own methods for making this determination in order to avoid benefit payments to households that have no vulnerability to energy cost increases. We are suggesting that States may want to use flyers, brief questionnaires or notices to advise their categorically eligible households of possible eligibility and at the same time to request those households to send in some kind of response indicating their degree of vulnerability. Other methods include cross-matching categorical roles with existing lists of households that are not vulnerable to energy cost increases. We provide a suggested list of those households in Appendix D. A final resort may have to be an application-based program or a detailed justification for a total or partial waiver of this requirement.

A variety of commenters offered suggestions about State calculation of benefit levels. Suggestions were as follows: payment amounts should be based upon income in relation to family size (3 comments); States should be allowed to establish their own benefit levels (2 comments); and a sliding income scale should be permitted in determining benefits (5 in favor, 1 opposed). The legislation and the regulations permit a State to adopt any of these suggestions. A State may utilize as a variable in its benefit computation tables a family-size factor. States are required to set their own benefit levels consistent with the \$750 ceiling discussed above. Our intention in § 260.154(a)(2), which requires that the highest benefit levels be paid to those with lowest incomes and highest energy costs in relation to income, is to permit the use of a sliding scale, as opposed to a few broad categories. However, we believe that requiring the use of a sliding scale could be too burdensome to most States.

Thirty commenters wanted strong assurance that the LIEAP would cover

those who pay for their utilities through their rent instead of directly to an energy supplier. We reiterate here that § 260.152(c) requires payments to such "renters", and § 260.154(g) requires the State to describe its method for making payments to renters. In addition, we have added § 260.154(c)(5) which suggests a method for calculating the benefit level for renters. We suggest that the State may wish to deem the households energy costs based on a comparison of income and energy burden with households that pay their rent directly. The State may pay a portion of the amount it deems, and that portion must be comparable to the amount it makes available to other eligible households.

One commentator asked that the period over which energy costs should be measured in order to calculate benefits be defined by us. We believe that because of the tremendous variation in costs and other factors from State to State, the time period is a State decision.

One commentator suggested that benefits should be available only as a supplement to an amount already paid by an eligible household. As with other suggestions concerning the form or amount of benefits, the decision here is the States'.

4. Priority for households with elderly and handicapped persons: The Act requires that priority be given to eligible households with an elderly or handicapped individual. States are left free to define "elderly," except the elderly may not be younger than 60 years of age. We permit States to use, as a definition of "handicapped," the definition in Section 504 of the Rehabilitation Act; the definition of "disability" under Title II of XVI of the Social Security Act; or any other definition for "handicapped" used in a statewide program.

The State plan must assure that these priorities are implemented in the program. The State may, for example, provide special treatment relating to ease of application or access to assistance, such as certifying elderly and handicapped persons by home visits or by mail, provide transportation, and/or utilize the services and facilities of agencies and organizations which serve these individuals.

This priority status does not remove or supplant the priorities in amount of assistance given by the Act to households with the lowest incomes. Extra benefits, or higher benefit levels, may be permitted for households with elderly or handicapped individuals only if those additional benefits are justified by the State in terms of the

considerations relating to income and burden of energy costs in § 260.154.

Comments and Responses

Nineteen commenters believed that the priority for the elderly and handicapped should be met through higher benefit levels, and fifteen commenters said that the priority treatment of the elderly should not be met through higher benefit levels. Others suggested alternative methods through which the priority should be met such as mail-in applications or increased outreach efforts. An additional suggestion concerning priority treatment of the elderly and handicapped was that no payment should be made to any household until all applications are accepted and the State is certain that its benefit levels are calculated to allow payments to all priority households. Only after they receive assistance would benefits be available to other eligible households. All of the suggestions listed here, *except* the suggestion that priorities for elderly and handicapped be met solely through increased benefits, are acceptable as parts of the method the State may use to meet the priority requirements in the Act. As mentioned in the preamble to the Interim Final Regulations, higher benefits for the elderly and handicapped are permissible to the extent that they are justified by other factors to be taken into account in calculating benefits.

One commenter noted that we made no special mention of infants in the regulations. While we agree that care of infants could be made a priority in a State program, the legislation is explicit in that it requires priorities for the elderly and handicapped and those with lowest incomes and highest energy costs in relation to income. Attention is called to the outreach requirement, § 260.60(a)(1), wherein young children are included in the priorities for outreach.

5. Purpose for which payments can be made. Payments may be made only to: (1) meet the rising costs of energy sources needed to provide heat in a residential dwelling for an eligible household; and (2) meet the rising costs of energy sources needed to provide cooling in a residential dwelling for an eligible household when the household establishes, to State satisfaction, that the need for cooling is medically necessary. The State plan must identify the conditions under which these payments will be made. Payments for cooling can only be made when there is a risk to life or health due to a particular medical condition that can be eased by use of home cooling.

Comments and Responses

Our regulations prohibit the States from using their allocations under the Act to provide benefits in the form of weatherization or conservation assistance. We received 68 comments criticizing this restriction. These respondents argued that there is a critical unmet need for weatherization and conservation assistance among low income households and that this program should help meet that need. Although we agree that weatherization and conservation are important in the long-run strategy to reduce our dependence on foreign energy sources and to alleviate the burden of increased energy costs, we do not believe Congress intended home energy assistance under this program to include weatherization or conservation services.

The Act explicitly directs us to transfer up to \$100 million to the Community Services Administration for energy crisis activities under its programs. CSA has the authority to establish programs of assistance to low income families designed to reduce fuel consumption including weatherization and conservation. The legislation history of the Act makes clear that Congress recognized the limitations of the low income energy assistance program it was establishing. As the Senate Committee on Labor and Human Resources stated:

*** whatever the home energy assistance program, there will always be households that for one reason or another will not get the help they need *** their particular problem such as a broken heating unit may not be one for which a vendor or cash payment is the solution. *** It is the intent of the Committee that these needs be met through the transfer of funds to the Community Services Administration ***.

The Act expressly requires States to refer low income households to existing Federal, State and local weatherization and energy conservation efforts, again indicating that the vendor or cash payments under the home energy assistance program might not meet the additional need for weatherization or conservation services. Indeed, the Act's criteria for determining the amount of assistance payments to eligible households relate to household income, home energy expenditures, the burden of energy costs compared to household income, and the variation in degree days throughout the State; the criteria do not include either the extent of need for or the cost of weatherization or conservation services. Nor does the Act provide for payments to weatherization or conservation contractors; the only statutory exceptions to direct assistance

payments to eligible households are for payments to home energy suppliers or building operators. Although the Act does not expressly define home energy assistance to exclude weatherization and conservation services nor expressly prohibit use of grants for such purposes, our best reading of the statute is that Congress intended the need for weatherization or conservation services to be met by other programs.

Beyond the structure of the Act itself, we believe there are important policy reasons why this program should be devoted to assisting eligible households to pay heating bills. This critical need is not adequately addressed by any other Federal or State program. On the other hand, several Federal programs already assist low income households with weatherization and conservation. These programs include direct weatherization assistance administered by the Department of Energy, home improvement loans administered by the Department of Housing and Urban Development and the Department of Agriculture and residential energy tax credits administered by the Internal Revenue Service.

Given the funds available for LIEAP, the increased number of eligible households and the rising costs of home energy, States' programs should focus on the immediate need for assistance in paying fuel bills this winter and not be diverted to supplement other programs designed to meet the need for weatherization or conservation assistance.

We were requested by three commentors to allow States to pay for secondary heating sources, and four asked that the cost of all electricity be counted as a heating cost. States have the flexibility under their programs to follow either or both of these courses. A State may, for example, pay for only one source or for multiple sources of energy and, alternatively, may use the cost of one source of energy as an indicator of the total energy costs for a household.

6. *Forms of Payment:* The State plan must indicate the forms of assistance that will be used to furnish benefits to or on behalf of eligible households. Benefits may include: cash; in-kind payments in the form of fuel; reimbursements to, or lines of credit with, energy suppliers; vouchers, stamps, coupons, or other forms of certificates which may be used in exchange for energy supplies. Except in the case of supply shortage or weather-related emergencies under § 260.80, in-kind payments may not include clothing or shelter. In all cases, the assistance supplied must be directly related to offsetting the rising cost of home energy.

Payments to a home energy supplier may be by means of reimbursements or a line of credit. A line of credit to an energy supplier may provide either a guarantee of reimbursement to the vendor for energy to be delivered, with payment made upon a delivery, or a pre-payment to the supplier for energy to be delivered to the eligible household.

The line of credit would in no case exceed the benefit level for the household. The pre-payment should be essentially limited to the amount needed by the energy supplier to avoid using its funds to cover the costs of the services provided to the eligible households during the time it normally takes the State agency to reimburse the supplier. The use of advance payments in excess of the estimated amount needed to supply energy to an eligible household beyond a one-month period should be specified in the State plan when describing the forms and methods of payment to or on behalf of eligible households as required in § 260.158 of the regulation.

The State must ensure that energy is provided for the full amount of the prepayment and that prepayments and costs of the energy provided are reconciled. The provisions under § 260.250 through § 260.260 of the regulation govern all prepayments.

The benefit of any payment made on behalf of an eligible household must accrue to the household for which it was paid. The household must realize full compensation corresponding to the amount paid under this Act to another party. This is intended to prohibit requirements such as those which mandate that eligible households sign over two-party checks unless there is a dollar-for-dollar benefit realized by the household.

Comments and Responses

Eight commenters suggested that we permit payment for clothing and blankets under State plans. One opposed this suggestion. We are not making the suggested changes. As we explained above, the intent of the Act is to help pay for fuel for home heating. The only exception is in the case of weather-related or supply shortage emergencies where clothing or blankets may be appropriate to meet the emergency.

One commenter suggested that applications should be necessary only once during a heating season. Benefits would be available to eligible households via a line of credit available throughout an entire heating season and based upon a single application. This is permissible under the regulations. The period an application will cover is a

State decision, as is the decision concerning the value of the line of credit or the period for which it is applicable.

7. *Timetable:* The State plan must include a timetable by which payments will be made and must indicate the time standard for acting on each application for assistance. The State's program must begin by December 15, 1980.

Comments and Responses

Two respondents suggested that a State's program should make payments on a year-round basis. We do not prohibit such a system, and a State can choose to do so. Another commenter suggested that the amount of assistance should be pro-rated by month according to the previous winter's heating bills. Again, we do not prohibit such a procedure. However, we believe that gathering the previous year's data that would be required to accurately determine the current year's payments would be cumbersome and error prone. Also, it is likely that a sizable proportion of the current year's eligible households will be finding themselves in different circumstances than they did the previous winter.

8. *Income and assets:* The interim final regulations required the States to consider the household's total cash income actually received from all sources, excluding cash over which the household has no control. As described below, we have amended the regulation to give the States more discretion over the income it will count or exclude.

For categorically eligible households, States must not apply assets tests other than those applied in the program on which eligibility is based, i.e., AFDC, SSI, Food Stamps, or certain veterans' programs. For other households, States may establish assets tests, but must not count cars, household and personal belongings, and primary residences.

Comments and Responses

Many respondents recommended changes in the regulations on determining income. Most asked for clarification such as whether we intended the States to count gross or net income. Others asked us to permit specific exclusions or deductions in determining household income. As a result of these comments, we amended these regulations to provide that each State must indicate in its plan the definition of income it will employ and the period over which income will be counted. The State may provide for exclusions or deductions from income, but any exclusion or deduction must be reasonably related to measuring the household's financial ability to meet the rising cost of home energy. A State may

employ the definition of income and the exclusions and deductions that it believes are best suited to the administration of its program. This would, for example, permit a deduction for medical expenses as was recommended by twelve respondents.

Fourteen commentors believe that we should prohibit or further restrict the use of assets test or that we should standardize such tests. Congress defined the limits of assets tests in the legislation and we cannot modify those limits. States may set assets tests to suit its own policy within the restrictions described above.

Eleven comments asked that we not require proof of income from applicants; six said that we should require proof of income. Section 305(c) of the Act requires that in verifying income eligibility the State shall apply procedures and policies consistent with those of its AFDC program. We have no authority to vary this requirement.

Two commentors suggested that we should require States to pay persons with special needs, even if their household incomes exceed the energy program limits. We have no authority to extend the program income eligibility limits set by Congress. Persons with special needs may be referred to other programs in the State or to voluntary agencies.

We have followed the recommendation of seven commentors by adding § 260.162 to the regulations. This new section makes explicit that any assistance to eligible households provided under this program may not be counted as a resource or income for any other State or Federal assistance program.

Subpart H—Payments to Building Operators

1. *General principles and definitions:* The Act specifies that operators of public and subsidized housing must receive energy assistance payments on behalf of eligible tenants in the building.

We implemented this provision in Subpart H of the interim final regulation. The regulation defined "building operator" and "eligible tenant," specified methods for computing payments, required the States to consider increased operating costs due to the higher fuel costs of the operators and the benefits that would accrue to the tenants in selecting operators for payment, made provision for paying partially vulnerable eligible tenants, and made certain requirements to verify tenant and operator eligibility.

The legislation requires that two calculations be made in determining the payment to an operator. The amount

paid per eligible tenant to a building operator is based on exact monthly expenditures for heat (the first computation) and may not exceed an amount comparable to the amount established for other similarly situated eligible households (the second computation). Our regulations set this comparable amount equal to the limit on the total amount the State may pay to building operators (determined in § 260.206(c)) divided by the number of eligible tenants on whose behalf building operators receive payments under the State's plan.

The comparable amount may be adjusted by the State for individual building operators or categories of operators under criteria based on the factors used to determine whether a building operator should receive a payment.

The Act directs the Secretary to determine the comparable amount by regulation. We believe this definition assures that comparable amounts are available for payments to eligible households and eligible tenants in public or subsidized housing. After allocating a portion of the Federal grant to eligible tenants and other households in proportion to their relative numbers, the definition of comparable amount establishes a ceiling on the payment per eligible tenant (as required by the statute) which corresponds to the amount available to the State for assisting other eligible households.

The term "building operator" means the owner or representative of an owner of a residential building or buildings in State or local government-operated housing projects which admit low income tenants based upon an income test. State or local projects that are financed but not operated by the State or local government are not included in this definition. In addition, "building operator" means the operator of a residential building or buildings established under five specific HUD and one USDA program set forth in § 260.202(a).

States are not required to make payments to all housing projects and building operators. However, distinctions must be based upon objective criteria including the extent to which the operator's costs are uncompensated by subsidy programs and the benefits that will accrue to the eligible tenants as a result of such a payment. The legislation and the regulation permits the States to make payments to building operators whether or not there is a clearly defined unmet cost for residential heating fuel. However, States must not make a payment to an operator who is fully

subsidized if, in the States' determination, an adequate benefit will not accrue to the eligible tenants should such a payment be made.

The State must define the criteria by which a tenant in subsidized or public housing will be considered "vulnerable," including partially and fully vulnerable. Tenants who pay excess usage charges or surcharges must be considered vulnerable to some extent. The State has flexibility to include in its definition of "vulnerable" tenants who have recently experienced rent increases. An example of this would be a municipality which raised the proportion of income the tenant must pay for shelter over the last few years from 25 percent to 30 percent and from 30 percent to 35 percent.

The State must limit the proportion of its allotment which it pays to operators to the ratio of the number of eligible tenants in the buildings which will receive assistance divided by the total number of eligible households under the State Plan. In determining the total number of eligible households for this ratio, the State will include the eligible tenants in the buildings for which operators will receive assistance. If a State does not have sufficient data to derive an exact number of eligible tenants or households the State may use its best estimates. In either case, the State plan must specify the State's limit and the bases upon which it was computed. Since this is a State plan requirement, a waiver of the limit can be considered. However, it would be necessary for the State to show that such a waiver would assist in promoting the Act's objectives and that it was necessary to enable the State to carry out its program. (See § 260.26).

"Eligible tenant" is used in the regulations for the purposes of establishing the amount of payment to a qualified building operator. In order for an "eligible tenant" to be counted for purposes of payment to a building operator under this subpart, the tenant must occupy a dwelling unit in a building or project operated by a building operator as defined above; meet the eligibility criteria for an eligible household under the State's plan; make a combined payment for rent and utilities in which the utility cost is not differentiated; and must not be fully vulnerable to energy cost increases.

Fully vulnerable tenants who pay their utility costs separate from their rent must not be counted as eligible tenants for the purposes of calculating the amount payable to a building operator. They may be eligible for a direct payment from the State as eligible households under Subpart G. As such,

they are not considered "eligible tenants."

In the case of a fully protected (i.e., non-vulnerable) tenant in subsidized housing, the State must pay the full benefit to the eligible building operator. In the case of an eligible tenant who is economically vulnerable to the rising costs of energy, the tenant may also qualify as an eligible household under Subpart G and the building operator's payment on the tenant's behalf must be reduced by the amount of the tenant's entitlement.

In this case, the State must pay the tenant as an eligible household, but only to the degree the tenant is vulnerable to the rising costs of fuel. Payments to both tenant and operator would be taken from the set-aside for operators under the comparable amount equation.

Comments and Responses

We received comments on Subpart H from a total of 87 writers. Specifically thirty-five commenters wanted this provision eliminated entirely or wanted benefits to building operators drastically reduced. Seven writers wanted a separate appropriation and, presumably, separate legislation to accompany the appropriation for building operators. In contrast only two writers were clearly in favor of the payments to building operators. Two other writers wanted us to require compliance with Executive Order 12185, which requires weatherization and energy conservation, before a payment can be made to an operator. We have not adopted these suggestions because they require changes in the legislation.

Several commenters addressed issues which in essence required clarification but not significant changes to the regulation. For example, eight writers wanted a ceiling on payments to operators. The requirement that the State pay the lesser of the exact fuel costs or the comparable amount does in practice set a ceiling which we expect will usually be the comparable amount.

One commenter suggested the addition of Section 8 "substantial rehabilitation" housing to the regulation. This type of housing is already included in the regulation.

In response to several questions about the nature of benefits that must accrue to eligible tenants we have required, in keeping with the purposes of the Act, that the benefit be heat or energy related.

2. *Method of calculating a payment to a building operator.* Payments are calculated by taking the exact monthly heating costs of the building operated by an eligible building operator and

dividing those costs by the total number of living units in the building.

Therefore, the exact monthly heating costs described above are to be divided by the total number of occupied living units in the building. The resulting heating cost per unit must then be multiplied by the number of eligible tenants. Since exact costs are specified in the Act, this would have to be done retroactively rather than before or during each month.

Exact heating costs incurred are the monthly residential heating costs for the building. The State must insure that reimbursement to building operators is based on costs that reflect actual consumption during the month and the State must specify the months for which a payment will be made. For example, if a ten unit building has heating costs of \$800 during a month specified by the State for heating assistance the cost per unit would be \$80. If there are four eligible tenants, the maximum amount payable to the building operator for that month would be \$320. The \$80 per eligible tenant, and therefore the \$320 payment, would have to be decreased if the comparable amount described under "General Principle and Definitions" was less than \$80, or any of the eligible tenants are entitled to receive payments directly as eligible households under the State program.

Some clarification is required concerning payments to tenants, splitting payments between tenants and operators according to vulnerability, and payments to operators on behalf of tenants. Payments are made directly to tenants who pay their own utility bills or whose rent can be increased to compensate the operator for increased costs. Since the increased payment must come from the tenant, the tenant receives the benefits and the operator has no direct involvement in the process, nor is the operator "entitled" in any way to the payment. Where a tenant is fully protected from increased utility costs, the operator is the recipient of the benefits and the tenant has no direct involvement in the payment process.

Where both tenant and operator have utility bills for the same unit (e.g., check metered apartments), the State may divide the payment. An example of this situation has been added to the regulation to clarify the process.

Comments and Responses

With regard to the specific form of payment to a building operator, one State government inquired about the allowability of making payments to an operator in the form of fuel to heat the building instead of cash. This is

permissible and such a provision has been added to the regulation, in § 260.206(i).

One writer suggested that the exact cost formula be based on eligible tenants divided by all tenants in the building instead of all units, some of which may be unoccupied. This was our intention. We have clarified the regulation on this point.

3. *Documentation and verification.* The State may make payments to a building operator only if the operator documents the specific location of each building for which payments are requested, documents the number of dwelling units in each building, and documents the tenants by name, income and if categorically eligible by type of aid received. The building operator must also document the exact monthly amounts of expenditures for heating cost for the building and must certify that tenants eligible for assistance under this program are not discriminated against with respect to rent. This means that the operator has not raised, or will not raise the rent payment for any eligible households living in the project due to a payment received by that household under this program either directly or through a vendor on their behalf.

The State is also responsible for the determination of eligibility for payments under this Subpart through prior verification of the data supplied by the building operator. Data sampling, rather than a 100 percent review, will be acceptable for purposes of State verification. The State will also promptly notify the subsidizing Federal, State or local agency of any payments, by amount and location, to operators of buildings under their jurisdiction.

The State must provide for methods to avoid duplication of payments where building operators are involved. Thus, the amount of entitlement a tenant has as an eligible household must be subtracted from the payment made to the building operator for that tenant. In order to do this, the State must establish some mechanism or screen by which it can identify those tenants for whom the building operator will receive payment. This includes the necessity to screen out, or adjust the benefits to "eligible tenants" in any flat grant approach used for categorically eligible households.

Direct contact with potentially eligible building operators by the single State agency or other agency responsible for carrying out this Subpart will be the most effective method of obtaining information about eligibility for payments under this Subpart. To assist the States in determining which residents of public and subsidized housing are not subject to increases in

fuel costs as part of their rent payments, we have received from the Department of Housing and Urban Development and the Farmer's Home Administration information that described the housing programs specified in the legislation which have statutory or regulatory limits on tenants' rent payments and described the degree of subsidization of the operator. This information has been distributed to HHS Regional offices for dissemination to the States.

Both HUD and FmHA have notified all of their local offices about the energy program and the expected communication with the States.

The State has latitude in its decision about making payments to building operators. Although the calculation of cost per eligible tenant is calculated on a monthly basis, the State may choose to make monthly payments or a single lump sum payment (for one or more months) to the building operator. Since establishing exact monthly costs is only possible after each month, there are some operational decisions that will have to be made by the State. For example a lump sum payment after the winter season might be utilized not only as an aid in determination of exact heating costs, but also allow time to screen out households which may have received payments or entitlements during the winter months under Subpart G.

Comments and Responses

Five writers requested that the benefits that accrue to the eligible tenants be measured on a dollar-for-dollar basis. After several consultations we found that the expense would be prohibitive for a State to monitor and verify such benefits to eligible tenants in a building with both eligible and noneligible tenants (some of whom may be partially vulnerable and may have received a separate payment). Additionally, it was clear that providing increased services would in most cases benefit all tenants and not just the eligible tenants.

Three commentators said that data will not be available in time for the State plan to determine the number of eligible tenants. Three other writers were concerned about our requirement to include a precise payment amount in the State plan. We allow the use of estimates and, correspondingly, allow the adjustment of the comparable amount.

Eleven writers requested that we require greater documentation of operator costs and one writer suggested that all operators meet the same eligibility criteria as eligible households. After consideration of these comments,

we augmented the documentation requirements by adding requirements that the operator inform the State of any current surcharges and any applications being made for increased subsidies. This requirement and the requirement that the State notify the subsidizing agency of payments to an operator will also respond to three writers' request that we require operators not to raise rents based on their increased energy costs. By making revenues from LIEAP known to the subsidizing agency a rent increase can only be justified when a need for additional revenue is identified. Beyond that we have not required that an operator have unmet fuel costs before a payment is made.

While increases in rent, subsidy payments, or both are expected to cover rising operating expenses, rapidly escalating costs and possible subsidy shortfalls have the result that there are still housing units which might have serious financial problems, some of which are exacerbated by rising fuel costs. States must assure us that they have established objective criteria and surveyed in some manner the potentially eligible operators before we will accept a plan which does not pay any building operators.

Finally, eleven writers requested that we require notification of tenants where a building operator will receive benefits on their behalf. The regulation is consistent in the requirement to notify eligible households under all other circumstances of benefits that accrue to the household. Therefore we have included a requirement that eligible tenants be notified, either by the State or the operator, of any benefit that they are to receive under this program. Our reasons are several: notification provides the potential for a simple means of determining that the benefit was delivered through feedback from the tenants, the paperwork burden is minimal and the tenants, whose eligibility qualifies the operator for a payment in the first place, have a right to know of any action taken on their behalf, especially when it concerns financial benefits.

4. *Reduction of subsidies:* Congress intended that payments to building operators be in addition to, rather than in lieu of, the normal subsidies for utility costs. Therefore, these ongoing subsidies should not be reduced on account of payments received under the State plan.

Subpart I—Payments and Tax Credits to Home Energy Suppliers

1. *Payments to energy suppliers on behalf of eligible households:* States may furnish energy assistance on behalf

of eligible households through payments or tax credits to one or more home energy suppliers designated by the household.

Based on our review of the interim regulation, we have amended § 260.250 to allow States to pay incidental costs on behalf of an eligible household. Incidental costs are the nominal costs of services billed to the eligible household by a home energy supplier that are necessary for the use or delivery of home energy. These may include connection or reconnection fees, delivery fees, deposits and other fees related to the start up of service. A State plan must describe any incidental costs for which the State will pay and any limits on the amount of payment.

A State that agrees to make payments to a home energy supplier on behalf of eligible households must obtain certain agreements from the energy supplier in return. These agreements must be obtained in any situation in which the form of payment used by the State agency specifies a particular energy supplier as payee including two-party checks, vouchers and certificates. The supplier must agree not to discriminate against eligible households in its terms of sale, credit, delivery or price. For example, the supplier must offer deferred payment and level payment plans to eligible households if it offers them to other households. The supplier must agree not to charge them more than the difference between the home energy assistance program payments and the energy bills the households would otherwise receive.

Comments and Responses

Twenty-one commenters expressed a preference for vendor payments as opposed to cash payments to the household. One commenter was opposed to any vendor payments. The State may base its program on vendor payments, but cannot rely exclusively on that payment method. Where the household pays for its home energy through an undesignated portion of its rent, or where the household's supplier declines to enter into the agreement required by the regulations, the State must make payment directly to the household. One commenter opposed "automatic" payments to energy suppliers.

As explained above, our regulations provide that payment can only be made to a supplier who has been designated by the household and has agreed to or been exempted from the requirements set forth in the regulation.

An advocacy group suggested that the States be required to allow a household to designate more than one supplier to

whom vendor payments could be made. They gave as an example a household that uses two sources of home energy such as fuel oil and electricity. We permit but do not require the State to pay more than one vendor on behalf of an eligible household. This will not disadvantage a household with two sources of home energy since the payment to one vendor may be based on the household's total home energy expenditures.

Three energy suppliers objected to billing eligible households on the basis of expected payments from the State. The Act requires the State to make payments to the supplier on a "timely basis." We leave it to the States and suppliers to negotiate the timing of the payments. Two commenters suggested that the supplier should notify the household of payments made on its behalf by the State. Our regulations already require the State to provide this notice. We do not believe that imposing this requirement on the supplier is necessary. Most suppliers, as part of their normal billing practice, show any credits to the customer's account on their bills. In response to a suggestion from an advocacy group, we have placed in the final regulations the requirement expressed in the preamble to the interim regulations that a payment on an overdue bill must be applied to the oldest part of the bill. We have also clarified the term "actual cost" used in the Act by substituting the term "price normally charged for the energy delivered to non-eligible, similarly situated households."

2. Conditions for termination of home energy: Under the Act the supplier must also agree not to terminate service to an eligible household on whose behalf the supplier is receiving payment from the State unless the household has failed to pay the amount charged to it for at least two months and has been provided at least 30 days notice of the termination and the opportunity for a hearing prior to termination. We provide that the time for measuring the household's failure to pay a bill begins on the date the payment is due and ends on the same date two months later. If the household is behind in its payment and pays a portion of the bill, the payment must be applied to the oldest part of the bill. Once the part of a bill for which service could be terminated is paid, the supplier cannot terminate service because of a remaining arrearage that is less than two months overdue.

The household must receive the termination notice at least 30 days before the scheduled date of termination. Where State law or other

requirements provide for longer grace periods and notification periods, these State requirements will prevail. The termination notice must inform the household that it may request a hearing before a government agency, to be determined by the State, on the proposed termination, and that if the request is made within 10 days of receipt of the notice the energy supply will continue until a decision based on the hearing is issued.

The hearing must afford the household a reasonable opportunity to explain its side of the dispute to an unbiased party who will settle the issue. Under this requirement the State need not provide a formal adjudicative hearing. States are free to consider less formal dispute settlement mechanisms and innovative techniques of dispute resolution. We will review the hearing procedures set out in the State plan for fairness and efficiency for both the household and the supplier.

Comments and Responses

In response to several comments, we have amended the regulations to make clear that the supplier's agreement regarding nondiscrimination and termination of service only applies to eligible households on whose behalf the supplier is receiving payment from the State. We have also clarified the kind of discriminatory treatment prohibited by the regulation.

The restrictions on termination of home energy to eligible households received a great deal of criticism from home energy suppliers and some States. They objected on the grounds that the grace period between non-payment of a bill and termination of service is too long, the notice requirement is too burdensome, and the overall procedure is inconsistent with many States' laws and the Department of Energy guidelines. Four respondents believe our rules are not strict enough. We have little discretion in this area. The grace period, notice and opportunity for a hearing that must precede termination of service are statutorily required. We believe that our procedural requirements for notice and hearing are the minimum necessary to effectuate these provisions and that the burden they impose on the supplier is not unreasonable.

If the State determines that these restrictions on termination would seriously jeopardize the ability of a small home energy supplier to continue in business, the State may partly or wholly exempt that supplier from these restrictions, subject to State law or other requirements. We suggest the factors the State should consider in making that determination, including such things as

the number of eligible households that have designated the supplier to receive their energy assistance payments and the feasibility of the supplier's passing through its losses from nonpayment to other customers. These are among the factors that we believe indicate the effect the termination restrictions are likely to have on the supplier's ability to continue in business. The State may determine exemptions individually or by category of supplier. We do not anticipate that most public utilities will qualify for an exemption from the termination agreement since they have the ability to "expense" such debts among all their customers. We believe that by "small home energy suppliers" Congress meant dealers in fuel oil, propane, wood and the like.

In deciding how it will apply the exemption from the termination requirement, the State should consult with State trade associations, consumer organizations and other interested parties to assure that the exemption is applied in a way that is administratively feasible and consistent with the purpose of restricting terminations as well as the purpose of waiving those restrictions. The State may wish to form an advisory council to recommend policy for granting the exemption from the termination requirement.

Ten respondents made suggestions about the standards under which suppliers would be exempt from the termination requirements. Five believe that the States should apply the exemption liberally. Two believe that the exemption should be applied strictly. Two others suggested that the States should use Department of Energy or Small Business Administration definitions of a "small" supplier. One respondent pointed out that the criterion of the number of eligible households served by the supplier cannot be applied until the State knows how many households have designated that supplier; this could delay the State making payments on behalf of these households. We believe that the States will apply the exemption neither liberally nor restrictively, but fairly. Although we do not prohibit the States from using the Department of Energy or Small Business Administration definitions in their determination of which supplier should receive an exemption, we do not recommend it. Those definitions were designed for purposes unrelated to the determination that the State must make about whether or not the termination requirements seriously jeopardize the supplier's ability to continue in business. A State could use the number of eligible

households served by the supplier as a criterion for the exemption without delaying payments. For example, the State could grant the exemption once the proportion of eligible households designating a supplier exceeds a certain number. It would not have to wait until the application period closed and then count the number of eligible households that designated a particular supplier.

Thirteen comments were received urging that agreements between the States and home energy suppliers be closely monitored. Our regulation emphasizes the need for the States to monitor these agreements and secure documentation of energy supplied to eligible households.

We received three requests to clarify the period during which the supplier's agreement with the State is in effect. The intent of Congress is to protect eligible households during the heating season. Thus, the agreement should be in effect at least during the months that home heating is generally required. Beyond that, the effective period is subject to negotiation between the State and the vendor. Similarly, if vendor payments are made on behalf of a household with a medical need for cooling, the restrictions on termination should be in effect during the months home cooling is generally required.

An advocacy group believes the regulations should require a supplier to restore service that was previously terminated when the supplier is notified of the household's eligibility for assistance. We do not have authority under the Act to impose that requirement.

3. Tax credits to energy suppliers: State tax credits may be provided to an energy supplier that sells energy at reduced rates to eligible households. Such a credit may not exceed the amount of the supplier's loss of revenue on account of such reduced rate.

A State that chooses to assist eligible households through tax credits to home energy suppliers need not enter into the agreements required for payments to home energy suppliers. Congress did not require such agreements in the case of tax credits.

We have added a requirement that a household which receives assistance through this plan must receive equivalent benefits to those received by other similarly situated households.

Comments and Responses

A respondent also asked us to clarify whether tax credits to energy suppliers are in addition to or in lieu of an energy assistance payment to eligible households. The tax credit is an additional option to the State to

facilitate provision of assistance to eligible households.

Subpart J—Direct Payments by SSA to SSI Beneficiaries

A State Plan may provide for automatic payments to be made directly to SSI recipients. If a State chooses to make such payments, it may make them itself or it may ask the Social Security Administration (SSA) to make them. This is an administrative option offered to the States by the Act and regulations if the States want to make automatic payments to SSI recipients. Such payments by us, at the request of a State, are payments made under the State plan and are subject to the same conditions and limitations as other payments made by the State under its plan.

A State must have made its request by June 30, 1980 and must sign an agreement with us within 30 days after publication of these final regulations.

We will make these payments as checks separate from those for regular SSI benefit payments. We cannot make energy assistance payments to home energy suppliers or to operators of subsidized or government-operated housing. The Act does not authorize us to do so, and there would be no special advantage for the States in having us do so.

A State can have us pay up to five different amounts varying geographically in the State but there can only be one amount within each county. These and most other limits on State options for our payments are due to limitations on how much we can modify our existing SSI computer records and programming for the energy assistance payments within the time available.

We will make payments in up to four checks, one per month, sent in any one or more of the months of December 1980, and January, February, and March 1981.

We cannot make payments to help with the cost of medically necessary home cooling because our records generally contain no information about this medical need. However, as one commenter suggested, information about the State's cooling program can be included with the direct payment at the State's option. The State will be responsible for providing hearings requested by SSI beneficiaries who do not receive energy payments or who think the payment should be larger. The State must also make out of its allotment any payments resulting from the hearing decisions. Any hearing request we receive will be forwarded to the State with all relevant information we have.

We will withhold from the State's allotment enough money to cover both

the estimated payments to SSI households (plus a margin for error) and our administrative costs for making the payments.

For those States which decide to use the SSI direct payment option, we can do only limited screening of our SSI rolls to avoid payments to ineligible households or duplicate payments to a single household. We will screen out SSI recipients who live in a Medicaid institution, live in another person's household and receive support and maintenance in kind from such person, or are children and live with a parent or parents' spouse. We will screen out one spouse where both members of a married couple receive SSI benefits. We will also screen out recipients living in institutions who are not vulnerable to increased energy costs and other non-vulnerable recipients if the State supplies us the necessary data.

We will give the State a list showing whom we paid, when, how much, and the basis for paying that amount. The list will be in the same form as the State Data Exchange (SDX) records we give the States showing payments of SSI benefits.

The State must screen against this list to avoid making duplicate payments to or for households we have already paid on the State's behalf.

Instead of having us make its payments to SSI households, a State can use special SDX computer tapes for one or more of the months December 1980-March 1981 to make its own payments. We will provide the tape or tapes for a fee to be paid from the State's allotment. We will screen the tape just as we would if we were making the State's payments.

Comments and Responses

One commenter asked that we require States to pay all eligible SSI recipients directly. Another requested that we prohibit such payments. The legislation makes direct payments to SSI recipients a State option and, therefore, precludes either a requirement for direct payments or a prohibition of them.

One State wrote that the concept of States paying for an ongoing function of SSA with pure State dollars is wrong. Low income energy assistance is a State administered program. The Act permits SSA services to States at State option when the State determines that this would improve its administration of the program. Therefore, we cannot agree with the interpretation that energy assistance payments to SSI recipients are an SSA function.

We will withhold from the States' allotments enough money to cover both the estimated payments to SSI

households (plus a margin for error) and our administrative costs for making the payments.

Another comment on the SSI direct payment option was that the option is not advantageous enough to the States. We must point out that it is SSA's responsibility to offer a direct payment option which is consistent with the legislation. Each State must decide whether or not it is to its advantage to utilize SSA services.

One respondent maintained that only households headed by an SSI recipient should receive an automatic payment. Such screening would not be feasible because data on household composition is not available in our automated system of records. Two health care organizations pointed out that not all SSI recipients who live in institutions are protected from increased energy costs. It is the State's responsibility to determine vulnerability and inform us of the SSI households which are not vulnerable to increased energy costs.

One commenter suggested that the automatic payments we make should be accompanied by a notice explaining why they are being sent, what they represent and how they may be used. We will do this. We do not believe a change in the regulation is necessary.

Subpart K—Applications, Notices, and Hearings

1. *Application procedures:* States have the option either to require an application for energy assistance by categorically eligible households or to pay them automatically. The need for an application from these households will depend mainly on whether or not the State chooses to make automatic payments and how the State wants to take account of factors about which it needs information from the households. We have amended the regulations to provide that the State may make automatic payments to General Assistance recipients or recipients of other State programs if the income limit for eligibility in those programs is no greater than the applicable BLSLLS or, in the case of a single person household 125 percent of the CSA Poverty Income Guidelines, and eligibility is determined using income verification standards and procedures that are consistent with those used in the State's AFDC program. Other non-categorically eligible households must file applications to establish their eligibility. The application must be written and signed under criminal penalty for giving false information.

Anyone wishing to apply for energy assistance must be informed of the eligibility requirements and appeal

rights and must be given the opportunity for a hearing and any assistance needed to apply. The State must identify in its plan the time standard it will use for acting on applications for the energy assistance program. We have added a requirement that this time standard must not exceed 45 days from the date the application is received.

The State agency must also provide communications assistance, in the form of bilingual staff, applications, literature and other services if the agency's service area contains a substantial number of eligible households that are not proficient in the English language. Communication assistance for handicapped persons is also required as described in § 260.352.

Comments and Responses

Senior citizen centers, Community Action Agencies and farm worker organizations were suggested as organizations that should be allowed to take applications and certify eligibility. One commentator argued that utility companies should not be allowed to take applications because of a potential conflict of interest. The Act permits the States to use any of the organizations mentioned to take applications and certify eligibility so we have made no change in the regulations.

Two advocacy groups suggested a prohibition on prescreening of applicants. They fear some households will be told informally that they are ineligible for assistance and dissuaded thereby from filing an application and appealing a denial of aid. As noted, our regulations require that anyone who wishes to apply for assistance must be given the right to do so without delay and that he or she must be informed of this right. Violations of these requirements should be called to our attention.

One respondent urged that application forms be short and use simple language. We agree with this suggestion and believe this is the goal of most State agencies. If asked, we will work with the States in designing their application forms to achieve such simplicity.

There were three requests for clarification of the kind of assistance the State must supply to applicants. Assisting an applicant includes, where necessary, explaining the questions on the application, explaining eligibility requirements, helping applicants obtain documentation to establish their eligibility, making home visits and providing mail-in applications. Applicant assistance may also include, as one respondent suggested, providing TTY service for the hearing impaired.

2. *Notice and hearing procedure:* The State's notice of payment, denial, or earlier-than-expected termination of energy assistance must inform the household of its right to a hearing if the household objects to the amount, denial, or termination of the payments. The time within which a household may request a hearing must be at least 60 days after sending a notice of payment or denial of payment and at least 10 days after sending a notice of decreased payment amount or duration of payment. Before conducting a State agency hearing on amount, denial, or termination of assistance the State agency may provide a preliminary appeal step. This can be either an evidentiary hearing before a local agency or an informal conference, or both. This preliminary step may resolve disputed claims quickly and inexpensively.

The same kind of hearing must also be available if a State fails to approve or disapprove an application for energy assistance within the time limit the State has established.

The hearing decision on amount, denial, or delay of assistance must be issued within 30 days after the hearing. The hearing decision on termination must be issued before termination.

Comments and Responses

Commentors on the hearing regulations made a variety of suggestions for change: the time to request a hearing is too short (one comment); the time to request a hearing is too long (two comments); the household requesting a hearing should state its reasons (one comment); subpoenas should not be used (one comment); hearings should not be recorded (one comment); and States should have more flexibility in designing hearing procedures (two comments). One county official stated that the hearing procedure is too costly to local governments. We have considered these comments but we are not making the requested changes. We believe that the hearing procedures, which are modeled after those of the AFDC and SSI programs, provide an appropriate balance between the needs of applicants and recipients under the program, the States and the general public. In response to a request from a city office for the handicapped, we have amended the regulations to require that the place of the hearing be accessible to the handicapped.

Two advocacy groups approved of the requirement that notice of hearing rights be given both at the time of application and at the time the household is notified

of an adverse action affecting its claim for assistance.

One commentor stated that the language in the regulation describing criminal penalties for fraud was too threatening.

A county welfare department asked for guidelines for handling fraud cases. The language in the regulation is the language used in the statute. We are making no changes. The Department's Office of the Inspector General works with the States in handling fraud cases. Our regional offices are also prepared to assist the States in this area.

A Community Action Agency noted the importance of early hiring and training of staff to administer the program. As described in Subpart F, we will assist the States in this endeavor by reimbursing them for any planning and administrative costs they have incurred before receiving their allocation.

One commentor suggested that notices of eligibility should suggest a maximum thermostat setting. States may include such information if they wish, but they must be cautious not to discourage a higher setting by persons whose medical condition requires a warmer environment.

(Catalog of Federal Domestic Assistance No. 13.816)

Accordingly Chapter II, of title 45 of the Code of Federal Regulations is amended by revising Part 260 to read as follows:

PART 260—LOW INCOME ENERGY ASSISTANCE PROGRAM

Subpart A—Introduction

- Sec.
260.1 Scope of this part.
260.2 Definitions.

Subpart B—State Plan Requirements

- 260.15 Summary of State plan requirements.

Subpart C—Development of State Plans

- 260.20 General.
260.22 Public participation in development of the State Plan.
260.24 Timetable for submitting plans.
260.26 Waiver of plan requirements.
260.28 Approval and disapproval of State plans and plan amendments.
260.30 Hearing on plan disapproval.
260.32 Withholding of funds for non-compliance with approved State plan.
260.36 Parties to hearing on plan disapproval or withholding the grant.

Subpart D—Administration of the State program

- 260.50 State agency and local administrative arrangements.
260.52 Administrative procedures.
260.56 Maintenance of regular benefit levels.

- Sec.
260.58 Coordination with weatherization programs and energy conservation efforts.
260.60 Outreach activities.
260.62 Identifying and certifying eligible households.
260.64 Monitoring procedures by States.
260.66 Data collection and reporting by States.
260.68 Federal monitoring.
260.70 Cooperation by States in program evaluations.

Subpart E—Fiscal Control and Accountability

- 260.80 Reserve funds for emergencies.
260.82 Fiscal reports by States.
260.84 Administrative costs.

Subpart F—Federal Allotments and Payments

- 260.100 Definitions.
260.101 Computation of States' allotments.
260.102 Quarterly grants to States.
260.104 Allotments for the Commonwealth of Puerto Rico and the insular areas.
260.106 Equivalent benefits for Indians.
260.108 Reallotment of funds.
260.110 Reimbursement for funds advanced by States.
260.112 Incentive grants to States.

Subpart G—Eligibility and Payments for Home Energy Assistance

- 260.150 Who is eligible for assistance.
260.152 To whom payments may be made.
260.154 Amounts of assistance payments.
260.155 Priority for households with elderly or handicapped persons.
260.156 Purposes for which payments may be made.
260.158 Forms of payment.
260.159 Timetable for making payments.
260.160 Income and assets—definition and verification.
260.162 Energy assistance is not a resource or income for other programs.

Subpart H—Payments to Building Operators

- 260.200 General.
260.202 Definitions.
260.204 Computing a payment to a building operator on behalf of eligible tenants.
260.206 State administration of payments to building operators.
260.208 Documentation and verification.

Subpart I—Payments and Tax Credits to Home Energy Suppliers

- 260.250 When the State may make payments to energy suppliers.
260.254 Conditions for termination of home energy by participating suppliers.
260.256 Termination notices.
260.258 Pre-termination hearings.
260.260 Exceptions to the pre-termination requirements.
260.264 When home energy assistance funds may be used for tax credits to home energy suppliers.

Subpart J—Direct Payments by Social Security Administration to Beneficiaries of the Supplemental Security Income Program

- 260.300 General.

- Sec.
 260.301 Timetable for agreements by States with the Social Security Administration.
 260.302 Where we will send checks.
 260.303 Payment amounts and timing.
 260.304 Notices to households and States.
 260.306 Appeals.
 260.308 State's payment to Social Security Administration.
 260.310 Screening out ineligible and preventing duplicate payments to households.
 260.314 State use of SSI payment tapes.

Subpart K—Applications, Notices, and Hearings

- 260.350 Applications.
 260.352 Communication assistance for limited English-speaking proficiency and handicapped persons.
 260.354 Criminal penalties for false information.
 260.358 Notices.
 260.360 Fair hearing for dissatisfied household.
 Appendix A—Lower Living Standard Income Levels.
 Appendix B—General Administrative Requirements for the Low Income Energy Assistance Program.
 Appendix C—Guidelines for Varying Payment Amounts.
 Appendix D—Guidelines for Households Not Vulnerable to Energy Cost Increases.

Authority: Sec. 313, title III, Pub. L. 96-223, 94 Stat. 298 [42 USC 8612] and Continuing Resolution enacted on Oct. 1, 1980, Pub. L. 96-369.

Subpart A—Introduction

§ 260.1 Scope of this part.

(a) *General.* This part implements Title III of Public Law 96-223, the "Home Energy Assistance Act of 1980." This Act establishes the Low Income Energy Assistance Program, through which grants will be made to States to provide assistance for eligible low income households to offset the rising costs of home energy that are excessive in relation to household income. For this purpose, the Act authorizes grants to States for fiscal year 1981 to provide financial assistance to and on behalf of eligible households. Eligible households are those containing a person eligible for Aid to Families with Dependent Children (AFDC), Supplemental Security Income (SSI) (with some exceptions), Food Stamps, certain Veterans Administration benefits, and other households with income at or below the Bureau of Labor Statistics Lower Living Standard, and single person households whose income is at or below 125 percent of the CSA Poverty Income Guidelines. The assistance can be in the form of direct payments to eligible households; payments on their behalf to their suppliers of home energy; or any combination of the two, and for certain eligible tenants that live in specified public and subsidized housing,

payments to their building operators. The amount of assistance for a household depends on such things as the household's income, energy costs and climate.

(b) *How this part is organized.* (1) Subpart A (§§ 260.1 and 260.2) provides an introduction and important definitions of terms used throughout this part.

(2) Subpart B (§ 260.15) contains a summary of provisions required to be in a State's energy assistance plan.

(3) Subpart C (§§ 260.20-260.36) explains the procedures for submission of a State Plan to us. It includes a discussion of plan approval and disapproval, compliance, waivers of Federal requirements, and public participation in development of the State plan.

(4) Subpart D (§§ 260.50-260.70) explains the State's administration of the energy assistance program. It includes a discussion of required coordination, outreach, monitoring, data collection, and reporting by the States.

(5) Subpart E (§§ 260.80-260.84) explains fiscal control and accountability requirements.

(6) Subpart F (§§ 260.100-260.112) explains how allotments will be computed for the States, Puerto Rico, the territories, the Community Services Administration, and additional incentive grants to the States. It also explains how and when we will reallocate funds among States and the conditions under which we will reimburse a State for expenditures incurred before it has an approved State plan. It also explains conditions for direct Federal grants to Indian tribes.

(7) Subpart G (§§ 260.150-260.162) explains who may receive energy assistance and the purpose for which it may be paid. In addition, this Subpart discusses methods and amounts of payments, assets tests and income.

(8) Subpart H (§§ 260.200-260.208) explains the circumstances under which States may make payments to building operators on behalf of eligible tenants, and the amounts of these payments.

(9) Subpart I (§§ 260.250-260.264) explains the agreements States may make with energy suppliers to pay them on behalf of eligible households, and conditions these suppliers must meet before terminating home energy to an eligible household. The Subpart also describes the States' option to grant tax credits to energy suppliers.

(10) Subpart J (§§ 260.300-260.314) explains how a State may, at its option, request SSA to administer energy payments to Supplemental Security Income beneficiaries.

(11) Subpart K (§§ 260.350-260.360) discusses applications, notices and hearings, and criminal penalties for false information.

§ 260.2 Definitions.

Terms used in single sections or Subparts are defined in those sections or Subparts. Terms used throughout the Part are defined here. As used in this Part—

"Act" means the "Home Energy Assistance Act of 1980," title III of Pub. L. 96-223.

"AFDC" means Aid to Families with Dependent Children payments made under title IV-A of the Social Security Act, but not including Foster Care payments under 45 CFR 233.110 or Emergency Assistance payments to needy families with children under 45 CFR 223.120.

"Associate Commissioner" means the Associate Commissioner of Social Security for Family Assistance.

"Commissioner" means the Commissioner of Social Security.

"Community Services Administration (CSA) Poverty Income Guidelines" means the income level determined annually as a guidelines for CSA and other program eligibility. We use 125 percent of the CSA Poverty Income Guidelines as the maximum income eligibility standard for single person households. The Poverty Income Guidelines current at the time of publication of this regulation are listed in Appendix A.

"Compliance" means that the State plan and State practice meet requirements of the Home Energy Assistance Act, Federal regulations and issuances.

"Categorically eligible" means eligible for assistance under the Act as a result of eligibility for AFDC, Food Stamps, certain SSI and veterans benefit programs.

"Days" means calendar days.

"Elderly" means a person over any age designated by the State, but not less than 60 years old.

"Eligible household" means—

(1) Any household in which one or more persons are categorically eligible; and

(2) Any other household with income equal to or less than the Bureau of Labor Statistics Lower Living Standard Income Level; and

(3) Any single person households with income at or below 125 percent of the CSA Poverty Income Guidelines.

"Fiscal year" means the Federal fiscal year October 1 through September 30, unless otherwise stated.

"Handicap" or "handicapped" means one of the following, at State choice—

(1) The definition of handicapped established by the Rehabilitation Act of 1974, under which a handicapped person is a person who "has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment;"

(2) The definition of disability established by Title II of the Social Security Act for the SSA disability program, under which disability means—

(i) "Inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months"; or

(ii) In the case of an individual who has attained the age of 55 and is blind (within the meaning of "blindness" as defined in section 216(i)(1)), inability by reason of such blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time.

(3) The definition of disability established by Title XVI of the Social Security Act for the SSI program, under which disability means—

(i) "Inability to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity);" or

(ii) Permanent and total disability as defined under a state plan approved under title XIV or XVI of the Social Security Act as in effect for October 1972 and for which an individual received aid under such plan (on the basis of disability) for December 1973, and for at least one month prior to July 1973 so long as he is continuously disabled as so defined; or

(4) Any definition of handicap or handicapped or equivalent term which the State uses for a Statewide program of assistance for the handicapped.

"Heating degree days" means the result of the following calculation: For each day in a year's time on which the day's mean temperature in a given locality is less than 65 degrees F., find the difference between the day's mean temperature and 65 degrees F. Then add

together all of these daily differences for the whole year. The result is the "heating degree days" for that locality.

"Home energy" means electricity, oil, gas, coal, wood, kerosene, or any other fuel used for heating or cooling in a residential dwelling.

"Household" means any individual or group of individuals who are living together as one economic unit and for whom residential energy is customarily purchased in common, or who make undesignated payments for energy in the form of rent.

"Lower Living Standard Income Level" means the income level determined annually by the Bureau of Labor Statistics based upon the most recent lower living standard family budget. The amount is different for different places in the United States and for families of different sizes. The Lower Living Standard Income Levels current at the time of publication of this regulation are listed in Appendix A.

"Regional Commissioner" means the Regional Commissioner of Social Security for the Federal Region within which the State is located.

"Secretary" means the Secretary of Health and Human Services.

"State" means the 50 States and the District of Columbia.

"SSI benefits" means Supplemental Security Income benefits under title XVI of the Social Security Act, including mandatory and optional payments that we administer for a State under Subpart T of 20 CFR 416 to supplement Federal benefits, but excluding benefits:

(1) Paid under 20 CFR 416.231 because the beneficiary is living in a Medicaid institution and Medicaid is paying more than 50 percent of the cost of care;

(2) Reduced by one-third under 20 CFR 416.1125(b) because the beneficiary is living in another person's household and is receiving both support and maintenance (food and shelter) from that person and is not paying a pro rata share of food and shelter expenses; or

(3) Paid to a beneficiary who is a child for SSI purposes under 20 CFR 416.1050 and is living with a parent or with the spouse of a parent.

"We", "us" or "our" means the Department of Health and Human Services.

Subpart B—State Plan Requirements

§ 260.15 Summary of State plan requirements.

Each State that wishes to receive a home energy assistance grant must submit a State plan. Following is a brief summary of the requirements for State plan approval. The referenced sections include a full description of the State

plan requirements which States must include in their plans. The State plan must—

(a) Be submitted in accordance with procedures, timetables, and standards established by us. See §§ 260.20—260.26;

(b) Designate an agency of the State to administer the program, and describe local administrative arrangements. See § 260.50;

(c) Provide that the State agency will furnish home energy assistance to eligible households through payments to home energy suppliers, to eligible households, to any combination of home energy suppliers and eligible households, and to building operators. See §§ 260.150—260.314;

(d) Describe procedures for identifying and certifying eligible households as participants. See § 260.62;

(e) Describe the amount of assistance to be provided to or for participating households, assuring that priority is given to households with lowest incomes and to eligible households with elderly or handicapped persons; and that the highest level of assistance is provided to households with the lowest incomes and highest energy costs in relation to income. See §§ 260.154 and 260.155;

(f) Describe the provisions for agreements with suppliers under which they will receive payments. See § 260.250;

(g) Provide for direct payments to eligible households when the household is paying for utilities through rent and in other situations when the State determines it is practical to do so. See § 260.152;

(h) Provide for public participation in the development of the State and describe that process. See § 260.22;

(i) Provide assurance that owners and renters will be treated equitably. See § 260.152;

(j) Provide that the State will use from its Federal allotment, to pay for administrative costs, no more than an amount equal to 7½ percent of its total costs of carrying out the plan and that any additional administrative costs shall be paid by the State from non-Federal funds. See § 260.84;

(k) Provide that there are administrative procedures for carrying out the plan. See § 260.52;

(1) Provide fair hearing procedures to be used by the designated State agency for households whose claim for assistance is denied, terminated, not acted upon with reasonable promptness or results in a payment lower than they believe correct. See § 260.360;

(m) If the State chooses, provide for a set aside of up to 3 percent of its allotment for weather-related and

supply shortage emergencies. See § 260.80;

(n) Provide assurance that there will be, to the maximum extent possible, referral of individuals to, and coordination with, existing Federal, State, and local weatherization and energy conservation efforts. See § 260.58;

(o) Provide for outreach activities through statewide and local resources to assure that all eligible households are aware of assistance availability—with emphasis upon the elderly, the handicapped, the house-bound, migrants, persons with limited English-speaking proficiency, the working poor, children, and those in remote areas. See § 260.60;

(p) Establish procedures for monitoring the assistance provided under the plan, including monitoring and auditing agreements with home energy suppliers. See § 260.64;

(q) Provide assurances that the State will not reduce regular benefit levels, from the level of such benefits as of February 26, 1980, in existing Federally assisted cash assistance programs, except that in a State which increases those program benefits solely for energy assistance, that increase will not be considered a part of the regular benefit level of the program for the purposes of this requirement. See § 260.56;

(r) Provide assurance that the State will not establish any assets tests which count cars, household or personal belongings, or a primary residence. See § 260.160.

(s) Provide that reports will be filed and will contain all information we require. See §§ 260.66 and 260.82.

(t) Provide that the State will comply with the standards for financial management systems contained in 45 CFR 74, Subpart H.

Subpart C—Development of State Plans

§ 260.20 General.

The State plan is a comprehensive statement submitted by the State agency administering the Low Income Energy Assistance Program which describes in full the nature and scope of its program. It represents the State's commitment to administer the program in conformity with Federal statutes, regulations and issuances. The State plan must contain all Federally-imposed State plan requirements in sufficient detail for us to determine whether or not the program is approvable.

§ 260.22 Public participation in development of the State plan.

(a) The purpose of the public participation process is to enable the residents of each State to participate meaningfully in the State's decision-making processes for the home energy assistance program. It is intended to assure that each State has provided an opportunity for prior public participation of eligible households, public and private organizations—including organizations serving or representing elderly and handicapped persons—public officials, energy suppliers, housing operators, Indian tribes and off-reservation Indian community-based organizations, and the general public in needs assessments, identification of priorities and allocation of resources in development of the State plan.

(b) The State plan must provide for public participation in the development of the plan. Under this requirement, the State must—

(1) Have submitted a description of its public participation process to the Associate Commissioner and the Regional Commissioner by June 30, 1980.

(2) Include a description of its public participation process in its State plan. The process must include at least—

(i) Notices or advertisements in major local newspapers containing a summary of the major provisions, eligibility requirements, and any waiver requests (under § 260.26) in the plan;

(ii) Availability of the proposed State plan for inspection, and distribution of a summary (which must include explicit identification of any waivers requested under § 260.26), free of charge, at a public agency in each county;

(iii) Notice to the public through news media of—

(A) The locations within each county where the proposed plan may be inspected and the plan summary obtained;

(B) The latest date on which written comments on the proposed plan will be accepted, which must be no less than 20 days from the date the notice is published; and

(C) The address where written comments may be sent and, if there are to be public hearings on the proposed plan, the location, date and time for those hearings; and

(iv) Consideration of, and public access to, the written comments received by the State agency.

(c) States may adopt procedures in addition to those required under paragraph (b)(2) of this section, including public hearings, advisory committees and other mechanisms. States are urged to consider use of advisory committees which would

provide a broad base of usable information and general public reaction.

(d) States must use the above public participation process when major amendments are proposed to approved State plans. Amendments which involve significant changes in the population served or amounts of assistance paid, are examples of major amendments.

(e) The State shall submit a summary of the comments it received on its proposed plan or plan amendments at the same time it submits the plan or plan amendments to us for approval. The State shall retain all written comments and transcripts of public hearings and minutes of advisory council meetings, if any, and provide us access to those records in accordance with the requirements of 45 CFR 74, Subpart D.

§ 260.24 Timetable for submitting plans.

(a) States must submit proposed State plans within 30 days after publication of these final regulations. We will expeditiously approve or disapprove State plans submitted in accordance with these regulations. Extenuating circumstances such as the need for additional information may delay a decision to approve or disapprove a plan.

(b) Amendments to State plans may be submitted at any time.

§ 260.26 Waiver of plan requirements.

(a) *Authority for waivers.* (1) Where we determine that a waiver is necessary for the State's administration of its program and is likely to assist in promoting the objectives of the home energy assistance program, we may waive compliance with any of the State plan requirements upon request of the State, to the extent and for the period necessary to enable a State to carry out its energy assistance program.

(2) Where we determine that a waiver for all States is necessary to allow them to administer their programs and is likely to assist in promoting the objectives of the Low Income Energy Assistance Program, we may waive compliance with any of the State plan requirements to the extent and for the period necessary to enable all States to carry out the program.

(b) *Requests for waivers.* (1) Under paragraph (a)(1) of this section, States must submit requests for waivers of any State plan requirements in writing to the Associate Commissioner and the Regional Commissioner. Requests may be submitted at any time including when State plans or amendments are submitted.

(2) The waiver request must—

(i) Identify the specific requirement the State is asking us to waive;

- (ii) Specify in detail how the requested waiver would promote the objectives of the energy assistance program;
- (iii) Specify the period during which the waiver would be in effect;
- (iv) Describe in detail why the State would be unable to carry out its energy assistance program without the waiver and the consequences to the State's program if the request is approved or disapproved; and
- (v) Identify the expected cost impact if the waiver is granted.

(c) Before submitting a request for a waiver the State must do the following, unless it is exempted from doing so under paragraphs (d) or (e) of this section—

- (1) Give public notice through local or statewide media that it plans to request a waiver of a plan requirement and describe the waiver contemplated;
- (2) Make available copies of the waiver request in accessible locations for a period of at least 10 days after notice is given;
- (3) Consider any comments received;
- (4) Send copies or a summary of comments to the Associate Commissioner; and
- (5) Certify to us that residents of the State had the opportunity to review the waiver request and that their comments were considered.

(d) The State need not adhere to the requirements of paragraph (c) of this section if, in our judgment, the requirement to be waived is not significant.

(e) A waiver request that is submitted as part of the State plan or a State plan amendment will be subject to the public participation requirements established for plan submissions under § 260.22 rather than the requirements of paragraph (c) of this section.

§ 260.28 Approval and disapproval of State plans and amendments.

(a) State plans and amendments must meet the requirements of Federal statutes, regulations and issuances. They must be submitted in the format we prescribe to the Associate Commissioner with a copy to the Regional Commissioner. The State shall use the following address in submitting its plan to: Associate Commissioner for Family Assistance, P.O. Box 23367, L'Enfant Plaza, Washington, D.C. 20024.

(b) Approval of State plans and amendments.

- (1) The date of receipt of the State plan or amendment is the date the Associate Commissioner receives it.
- (2) The Regional Commissioner will—
 - (i) Review each proposed State plan and amendment;

(ii) Secure clarification of the plan or amendment as appropriate;

(iii) Send recommendations to the Associate Commissioner regarding disposition of the proposed plan or amendment.

(3) If the Associate Commissioner approves the State plan or amendment, the State will be so notified.

(4) If the Associate Commissioner believes the plan or amendment should be disapproved, the State will be notified of the intent to disapprove and of its opportunity for a hearing under § 260.30 prior to disapproval.

(5) If after approval we discover that the plan or amendment should not have been approved we will notify the State, as provided under paragraph (b)(4) of this section, that disapproval is being contemplated. In this case the State will have an opportunity for a hearing under § 260.30.

§ 260.30 Hearing on plan disapproval.

(a) A State may request a public hearing within 10 days after receiving notice under 260.28(b) (4) or (5) that we intend to disapprove its plan or amendment. The request must be made in writing to the Commissioner with copies to the Associate Commissioner and the Regional Commissioner.

(b) Upon receipt of the State's request for a hearing we will—

(1) Promptly send the State a list of all material that was used in deciding that the plan or amendment should be disapproved;

(2) Notify the State and the public of the date, time and place in the State at which a hearing will be held. The hearing will be held not less than 20 days after the date of this notice to the State unless there is written agreement with the State to hold the hearing at another time.

(c) We will work with the State to resolve the issue at any time before, during or after the hearing. If the issue is received and an approvable plan or amendment is submitted, the hearing will be cancelled or terminated.

(d) We will designate a hearing officer who will preside at the hearing and—

- (1) Take testimony;
- (2) Make a record of the proceedings;
- (3) Hold conferences to settle or simplify issues; and
- (4) Submit to the Commissioner the hearing record and his or her recommendation(s) regarding the disapproval.

(e) The Commissioner will arrive at a decision and notify the State regarding the disapproval within 30 days after receiving the hearing officer's record and recommendation(s).

(f) The Commissioner's decision is our final administrative action on the disapproval.

§ 260.32 Withholding of funds for noncompliance with approved State plans.

(a) We will cite a State for noncompliance when it fails substantially to comply with the Home Energy Assistance Act and to implement Federal regulations and issuances. An issue of noncompliance exists when—

(1) The State fails to amend its approved plan to conform to new Federal requirements for State plans; or

(2) The State fails in practice to comply with its plan or a Federal requirement (whether or not its State plan has been amended to conform to the requirement);

(b) If we believe that a State is out of compliance, we will notify the State of this belief including our intention to withhold the grant.

(c) The State may request a public hearing within 20 days after it receives the notice specified in paragraph (b) of this section. The hearing will be carried out in accordance with the procedures in § 260.30.

(d) After a hearing, or after the 20 day time period in paragraph (c) if the State has not requested a hearing, we will make a finding regarding whether there has been a substantial failure to comply. If there has been such a failure we will withhold the grant during the period of non-compliance and the provisions of 45 CFR 74.95 and 74.114 will apply during such period.

§ 260.36 Parties to hearing on plan disapproval or withholding the grant.

(a) The Department and the State are parties to the hearing without making a specific request to participate.

(b) Other individuals or groups may be recognized as parties, according to procedures to be issued by the Associate Commissioner, if the issues to be considered at the hearing have caused them injury and their interest is within the zone of interests to be protected by the governing Federal statute.

Subpart D—Administration of the State Program

§ 260.50 State agency and local administrative arrangements.

(a) The State plan must name a single State agency responsible for administering the home energy assistance program for the State. Under this requirement, the single State agency must be certified as having proper authority to administer the program by the Governor or Attorney General of the State.

(b) The single State agency may contract with other agencies, such as community action agencies, off-reservation Indian community-based organizations, or utilities, to perform operational functions of the home energy assistance program. If it does so, the State may not delegate any function which involves administrative or policy discretion. The State plan must specify, in relation to any functions that are delegated—

(1) The division of responsibility between the agencies;

(2) How the single State agency plans to carry out its responsibility for supervision of the program with respect to the functions that are delegated; and

(3) What methods are available in the single State agency for correction of errors in case the agency performing operational functions fails to carry them out correctly.

§ 260.52 Administrative procedures.

The State plan must include an agreement by the State that it will implement the administrative procedures to be used in carrying out the plan and satisfying the requirements of these regulations, including the specific administrative requirements in Appendix B.

§ 260.56 Maintenance of regular benefit levels.

The State plan must provide that—

(a) In order to receive assistance under the Act, the State will not reduce, before October 1, 1981, regular benefit levels in any federally assisted cash assistance program from the level as of February 26, 1980.

(1) By "federally assisted cash—assistance programs" we mean AFDC, SSI State Supplements and Federal-State unemployment compensation.

(2) By "regular benefit levels" we mean the basic payment standard or schedule on which recurring benefits are based. This would not include special or non-recurring payment items.

(b) Notwithstanding paragraph (a) of this section, if benefits in a Federally assisted cash assistance program were increased solely to help pay for home energy, the State may reduce those increased benefits to an eligible household by the amount of such increase or the amount of the energy assistance payment to the household, whichever is less.

§ 260.58 Coordination with weatherization programs and energy conservation efforts.

A State plan must—

(a) Provide assurance that there will be, to the maximum extent possible, referral of individuals to, and

coordination with, existing Federal, State and local weatherization and conservation efforts. To carry out this requirement, the State plan must—

(1) Specify the government, voluntary and private weatherization and conservation programs to which there will be referrals in order to reduce the energy costs of households eligible for assistance under this program;

(2) Specify the arrangements made by the State agency with the programs specified in paragraph (a)(1) of this section, including the services available to recipients of assistance to help them make economical and efficient use of energy.

(3) Identify information about, and indicate instructions for, use of such programs for distribution to local agencies participating in the administration of the State's program.

(b) Indicate how recipients of assistance under this program will be referred to programs identified in paragraph (a) of this section and informed about and instructed in energy conservation and weatherization practices.

§ 260.60 Outreach activities.

A State plan must—

(a) Make provision for reaching and serving those eligible for and in need of assistance under the State's program, with priority attention to outreach activities to identify and serve—

(1) Those most vulnerable to the effects of cold, especially the elderly, the ill, the bedridden, the handicapped, and young children;

(2) Those for whom access to assistance programs is made difficult by—

(i) Remote location of residence, such as isolated or rural areas;

(ii) Frequent change of residence, such as migrants and migrant farmworkers;

(iii) Limited English speaking proficiency or communications handicaps;

(iv) General lack of knowledge about community service programs; and

(3) Lowest income individuals and families, especially those who are most seriously threatened by the increased costs of energy for residential purposes or who are not categorically eligible.

(b) Provide for maximum, effective use of statewide and local resources for serving and finding the eligible individuals, families and groups specified in paragraph (a) of this section, by using where appropriate—

(1) Community service agencies such as Community Action Agencies, State and local welfare agencies, public and private non-profit agencies serving children and families, and other

appropriate agencies and organizations within the State;

(2) Volunteer programs carried out under the Domestic Volunteer Service Act of 1973;

(3) State and local area agencies on aging;

(4) Indian tribes and off-reservation Indian community-based organizations;

(5) Home energy suppliers;

(6) Crisis assistance programs or other agencies with outreach expertise or experience with winter energy programs;

(7) Individuals particularly recruited and trained for the purpose of serving as casefinders, program interpreters and escorts;

(8) Units of the Federal government located within the State, including post offices, SSA District and Branch offices and Veterans Administration Regional Offices;

(9) The public education, public library and public recreation systems as well as police and fire departments throughout the State;

(10) Religious organizations; and

(11) Public media facilities.

(c) Provide a fiscal plan for reimbursement of outreach activities as proper administrative expenses. Contracting with organizations or other agencies to perform outreach activities is a valid part of the State's fiscal plan and administrative expenditures.

§ 260.62 Identifying and certifying eligible households.

The State plan must describe how the State will identify and certify eligible households as home energy assistance program participants and the records the State will keep to support its eligibility decisions.

§ 260.64 Monitoring procedures by States.

The State plan must describe the administrative records which will be kept and monitoring system which will be used, including the monitoring of agreements with energy suppliers and securing documentation of energy supplied to eligible households. That system must enable the State to identify and correct, in a timely manner, problems in the operation of its home energy assistance program, including noncompliance with the provisions of this Part or of the State's plan.

§ 260.66 Data collection and reporting by States.

(a) The State plan must provide—

(1) A description of energy usage and the average cost of home energy in the State, identified by type of fuel and by region of the State; and

(2) For reporting to us information on households which apply for or are

assisted by the program. The State agency must report to us the following cumulative totals as of the end of each quarter. We must receive the report within 30 days of the end of the quarter. In addition, cumulative totals for items (A) through (F) must be reported as of the end of January 1981 and as of the end of February 1981. Each of these abbreviated reports is due within 30 days of the end of their respective reporting periods.

(i) States whose administrative records will not include information required in items (I), (J) and (K) must include in their State plan a description of the means they will use to obtain information on these items.

(A) The unduplicated count of households receiving heating assistance;

(B) The unduplicated count of recipients within these households receiving heating assistance;

(C) The unduplicated count of applicant households which apply for and receive heating assistance; the count must be broken down by income levels and fuel type (with a separate column for renters making undesignated energy payments if such renters' benefits are calculated in any way differently from benefits of households which make designated energy payments) for each region of the State recognized in setting separate benefit levels according to § 260.154 and Appendix C.

(D) The unduplicated count of households receiving automatic payments; this count must be broken down by income levels and the categorical groups receiving the payments.

(E) The unduplicated count of "eligible tenant" households assisted through payments to building operators;

(F) The unduplicated count of households receiving heating assistance by any means not reported in (C), (D) or (E);

(G) The unduplicated count of households receiving assistance for cooling; this count must be broken down by income levels.

(H) The unduplicated count of recipients within these households receiving cooling assistance;

(I) The unduplicated counts of assisted applicant households containing members belonging to the following measurable program target groups: elderly; handicapped; migrant workers, young children; Indians.

(J) The sex and ethnicity of the assisted applicants.

(K) The unduplicated counts of assisted applicant households which also receive: AFDC, Food Stamps; SSI;

Income-tested VA benefits; general assistance.

(L) The number of applications by households for assistance approved and the number disapproved.

(M) The number of decisions on requests for hearings which upheld the original determination and the number which reversed the original determination.

(ii) [Reserved]

(b) Expenses incurred by States for data collection and reporting required under this section are countable administrative costs under the State's plan.

(c) States must submit data required under paragraph (a) of this section according to specifications we will provide in subsequent instructions.

(d) States must cooperate with our additional efforts to develop information on home energy usage by the general population. This information will include, but might not be limited to—

(1) Home energy consumption by the general population; and

(2) The annual cost and types of fuel used by various income groups.

§ 260.68 Federal monitoring.

The Regional Commissioner will monitor the State's compliance with its approved State plan.

§ 260.70 Cooperation by States in program evaluation.

The State agency must cooperate in any evaluations of the energy assistance program that are conducted or funded by the Federal government. In some States evaluation may employ the State's administrative records kept on households assisted or denied.

Subpart E—Fiscal Control and Accountability

§ 260.80 Reserve funds for emergencies.

(a) The State may reserve up to 3 percent of the funds allotted under § 260.101(a) for weather-related and supply shortage emergencies.

(b) A State wishing to reserve these funds must include in its State plan—

(1) A description of the emergencies or types of emergencies it will cover and the amounts and kinds of assistance to be available.

(2) Its procedures for planning for such emergencies;

(3) The administrative procedures it will use to determine that covered emergencies have occurred, and the procedures it will use to implement its emergency plan;

(4) The procedures by which eligible households will be informed that emergency assistance is available and

instructions as to how they may apply for it; and

(5) The procedures for the use of funds reserved under this section during the fiscal year in the event that the funds are not exhausted by emergencies.

(c) Emergency assistance may include minor repairs and consumer goods suited to the nature of the emergency.

§ 260.82 Fiscal reports by States.

(a) The Quarterly Estimate of Expenditures and Allotment Need will be used to help determine the amount of the State's or Indian tribe's quarterly grant and the amount for reallocation. It must—

(1) Provide the State agency's or Indian tribe's estimate of its need for Federal funds for a forthcoming quarter and an estimate of its need for Federal funds for the fiscal year. (We will provide a form for this report).

(2) Contain the following information—

(i) Estimated Federal funds needed for energy assistance payments to be made during the estimate quarter;

(ii) Estimated Federal share of administrative costs for the estimate quarter;

(iii) The State and local or Indian tribe funds available for estimate quarters;

(iv) Estimated Federal funds needed for the fiscal year; and

(v) An explanation, if the State's allotment or the amount reserved for the Indian tribe is less than the amount needed, of how the State or Indian tribe determined the additional amount it needs and how the total amount of Federal funds required for the fiscal year will be expended;

(3) Be submitted to the Associate Commissioner, with a copy to the Regional Commissioner, in accordance with instructions issued by the Associate Commissioner.

(b) The Financial Status Report presents the State agency's or Indian tribe's accounting of the disposition of the Federal funds granted for past quarters and provides the basis for making adjustments necessary when the State's or Indian tribe's estimates are greater or less than the amount actually expended in the period covered by this report. (We will provide a form for this report.) It must—

(1) Contain information including, but not limited to—

(i) Expenditures for home energy assistance payments to or for applicant households;

(ii) Expenditures for payments made to or for eligible households receiving automatic payments;

(iii) Expenditures for payments made to housing operators on behalf of eligible tenants;

(iv) Expenditures for tax credits to home energy suppliers; and

(v) Expenditures for weather-related and supply shortage emergencies; and

(vi) Total expenditures for planning and administering the State's approved plan for energy assistance to low income households and the Federal share of those expenditures.

(2) Be submitted to the Associate Commissioner, with a copy to the Regional Commissioner, in accordance with instructions issued by the Associate Commissioner.

§ 260.84 Administrative costs.

A State or tribe may use for planning and administering the plan an amount of its allotment up to 7½ percent of the total cost of carrying out the plan. By "total cost of carrying out the plan" we mean the sum of all expenditures for allowable assistance payments and administrative costs made under an approved plan. The State or tribe will pay from non-Federal sources the remaining costs of planning and administering the plan.

Subpart F—Federal Allotments and Payments

§ 260.100 Definitions.

As used in this part:

"Allotment" means a State's share of the Federal funds provided for the Low Income Energy Assistance Program for fiscal year 1981.

"Reallotment" means decreasing the allotment amount for one or more States, or the amount reserved in the case of Indians tribes, when such allotment or reserved amount is in excess of the Federal fund needs for the State or Indian tribe, and redistributing such excess to the State(s) or Indian tribe(s) in need.

§ 260.101 Computation of States' allotments.

We will distribute each State's allotment and the remainder of the funds provided by Congress in the following manner and order (after providing for Federal administrative expenses)—

(a) To each State with a State plan approved under § 260.28 of these regulations, an amount computed in accordance with the allotment formula required to be used by the Continuing Resolution enacted on October 1, 1980;

(b) To the Commonwealth of Puerto Rico, and the Insular Areas (as defined in § 260.104(a)(1)) \$2,500,000 allotted on the basis of need under § 260.104(b);

(c) To the Director of the Community Services Administration, \$87,500,000;

(d) To the States as incentive grants for fuel assistance programs under § 260.112, the balance, if any, after paragraphs (a), (b) and (c) of this section;

(e) The remainder, after paragraphs (a), (b), (c) and (d) of this section, if any, will be distributed in accordance with the allotment formula required to be used by the Continuing Resolution enacted on October 1, 1980.

§ 260.102 Quarterly grants to States.

Grants will be made for each quarter of FY 1981 to States with plans approved under this Part.

§ 260.104 Allotments for the Commonwealth of Puerto Rico and the insular areas.

(a) *Definitions.* (1) "Insular Areas" means Guam, American Samoa, the Virgin Islands, Northern Mariana Islands and the Trust Territory of the Pacific Islands.

(2) "Home energy," for purposes of this section, means a source of heating, refrigeration or other home uses, but includes air conditioning only when medically necessary.

(b) Puerto Rico and the Insular Areas are allotted the amounts set forth below based on their need:

| | |
|---|-------------|
| Puerto Rico..... | \$2,167,835 |
| Trust Territories of the Pacific Islands..... | 92,083 |
| Guam..... | 87,333 |
| Virgin Islands..... | 82,583 |
| American Samoa..... | 39,833 |
| Northern Mariana Islands..... | 30,333 |

(c) Each jurisdiction seeking a home energy grant under this section must submit to us a plan containing provisions which describe the program for which a grant is sought and which are consistent with the requirements for State plans under this Part (see § 260.15). Grants for home energy assistance will be awarded to the Commonwealth of Puerto Rico and the Insular Areas upon approval of their respective plans.

(d) The requirements applicable to the States under this Part shall apply to Puerto Rico and the Insular Areas with the following exceptions:

(1) A plan submitted under this section may, but need not, comply with the provisions of § 260.22 [public participation] and §§ 260.200-260.208 [payments to operators of subsidized housing].

(2) Plans shall be submitted within 30 days after Congress makes funds available for these programs.

(3) The Quarterly Estimate of Expenditures and allotment need

required by § 260.82 shall be submitted in accordance with instructions to be issued by the Associate Commissioner.

(4) In determining the amount of assistance under § 260.154, a reasonable substitute for heating degree days shall be used if adequate information is not available on average home energy expenditures for households.

(5) The provisions of Subpart J [direct payments to SSI recipients] do not apply to grants under this section. However, if the agency administering the program in the Northern Mariana Islands wishes us to make direct payments to SSI recipients, we will work with the agency to develop an agreement under which this can be done.

§ 260.106 Equivalent benefits for Indians.

(a) *Definitions.* As used in this section, "Indian," "Indian Tribe," and "Indian Organization" mean the definition established for them, respectively, by 45 CFR 1336.1, under which—

(1) Indian means "any individual who is a member or a descendant of a member of a North American tribe, band, or other organized group of native people who are indigenous to the continental United States or who otherwise have a special relationship with the United States through treaty, agreement, or some other form of recognition. This includes any individual who claims to be an Indian and who is regarded as such by the Indian community of which he or she claims to be a part. This definition also includes Alaskan Natives."

(2) Tribe or Indian tribe means "a distinct community of Indians that exercises powers of self-government." Consortia of tribal governments may act in behalf of Indian tribes.

(3) Indian organization means "a public or private non-profit agency whose primary purpose is promoting the economic or social self-sufficiency of Indians in urban or rural non-reservation areas, the majority of whose governing board and membership is Indian."

(b) The State plans must provide assurances that Indians will receive benefits that are equivalent to benefits provided to other households in the State.

(c) If we make a determination that Indians are not receiving or will not receive equivalent benefits under the proposed State plan—

(1) As a condition of approving the plan we will require the State to make changes in its plan so that Indians will receive benefits equivalent to other households in the State; or

(2) We will determine if those Indians would be better served through grants made directly to Indian tribes. If we determine they would be better served by direct grants, we will—

(i) Reserve from sums that would otherwise be allotted to the States no less than that proportion of the States total allotment that the population of eligible Indians bears to the population of all eligible households in the State;

(ii) Calculate the amount to be reserved from sums which would otherwise be allotted to the State by taking into account heating degree days and the average home energy expenditures for households in the areas in which the reservation is located. This is to assure that the tribe has sufficient funds to make benefits available to its eligible households that are no less than the benefits the State may make available to similarly situated eligible households.

(iii) Provide that proportion of the Federal funds by direct grant to the appropriate Indian tribe;

(d)(1) If, during the development of a State's plan, the State and an Indian tribe within that State (or a tribe and more than one State, in cases where tribal lands are in more than one State) agree that members of the tribe would be better served by a direct grant to the tribe, rather than under the State's plan, the State and the tribe must have notified us of their intent to enter into such an agreement by June 30, 1980 and must have finalized the agreement by August 15, 1980. We will determine whether members of the tribe are not receiving or will not receive equivalent benefits, and will determine whether members of the tribe would be better served by a direct grant from us, taking that agreement into consideration. In the event of such an agreement and determinations, we will make a direct grant to the tribe.

(2) If a tribe has eligible households in more than one State, a separate agreement must be negotiated for a reserve of funds out of each State's allotment. If a State in which a tribe is located does not enter into an agreement with a tribe to administer its own energy assistance program, the agreement between the tribe and any State with which it has an agreement must indicate that the tribe will serve only eligible households that reside within the State with which it has an agreement.

(e) Except as provided in paragraph (f) of this section, an Indian tribe or organization that seeks direct funding must submit to us for our approval a plan containing the same provisions that are required of States.

We will provide, on a priority basis, technical assistance to help an Indian tribe or organization for which such determinations have been made to prepare a plan for delivering benefits to members. Under that plan the tribe or organization will receive Federal funds according to the calculation in paragraph (c)(2) of this section.

(f) (1) An Indian tribe may, but need not, comply with the provisions of Subpart H (payments to operators of subsidized housings) and may modify the provisions of § 260.22 (public participation) to suit its own conditions; and

(2) The provisions of § 260.56 (maintenance of regular benefit levels), § 260.264 (when home energy assistance funds may be used for tax credits to home energy suppliers) and Subpart J (automatic payments by the Social Security Administration to beneficiaries of the Supplemental Security Income program) are not applicable to plans for energy assistance submitted by Indian tribes.

§ 260.108 Reallocation of funds.

(a) The portion of any State's allotment or Indian tribe's set aside which the Secretary determines will not be required to carry out its approved State plan for fiscal year 1981 will be reallocated as provided below to other States and to Indian tribes based on their need and ability to expend the funds consistent with the provisions of their approved State plans. The purpose of this reallocation is to assure the most effective use of funds available.

(b) In addition to meeting the reporting requirements set forth in § 260.82, a State or tribe must advise us whenever it determines that a portion of its allotment or amount reserved will not be required to carry out its home energy assistance plan.

(c) We will determine the amount of funds, if any, available for reallocation. The determination will be based on—

(1) Reports from the States and Indian Tribes submitted under these regulations;

(2) Climatic conditions;

(3) Provisions in State and tribal plans regarding method, timing and form of payment, emergency reserves, and payments for summer cooling when medically necessary;

(4) Notice and comment under paragraphs (d) and (e) of this section; and

(5) Other relevant factors necessary to assure that no State or Indian tribe loses funds necessary to carry out the purposes of the home energy assistance program.

(d) Before removing any portion of funds which were allotted to a State or tribe, we will notify the Governor of the State or the appropriate tribal official by letter and the general public by notice in the **Federal Register** of the intent to reallocate, and we will invite comment. A period of 30 days from the date of publication of the notice in the **Federal Register** will be allowed for comments to be submitted to us.

(e) After considering any comments received during the 30 day notice period, we will notify the Governor of the State or an appropriate tribal official of any decision to reallocate funds, and we will publish the decision in the **Federal Register**.

(f) We will reallocate the funds determined to be available under paragraph (c) of this section to States and Indian tribes having need and ability to expend additional funds using the following method:

(1) First, the total amount of the excess funds for those States and Indian tribes determined to have an excess will be computed;

(2) Then, the total original allotment amounts and reserved funds for those States and Indian tribes which have a need for additional funds will be computed;

(3) Next, for each of the States and Indian tribes in paragraph (f)(2) of this section the percentage its original allotment or reserved funds is of the total in paragraph (f)(2) of this section will be determined;

(4) Next, the percentage for each State and Indian tribe determined in paragraph (f)(3) of this section will be applied to the amount determined in paragraph (f)(1) of this section; and

(5) Last, if the amount determined in paragraph (f)(4) of this section for each State or Indian tribe is equal to or less than the additional amount each State or Indian tribe needs, the process of making the reallocation is completed.

(6) If the amount determined in paragraph (4) of this section for any State or Indian tribe exceeds the additional needs of that State or Indian tribe, the excess will be further distributed to those States and Indian tribes needing additional funds using the procedures in paragraph (f) (2), (3) and (4) of this section. This reallocation process will continue until all excess funds available for reallocation have been distributed or all the States' and Indian tribes' needs have been satisfied.

(g) A State allotment or the amount reserved for an Indian tribe as changed by any reallocation will be considered to be its allotment under § 260.100 or the amount reserved under § 260.106(c) for fiscal year 1981.

§ 260.110 Reimbursement for funds advanced by States.

Any State which, on or after April 2, 1980, makes advances from its own sources for activities relating to the planning and administration of a State plan, or after the start of the 1981 fiscal year makes advances for assistance payments in substantial compliance with a subsequently approved State plan, may be reimbursed for such advances from the allotment made to that State under § 260.101(a).

§ 260.112 Incentive grants to States.

(a) The purposes of these grants are to provide an incentive to States that have State-funded home energy assistance programs serving eligible households as defined in § 260.150 to continue those programs and to provide an incentive to other States, where there is a need, to begin such programs.

(b) A State seeking an incentive grant under this section must submit a written application in accordance with the notice of priorities and requirements for applications that we publish in the Federal Register. The application must—

(1) Describe the State program for which Federal incentive funds are sought under this section;

(2) Identify the eligible households that will be served under the program;

(3) Provide that the provisions of 45 CFR Part 74 apply to the State program; and

(4) Describe how the State program meets the priorities for funding established by us under subsection (c).

(c) We will publish in the Federal Register priorities for the awarding of grants under this section and any additional provisions that a State must include in its application.

(d) We will select from the applications for grants those State programs which in our judgment will best carry out the priorities established by us. States will be notified within 120 days from the deadline for filing applications whether their programs have been selected for funding. States whose programs are selected will be sent grants as soon as practicable after this selection.

(e) No grant under this section will be for more than 25% of the cost of the State program selected for funding.

Subpart G—Eligibility and Payments for Home Energy Assistance**§ 260.150 Who is eligible for assistance.**

The State plan must identify the categories or groupings of households that will be eligible for home energy assistance under the State's program.

(a) In order for a household to be an eligible household, it must have income no greater than the Bureau of Labor Statistics Lower Living Standard Income Level or must contain at least one person eligible for—

(1) AFDC (other than AFDC Foster Care or Emergency Assistance to Needy Families with Children);

(2) Supplemental Security Income (except if excluded in section 260.2);

(3) Food Stamps; or

(4) Veteran's benefits under sections 415, 521, 541 or 542 of title 38 of the U.S. Code.

(b) A single person household is an eligible household if it has income no greater than 125 percent of the CSA Poverty Income Guidelines.

(c) In determining eligibility for categorically eligible households, a State may use verified data already on file for such households, if using that data will expedite or not unreasonably delay delivery of benefits.

(d) Except in the case of emergency assistance under § 260.80, the State may not require proof of unpaid fuel bills or notices of termination of utility service as eligibility criteria.

§ 260.152 To whom payments may be made.

(a) The plan need not provide for payment for all households identified in § 260.150 (a) and (b). However, when it does not provide for payments for all of those households, it may make exclusions only after taking into account the priority identified in § 260.154(a)(1). This means that households that have lowest incomes may not be excluded.

(b) The State plan must provide that payments for home energy assistance will be made—

(1) Directly to eligible households;

(2) To home energy suppliers on behalf of eligible households, as described in Subpart I; or

(3) To any combination of eligible households and home energy suppliers; and

(4) To operators of public and subsidized housing on behalf of eligible tenants, as described in Subpart H.

(c) Under the Plan, eligible households that pay energy costs as undesignated portions of their rent payments must be treated in the same way that similarly situated eligible households which pay those costs directly to energy suppliers are treated. See § 260.154(c)(5).

(d) The State Plan must provide that payments will not be made to or on behalf of households that are not vulnerable to energy cost increases, except for payments made to building operators on the basis of eligible tenants as described in Subpart H.

(1) By "vulnerable to energy cost increases" we mean that a household is at least in part responsible for its own energy costs. This could be through direct payments to utilities, increases in rent when leases are renewed, extra energy charges or surcharges, or other vehicles through which the household's costs for shelter could ultimately be expected to rise as home energy costs rise. A household that is vulnerable to energy cost increases is one that is not fully protected against such increases under any government program.

(2) Appendix D contains guidance and examples of some situations in which households may not be vulnerable to energy costs increases.

(e) The plan must assure that no duplicate payments will be made. We will not reimburse the State for any duplicate payments. A duplicate payment is more than one payment, under the plan, attributable to the same energy costs for the same household.

§ 260.154 Amounts of assistance payments.

The State plan must describe the amounts of assistance that will be furnished under the plan and how—

(a) In setting the amount of assistance to be furnished to or on behalf of eligible households—

(1) Priority is given to households with lowest incomes; and

(2) The highest level of assistance is provided to households with lowest incomes and the highest energy costs in relation to income.

(b) The State plan must indicate how the State will meet the priority requirement under paragraph (a) of this section. As used in this section, "priority" means that special amounts of assistance are provided under the State's program. This can be done through higher benefits, or favorable methods of income or payment calculation for households with priority over similarly situated households without priority.

(c) Payment amounts must vary according to differences in circumstances for categories of households. In computing the amount of benefits, States must reasonably take into account—

(1) The average home energy expenditure for households. If adequate information is not available, heating degree day data and average cost by type of energy source and other relevant data may be substituted;

(2) The proportional burden of energy costs in relation to income or ranges of income;

(3) The variation in degree days in regions of the State, where appropriate.

If the degree day variation within the State is minimal, the State may elect not to take this into account;

(4) The extent to which the household is vulnerable to or protected against rising costs of home energy;

(5) In the case of households making undesignated payments for energy in the form of rent, their actual energy costs where available from the landlord or some other source, or an amount deemed to represent those costs based upon a comparison with the income and energy burden of similarly situated eligible households that pay their utility costs directly; and

(6) Any other relevant consideration selected by the Chief Executive of the State.

(d) The factors in paragraph (c) of this section must be taken into account in computing amounts of benefits. Criteria which we consider reasonable, in determining whether different payment amounts must be established due to variations in those factors, are set forth in Appendix C. Upon receiving adequate explanation, we will consider the applicability of additional or substitute criteria, or alternative uses of the criteria discussed in the appendix, if the requirements of paragraph (c) of this section are met.

(e) In computing benefit amounts, the State may take into account the specific energy costs of an eligible household. It may also take into account other relevant considerations that are in accordance with the purposes of this program and not contrary to the priority requirements in paragraph (a) of this section and in § 260.155, or the required payment considerations in paragraph (c) of this section. If the State chooses such optional considerations, it must identify them in the plan.

(f) A State may use automatic payments to categories of eligible households. However, if such a system is used, other payment mechanisms in the State's plan must satisfy the requirements of paragraphs (a) and (c) of this section and Appendix C.

(1) States which use automatic payments must describe in their Plans their procedures for assuring that such payments will not be made to households that are not vulnerable to the rising cost of home energy, except where a waiver has been granted.

(2) An automatic payment is a payment made under this program to an eligible household, without use of a separate application, based upon its categorical eligibility.

(g) Households eligible under the State's plan and that are similarly situated with respect to energy costs, income, and other considerations

relevant to assistance under the Act, must receive similar amounts of assistance. In the case of households that pay energy costs as undesignated portions of their rent, the State must establish and describe in the State Plan its method for reasonably attributing a portion of the rent to energy costs.

(h) No assistance paid to or in behalf of an eligible household in any State may exceed \$750.

§ 260.155 Priority for households with elderly or handicapped persons.

(a) The State plan must describe how priority will be given to eligible households with elderly or handicapped persons. As used in this section, "priority" means that households are given special treatment relating to ease of application or access to assistance, timing of benefits, or guarantees of assistance if program funds are inadequate.

(b) A State may provide extra or higher benefit levels for households with elderly or handicapped individuals only if the State plan justifies those levels on the basis of the income and energy burden considerations required by § 260.154(b). If the State plan does establish such higher or extra benefit levels on that basis, those higher levels will satisfy the priority requirements of this section.

§ 260.156 Purposes for which payments may be made.

(a) The State plan must provide that payments may be made only to—

(1) Meet the rising cost of energy needed to provide heat in a residential dwelling for an eligible household; and

(2) Meet the rising cost of energy needed to provide cooling, when medically necessary, in a residential dwelling for an eligible household.

(b) The State plan must identify the conditions under which payments will be made to eligible households for the rising costs of cooling. Payments for cooling may be made only when there is a risk to life or health due to a particular illness or medical condition which can be ameliorated by cooling facilities. Such conditions include, but are not limited to, heart disease, stroke, skin diseases, diabetes mellitus and heat exhaustion, especially among the elderly. Medical conditions requiring cooling shall be certified by a medical doctor or an appropriate public health official. The certification may be on behalf of individuals or groups of individuals.

(c) Except in the case of weather related or supply shortage emergencies under section 260.80, the State's energy program must not provide assistance in

the form of repairs or consumer goods. In no case shall the program provide benefits in the form of weatherization or conservation assistance.

§ 260.158 Forms of payment.

(a) The State Plan must indicate the form(s) and method(s) of payment to or on behalf of eligible households. These may include, but are not limited to—

(1) Cash;

(2) In-kind payments, including fuel and vendor lines of credit. In-kind payments may not include clothing or shelter;

(3) Vouchers, stamps, coupons and other forms of certificates which may be used in exchange for energy supplies; and

(4) Any combination of these.

(b) The benefit of any payment made to or on behalf of an eligible household must accrue to that eligible household. Under this requirement, when a payment in behalf of a household is made to another party, the household must realize full compensation corresponding to the amount paid to the other party.

§ 260.159 Timetable for making payments.

The State Plan must include the timetable by which payments will be made under its energy assistance program. The schedule must, for each month, provide an estimate of the number of households to be assisted and the total amount of assistance to be provided to these households. Under this requirement, the State's energy assistance program must begin by December 15, 1980.

§ 260.160 Income and assets—definition and verification.

(a) The State shall include in its plan its definition of income and the period it will use for measuring income. In defining income, the State may provide for exclusions and deductions that are reasonably related to measuring a household's financial ability to meet the increased costs of home energy and must exclude:

(1) Cash over which the household has no control, including but not limited to—

(i) Reimbursement for expenses incurred in connection with employment;

(ii) Reimbursement for other expenses incurred, such as for medical expenses; and

(iii) Payments made to others on the household's behalf, provided that such payments were not directed by the households;

(2) Loans;

(3) Any cash which the State defines in its plan as excluded because it is

administratively difficult to consider or to compute, such as irregular or small amounts; and

(4) Federal payments or benefits, the exclusion of which is required by Federal law.

(b) States must verify household income eligibility. In verifying income, the State must apply verification standards and verification procedures consistent with those it uses for AFDC. For categorically eligible households it is sufficient to verify that the household is eligible for, or receiving, assistance under one of the programs identified in § 260.150(a)(1) through (a)(4).

(c) For categorically eligible households, the State may apply no assets test other than the one it applied to that household under the appropriate categorical program. For other households, the State may establish an assets test, but that test may not consider cars, household or personal belongings, or a primary residence.

§ 260.162 Energy assistance is not a resource or income for other programs.

Benefits paid to eligible households under this program shall not be counted as income or resources for any purpose under any Federal or State law, including any law relating to taxation, public assistance or welfare programs.

Subpart H—Payments to Building Operators

§ 260.200 General.

The State plan must provide for direct payments to building operators of specified public and subsidized housing projects on behalf of eligible resident tenants. The amount paid to each operator must be based upon the monthly actual heating cost per unit in the building(s), the number of eligible tenants, and the entitlement to direct assistance which eligible households may have under the State's Plan. Payments need not be made to all building operators; and the State must consider several factors in determining those to which the payments will be made. States must prevent duplicate payments as defined in § 260.152.

§ 260.202 Definitions.

(a) "Building operator" means the owner of a residential building or buildings, or the owner's representative, in—

(1) Housing projects established under—

(i) Section 221(d)(3) of the National Housing Act of 1968 (12 USC 1715l);

(ii) Section 236 of the National Housing Act of 1968 (12 USC 1715z-1);

(iii) Section 202 of the Housing Act of 1959 (12 USC 1708);

(iv) Low rent housing established by the U.S. Housing Act of 1937 (42 USC 1437);

(v) Section 8 Housing as created by the Housing and Community Development Act of 1974 (42 USC 1437f); or

(vi) Section 515 of the Housing Act of 1949 (42 USC 1485); and

(2) State and local government-operated housing projects which admit low income tenants based upon an income test—

(b) An "eligible tenant" means a household that—

(1) Occupies a dwelling unit in a building or project operated by a building operator;

(2) Meets the requirements for an eligible household under the State's plan;

(3) Generally makes payments for energy as an undesignated portion of rent. A family that generally pays for its heating or cooling energy with separate payments directly to a supplier or utility is not an eligible tenant; and

(4) Is not fully vulnerable to rising fuel costs under the State's definition required in § 260.206(g).

(c) "Project" is used in this subpart to mean any of the buildings or groups of buildings, or living units specified under (a) above.

§ 260.204 Computing a payment to a building operator on behalf of eligible tenants.

(a)(1) Payments to building operators must be calculated by first taking the exact monthly residential heating costs of the project divided by the total number of occupied living units in the building or project, and multiplying the quotient by the number of eligible tenants in the project that month. The payment to the building operator must be the lesser of that amount or the product, calculated on a monthly basis, of the comparable amount determined under paragraph (a)(2) of this section, multiplied by the number of eligible tenants in the project.

(2)(i) The comparable amount is equal to the limit on the total amount the State may pay to building operators as determined in § 260.206(c) divided by the number of eligible tenants in the project which will receive assistance under the State Plan.

(ii) The comparable amount may be adjusted higher or lower for individual building operators or categories of operators according to criteria which reflect—

(A) The extent to which the building operator's costs for residential heating are not compensated by subsidies, rent receipts, and other revenues; and

(B) The extent to which payments made to the building operator will benefit eligible tenants in the project.

(iii) The State must make any adjustments under paragraph (a)(2)(ii) of this section to assure that the total payments to building operators under the State Plan substantially equals the amount the State may pay to building operators under § 260.206(c).

(b) "Exact monthly residential heating cost" is the cost of fuel used for heating the building or project during the month for which payment is claimed. States must specify in the State plan those months for which payments will be made to building operators.

(c) An example of the calculation in paragraph (a) of this section would be as follows—

(1) If the State specifies that it will make payments to building operators for the month of January, the payment for a ten unit building would be calculated by first dividing the exact cost of heating fuel consumed during that month by the occupied ten units. If the exact cost of heating fuel consumed was \$800, the per-unit cost would be \$80. If there are four eligible tenants who are not entitled to a direct payment under this program then under this heating cost formula the amount payable to the building operator for January would be \$320.00.

(2) Suppose, however, that under the State's plan the comparable amount determined under paragraph (a)(2) of this section is \$60 for January. This would then be the maximum permissible payment, and would yield a maximum payment of \$240 on behalf of four tenants. The State must pay the lesser of this amount or the \$320 computed under paragraph (c)(1). In this case, the payment would be \$240.

(3) If one of the four eligible tenants is partially vulnerable and therefore entitled to a direct payment from the State under § 260.154, the amount to which that tenant could entitle the operator would then have to be further reduced by the amount of that tenant's direct entitlement.

§ 260.206 State administration of payments to building operators.

(a) The State Plan must identify the objective criteria the State will use to determine which housing operators will receive payments under this Subpart. In establishing these criteria the State must take into account—

(1) the extent to which building operator's costs for residential heating are not compensated by subsidies, rent receipts and other revenues; and

(2) the extent to which payments made to particular building operators

will benefit the eligible tenants in their buildings or projects.

(b) The State must not make a payment to a building operator if the operator's residential heating costs are fully met by rent subsidies or other revenues and the State determines that a heat or energy related benefit will not accrue to the eligible tenants.

(c) The State plan must specify the maximum amount the State will pay to building operators under the Plan.

(1) This amount must equal the State's aggregate amount of benefits payable to eligible households, multiplied by the number of eligible tenants in the buildings and projects for which operators will receive assistance under the State Plan divided by the total number of eligible households (including eligible tenants) who qualify for assistance under the State plan. As used in this paragraph "aggregate amount of benefits payable to eligible households" is the State's allotment less deductions for grants made directly to Indian tribes, (if applicable) administration, and the optional 3% for emergency assistance.

(2) The Plan will identify the bases upon which the State's payments to building operators are computed under this paragraph.

(3) If a State uses estimates in determining the number of eligible tenants, then it must describe the method by which those estimates were derived.

(d) If there are funds remaining in the comparable amount set aside for building operators, the State may recalculate the amounts in the formula and distribute the excess funds to other building operators of eligible households.

(e) If a State qualifies for reallocated funds, it may adjust the set aside for building operators to reflect the increased funds available.

(f) The State plan must assure that no duplicate payments will be made as required under § 260.152(e). Under this requirement, any time an eligible tenant is entitled to assistance as an eligible household under Subpart G and the State Plan, the amount of that assistance must be deducted from the payment to the building operator on that tenant's behalf.

(g) The State Plan must define "vulnerability" for eligible tenants.

(1) This definition must include as vulnerable those eligible tenants who pay extra energy charges, surcharges or other excess charges over the normal monthly undesignated rent payment.

(2) The Plan may include as vulnerable those tenants whose rent payments have increased recently to compensate for rising energy costs.

(3) Under this requirement the State plan must identify criteria for determining extent of tenant vulnerability, including those at least partially vulnerable and fully vulnerable. The State may use ranges of vulnerability and for each range assess a fixed percentage of the energy assistance payment to be paid. For example, if a tenant's residence is check-metered and if the tenant must pay directly between 21 and 28 percent of the energy used in the residence, then the State may establish a standard amount of vulnerability, such as 25 percent. The State would then pay those tenants, and others in similar circumstances 25 percent of the energy assistance payment.

(h) The benefit of any payment made to a building operator must accrue to the tenants in the building or project for which the payment was made. The State must insure that the eligible tenants are notified of benefits accruing to them. This may be done either directly by the State or by requiring the building operator to notify the eligible tenants in writing, either individually or by posting an appropriate notice or notices prominently in the building, of the benefit that they will receive and the source and reason for that benefit.

(i) The State may make payments to a building operator on behalf of eligible tenants in the form of fuel by arrangement with a supplier to make such deliveries. In order to do so the operator must agree, to accept the fuel instead of the cash benefits.

§ 260.208 Documentation and verification.

(a) States may make payments to a building operator only after the operator—

(1) Documents the specific location of each building for which payments are requested;

(2) Documents the number of dwelling units and tenants in each building;

(3) Documents the number of eligible tenants in each building by—

(i) Name and income; and
(ii) If categorically eligible by type of aid received (e.g., AFDC, SSI, FS, VA);

(4) Documents the exact monthly costs of heating fuel used in that building during the month or months for which the operator will receive a payment; and

(5) Documents any surcharges currently levied against eligible tenants, any applications for increases in revenues, rents or subsidies that are currently in progress, and when the most recent completed application was approved or disapproved; and

(6) Certifies that tenants eligible for assistance under this program are not

discriminated against with respect to rent. This means that the rent has not been and will not be raised because a tenant has received, directly or through a vendor, a payment under this program.

(b) The State agency must—

(1) Be responsible for the determination of eligibility of eligible tenants and verification of the data supplied by the building operator upon which the eligibility determination was based; and

(2) Promptly notify the subsidizing Federal, State or local agency of any payments, by amount and location of building, made to the operator.

Subpart I—Payments and Tax Credits to Home Energy Suppliers.

§ 260.250 When the State may make payments to energy suppliers.

(a) A State may furnish home energy assistance on behalf of an eligible household through payments to one or more home energy suppliers designated by the household, but only if the supplier has agreed—

(1) To charge the household in the supplier's normal billing process and no more than the difference between—

(i) The price normally charged for the energy delivered to a non-eligible similarly situated household; and

(ii) The payments the supplier has received or can expect to receive from the State for home energy supplied or to be supplied under this agreement.

(2) Not to discriminate against the eligible household in offering deferred payment or level payment plans or in other conditions of sale, credit, delivery, or price; and

(3) Unless exempted under section 260.260, not to stop supplying energy to the eligible household except under the conditions in section 260.254.

(b) The agreement required by paragraph (a) shall apply in any case in which the State designates a particular energy supplier to receive payment on behalf of an eligible household including two-party checks, vouchers and certificates. The agreement does not apply to tax credits under § 260.264.

(c) The agreement required by paragraph (a) must be in effect at least during the months that home heating is generally required and, if the State plan provides for payments on behalf of households with a medical need for cooling, the agreement must be in effect during the months that cooling is generally required.

(d) Payments to an energy supplier must be made by the State in a timely manner by means of installment payments, as reimbursements or a line of credit.

(e) The State must notify each eligible household when it makes a payment to a home energy supplier on the household's behalf, specifying the amount of the payment.

(f) *Incidental costs.* (1) Incidental costs are the nominal costs of services billed to the eligible household by a home energy supplier that are necessary for the use or delivery of home energy. Examples of incidental costs include connection or reconnection fees, delivery fees, deposits and other fees related to the start up of service.

(2) If a State chooses to pay for incidental costs, its State plan must describe the kinds of costs for which it will pay and any ceilings on the amount of payment.

§ 260.254 Conditions for termination of home energy by participating suppliers.

(a) A home energy supplier, unless exempted under § 260.260, must agree not to terminate home energy to an eligible household receiving energy under the agreement except under the following conditions—

(1) The household has failed to pay its share of an energy bill under § 260.250(a)(1) for at least two months measured from the due date for each such payment to the same date two months later (if the household is behind in its payment and pays a portion of the bill, the payment must be applied to the oldest part of the bill);

(2) The household has received a written termination notice, as described in § 260.256, at least 30 days prior to the termination; and

(3) If the household requests a hearing within ten days after receiving the termination notice, the supplier will continue supplying home energy to the household until a decision is reached in accordance with the requirements of §§ 260.256 and 260.258.

(b) If State law or other legal requirements provide for longer periods of time than those contained in paragraph (a) of this section, the State law or other legal requirements must apply.

(c) For purposes of this section and § 260.256, the date of receipt of a termination notice is presumed to be five days after the date of such notice unless there is a reasonable showing to the contrary.

§ 260.256 Termination notices.

The termination notice required by § 260.254 must be in writing and state at least the following—

(a) The earliest date the supplier will stop supplying home energy to the household;

(b) The reason for the termination;

(c) The amount the household must pay, by when, and where, to prevent termination;

(d) How to request a hearing and where the hearing will be held; and

(e) That if the household requests a hearing within 10 days after receiving the termination notice, the supplier will continue supplying home energy to the household until a hearing decision is reached.

§ 260.258 Pre-termination hearings.

The hearing required by § 260.254 must be held and decided by the State agency or another Government agency designated by it. The hearing must afford the household a reasonable opportunity to appear before an unbiased person who will hear and resolve the dispute fairly between the household and energy supplier.

§ 260.260 Exceptions to the pre-termination requirements.

(a) If a State determines that the requirements of §§ 260.254 through 260.258 would seriously jeopardize the ability of small fuel oil dealers or other small home energy suppliers to continue in business, the State may, subject to the State law or other legal requirements, modify its plan provisions to change the requirements of those sections as they relate to those suppliers or exempt them from some or all of the requirements of those sections. If the State chooses to do this it must identify the criteria it will use to determine which suppliers will be subject to modifications of §§ 260.254 through 260.258, and what those modifications are.

(b) The State may make the determination under paragraph (a) of this section on an individual basis or by categories of suppliers. In making the determination, the State may consider among other things—

(1) The feasibility of the supplier passing through its non-payment losses to other customers;

(2) The number of eligible households that have designated the supplier to receive their energy assistance payments as a proportion of the supplier's total customers;

(3) The number of persons employed by the supplier;

(4) The supplier's gross sales in dollars;

(5) The supplier's sales in terms of gallons or other unit of measurement;

(6) The availability of credit to the supplier;

(7) The supplier's past credit practices; and

(8) The supplier's overdue and uncollectable accounts.

§ 260.264 When home energy assistance funds may be used for tax credits to home energy suppliers.

(a) The State plan may provide for a credit against State tax to an energy supplier that sells energy at reduced rates to eligible households. The credit may not exceed the amount of the supplier's loss of revenue on account of the reduced rate.

(b) For purposes of paragraph (a) of this section:

(1) "State tax" means any tax imposed by the State directly on the energy supplier, or on the consumer when the energy supplier is acting in the capacity of a collections agent for the State;

(2) "Reduced rates" means the sale price of home energy to eligible households at less than the energy supplier's normal selling price to households other than eligible households in the same or similar location.

(c) A State plan that includes provision for tax credits under paragraph (a) of this section must provide for—

(1) Certification to us, at the end of each quarter, of the total amount of credits provided which represent an allowable Federal expenditure; and

(2) Maintenance of auditable records supporting the amount of tax credits provided and showing that the tax credits meet Federal and State requirements.

(3) Benefits to eligible households equivalent to those received by similarly situated households under other methods of providing assistance.

Subpart J—Direct Payments by the Social Security Administration to Beneficiaries of the Supplemental Security Income Program

§ 260.300 General.

A State plan may provide for automatic payments made directly to SSI recipients. If the State chooses to make such payments, it may make them itself or it may have the Social Security Administration make them for it.

§ 260.301 Timetable for agreements by States with the Social Security Administration.

(a) At the request of a State, we will make its energy assistance payment for heating needs, out of the State's allotment, to members of eligible households in the State who receive SSI benefits as defined in § 260.2.

(b) Such payments by us, at the request of a State, are payments made under the State plan and are subject to the same conditions and limitations as other payments made by the State under its plan.

(c) In order to have us make its payments to SSI beneficiaries, a State must—

(1) Have notified us by June 30, 1980 of its intent; and

(2) Sign an agreement with us to this effect within 30 days after publication of these final regulations.

(d) A State which withdraws must pay us the administrative cost we incurred preparing to make energy assistance payments for the State.

§ 260.302 Where we will send checks.

(a) We will send the household's check directly to the SSI beneficiary (or his or her representative payee under Subpart F of 20 CFR Part 416).

(b) It will be a separate check from the regular SSI benefit check.

(c) We will not make energy assistance payments to home energy suppliers or to operators of subsidized or government-operated housing.

§ 260.303 Payment amounts and timing.

(a) A State may have us make payments in up to five different amounts (see Appendix C). The State must specify in the agreement one amount for each county or list of counties.

(b) A State can have us make energy assistance payments, based on SSI rolls, in any one or more of the months of December 1980, and January, February and March 1981. Each month's payment will be made only to individuals who, according to our automated records at the time we process the energy payment, have received an SSI payment for that month.

(c) The schedule of payments in paragraph (b) of this section is predicated upon our having sufficient advance notice from the State to complete our programming and validation. If upon notice by the State of its payment amounts we determine that insufficient lead time exists we will modify the schedule of payments as required and notify the State.

§ 260.304 Notices to households and States.

(a) We will enclose a general, State-wide notice of eligibility with our energy assistance payments to SSI households in each State.

(b) After making energy assistance payments for a State to its SSI households, we will give the State a tape showing whom we paid, when, how much, and the basis for paying that amount. The tape will be in the same format as the State Data Exchange (SDX) records we give the States showing payments of SSI benefits.

§ 260.306 Appeals.

The State must assume the responsibility for conducting a hearing for any dissatisfied SSI beneficiary receiving direct payments from us.

(a) We will forward to the State, for appropriate action, any complaints or appeals we receive about failure to receive a payment or about the amount of the payment. We will include all information we have relevant to the complaint or appeal.

(b) The State must provide a hearing under § 260.360 on request.

(c) If the State decides the household is entitled to a payment, or is entitled to a payment amount other than the amount it received or will receive from us, the State must make the payments.

§ 260.308 State's payment to Social Security Administration.

(a) For benefits to be paid by us, we will withhold from the State's allotment for energy assistance an amount agreed on with the State from which to make payments to SSI households. The amount withheld will include a margin of up to 7 percent for any errors in estimating the number of SSI households. When we have finished making our energy assistance payments to the State's SSI beneficiaries—

(1) We will pay the State any remaining part of the amount we withheld; or

(2) If the payments we made total more than we withheld, the State must pay us the difference.

(b) We will also withhold from the State's allotment our administrative costs caused by making energy assistance payments for the State.

§ 260.310 Screening out ineligible and preventing duplicate payments to households.

(a) To avoid payments to ineligible households and to households that are not vulnerable to rising energy costs and to avoid duplicate payments to households, we will screen out—

(1) The three groups excluded by the definition of SSI benefits in § 260.2;

(2) One member of eligible SSI couples;

(3) People who live in institutions or other living arrangements where they are not vulnerable to energy cost increases (as described in § 260.152), if the State is one whose supplements to SSI benefits we administer and the State tells us, at least 60 days before our first agreed processing date for the State's energy assistance payments, the State's data codes for living arrangements that we should screen out; and

(4) Other people who are on a list of individuals to screen out, which the

State gives us at least 14 days before our processing date in a form our computers can use. We will furnish States on request our requirements for the format of this tape. To make sure our computers can use the tape, we must have a test copy of the tape, listing some or all of the individuals to be excluded, at least 60 days before our agreed processing date.

(b) By a combination of giving us the items required under paragraphs (a) (3) and (4) of this section for us to screen our payments, and the State's screening its own payments against the record we provide of the payment we made, the State must, unless it has received a waiver under § 260.26, prevent—

(1) Duplicate payments; and

(2) Payments to households that are not vulnerable to energy cost increases.

§ 260.314 State use of SSI payment tapes.

(a) If a State wishes to make payments to SSI households itself rather than having us make them, we will give the State, upon request, a special SDX computer tape screened as in § 260.310(a). We will withhold our cost for providing this tape from the State's allotment.

(b) The tape will reflect SSI payment status for one or more of the months of December 1980, and January, February, and March 1981, at the State's option.

(c) The timetable for arranging for this service is the same as for our making the payments (§ 260.300).

Subpart K—Applications, Notices, and Hearings.

§ 260.350 Applications.

(a) Except as provided in paragraph (b) the State must require a member of an eligible household to file an application to establish eligibility for energy assistance.

(b) The State Plan may provide for automatic payments to categorically eligible households and to households containing one or more recipients under a State program in which the income eligibility limit is not more than the applicable lower living standard income level or for single person households, 125 percent of the CSA Poverty Income Guidelines, if, in determining eligibility for that State program, the State uses income verification standards and procedures consistent with those it uses for AFDC.

(c) Where an application is required, it must be written and must be signed under penalty of criminal prosecution if false information is knowingly given which results in a payment to which the applicant is not entitled.

(d) The State Plan must assure that everyone who wishes to apply for assistance is—

- (1) Given the opportunity to apply without delay;
- (2) Provided assistance, when needed, in completing the application form, or in obtaining required documentation; and
- (3) Informed of eligibility requirements and hearing rights under § 260.360.

(e) The State plan must provide that a decision shall be made promptly on applications pursuant to reasonable State-established time standards not in excess of 45 days after the application is received. The State plan must identify the time standard.

§ 260.352 Communication assistance for limited English-speaking proficiency and handicapped persons.

(a) The State plan must provide communication assistance as needed to serve persons with limited English-speaking proficiency.

(b) If the agency that receives applications serves an area that contains a substantial number of eligible households with limited English-speaking proficiency, who speak the same language and who are or may be eligible for assistance, the agency must provide—

- (1) Assistance in communication through bilingual staff;
- (2) Application forms and literature in the appropriate language;
- (3) A translation of the notices required in § 260.358 in the appropriate language and a statement that bilingual services are available; and
- (4) A statement on the notice in the appropriate language explaining the purpose of the notice and a telephone number to call for more information and bilingual assistance.

(c) The agency must provide communication assistance, as needed, to insure that persons with impaired hearing, vision or speech or who are illiterate can learn about the program, know their appeal rights and understand what is needed to determine eligibility. Communication assistance must include helping the individual understand notices and forms, complete forms and obtain necessary information. Assistance may include taped material, material in braille or very large type, use of sign language and other communication aids.

(d) The agency must provide individuals who are illiterate or handicapped with help in applying for assistance and in establishing eligibility.

§ 260.354 Criminal penalties for false information.

Anyone who violates the provisions of the Act or who knowingly provides false information in any report required under it must be fined not more than \$10,000 or imprisoned not more than five years or both.

§ 260.358 Notices.

The State Plan must assure that—

(a) When the State makes its payment (or, in cases of multiple payments, its first payment) to a household, the State will notify the household of the amount and duration of the household's payments.

(b) The State will send a notice to any household whose application for a payment is denied or whose amount or duration of payments will be less than indicated in the notice under paragraph (a) of this section. The notice must state the reason for the denial or for the decrease in amount or duration.

(c) The notice required in paragraphs (a) and (b) of this section will describe the household's hearing rights under § 260.360.

§ 260.360 Fair hearing for dissatisfied household.

(a) The State plan must provide the opportunity for a fair hearing before the State agency to any household whose—

- (1) Application is denied;
- (2) Application is neither approved nor denied within the time specified under § 260.350(e), unless the delay was caused by the household's lack of cooperation in providing necessary and reasonable evidence;
- (3) Payment is less than the household believes it should be; or
- (4) Payments will be made in a lesser amount or duration than the household was notified earlier.

(b) The hearing must meet the following standards—

- (1) It must be held in a place reasonably convenient and accessible to the claimant;
- (2) The claimant must have a chance before the hearing to review the case file and any written evidence that will be used in the hearing;
- (3) The hearing officer must be a State employee not involved in the decision being appealed;
- (4) The claimant must have the right to—

- (i) Bring to the hearing a representative of his or her choice;
 - (ii) Present oral and written statements and other evidence;
 - (iii) Have witnesses subpoenaed;
 - (iv) Cross-examine witnesses; and
 - (v) Bring an interpreter if needed;
- (5) Testimony must be under oath; and

(6) The hearing must be recorded and the decision must be based on the record.

(c) The State may provide a preliminary appeal step, either as an evidentiary hearing before a local agency or as an informal conference, or both, to try to resolve the issue before conducting a State agency hearing.

(d) The State plan must observe the following time limits for hearings—

(1) The State may require that a hearing be requested within a fixed time period after notice of payment, notice of denial or notice of decreased payment amount or duration, but that time must be at least—

- (i) 60 days after sending notice of payment or denial; and
- (ii) 10 days after sending notice of decreased payment amount or duration.

(2) If a claimant requests a hearing within the time limit allowed, the hearing must be held, a decision issued, and action to carry out the decision taken—

- (i) Within 30 days after the request, regardless of whether the State provides a preliminary appeal step, if denial, delay or payment amount is the issue; or
- (ii) Before decreasing or stopping payments, if that is the issue.

(e) The State must assure that funds are available to pay successful appeals.

Appendix A—Lower Living Standard Income Levels

The lower living standard income level varies by location and size of household. First, on Table 1 find the Standard Metropolitan Statistical Area (SMSA) or non-SMSA area for which you want the living standard. That gives the living standard for a household of 4. To find the income level for a household of other than 4, identify the line in Table 2 which contains, in the column for a household size of 4, the standard you found in Table 1. Then track across that line to the desired household size column. Table 3 contains the appropriate figures for single person households.

Table 1.—Household of 4

A. Northeastern States (Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont) and Virgin Islands

| | |
|--------------------|----------|
| Boston SMSA..... | \$13,620 |
| New York SMSA..... | 12,950 |
| Other SMSA's..... | 12,880 |
| Non-SMSA..... | 12,420 |

B. North Central States (Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Wisconsin)

| | |
|--------------------------------|----------|
| Chicago SMSA..... | \$12,890 |
| Milwaukee SMSA..... | 12,690 |
| Minneapolis-St. Paul SMSA..... | 12,790 |
| Other SMSA's..... | 12,600 |
| Non-SMSA..... | 12,240 |

Table 1.—Household of 4—Continued

| | |
|---|----------|
| C. Southern States (Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia), American Samoa, Northern Marianas, Puerto Rico, and Trust Territory of Pacific Islands | |
| Baltimore SMSA | \$12,770 |
| Houston SMSA | 12,100 |
| Washington, D.C.-Maryland-Virginia SMSA | 13,630 |
| Other SMSA's | 11,960 |
| Non-SMSA | 11,180 |
| D. Western States (Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming) | |
| Los Angeles-Long Beach SMSA | \$13,400 |
| San Francisco-Oakland SMSA | 13,910 |
| Seattle-Everett SMSA | 13,910 |
| Other SMSA's | 13,240 |
| Non-SMSA | 13,540 |
| E. Alaska | |
| Anchorage SMSA | \$19,690 |
| Non-SMSA | 18,510 |
| F. Hawaii and Guam | |
| Honolulu SMSA | \$16,510 |
| Non-SMSA | 15,520 |

Table 2.—Adjustment of Lower Living Standard Income Level by Household Size

| 1 | 2 | 3 | 4 | 5 | 6 ¹ |
|---------|---------|---------|----------|--------|----------------|
| \$4,020 | \$6,600 | \$9,060 | \$11,180 | 13,190 | 15,430 |
| 4,310 | 7,060 | 9,690 | 11,960 | 14,110 | 16,500 |
| 4,360 | 7,140 | 9,800 | 12,100 | 14,280 | 16,700 |
| 4,410 | 7,220 | 9,910 | 12,240 | 14,440 | 16,890 |
| 4,470 | 7,330 | 10,060 | 12,420 | 14,660 | 17,140 |
| 4,540 | 7,430 | 10,210 | 12,600 | 14,870 | 17,390 |
| 4,570 | 7,490 | 10,280 | 12,690 | 14,970 | 17,510 |
| 4,600 | 7,530 | 10,340 | 12,770 | 15,070 | 17,620 |
| 4,600 | 7,550 | 10,360 | 12,790 | 15,090 | 17,650 |
| 4,640 | 7,600 | 10,430 | 12,880 | 15,200 | 17,770 |
| 4,640 | 7,610 | 10,440 | 12,890 | 15,210 | 17,790 |
| 4,660 | 7,640 | 10,490 | 12,950 | 15,280 | 17,870 |
| 4,770 | 7,810 | 10,720 | 13,240 | 15,620 | 18,270 |
| 4,820 | 7,910 | 10,850 | 13,400 | 15,810 | 18,490 |
| 4,870 | 7,990 | 10,970 | 13,540 | 15,980 | 18,690 |
| 4,900 | 8,040 | 11,030 | 13,620 | 16,070 | 18,800 |
| 4,910 | 8,040 | 11,040 | 13,630 | 16,080 | 18,810 |
| 5,010 | 8,210 | 11,270 | 13,910 | 16,410 | 19,200 |
| 5,590 | 9,160 | 12,570 | 15,520 | 18,310 | 21,420 |
| 5,940 | 9,740 | 13,370 | 16,510 | 19,480 | 22,780 |
| 6,660 | 10,920 | 14,990 | 18,510 | 21,840 | 25,540 |
| 7,090 | 11,620 | 15,950 | 19,690 | 23,230 | 27,170 |

¹ For each household member over 6 persons, add to the 6-person level an amount equal to the difference between the 6-person level and the 5-person level.

Source: Department of Labor, Employment and Training Administration, Office of Comprehensive Employment Development.

Table 3.—1980 Community Services Administration Poverty Income Guidelines for One Person Households

| Location | Amount | |
|---|---------|---------|
| | Nonfarm | Farm |
| All States (except Hawaii and Alaska) | \$4,738 | \$4,063 |
| Alaska | 5,950 | 5,113 |
| Hawaii | 5,463 | 4,700 |

Source: Community Services Administration Final Rule on funding requirements for fiscal year 1981 crisis intervention program, FEDERAL REGISTER Vol. 45, No. 173, September 4, 1980, P. 58539.

APPENDIX B—General Administrative Requirements for the Low Income Energy Assistance Program

A. Single State Agency Responsibility

The single State agency designated to administer the State's low income energy assistance program under P.L. 96-223, accepts responsibility for the administration of the program. This includes responsibility for eligibility and administrative policy, and for operational procedures, including:

1. outreach;
2. intake process;
3. methods of eligibility determination;
4. maintenance of adequate records supporting the eligibility decisions, including a consideration of income and energy cost increases;
5. method of payment or issuance of vouchers and cash flow;
6. the accounting system;
7. procedures for monitoring agency performance;
8. staffing and plans for staff training related to the energy program;
9. procedures for handling complaints and review process; and
10. remedial methods for correction of errors.

The State agency must administer the program in accordance with the requirements of section 260.50 of these regulations and 45 CFR 74.

B. Agency Delegation

If the single State agency uses one or more other agencies to perform any operational function of the Energy program, the agencies must enter into an agreement which must specify, at a minimum—

1. the division of responsibility among or between the agencies;
2. the manner in which the single State agency retains control and supervision of the program with respect to—
 - a. eligibility policy;
 - b. operational implementation;
 - c. payment process and methods of reporting;
 - d. recording and accounting procedures;
 - e. monitoring of agency performance;
 - f. handling of complaints and review processes including fair hearings;
 - g. staffing and staff training plans;
 - h. administrative cost reimbursement; and
 - i. benefit calculations.

The agreement must also specify remedial methods for the correction of administrative errors, if the agency or agencies providing operational support fail(s) to carry out the provisions of the agreements.

Agreements entered into must be submitted to us as an attachment to their State Plan and are subject to review and approval by us.

C. Expenditures Not Reimbursable Under the Energy Assistance Program.

The following expenditures are not subject to Federal reimbursement and must not be claimed—

1. Energy assistance payments to or on behalf of households not meeting the eligibility and payment requirements under the State plan;
2. Tax credits which are not in accordance with the State plan;

3. Any portion of an energy assistance payment which exceeds the amount set forth in the State plan;

4. Allowable administration and planning costs in excess of the limitations in 45 CFR 260.84;

5. Allowable assistance payments, tax credits, and administration and planning costs in excess of the amount we allot to the State;

6. Administrative costs which do not meet the requirements of 45 CFR 74

(Administration of grants), 45 CFR 205.150 (Cost allocation), and 45 CFR 205.160 (Non-expendable personal property);

7. Expenditures for energy delivered or furnished after September 30, 1981; and

8. Any expenditures which are not in accordance with the approved State plan.

We will determine the allowability of costs claimed for reimbursement under the energy assistance program. A State may appeal our determination that expenditures are not reimbursable under the energy assistance program. We will establish procedures for such appeals.

D. Allowable Administrative Costs

The following rules will apply with respect to allowable administrative cost:

(1) Costs of planning and administration charged to the energy assistance program must be claimed in accordance with 45 CFR 205.150 (Cost Allocation), 45 CFR 205.160 (Non Expendable Personal Property) and the appropriate cost principles in 45 CFR 74 Subpart Q.

(2) Specifically, 45 CFR 74.171 applies to State and Local governments and Indian tribes and Councils. 45 CFR 74.174 applies to nonprofit organizations.

(3) We will not reimburse costs associated with the State or local agency's ongoing activities—e.g., eligibility determination, redeterminations or case maintenance for any program other than the energy assistance program.

(4) Where cognizance for approving cost allocation plans is other than HHS, State agencies are responsible for filing an amended cost allocation plan with the cognizant Federal agency.

(5) The Director, Division of Cost Allocation in the appropriate Health and Human Services regional office may be called upon for assistance in obtaining approval of a cost allocation plan and/or indirect cost rate.

E. Standards for Financial Management Systems

For the standards that financial management systems must meet see 45 CFR 74, Subpart H.

F. Requirements for Record Retention and Access

For requirements on retaining records and providing Federal access to records see 45 CFR 74, Subpart D.

G. Refunds and Recovery of Erroneous Payments

Whenever a State recovers a payment or receives refund of a payment in which there was Federal financial participation, the Federal funds must be returned.

H. Safeguarding of Information

The use or disclosure of information concerning applicants and recipients of the energy assistance program will be limited to purposes directly connected to the administration of assistance programs as provided in 45 CFR 205.50 (Safeguarding information).

I. Unused Funds

Grant authority not used under the State's plan shall be withdrawn. We will issue a decreasing adjustment for the amount of any authority withdrawn. Funds drawn by the State in excess of the adjusted grant authority shall be recovered from the State in accordance with 45 CFR 74.112.

J. Personnel Standards

The State must comply with 5 CFR, Part 900 and 45 CFR 235.50 governing merit system, equal opportunity, affirmative action, protection of civil rights and provision for the handicapped.

Appendix C—Guidelines for Varying Payment Amounts

1. Payment Variations

The purpose of this appendix is to give States guidance on reasonable payment variations and to provide examples of reasonable standards.

Under § 260.154, States must consider average home energy expenditure in computing benefit amounts. Where actual expenditure data are not available, heating degree day data for the area cost by type of energy source and any other relevant data may be substituted.

With regard to heating degree day variations, we believe it is reasonable to establish a separate category for each region of the State which experiences a difference of 500 degree days or more. Therefore, if the 6 Northern counties of State X average 525 heating degree days more than the 10 Southern counties of the same State, the State should set up two regions for purposes of payment under its energy assistance program.

In the same example, if a variation in the average costs of different fuel types exists in that State, a payment variation by fuel types should be built into the program. For example, if the cost of fuel oil is 30% higher than the cost of gas and the cost of gas is 25% higher than the cost of electricity, the State should establish three different payment categories by fuel type. In addition, significant variation in the cost of a single fuel type by Region would also warrant separate payment categories. In each case, it is reasonable to consider a 20% or greater variation in average costs to be significant enough to warrant a different payment amount category.

If less than about 5% of the population uses a specific fuel type, a separate payment category may not be necessary. If in the same State, for example, the cost of wood is 30% less than the cost of electricity, but only 2% of the population uses wood, the State may want to place wood users in the nearest payment category (in this case, electricity) rather than create a separate payment category for wood as a fuel type.

Another requirement under § 260.154 is that the highest level of benefits must go to those with the lowest incomes and highest energy burden. If the highest benefit goes to the lowest income families in each climate region for each fuel type, the payments will reflect the proportional burden of energy cost in relation to need. Income ranges by dollar amount or by percentages of the lower living standard would both be reasonable measures of income variation.

If State X, in the example above, chooses to use dollar income ranges, its payment variations could be set according to a chart like Chart 1:

Chart 1

| Income | Fuel oil | | Gas | | Electricity | |
|-------------------------|----------|----|-----|----|-------------|----|
| | I | II | I | II | I | II |
| Under \$3,000..... | | | | | | |
| \$3,001 to \$6,000..... | | | | | | |
| \$6,001 to \$9,000..... | | | | | | |
| Over \$9,000..... | | | | | | |

Actual payment amounts could then be set based on estimates for fuel cost by type and region, or by variations on a base benefit amount. The boxes in Chart 1 would either contain payment amounts or multipliers to be applied against a base benefit, and would reflect the differences in the burden attributable to each category of household. It should be noted that no household may receive more than \$750 under this program, unless this restriction is waived by the Secretary.

Other variables for payment categories may be desired to reflect other energy cost variations—such as size of dwelling or size of family—if the State wishes.

Households which pay undesignated portions of their rent may be either an additional payment category in the chart developed by the State, or could be accommodated with another chart. This will apply to the categorical automatic payment example described below as well.

2. Categorical Automatic Payments

Chart 1 above is most practical in a program which pays benefits upon case-by-case applications. If a State makes automatic payments to categorically eligible households, however, it may not be able to vary those automatic payments by all of the factors in that chart. It might use one of the following alternative methods of payment for serving those households categorically eligible.

The benefit level for automatic payments to categorically eligible households might be based only on household income and heating degree days for the climatic zone in which the household is located. This information is readily available. Additional variations could be used if additional information is solicited from categorically eligible households on such items as fuel type or actual energy expenditures.

For example, if State Y has the same two climatic zones as State X above, but for reasons of administrative efficiency or other reasons chooses to make automatic payments

to categorical recipients, its payment chart constructed from known information could be as illustrated in Chart 2:

Chart 2

| Income | Climatic | |
|-------------------------|----------|-----------|
| | Region I | Region II |
| Under \$3,000..... | | |
| \$3,001 to \$6,000..... | | |
| \$6,001 to \$9,000..... | | |
| Over \$9,001..... | | |

Since this payment chart reflects only some of the factors used in identifying the burden of energy costs, the State must establish an additional payment mechanism to reflect variations in fuel burdens as well. One way to do this would be for the State to base the payments in Chart 2 on the least expensive fuel type used in State Y. The State could refer categorically eligible households to an agency responsible for acting on energy assistance applications for income eligible households under the State's plan. An application for additional assistance, up to the payment level set for the appropriate fuel type, or according to other variables the State may set, would then be processed.

If a State did not wish to, or was unable to, vary the automatic payment by income or Region, a flat payment for the smallest amount in the State's plan could be sent to categorically eligible households. Additional assistance would then have to be made available based on the other variables (such as income fuel type and climate) in order to reflect the burden of energy costs. This amount could be available through an application or by a vendor line of credit.

In a variation of the above example, if a State makes an automatic payment to SSI recipients (administered either by us or the State), it may choose to send either a flat amount or an amount only varied by climatic region to all SSI recipients. To meet the other priorities of the Act, additional assistance must also be made available based on variables such as income and cost of energy by fuel type. However, in the case of SSI, and in other instances where income ranges for recipients may be very narrow, an income variation may not be necessary.

Under all payment approaches, all households not vulnerable to energy costs must be screened out. Under an application program this can readily be done as part of the application process; with automatic payments it is the responsibility of the State to achieve this screen, collecting whatever data are necessary prior to making payments.

We believe the guidelines discussed in this appendix (i.e., 500 degree day difference in determining regions, 20% variation in cost of fuel type used by at least 5% of the population) are reasonable standards for establishing payment categories. If the State can justify different standards for creating payment categories, it may do so.

Appendix D—Guidelines for Households Not Vulnerable to Energy Cost Increases

Payments may not be made to households that are not vulnerable to energy cost increases. This will require that States screen applicants to determine those who are not

vulnerable for rising energy costs. This screen will have to be made prior to sending out payments on behalf of a State to SSI recipients, prior to any automatic payments that may be sent out by the State, and at the time of application for other households under the State plan.

In order to assist the State in this screening process we have developed the following list that gives examples of households that may not be vulnerable to energy cost increases. These examples are not an all inclusive list, but should give some guidance about what living arrangements to look for in screening for energy vulnerability.

(1) Residents of some public housing projects;

(2) Residents of some rent-controlled housing;

(3) SSI recipients living in "congregate" care or "domiciliary" care facilities or foster care placements who receive SSI State supplements which correspond to these living arrangements; and

(4) Others in public or private institutions whose living costs are subsidized by State or local governments. Examples of such individuals include, but are not limited to:

(i) resident of vocational education facilities whose living costs are subsidized; and

(ii) persons in nursing homes or medical institutions for whom Medicaid pays over 50% of costs.

(5) Residents of group living facilities who share the burden of energy cost increases. These residents must be screened to prevent payments that total more than the amount for a similarly situated household. Payments can be set lower since residents are only partially vulnerable for energy costs.

Dated: September 25, 1980.

William J. Driver,

Commissioner of Social Security.

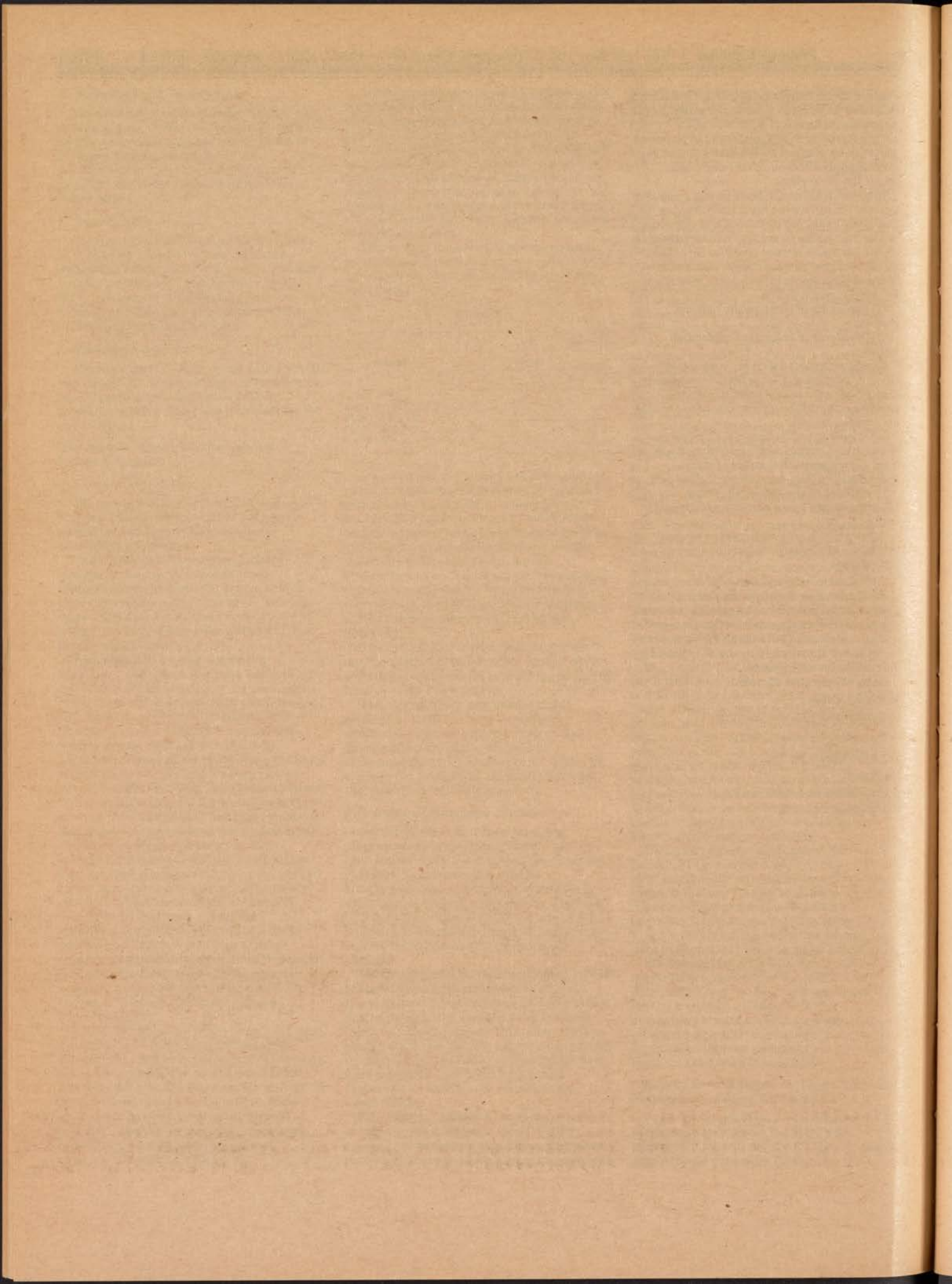
Approved: October 2, 1980.

Patricia Roberts Harris,

Secretary.

[FR Doc. 80-31091 Filed 10-6-80; 8:45 am]

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federal register

Tuesday
October 7, 1980

Part VIII

Department of Labor

Office of the Secretary

**Nondiscrimination on the Basis of
Handicap in Programs and Activities
Receiving or Benefiting From Federal
Financial Assistance**

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 32

Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance

AGENCY: Department of Labor.

ACTION: Final rule.

SUMMARY: These regulations implement Department of Labor requirements under section 504 of the Rehabilitation Act of 1973, as amended, and the Department of Health, Education, and Welfare's rules for Federal agency regulations under section 504, 45 CFR Part 85, published January 13, 1978 (43 FR 2132). The regulations prohibit discrimination against qualified handicapped individuals in programs receiving or benefiting from Federal financial assistance from the Department of Labor.

EFFECTIVE DATE: November 6, 1980.

FOR FURTHER INFORMATION CONTACT: Fredrick A. Drayton, Division of Equal Employment Opportunity, Employment and Training Administration, 601 "D" Street, N.W., Washington, D.C. 20210, Telephone (202) 376-6743.

SUPPLEMENTARY INFORMATION: These regulations were published for notice and comment on January 4, 1980 (45 FR 1392). Over 100 comments were received from organizations representing the handicapped, state agencies, private corporations, government officials and private individuals. These comments have been carefully reviewed and the following is a summary of the significant comments received and the action taken by the Department of Labor.

Some commenters expressed concern over differences between HEW's guideline regulations (45 CFR Part 85) and these regulations. However, under Executive Order 11914 (April 28, 1976) delegating lead agency authority for section 504 to HEW, the President required HEW to assure that the rules, regulations and orders which it adopted would not be inconsistent with or duplicative of policies adopted by other Federal agencies relating to the handicapped, including those adopted in accordance with section 503 of the Rehabilitation Act of 1973, as amended, (E.O. 11914, Section 2.) Thus, the policies already adopted in the Department of Labor regulations under section 503 were to be taken into consideration by HEW in framing its 504 regulations. In drafting the Department of Labor regulations under Section 504 it was of

primary importance that recipients of Federal financial assistance from the Department of Labor who are also government contractors under section 503 of the Act be subject to consistent requirements under both programs, as intended by Executive Order 11914. Therefore, as explained more fully below, the Department of Labor has modified some of the provisions of HEW's 504 regulations to take into account experience with the 503 regulations.

An extensive series of meetings was held between the Department of Labor, the Equal Employment Opportunity Commission (in its interagency coordination role under Executive Order 12067) and HEW (and its successor agencies Department of Health and Human Services and Department of Education). All of the agencies are agreed that the regulations published today come within the guidelines established by HEW and will effectively implement section 504.

Where appropriate, amendments will be made in the 503 regulations to conform them to these 504 regulations in the near future. As a first step, however, these regulations adopt a provision in proposed regulations published by the Office of Federal Contract Compliance Programs on December 28, 1979 (44 FR 77010) amending 41 CFR 60-1.9. That proposal would give labor unions greater opportunity to participate in the enforcement process.

A new section (c) has been added to the definition of "qualified handicapped individual" for purposes of DOL-funded employment related training programs. Many of these programs actually involve employment or activities similar to employment (e.g., on-the-job training, classroom job skills training). This definition therefore makes it clear that recipients have the obligation to make reasonable accommodation for participants who meet the eligibility requirements for the program. A recipient is not relieved of its obligation to make its facilities physically accessible under subpart C, however, by this reasonable accommodation requirement.

In addition, the phrase "essential functions of the job" has been added to the definition to clarify the reasonable accommodation requirement. Although it is not intended to require employers to conduct a formal job analysis for each job, addition of this phrase obligates employers to give careful consideration to reassignment of specific duties which a handicapped person cannot perform and making other appropriate accommodations with respect to job

functions which cannot reasonably be reassigned.

In applying the definition of qualified handicapped individual, contractors should be aware that the standards used to determine whether an individual is capable of safely and adequately performing the job shall be applied equally to all applicants and employees.

A definition of reasonable accommodation for employment and employment related job training programs has been added to provide additional guidance on the scope of the obligations. However, it is made clear that the duty to accommodate is separate from the obligation to make facilities physically accessible to the mobility impaired, as required in subpart C, and to provide auxiliary aids as required under § 32.3(b)(7). There was some confusion in the proposal between the requirement that employers and employment related training programs make reasonable accommodations, and the obligation to make programs accessible under subpart C. The program accessibility requirement under subpart C is directed at making the facilities where a program is conducted physically accessible to the mobility impaired. Reasonable accommodation in the employment and training context requires modifications and adjustments tailored to specific handicapped individuals in response to their particular needs. However, in providing services under this part all recipients have an obligation to provide nonpersonal auxiliary aids such as taped texts for the blind and interpreters or other methods of communication for the hearing-impaired. Thus, for example, in HEW's 504 regulation for its own programs, there are specific provisions on the availability of auxiliary aids (45 CFR 84.44(d) and 45 CFR 84.52(d)). Therefore, § 32.4(b)(7) has been rewritten to clarify this obligation. In the case of employment and employment-related training programs, the obligation to provide auxiliary aids is limited to the intake, assessment and referral process. This section includes a provision that each program, when viewed in its entirety, must make auxiliary aids readily available.

Some commenters noted the difference in the definition of handicapped individual in Section 504 and the CETA regulations, 20 CFR 675.4. These distinctions are necessary because the CETA regulations define handicapped persons for purposes of assuring their inclusion in CETA training and employment programs and to meet the handicapped affirmative action requirements of CETA, whereas

the statutory definition used for section 504 describes those persons protected from unlawful discrimination and entitled to file complaints.

A definition of "small recipient" has been added to clarify how small recipients are determined in those situations where they are not obligated to meet the same requirements as large recipients.

A number of commenters pointed out that the proposal was unclear as to whether the provisions in subpart B on employment were also applicable to employment related training programs. They recommended that subpart B be made clearly applicable to such programs. Accordingly, the heading and some of the language in subpart B was revised to reflect the fact that many DOL funded programs and activities are employment related training, and that the requirements of subpart B which are applicable to recipients' employees are also applicable to the participants in those employment related training programs.

Some comments expressed concern that the limitations on pre-employment inquiries in § 32.15 would impair the ability of certain recipients to recruit and serve targeted groups. However, programs such as CETA and the Employment Service may, in order to meet their eligibility verification, specialized services, affirmative action, and reporting responsibilities continue to make inquiry as to whether an applicant for service or employment is handicapped, as long as the conditions in § 32.15(b) (1) and (2) are met.

Many commenters representing both employers and handicapped groups objected to the use of physicians to determine whether applicants were capable of performing particular jobs, as required in § 32.15(c)(2). We agree with the commenters that physicians do not necessarily have sufficient knowledge about particular job duties to determine whether an individual is or is not qualified. Therefore § 32.15(c)(2) has been revised to spell out that the physician's role is to make an assessment of the employee's or applicant's functional abilities and limitations (i.e. no lifting over 30 pounds; 25 per cent reduction in peripheral vision) rather than to determine whether or not he or she should be hired or placed. The physician may advise and assist the placement officers, but actual decisions on suitability for jobs must be made by persons capable of evaluating physical or mental demands of particular jobs and matching applicants with appropriate jobs based upon those assessments.

Although the Department of Labor recognizes that the provisions of § 32.15 on the use of pre-employment medical examinations differ somewhat from the HEW guidelines, the Department thinks these differences are appropriate to the particular circumstances involved in Labor Department grant programs. In enforcing this section, the Department of Labor will be guided by the principle embodied in the HEW guidelines that the use of pre-employment medical examinations should be circumscribed as much as possible. By permitting the use of pre-employment medical examinations, the Department of Labor's intent is not to encourage the use of such examinations. Rather, the procedures regulating the use of pre-employment medical examinations have been included in recognition of the fact that many large employers participating in employment and training programs, such as the Private Sector Initiatives Program and On-the-Job Training programs have regularly used such examinations to meet their needs for maintaining a job ready pool of applicants. For these types of employers who have normally used pre-employment medical examinations, it is recognized that to prohibit their use may significantly disrupt their employment procedures and could reduce the number which participate in employment and training programs. The end result could be a reduction in job and training opportunities for the handicapped.

Because the pre-employment medical examination is a point in the screening process that is particularly susceptible to discrimination against the handicapped, the Department of Labor will scrutinize the practices of employers utilizing pre-employment medical examinations. In particular, the practices of employers which have not traditionally used such exams but institute them for the first time now will be closely examined to ensure that the requirements of this regulation are being carefully followed.

In recognition of the particular circumstances of Department of Labor program, we think it is appropriate to provide for a different approach from that of HEW, whose regulations cover recipients with different employment practices from most DOL recipients. Recipients should note carefully however the procedural safeguards on the use of pre-employment medical examinations in § 32.15, as well as the requirement that the burden is on the employer to demonstrate that those safeguards have been met) § 32.15(c)).

It is important to note that the purpose of conducting a medical examination,

under the conditions in § 32.15, must be to determine an individual's current physical or mental ability, not to speculate the long term possibility that the condition will progress or lead to inability to work. Thus, although an employer can consider disqualifying a person because his handicap creates a substantial risk of imminent injury, disqualification based on speculation about the risk of injury or speculation about inability to work at some imprecise time in the future is not permissible.

There was some confusion in the comments about whether an employer which hires a veteran who is a receiving veteran's benefits, or hires a person who is a participant in a CETA program is covered by section 504. A distinction must be made between hiring a veteran or other individual who receives benefits from the government, no portion of which flows to the employer, and hiring or providing training to an individual under a CETA program in which the employer is reimbursed for portion of the individual's wages or the cost of the training. In the first case, section 504 does not apply, but in the second situation the employer is covered by section 504 because the employer is receiving Federal financial assistance in the form of the reimbursement payments. Language in the regulatory analysis on the meaning of the term "recipient" which may have caused some confusion has been rewritten. Similarly, registration of apprenticeship programs by the Bureau of Apprenticeship and Training or a recognized state agency under 29 CFR Part 29 does not constitute Federal financial assistance covered by section 504.

Some commenters objected to these regulations setting standards for employment in DOL-funded programs. They asserted that the Department's authority was limited to regulating discrimination in the provision of DOL-funded services under the principles set forth in *Trageser v. Libby Rehabilitation Center, Inc.* 590 F.2d 87, (4th Cir. 1978.) cert. den. 47 U.S.L.W. 3814. In *Trageser* the court held that an individual did not have a private right of action for employment discrimination under section 505 of the Act. That section, added in 1978, created a private right of action for individuals aggrieved under section 504 through the remedies, procedures and rights in Title VI of the Civil Rights Act of 1964. Because Title VI contains a limitation on coverage of employment practices, the court in *Trageser* held the same restriction

applicable in private actions under section 504.

We think the court's reasoning in *Trageser* was faulty and in any event applies only to private actions, not the government's enforcement authority. The fact that the regulations cross reference the Title VI enforcement procedures § 32.47 does not imply that the limitation on coverage of employment in Title VI is applicable to section 504. The Senate Committee on Labor and Human Resources, in its report on S. 446, a bill to amend Title VII of the Civil Right Act of 1964, emphatically rejected the *Trageser* decision as "not consistent with Congress' original and continuing intent that handicapped individuals be empowered to bring suit in Federal District Court for alleged employment discrimination in violation of Title V, regardless of the designated use of the Federal funds received by the employer in question." At least one court, the Northern District of California, has repudiated *Trageser* in *Hart v. County of Alameda*, 21 EPD 30, 418 (Sept. 6, 1979), holding that nothing in the legislative history supports the *Trageser* reasoning.

Some private employers and employer associations objected to the reasonable accommodation provision of the proposal, asserting that it imposed an affirmative action obligation in excess of the statutory authority under section 504. The Supreme Court, in *Southeastern Community College v. Davis*, 99 S.Ct 2361 (June 11, 1979) held that Section 504's prohibition against discrimination did not constitute an authorization for HEW to require recipients to take affirmative action. However, it added that the line between illegal discrimination and lawful refusal to take affirmative action will not always be clear. "Thus," the Court said, "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory." Therefore, the Supreme Court held that reasonable accommodations may be necessary where "an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program." 99 S. Ct 2361, 2370. The accommodation requirement of this regulation comes within the zone of permissible agency action under the *Davis* case.

Some commenters asked the Department to define the term "undue hardship" as used in § 32.13(c) regarding the duty to undertake reasonable accommodation. However, what

constitutes a hardship for one recipient may be relatively simple and inexpensive by comparison for another. Because what constitutes undue hardship must be evaluated on a case by case basis, there can be no single standard. The appendices to the regulation set forth some suggested forms of accommodation, but they are not included in the regulation itself because they may not be appropriate for all recipients in all circumstances.

Some commenters objected to the job restructuring provisions under appendix A as an element of reasonable accommodation. However, none of the suggestions in appendix A is mandatory. Appendix A describes various examples of steps which may be appropriate accommodations in some circumstances. It may be that other steps not described in appendix A will be more appropriate to meet individual needs of particular handicapped participants. Even if job restructuring would enable a qualified handicapped individual to perform the job or to participate in a training program, it may constitute an undue hardship in some cases, such as where there are too few employees on a shift to reassign duties. However, where job restructuring is appropriate, such as deleting the duty of a blind writer to proofread his own galleys, for example, it may be required if it does not constitute an undue hardship on the recipient.

Upon the recommendation of the Architectural and Transportation Barriers Compliance Board, § 32.28(c) had been changed to incorporate the accessibility standards for Federal and Federally-funded buildings issued by the General Services Administration under the Architectural Barriers Act rather than the American National Standards Institute (ANSI) standards. This will ensure consistent standards under the Rehabilitation Act and the Architectural Barriers Act, and will lead to greater architectural access because Federal regulations may be improved and amended with the development of more advanced engineering technology and architectural knowledge more easily than the ANSI standards. Moreover, if Federal funds are used to build or purchase facilities, parking lots or other structures, the Architectural Barriers Act will also apply to the recipients of Federal financial assistance so that it is important to apply consistent standards.

Several commenters expressed confusion as to which programs subpart C, Program Accessibility refers to, and who has responsibility for insuring compliance. In the proposed regulations the Department differentiated programs

available to CETA eligible individuals and stated that for Job Corps and small recipients, the prime sponsor shall insure compliance when these programs are "viewed in their entirety". For Classroom Training, Public Service Employment and Work Experience, the concept of "when viewed in its entirety" flowed-down to the subrecipient level. The Department, in reconsideration of this issue, is now treating all programs offered by a prime sponsor equally, so that the concept of "when viewed in the entirety" will be applied at the prime sponsor level to insure compliance with each CETA program including Job Corps. Similarly, accessibility can be most effectively insured when the responsibility for program accessibility rests with other primary recipients of Department of Labor financial assistance. References to small recipients shall remain the same as in the proposed regulations.

The responsibility for CETA programs at the state and local level rests with the prime sponsor and other primary recipients. The responsibility was originally placed there because these entities are in the best position to know their employment and training needs, and to be able to design services to meet those needs. The Department felt that the best method of preserving the integrity of the employment and training delivery system would be to make the prime sponsor and other primary recipients responsible for insuring that each of their programs, when viewed in their entirety, is accessible to the qualified mobility impaired individual. In order to evaluate compliance with 504, monitors will need to consider the prime sponsors' programs, and not the programs operated by 50,000 or more subrecipients.

The object of implementing the 504 regulations is to make the current level of employment and training opportunities available to more CETA eligibles. Implementation should not result in fewer training opportunities because deliverers drop out of the system. Prime sponsors and other primary recipients have the flexibility and the resources to make programs accessible. They have an overall view of their delivery system which places them in the best position to efficiently and economically deliver accessible programs to the mobility-impaired.

Some comments objected to the provision in § 32.44(c) that recipients may not deny access to information in an investigation by asserting privacy or confidentiality. They claimed that it violates protections against invasion of privacy particularly with respect to

medical records. However, access to all information relevant to an investigation of compliance with the Rehabilitation Act is fundamental for the government to carry out its obligation to enforce the Act. Medical information is among the primary material the government must review to determine compliance with a law which prohibits discrimination against the handicapped. Furthermore, no unwarranted invasion of privacy will be caused by providing access to the Department of Labor to this information. Information concerning an individual who has filed a complaint may not be disclosed without that person's consent under the Privacy Act of 1974 (5 U.S.C. 552a). To the extent that confidential information is obtained about other individuals which, if disclosed, would cause an unwarranted invasion of privacy, the government will exercise its discretion to withhold the information under the b(6) exemption in the Freedom of Information Act.

Signed at Washington, D.C., this 1st day of October 1980.

Ray Marshall,

Secretary, Department of Labor.

Charles B. Knapp,

Acting Assistant Secretary for Employment and Training Administration.

Donald Elisburg,

Assistant Secretary for Employment Standards Administration.

John Yuasa,

Acting Director, Office of Federal Contract Compliance Programs.

Title 29, Code of Federal Regulations is amended by adding a new Part 32 to read as follows:

PART 32—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

Subpart A—General Provisions

- Sec.
- 32.1 Purpose.
- 32.2 Application.
- 32.3 Definitions.
- 32.4 Discrimination prohibited.
- 32.5 Assurances required.
- 32.6 Remedial action, voluntary action, and self-evaluation.
- 32.7 Designation of responsible employee.
- 32.8 Notice.
- 32.9 Administrative requirements for small recipients.
- 32.10 Effect of State or local law or other requirements and effect of employment opportunities.
- 32.11 [Reserved.]

Subpart B—Employment Practices and Employment Related Training Program Participation

- 32.12 Discrimination prohibited.

- Sec.
- 32.13 Reasonable accommodation.
- 32.14 Job qualifications.
- 32.15 Preemployment inquiries.
- 32.16 Listing of employment openings.
- 32.17 Labor unions and recruiting and training agencies.
- 32.18-32.25 [Reserved.]

Subpart C—Program Accessibility

- 32.26 Discrimination prohibited.
- 32.27 Access to programs.
- 32.28 Architectural standards.
- 32.29-32.43 [Reserved.]

Subpart D—Procedures

- 32.44 Compliance information.
- 32.45 Investigations.
- 32.46 Procedure for effecting compliance.
- 32.47 Hearing practice and procedure.

Subpart E—Auxiliary Matters

- 32.48 Post-termination proceedings.
- 32.49 Recordkeeping.
- 32.50 Access to records.
- 32.51 Rulings and interpretations.
- Appendix A.

Authority: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 [29 U.S.C. 794]; Sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 [29 U.S.C. 706]; Section 119 and 122 of the Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, 92 Stat. 2955; Executive Order 11914, 41 FR 17871.

Subpart A—General Provisions

§ 32.1 Purpose.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap in any program or activity receiving or benefiting from Federal financial assistance. The purpose of this part is to implement section 504 with respect to programs and activities receiving or benefiting from Federal financial assistance from the Department of Labor.

§ 32.2 Application.

(a) This part applies to each recipient of Federal financial assistance from the Department of Labor, and every program or activity that receives or benefits from such assistance, but is limited to the particular program for which Federal financial assistance is provided.

(b) A government contractor covered by the provisions of section 503 of the Act shall be deemed in compliance with the employment provisions of these regulations if it is in compliance with 41 CFR Part 60-741 (as amended after publication of these regulations) with respect to Federal financial assistance from the Department of Labor.

§ 32.3 Definitions.

As used in this part, the term: "The Act" means the Rehabilitation Act of 1973, Public Law 93-112, as

amended by the Rehabilitation Act Amendments of 1974, Public Law 93-516, and by the Rehabilitation, Comprehensive Services, and Developmental Disabilities

Amendments of 1978, Public Law 95-602. "Assistant Secretary" means the Assistant Secretary for Employment and Training Administration or his or her designee.

"Applicant for assistance" means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

"Department" means the Department of Labor.

"Facility" means all or any portion of the buildings, structures, equipment, roads, walks, parking lots or other real or personal property or interest in such property which are utilized in the execution of the program for which Federal financial assistance is received.

"Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guarantee), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

- (a) Funds;
- (b) Services of Federal personnel; or
- (c) Real and personal property or any interest in or use of such property, including:

- (1) Transfers or leases of such property for less than fair market value or for reduced consideration; and
- (2) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

"Government" means the Government of the United States of America.

"Handicap" means any condition or characteristic that renders a person a handicapped individual as defined in this section.

"Handicapped individual"

(a) "Handicapped individual" means any person who

- (1) Has a physical or mental impairment which substantially limits one or more major life activities;
- (2) Has a record of such an impairment; or
- (3) Is regarded as having such an impairment.

(b) As used in the proceeding paragraph of this section, the phrase:

(1) "Physical or mental impairment" means

- (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including

speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine;

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(iii) The term "physical or mental impairment" includes but is not limited to such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) "Substantially limits" means the degree that the impairment affects an individual becoming a beneficiary of a program or activity receiving Federal financial assistance or affects an individual's employability. A handicapped individual who is likely to experience difficulty in securing or retaining benefits or in securing, or retaining, or advancing in employment would be considered substantially limited.

(3) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and receiving education or vocational training.

(4) "Has a record of such an impairment" means that the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more life activities.

(5) "Is regarded as having such an impairment" means that the individual

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (b)(1) of this section but is treated by a recipient as having such an impairment.

"Qualified handicapped individual" means: (a) with respect to employment, an individual with a handicap who is capable of performing the essential functions of the job or jobs for which he or she is being considered with reasonable accommodation to his or her handicap;

(b) With respect to services, a handicapped individual who meets eligibility requirements relevant to the

receipt of services provided in the program;

(c) With respect to employment and to employment related training programs, a handicapped individual who meets both the eligibility requirements for participation in the program and valid job or training qualifications with reasonable accommodation.

"Reasonable accommodation" means the changes and modifications which can be made in the structure of a job or employment and training program, or in the manner in which a job is performed or an employment and training program is conducted, unless it would impose an undue hardship on the operation of the recipient's program. Reasonable accommodation may include:

(a) Making the facilities used by the employees or participants in the area where the program is conducted, including common areas used by all employees or participants such as hallways, restrooms, cafeterias and lounges, readily accessible to and usable by handicapped persons, and

(b) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

"Recipient" means any state or its political subdivisions, any instrumentality of a State or its political subdivisions, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

"Secretary" means the Secretary of Labor, U.S. Department of Labor.

"Section 504" means section 504 of the Act.

"Small recipient" means a recipient who serves fewer than 15 beneficiaries, and employs fewer than 15 employees at all times during a grant year.

"United States" means the several states, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa and the Trust Territory of the Pacific Islands.

§ 32.4 Discrimination prohibited.

(a) *General.* No qualified handicapped individual shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

(b) Discriminatory actions prohibited.

(1) A recipient, in providing any aid, benefit, service or training, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped individual the opportunity to participate in or benefit from the aid, benefit, service or training;

(ii) Afford a qualified handicapped individual an opportunity to participate in or benefit from the aid, benefit, service or training that is not equal to that afforded others;

(iii) Provide a qualified handicapped individual with any aid, benefit, service or training that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped individuals or to any class of handicapped individuals unless such action is necessary to provide qualified handicapped individuals with aid, benefits, services or training that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped individual by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, service or training to beneficiaries of the recipient's program;

(vi) Deny a qualified handicapped individual the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped individual in enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, service or training.

(2) For purposes of this part, aid, benefits, services and training, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped individuals, but must afford handicapped individuals equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) A recipient may not deny a qualified handicapped individual the opportunity to participate in its regular programs or activities, despite the existence of separate or different programs or activities for the handicapped which are established in accordance with this Part.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified handicapped individuals to discrimination on the basis of handicap;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped individuals; or

(iii) That perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections.

(i) That have the effect of excluding handicapped individuals from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped individuals.

(6) As used in this section, the aid, benefit, service or training provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, service or training provided in or through a facility that has been constructed, expanded, altered, leased, rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(7)(i) In providing services under programs of Federal financial assistance, except for employment-related training, a recipient to which this subpart applies, except small recipients, shall ensure that no handicapped participant is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the program or activity operated by the recipient because of the absence of auxiliary aids for participants with impaired sensory, manual or speaking skills. In programs of employment and employment-related training, this paragraph shall apply only to the intake, assessment and referral services. A recipient shall operate each program or activity to which this subpart applies so that, when viewed in its entirety, auxiliary aids are readily available.

(ii) Auxiliary aids may include brailled and taped written materials, interpreters or other effective methods of making orally delivered information available to persons with hearing impairments, readers for persons with visual impairments, equipment adapted for use by persons with manual impairments, and other similar services

and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

(c) *Programs limited by Federal law.* The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute on Executive Order to handicapped individuals or the exclusion of a specific class of handicapped individuals from a program limited by Federal statute or Executive Order to a different class of handicapped individuals is not prohibited by this part.

(d) *Integrated setting.* Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped individuals.

(e) *Communications with individuals with impaired vision and hearing.* Recipients shall take appropriate steps to ensure that communications with their applicants, employees, and beneficiaries are available to persons with impaired vision and hearing.

§ 32.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Assistant Secretary, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended or the federally-funded program is operated, whichever is longer.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure

nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no Federal transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (c)(1) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security to finance construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Assistant Secretary may agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective. Such an agreement by the Assistant Secretary may be entered into only upon the request of the transferee (recipient) if it is necessary to accomplish such financing and upon such terms and conditions as the Assistant Secretary deems appropriate.

(d) *Interagency agreements.* Where funds are granted by the Department to another Federal agency to carry out a program under a law administered by the Department, and where the grant obligates the recipient agency to comply with the rules and regulations of the Department applicable to that grant the provisions of this part shall apply to programs and activities operated with such funds.

§ 32.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 of this part, the recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Assistant Secretary, where appropriate,

may require either or both recipients to take remedial action.

* (3) The Assistant Secretary may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action:

(i) With respect to handicapped individuals who would have been participants in the program had the discrimination not occurred; and

(ii) With respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when the discrimination occurred; and

(iii) With respect to employees and applicants for employment.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped individuals.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons who are selected by the recipient, including handicapped individuals or organizations representing handicapped individuals, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons who are selected by the recipient, including handicapped individuals or organizations representing handicapped individuals, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons who are selected by the recipient, including handicapped individuals or organizations representing handicapped individuals, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient, other than a small recipient, shall for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Assistant Secretary upon request:

(i) A list of the interested persons consulted;

(ii) A description of areas examined and any problems identified; and

(iii) A description of any modifications made and of any remedial steps taken.

§ 32.7 Designation of responsible employee.

A recipient, other than a small recipient shall designate at least one person to coordinate its efforts to comply with this part.

§ 32.8 Notice.

(a) A recipient, other than a small recipient, shall take appropriate initial and continuing steps to notify participants, beneficiaries, referral sources, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations which have collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of handicap in violation of section 504 and of this part. The notification shall state, where appropriate, that the recipient does not discriminate in the admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to § 32.7. A recipient shall make the initial notifications required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipient's publications, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 32.9 Administrative requirements for small recipients.

The Assistant Secretary may require any recipient that provides services to fewer than 15 beneficiaries or with fewer than 15 employees, or any class of such recipients, to comply with §§ 32.7 and 32.8, in whole or in part, when the Assistant Secretary finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 32.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped individuals to receive services, participate in programs or practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped individuals than for nonhandicapped persons.

§ 32.11 [Reserved]

Subpart B—Employment Practices and Employment Related Training Program Participation

§ 32.12 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped individual shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies. This subpart is applicable to employees and applicants for employment with all recipients and to participants in employment and training programs financed in whole or in part by Federal financial assistance.

(2) A recipient shall make all decisions concerning employment or training under any program or activity to which this subpart applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees or participants in any way that adversely affects their opportunities or status because of handicap.

(3) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants, employees or participants to discrimination prohibited by this subpart. The relationships referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment advertising, and the processing of applicants for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer,

layoff, termination, right of return from layoff and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer-sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(c) *Collective bargaining agreements.* Whenever a recipient's obligation to comply with this subpart and to correct discriminatory practices impacts on and/or necessitates changes in a term of a collective bargaining agreement(s) to which the recipient is a party, the recipient shall attempt to achieve compliance consistent with the provisions of § 32.17(a). However a recipient's obligation to comply with this subpart is not relieved by a term of any such collective bargaining agreement(s).

(d) *Compensation.* In offering employment or promotions to handicapped individuals, the recipient shall not reduce the amount of compensation offered because of any disability income, pension or other benefit the applicant or employee receives from other source.

§ 32.13 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant, employee or participant unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number of participants, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition

and structure of the recipient's workforce, and duration and type of training program; and

(3) The nature and cost of the accommodation needed.

(c) A recipient may not deny any employment or training opportunity to a qualified handicapped employee, applicant or participant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee, applicant or participant.

(d) Nothing in this paragraph shall relieve a recipient of its obligation to make its program accessible as required in subpart C of this Part, or to provide auxiliary aids, as required by § 32.4(b)(7).

§ 32.14 Job qualifications.

(a) The recipient shall provide for, and shall adhere to, a schedule for the review of the appropriateness of all job qualifications to ensure that to the extent job qualifications tend to exclude handicapped individuals because of their handicap, they are related to the performance of the job and are consistent with business necessity and safe performance.

(b) Whenever a recipient applies job qualifications in the selection of applicants, employees or participants for employment or training or other change in employment status such as promotion, demotion or training, which would tend to exclude handicapped individuals because of their handicap, the qualifications shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and safe performance. The recipient shall have the burden to demonstrate that it has complied with the requirements of this paragraph.

§ 32.15 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct preemployment medical examinations or make preemployment inquiry of an applicant for employment or training as to whether the applicant is a handicapped person or as to the nature or the severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination, when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally-assisted program or activity, or when a recipient is taking affirmative action

pursuant to section 503 of the Act, the recipient may invite applicants for employment or training to indicate whether and to what extent they are handicapped if:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally, if no written questionnaire is used, that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts.

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant, employee or participant to any adverse treatment, and that it will be used only in accordance with this part.

(c) An employer who routinely requires medical examinations as part of the employment selection process must demonstrate that each of the requirements of this subsection are met:

(1) The medical examination shall be performed by a physician qualified to make functional assessments of individuals in a form which will express residual capacity for work or training. Such an assessment does not require clinical determinations of disease or disability, but shall provide selecting or referring officials sufficient information regarding any functional limitations relevant to proper job placement or referral to appropriate training programs. Factors which may be assessed may include, for example, use of limbs and extremities, mobility and posture, endurance and energy expenditure, ability to withstand various working conditions and environments, use of senses and mental capacity;

(2) The results of the medical examination shall be specific and objective so as to be susceptible to review by independent medical evaluators and shall be transmitted to the applicant or employee at the same time as the employing official;

(3) The results of the medical examination shall not be used to screen out qualified applicants and employees but to determine proper placement and reasonable accommodation. The employing official using physical or mental information obtained pursuant to this section should be familiar with physical or mental activities involved in performing the job, and the working conditions and environment in which it is carried out. If the applicant is being considered for a variety of jobs having different requirements or skills, the employing official should make a functional assessment of the physical or

mental demands of the jobs in order to match the applicant with the most suitable vacancy;

(4) All of potential employees for the jobs are subjected to the medical examination;

(5) The procedures for using medical examinations or the medical information shall be constructed in such a manner that:

(i) A conditional job offer was made or the individual was conditionally placed in a job pool or conditionally placed on an eligibility list prior to the medical examination being performed; or

(ii) The results of the medical examination were considered by the employing official only after a conditional decision to make a job offer or the individual had been placed conditionally in a job pool or conditionally placed on an eligibility list; that is the medical results were the last factor evaluated by the employing officials before a final decision to make an offer of employment was made.

(6) Unless a conditional job offer is made prior to the medical examination, all potential employees for the job shall be informed at the time of the medical examination that:

(i) The results of the medical examination are the last factor evaluated by the employing official before a final decision to make an offer of employment is made, and

(ii) The medical examination results shall be transmitted to the employing official and the applicant only after a conditional decision to make a job offer has been made.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Employing officials may obtain the information after making a conditional decision to make a job offer to the applicant or the applicant was placed conditionally in a job pool or placed conditionally on an eligibility list.

(2) Supervisors and managers may be informed regarding restrictions on the work or duties of qualified handicapped persons and regarding necessary accommodations;

(3) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(4) Government officials investigating compliance with the Act shall be provided information upon request.

§ 32.16 Listing of employment openings.

Recipients should request State employment security agencies to refer qualified handicapped individuals for consideration for employment.

§ 32.17 Labor unions and recruiting and training agencies.

(a) The performance of a recipient's obligations under the nondiscrimination provisions of these regulations may necessitate a revision in a collective bargaining agreement(s). The policy of the Department of Labor is to use its best efforts, directly or through the recipients, subgrantees, local officials, vocational rehabilitation facilities, and other available instrumentalities, to cause any labor union, recruiting and training agency or other representative or workers who are or may be engaged in work under programs of Federal financial assistance to cooperate with, and to comply in the implementation of Section 504.

(b) To effectuate the purposes of paragraph (a) of this section, the Assistant Secretary may hold hearings, public or private, with respect to the practices and policies of any such labor union or recruiting and training agency.

(c) Whenever compliance with section 504 necessitates a revision of a collective bargaining agreement or otherwise significantly affects a substantial number of employees represented by the union, the collective bargaining representatives shall be given an opportunity to present their views to the Assistant Secretary.

(d) The Assistant Secretary may notify any Federal, State, or local agency of his/her conclusions and recommendations with respect to any such labor organization or recruiting and training agency which in his/her judgment has failed to cooperate with the Department of Labor, recipients, subgrantees or applicants in carrying out the purposes of section 504. The Assistant Secretary also may notify other appropriate Federal agencies when there is reason to believe that the practices of any such labor organization or agency violates other provisions of Federal law.

§§ 32.18-32.25 [Reserved]

Subpart C—Program Accessibility

§ 32.26 Discrimination prohibited.

No qualified handicapped individual shall, because a recipient's facilities are inaccessible to or unusable by handicapped individuals, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any

program or activity to which this Part applies.

§ 32.27 Access to programs.

(a) *Purpose.* A recipient shall operate each program or activity to which this Part applies so that the program or activity, when viewed in its entirety, is readily accessible to qualified handicapped individuals. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by qualified handicapped individuals. However, if a particular program is available in only one location, that site must be made accessible or the program must be made available at an alternative accessible site or sites. Program accessibility requires nonpersonal aids to make the program accessible to mobility impaired persons. Reasonable accommodations, as defined in § 32.3, are required for particular handicapped individuals in response to the specific limitations of their handicaps.

(b) *Scope and application.* (1) For the purpose of this subpart, prime sponsors under the Comprehensive Employment and Training Act and any other individual or organization which receives a grant directly from the Department to establish or operate any program or activity shall assure that the program or activity, including Public Service Employment, Work Experience, Classroom Training and On-the-Job-Training, when viewed in its entirety, is readily accessible to qualified handicapped individuals.

(2) *Job Corps.* All agencies, grantees, or contractors which screen or recruit applicants for the Job Corps shall comply with the nondiscrimination provisions of this Part. Each regional office of the Department of Labor's Employment and Training Administration which makes the decision on the assignment of a Job Corps applicant to a particular center may, where it finds, after consultation with the qualified handicapped person seeking Job Corps services, that there is no method of complying with § 32.27(a) at a particular Job Corps Center, other than by making a significant alteration in its existing facilities or in its training programs, assign that individual to another Job Corps Center which is accessible in accordance with this section and which is offering comparable training. The Job Corps, and each regional office of the Employment and Training Administration, shall assure that the Job Corps Program, when viewed in its entirety, is readily accessible to qualified handicapped individuals and that all future

construction, including improvements to existing Centers, be made accessible to the handicapped.

(3) If a small recipient finds, after consultation with a qualified handicapped person seeking its services, that there is no method of complying with § 32.27(a) other than making a significant alteration in its existing facilities or facility the recipient may, as an alternative, refer the qualified handicapped person to other providers of those services that are accessible.

(c) *Methods.* A recipient may comply with the requirement of § 32.27(a) through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 32.28, or any other method that results in making its program or activity accessible to handicapped individuals. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with § 32.27(a). In choosing among available methods for meeting the requirement of § 32.27(a), a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(d) *Time period.* A recipient shall comply with the requirements of § 32.27(a) within 60 days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any even as expeditiously as possible.

(e) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of § 32.27(a), a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including qualified handicapped individuals.

A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to qualified handicapped individuals;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full program

accessibility and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by qualified handicapped individuals.

§ 32.28 Architectural standards.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by qualified handicapped individuals, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by qualified handicapped individuals.

(c) *Standards for architectural accessibility.* Design, construction, or alteration of facilities under this subpart shall meet the most current standards for physical accessibility prescribed by the General Services Administration under the Architectural Barriers Act at 41 CFR § 101-19.6. Alternative standards may be adopted when it is clearly evident that equivalent or greater access to the facility or part of the facility is thereby provided.

§§ 32.29-32.43 [Reserved]

Subpart D—Procedures

§ 32.44 Compliance information.

(a) *Cooperation and assistance.* The Assistant Secretary shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the Assistant Secretary timely, complete and accurate compliance reports at such times, and in such form and containing

such information as the Assistant Secretary may determine to be necessary to enable him to ascertain whether the recipient had complied or is complying with this part. For example, recipients should have available for the Department data showing the extent to which known handicapped individuals are beneficiaries and participants in federally assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the Assistant Secretary during normal business hours to such of its books, records, accounts, and other sources of information and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information, the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from access to or copying of records or information, or from evaluating or seeking to enforce compliance with this part.

(d) *Posters and information.* The recipient will post in prominent locations (bulletin boards, time clock areas, etc.) posters designed and furnished by DOL outlining and summarizing the nondiscrimination requirements of section 504. The recipient also will make readily available information on Section 504 requirements with respect to compliance procedures, the rights of beneficiaries and employees through handbooks, pamphlets and other materials furnished by DOL.

§ 32.45 Investigations.

(a) *Periodic compliance reviews.* The Assistant Secretary shall from time-to-time review the practices of recipients to determine whether they are complying with this part.

(b) *Adoption of grievance procedures.* A recipient shall adopt an internal review procedure incorporating appropriate due process standards which provides for the prompt and equitable resolution of complaints alleging any action prohibited by this part. The complainant or his or her

representative shall file the complaint with the recipient for processing under those procedures. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the Assistant Secretary for good cause shown. The recipient shall maintain records on all complaints filed alleging violation of the Act and shall make such records available to the Assistant Secretary upon request. The complaint and all actions taken thereunder shall be kept confidential by the recipient. If the complaint has not been resolved under those procedures satisfactorily to the complainant within 60 days of the filing or referral, the complainant or his or her representative may file a complaint with the Assistant Secretary within 30 days of the recipient level decision or 90 days from the date of filing the complaint, whichever is earlier. Upon such filing, the Assistant Secretary will proceed as provided in this section. Exhaustion of recipient level procedures shall be required except where:

(1) The recipient has not acted within the timeframe specified in this section; or

(2) The recipient's procedures are not in compliance with this section; or

(3) An emergency situation is determined to exist by the Assistant Secretary.

(c) *Complaints.* Where recipient level procedures have been exhausted, any person who believes he or she or any specific class of individuals has been subjected to discrimination prohibited by this part may (or through an authorized representative) file a written complaint with the Assistant Secretary.

(d) *Contents of complaints.* Complaints must be signed by the complainant or his or her authorized representative and must contain the following information:

(1) Name and address (including telephone or TTY number) of the complainant;

(2) Name and address of the recipient or sub-grantee who committed the alleged violation;

(3) A description of the act or acts considered to be a violation;

(4) A statement that the individual is handicapped or has a history of a handicap or other documentation of impairment or was regarded by the recipient as having an impairment; and

(5) Other pertinent information available which will assist in the investigation and resolution of the complaint.

(e) *Incomplete information.* Where a complaint contains incomplete information, the Assistant Secretary shall seek the needed information or any

other information which indicates a possible failure to comply with this part from the complainant and shall be responsible for developing a complete record. If such information is not provided within 60 days, the complaint may be closed upon notice to the parties.

(f) *Resolution of matters.* Where an investigation indicates that the recipient has not complied with the requirements of the Act or this part, efforts shall be made to secure compliance through conciliation and persuasion within a reasonable time. Before the recipient or subgrantee can be found to be in compliance, it must make a specific commitment, in writing, to take corrective action to meet the requirements of the Act and this part. The commitment must indicate the precise action to be taken and dates for completion. The time period allowed should be no longer than the minimum period necessary to effect such changes. Upon approval of such commitment by the Assistant Secretary, the recipient may be considered in compliance on condition that the commitments are kept. Where the investigation indicates a violation of the Act or regulations in this part (and the matter has not been resolved by informal means), the Assistant Secretary shall afford the recipient an opportunity for a hearing in accordance with § 32.47.

(g) *Intimidatory or retaliatory acts prohibited.* The sanctions and penalties contained in this regulation may be exercised by the Assistant Secretary against any recipient or sub-grantee who fails to take all necessary steps to ensure that no person intimidates, threatens, coerces or discriminates against any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in an investigation, compliance review, hearing, or any other activity related to the administration of the Act.

§ 32.46 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation and if the noncompliance or threatened noncompliance cannot be corrected by informal means, the Department may suspend, terminate or refuse to grant or to continue Federal financial assistance or take any other means authorized by law. Such other means may include, but are not limited to:

(1) A referral to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States

under any law of the United States or any assurance; and

(2) Any applicable proceeding under state or local law.

(b) *Noncompliance with the requirements of this part.* If a recipient fails or refuses to comply with a requirement imposed by or pursuant to this part, the Department may institute an administrative enforcement proceeding to compel compliance with the requirement, to seek appropriate relief, and or to terminate Federal financial assistance in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph if grants have not yet been approved or funds not yet committed to the recipient. However, the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until:

(1) The Assistant Secretary has advised the applicant or recipient of its failure to comply and compliance has not been secured by voluntary means; and

(2) There has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until:

(1) The Assistant Secretary has determined that compliance cannot be secured by voluntary means;

(2) The recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance; and

(3) The expiration of at least 10 days from the mailing of such notice to the recipient or other person.

§ 32.47 Hearing practice and procedure.

(a) All hearings conducted under section 504 of the Rehabilitation Act of 1973, as amended, and the regulations in this part shall be governed by the Department of Labor's rules of practice for administrative proceedings to enforce Title VI of the Civil Rights Act of 1964 contained in 29 CFR Part 31.

(b) For the purposes of hearings pursuant to this part 32, references in 29 CFR Part 31 to Title VI of the Civil Rights Act of 1964 shall mean section 504 of the Rehabilitation Act of 1973, as amended.

(c) The Assistant Secretary from time-to-time may assign to officials of other departments or agencies of the Government or of the Department of Labor (with the consent of such department or agency) responsibilities in connection with the effectuation of the purposes of section 504 of the Act and this part (other than responsibility for final decisions as provided in § 32.46), including the achievement of effective coordination and maximum uniformity within the Department and within the executive branch of the Government in the application of section 504 and this part to similar programs and in similar situations.

(d) Any action taken, determination made, or requirement imposed by an official of another Department or agency acting pursuant to an assignment of responsibility under this subsection shall have the same effect as though such action had been taken by the Secretary.

Subpart E—Auxiliary Matters**§ 32.48 Post-termination proceedings.**

(a) An applicant or recipient adversely affected by an order suspending, terminating or refusing to grant or continue Federal financial assistance shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility, brings itself into compliance with this part and satisfies the Assistant Secretary that it will fully comply with section 504 and this part.

(b) Any applicant or recipient adversely affected by an order suspending, terminating or refusing to grant or continue Federal financial assistance may request the Assistant Secretary to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of subparagraph (a) of this paragraph. If the Assistant Secretary determines that those requirements have been satisfied,

the applicant's or recipient's eligibility shall be restored.

(c) If the Assistant Secretary denies any such request, the applicant or recipient may submit a written request for a hearing, specifying why it believes the Assistant Secretary to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure specified in this part. The applicant or recipient will be restored to such eligibility if it proves at such hearing that it satisfied the requirements of paragraph (a) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order suspending, terminating or refusing to grant or continue Federal financial assistance shall remain in effect.

§ 32.49 Recordkeeping.

(a) Each recipient shall maintain for a period of not less than three years records regarding complaints and actions taken thereunder, and such employment or other records as required by the Assistant Secretary or by this part and shall furnish such information in the form required by the Assistant Secretary or as the Assistant Secretary deems necessary for the administration of the Act and regulations in this part.

(b) Failure to maintain and furnish complete and accurate records as required under this section is a ground for the imposition of appropriate sanctions.

§ 32.50 Access to records.

Each recipient shall permit access and copying during normal business hours to its places of business, books, records and accounts pertinent to compliance with the Act, and all rules and regulations promulgated pursuant thereto for the purposes of investigation.

§ 32.51 Rulings and interpretations.

Ruling under or interpretations of the Act and the regulations contained in this Part 32 shall be made by the Assistant Secretary.

Appendix A

Accommodations may take many forms based on the type of handicap and the needs of the individual. In developing appropriate accommodations, the individual should be consulted as to particular needs.

The following is a list of possible types of accommodations provided for guidance and technical assistance. These suggestions are not mandatory, and other forms of accommodation not described herein may be required if they are appropriate to meet the needs of particular handicapped individuals.

Accommodations for Participants and Employees

(a) Job restructuring means the procedure which includes:

- (1) Identifying the separate tasks that comprise a job or group of jobs;
- (2) Developing new position descriptions which retain some of the tasks of the original job; and
- (3) Developing a career ladder which builds upward from the new positions which contain the lesser skilled tasks to regular jobs. A restructured job can be clearly different from the original one in terms of skills, knowledge, abilities, and work experience needed to perform the work. Job restructuring is intended to maximize the abilities of the particular handicapped person and is not intended to permit a recipient to underemploy or job-stereotype that person. A restructured job, for example, could be one in which the more highly skilled but physically less demanding duties are retained, e.g. operating controls and switches in a steel mill, and less skilled, physically taxing duties, e.g. lifting, pulling, are reassigned to non-handicapped employees.

(b) Modify job or program schedules, for example, by allowing for a flexible schedule a few days a week so that a participant or employee may undergo medical treatment or therapy. Work-times or participation in program activities may also be altered to permit handicapped individuals to travel to and from work during non-rush hours. For employees or participants who become unable to perform the duties of their positions because of a physical or mental condition, recipients may be required to grant liberal time off or leave without pay when paid sick leave is exhausted and when the disability is of a nature that it is likely to respond to treatment of hospitalization. See, e.g., 339 Federal Personnel Manual-1-3(b)(1).

(c) Modify program and work procedures and training time.

(d) Relocate particular offices or jobs or program activities so that they are in facilities accessible to and usable by qualified handicapped persons. For example, an employee or participant with a respiratory ailment can be placed in a "nonsmoking" and/or well-ventilated office.

(e) Acquire or modify equipment or devices. For hearing-impaired participants or employees, this may include placing amplifiers on telephone receivers, making telephone equipment compatible with hearing aids, providing flashing lights to supplement telephone rings or installing telecommunications devices (TDD's or TTY's). For blind participants or employees, this may include providing tape recorders or dictating machines for those who cannot type. For wheelchair-users, this may include raising on blocks a desk that is otherwise too low for the employee, rather than purchasing a specially-made desk. A recipient is not obligated to acquire or modify equipment that enables a participant or employee to perform a particular job or participate in a particular program until after an employee with a need for these modifications is hired for a particular office or admitted to a program.

(f) Provide readers, interpreters, and similar assistance as needed for deaf, blind

and other handicapped participants or employees. In most instances, this would not require a full-time assistant.

(g) Decrease reliance solely on one form of communication. For example, for deaf participants or employees this may include supplementing program or job orientation sessions with written manuals and other visual materials. If appropriate, a visual warning system should be installed. It may also include providing flashing lights to supplement auditory signals such as sirens and alarm bells. For blind employees, this may include making some communications available in braille, enlarged print, or on cassette recordings. A recipient should tailor the accommodations listed above to the needs of the individual participants or employees who have been admitted to a particular program or hired for a particular office.

(h) Provide human relations-sensitivity training on issues pertaining to handicapped discrimination to all recipient employees.

(i) Conduct ongoing training and planning sessions with recipient supervisors, managers, personnel, technical experts and disability rights advocates to implement and evaluate methods of reasonable accommodation.

Accommodations for Applicants

(a) Announce program and job vacancies in a form readily understandable by mentally handicapped persons and by persons with impaired vision or hearing, for example, by making the announcements available in braille or on cassette tapes. § 32.4(e) of DOL's proposed section 504 regulations requires recipients to insure that communications with applicants are available to persons with impaired vision or hearing. Recipients shall undertake to explain, as appropriate, program and job announcements to mentally handicapped participants or employees or applicants. For example, this might entail notifying known mentally handicapped participants or employees of openings for positions that they might be able to perform and taking specific steps to clearly explain the nature of the program or job and its benefits to that individual.

Handicapped Persons

(b) Provide readers, interpreters, and other similar assistance during the application, testing, and interview process.

(c) Appropriately adjust or modify examinations so that the test results accurately reflect the applicant's skills, aptitude or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure). This may require the extension of traditional time deadlines or allowing, for example, a blind person to answer an examination orally.

(d) If necessary waive traditional tests and permit the applicant to demonstrate his or her skills through alternate techniques and utilization of adapted tools, aids, and devices.

Regulatory Analysis: Regulations Implementing Section 504 of the Rehabilitation Act of 1973 in the Department of Labor.

Executive Summary

A preliminary analysis of the economic impact associated with implementation of the 504 handicapped regulations indicates capital costs to employment and training programs estimated at nearly \$128 million. The potential increase in the numbers of handicapped participants in employment and training programs would be 195,000. The capital costs would largely be one time expenditures while the number of beneficiaries would increase over time. This analysis makes no attempt to arrive at a net cost figure because of the difficulty of estimating benefits. Surely, the net cost would be significantly lower. At this time, there is insufficient information for projecting increases in earnings accruing to this group as a result of more accessible employment and training facilities. However, there are other benefits which accrue to society as a result of increased participation by the handicapped in the Department of Labor employment and training programs. Transfer payments to these individuals would be reduced and the total costs of Veterans Administration (VA) and Vocational Rehabilitation programs (VR) could be lowered. In addition, there will be reduced costs to the Federal government's disability, medical and food stamp programs. There are also intangible benefits such as greater independence for handicapped individuals, a more productive workforce and a larger pool of skilled taxpaying workers. Because we do not know the current benefits being received nor the number of mobility impaired persons who will avail themselves of more accessible facilities, it is impossible to estimate the net cost of accessibility modifications other than to say that they will be substantially lower than the gross cost figure above.

Critical in reviewing these regulations is the interpretation of the requirement that programs, "when viewed in their entirety," be readily accessible. Without the very important "when viewed in its entirety" qualifier, the cost of making all the estimated employment and training facilities accessible could approach \$300 million. Employer participation and the costs of modifications depend greatly on whether or not every employment and training site must be made accessible.

Introduction

This paper analyzes the cost and benefits of implementing section 504 of the Rehabilitation Act of 1973. Benefits are defined only as the increase in the numbers of qualified handicapped individuals able to participate in Employment Service (ES), Unemployment Insurance (UI) and Comprehensive Employment and Training (CETA) programs as a result of these regulations. Section 504 requires that handicapped persons not be discriminated against with respect to programs and activities funded by any Federal agency:

"No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance."

The Department of Labor is fully committed to achieving accessibility for handicapped individuals under federally funded employment and training programs and activities. Pursuant to section 504, the Department has prepared a Final Rule implementing the requirements of this statute. To assist the Department in its rulemaking and to meet Executive Branch regulatory requirements, this analysis of costs and benefits of the accessibility requirements has been prepared. It includes:

a. A computation of costs associated with the proposed regulation.

b. Estimates of the numbers of potential beneficiaries.

An analysis is required for all "major" proposals, defined to include, among other criteria, all regulations resulting in aggregate increased expenditures by Federal, State and local governments of more than \$100 million in any two consecutive fiscal years. A preliminary analysis of the costs of implementing the proposed 504 regulations indicated that the \$100 million threshold could be reached.

The regulations mandate capital expenditures by both the public and private sector. While this analysis estimates cost impacts of the regulations, it does not attempt to link these additional costs to inflation. The government jurisdictions which must meet the added cost of the regulations have few options open to them to meet these requirements other than realigning current capital spending plans. Some private employers can avoid the cost altogether by not participating in employment and training programs. However, the "cost" of this alternative is the loss of training opportunities for both handicapped and nonhandicapped individuals. There is a \$25,000 tax deduction available to employers for these types of modifications. The tax deduction is for certain costs to remove barriers to handicapped persons in public facilities or transportation vehicles owned or leased by the taxpayer in a trade or business. This deduction will expire at the end of 1982. The \$25,000 tax deduction may be found in section 190 of the Internal Revenue Code and in Title 26 of the U.S. Code. For a copy of the regulations about standards for barrier removal, contact the Office of the Chief Counsel, Internal Revenue Service, Washington, D.C. 20224 (202) 566-4473.

The 504 regulations contain many provisions designed to eliminate discrimination against handicapped individuals. The focus of this analysis is on program accessibility which may be achieved in a number of ways. The major costs are concentrated in the area of providing accessibility to existing physical facilities.

The Regulations

The regulations prohibit discrimination against qualified handicapped individuals in programs receiving or benefiting from Federal financial assistance from the Department of Labor. The following is a summary of the major provisions of the regulations:

Selection and Accessibility. The regulations would prohibit discrimination against qualified handicapped persons in both employment and operating practices for

programs receiving assistance from the Department. In addition to selecting beneficiaries for such programs in a nondiscriminatory manner, recipients would be required to make reasonable accommodations to the handicaps of qualified job applicants and employees unless such accommodation would cause "undue hardship". Recipients would also be required to assure that handicapped beneficiaries have access to all employment and training programs. Moreover, new facilities must be readily accessible to handicapped individuals.

The number of handicapped individuals currently in employment and training programs (the majority of whom are not mobility impaired) indicates that there is already some compliance with regulations under individual assistance programs concerning nondiscriminatory selection of beneficiaries. However, the requirement that recipients assure handicapped individuals access to all employment and training programs can have substantial financial implications for local jurisdictions. In addition, it may affect the participation of private employers in employment and training programs.

New Facilities. While all new facilities must be constructed without architectural barriers, employment and training programs do not usually entail the construction of new buildings. However, if any new construction activity is necessary, the additional costs associated with accessibility regulations will be lower than the costs required to retrofit existing buildings. Some estimates have figured that making new facilities barrier-free adds about 1% to total construction costs.

Application Process. The regulations require that the application process must be accessible. For employment and training programs, the application process includes all of the functions of intake centers, including testing and related services. It is assumed that all of these structures where intake, testing and referral activities take place will have to be made fully accessible.

Program Accessibility. The regulations state that every existing training and employment facility need not be made physically accessible, but when viewed in their entirety, employment and training programs must be made accessible. If the recipient has not yet made the program accessible at the time a handicapped individual enrolls, the recipient must either provide access to the program, or consistent with the regulations, refer or place the individual in a comparable program at an alternative facility or one operated by another recipient which is accessible. If recipients are unable to make programs accessible by other means, the regulations mandate structural alterations to those facilities. We anticipate that a number of existing structures will need accessibility modifications. The number of facilities requiring alterations depends on the particular type of program.

The magnitude of the resulting financial requirements on State and local jurisdictions depends largely on the interpretation of program accessibility. The strictest interpretation would entail modifications of

all facilities used by beneficiaries/enrollees of the ES and the CETA prime sponsors. Prime sponsors contract with hundreds of governmental agencies as well as private non-profit and private-for-profit employers covering thousands of work sites; all would have to be modified. At the other end of the spectrum, a broad interpretation of program accessibility would involve the "set aside" of sufficient training slots in accessible facilities to accommodate all actual enrollees with physical handicaps.

"When viewed in its entirety". The regulations assume an intermediate interpretation of program accessibility—requiring that a program be accessible "when viewed in its entirety". A recipient is not required to make each existing facility or every part of a facility accessible to and usable by handicapped individuals. A program can be made accessible "when viewed in its entirety" by the redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites as well as by physical modifications of facilities.

Integrated Setting. This latitude in meeting program accessibility requirements is subject to qualification in the regulation by the following phrase, "In choosing among available methods, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting." Due to this provision in the regulation, the analysis will assume that program accessibility requires modifications of some physical facilities.

Recipient. The term "recipient", as applied to employment and training programs, refers to State Employment Security Agencies (SESA's) and CETA prime sponsors and subrecipients. The regulations give special treatment to small recipients, because many of them handle only a few beneficiaries per year and would find compliance an undue burden on their limited resources. Small recipients may refer applicants to alternative providers with accessible services if their facilities are inaccessible. Prime sponsors and Job Corps placement officials may refer handicapped applicants to alternative facilities offering comparable training which are accessible. However, they must also assure that the program, when viewed in its entirety, is accessible to handicapped individuals. All future construction and improvements to existing centers must be made accessible to the handicapped.

Program. The term "program" refers to the general types of services provided by the SESA's and other recipients—Classroom Training (CRT), On-The-Job Training (OJT), Public Service Employment (PSE) and Work Experience (WE). It does not apply to each and every employment and training site covered by CETA programs.

Employment Service. The Department's Employment and Training Administration oversees the SESA's and CETA programs with their decentralized manpower delivery system. The SESA's have a total of 2,500 offices throughout the nation. Each office provides employment counseling, testing, job development and referral. In SESA offices, the application process and other services

are provided in the same physical location. The percentage of local SESA offices that must be accessible to make the application process and the program accessible when viewed in its entirety will vary in each locality. It will depend on the number of offices and the distance between them. Obviously communities with only one SESA office must modify that office to meet accessibility standards.

CETA. The CETA program is operated through over 470 prime sponsors. Almost all sponsors are State or local jurisdictions. All sponsors have intake centers which provide counseling, testing and referral to training and employment. Occasionally prime sponsors contract with SESA to handle the intake or application function.

The four basic type of services offered by CETA prime sponsors are Classroom Training (CRT), On-The-Job Training (OJT), Public Service Employment (PSE), and Work Experience (WE). In addition some prime sponsors refer job-ready applicants directly from their intake center to jobs as do SESA's. These basic types of service are considered as "programs" in the proposed regulations.

Classroom training is a CETA program for classroom training instruction. Depending on the occupation, labs or simulated work sites with appropriate equipment may be attached to the classroom. Classroom training is offered in locations ranging from a local school classroom with no equipment to a multi-occupation skill center with the latest equipment. Accessibility modifications may thus involve only a classroom and its approaches or an entire skill center with classrooms and equipment areas. For our analysis, we assume that the classrooms located at community colleges are currently in compliance with HEW regulations.

Included under the CRT category is the *Individual Referral* option which is available to prime sponsors. If the prime sponsor determines that it is not viable to offer class size training in a particular occupation which is suitable for an interested beneficiary, the prime sponsor may send that individual to a community college or proprietary school.

The average number of CRT participants, excluding individual referrals, is 60 per site. Because classroom facilities are relatively expensive, there tends to be longer term commitments to contractors; hence little turnover of CRT sites.

Job Corps is a special form of CRT that addresses itself to youth with severe educational and skills deficiencies. It is a national program as opposed to local programs operated by prime sponsors. Many of the Job Corps centers offer residential training, often in a rural setting. Most of the centers are operated by "private for profit" organizations. Trainees can enroll in any Job Corps center, but most participants use their regional center. The Department of Labor determines which Job Corps center trainees will attend. Because this is a national program, participants may be assigned to any center in the Country offering appropriate training.

In an *On-The-Job* training program, enrollees receive their training in the establishment of a private employer. An OJT site may be a large establishment training

hundreds of enrollees but, more frequently, it is small businessperson who agrees to train one or two enrollees for a single 4-to-6 month period. The average number of participants per site is three. Potential occupations and sites cover the full range of U.S. industry and trade. Site turnover tends to be higher than with CRT.

Public Service Employment (PSE) and Work Experience (WE) programs are subsidized employment. The work is normally performed for governmental agencies or local public school systems but may include employment in private nonprofit organizations. A PSE-WE site may be an average office in an administrative building or when involved in Public Works, Environmental Service, Recreation and Park Maintenance, the job may not be site-specific. WE is largely targeted at in-school youth and hence part-time or summer employment. While WE jobs for youth cover a wide range of occupations and sites, most are concentrated in recreation and park maintenance type of services. Some PSE-WE employment involves large work groups in activities such as park maintenance; however, there are sufficient instances of individual assignments to clerical and semi-skilled administrative services lowering the average number of PSE and WE participants per site to five.

Table 1.—Estimated Number of Sites by Program Activity

| Type of program | Estimated number of sites | Average number of participants per site |
|-----------------------------------|---------------------------|---|
| 1. ES local offices..... | 2,400 | NA |
| 2. CETA Intake (Application)..... | 1,036 | NA |
| 3. CRT and Job Corps..... | 4,286 | 60 |
| 4. PSE..... | 106,700 | 5 |
| 5. WE..... | 25,056 | 5 |
| 6. Youth..... | 182,600 | 5 |
| 7. OJT..... | 24,120 | 3 |
| 8. PSIP..... | 30,000 | 3 |
| Total..... | 376,198 | |

(The methodology used to estimate the number of sites by program activity is described in detail in the appendix.)

Costs of Proposed Regulation

A thorough analysis of accessibility costs would require an architectural survey of a sample of existing facilities. We elected to develop cost figures based on analyses already completed by the Department of Transportation for their 504 regulations, by the Federal Architectural and Transportation Barriers Compliance Board, and by private handicapped organizations. We calculated the costs of the regulations by multiplying the estimated number of application centers and training and employment sites needing modifications by average modifications costs. The expected number of intake or application centers is based on the type and size of prime sponsors. The number of work and training sites is estimated from the number of years of services. We further assume that program accessibility requires some physical modifications. The methods for estimating the

number of sites needing accessibility modifications and for calculating the capital costs are described briefly below. (A more detailed description of the methodology is presented in the appendix to this analysis).

Modification Costs. The costs of modification vary according to the type of facility, its function in the delivery system, and the types of handicaps for which it will be modified. Modifications for mobility handicaps are the most extensive and expensive. These modifications can include creation of accessible parking facilities (\$100 to \$1,000), modification of toilet facilities (\$500 to \$3,000), construction of entrance ramps (\$3,000 to 4,500), modification of entrances and doorways including kickplates, handles and vision panels (\$100 to \$1,000), and lowering drinking fountains (\$100 to \$300). Communications with deaf persons require visual alarm systems (\$50) and teletypewriters (\$1,000). (Only the more expensive heavy duty TTY's were considered appropriate for the volume of traffic expected). Blind persons may require tactile warnings (\$100 to \$400).

For the present analysis, minor modifications are estimated to average \$500 consisting of \$100 for modifications of entrances and doorways, \$100 for lowering drinking fountains, and \$200 for installation of visual alarm systems and tactile warnings. More extensive modifications are estimated to average \$6,250 as follows: \$500 for additional parking, \$3,000 for construction of entrance ramps, \$1,500 for modification of toilet facilities, \$750 for modification of entrances and doorways, \$300 for lowering drinking fountains, and \$200 for visual alarms and tactile warnings. These estimates are based on studies by the Department of Transportation, the Federal Architectural and Transportation Barriers Compliance Board, and Mainstream Inc., a private firm conducting research on this subject matter.

Sites. A site is a place where an individual works or trains. Some jobs such as park maintenance are not site specific. The total number of existing sites in the employment and training delivery system is estimated to be 376,198. However, it is assumed that a certain percentage of the sites in State and local government facilities are already accessible. Because of the "when viewed in its entirety" clause, it is further assumed that only a portion of the remaining facilities will have to be made accessible.

A summary of capital costs disaggregated by program activity is presented in Table 2.

Table 2.—Capital Costs by Program Activity

| | |
|---|--------------------|
| 1. SESA's..... | \$6,000,000 |
| 2. CETA intake centers: | |
| Minor modifications..... | 388,000 |
| More extensive modifications..... | 5,633,000 |
| CETA Employment and Training Facilities | |
| 3. Classroom training and Job Corps .. | 4,900,000 |
| 4. PSE and WE..... | 55,338,000 |
| 5. Youth programs..... | 28,531,000 |
| 6. OJT..... | 27,060,000 |
| Total..... | 127,850,000 |

Overall, it is estimated that the capital costs of making employment and training programs

accessible under the proposed regulations would amount to about \$128 million. The following sections will discuss the costs of the proposed regulation for individual programs.

Based on a survey of SESA's, it is estimated that the costs of bringing local employment offices into compliance with the regulations would amount to \$6,000,000 for capital improvements. Sixteen States have reported that they are already in compliance and would not need any capital improvements. Another 20 States estimate that they will need less than \$100,000 statewide to bring their facilities into compliance. Many of the States lease facilities for local offices and had difficulty in projecting future rent increases based on owner accessibility modifications. We have ignored increases in the cost of annual rents resulting from owner alterations to lease facilities.

Given the regulation's requirement that the application process must be accessible in all instances, it is assumed that all CETA intake centers will have to be accessible. It is also assumed that intake centers need to be modified for all types of handicapped participants. Almost all intake centers have been established since 1973 and are located either in local government buildings or those used by community based organizations. It is estimated that one-fourth of all intake centers are currently in compliance and will need only minor modifications plus teletypewriters (total estimated at \$1,500 per facility). The other 75 percent of the centers will need more extensive modifications and teletypewriters (total estimated at \$7,250 per facility). Using these assumptions, we calculate that, based on the size and type of sponsors, modification costs will total \$6 million for the 1,036 CETA intake centers (excluding centers used jointly by SESAs and CETA). One-fourth of the centers will need minor accessibility modifications totaling \$388,000 and the rest will need more extensive modifications totaling \$5,633,000. The cost of interpreters for the deaf during intake and assessment are not calculated but would be extra.

It is estimated that 10 percent of classroom training sites are in community colleges already in compliance with HEW regulations. Projecting that the distribution of additional handicapped participants across CETA services will be similar to the distribution of the current participant population, it is assumed that the modification of 784 of the remaining facilities will be sufficient to provide accessible programs at an average modification cost of \$6,250, and will cost approximately \$4,900,000.

A large portion of PSE and WE participants work in State and local government agencies. While some of these positions are not site specific—such as the Departments of Parks, Environmental Protection, Sanitation, and Recreation it is assumed that a certain percentage of the positions are in accessible facilities. Assuming that the additional handicapped participants will not be assigned to locations that are not site specific and assuming the same distribution mentioned in classroom training, it is estimated that modification of an additional 4802 of the PSE and 4052 WE sites would

provide sufficient access to these programs at a cost of about \$55 million.

Although the total number of sites involved in youth programs is very large, the analysis assumes that accessibility modifications on only 2.5 percent of the sites will provide sufficient access to the programs. The cost would be \$28 million. The lower percentage of modifications used here reflects the assumption that a substantial fraction of the local governments or public schools which employ a large portion of youth already have largely accessible sites. Also the disability rate for 16 to 24 year olds is a relatively low 4.5 percent.

The estimated cost of the regulations for OJT is based on the assumption that a local OJT program providing training in 15 occupations (five in accessible facilities) would be "ready accessible, when viewed in its entirety." Program accessibility could be achieved by using larger employers' sites (about 5 percent of the total). Modification costs of \$10,000 per site are higher because of the need to convert common facilities. Under these assumptions, OJT modifications will cost about \$27 million.

Benefits of Proposed Regulation

In the Fiscal Year 1978, CETA programs served 178,500 handicapped persons, accounting for 4.3 percent of all participants. Presumably, most if not all of these persons either are not hindered by architectural barriers or are working or training in facilities that are already accessible.

However, there are undoubtedly a number of persons with severe physical handicaps who are not currently using employment and training services because of architectural or communications barriers but who would avail themselves of these services if they were offered in more accessible facilities.

It is estimated that about 105,000 additional handicapped individuals would benefit from more accessible employment and training facilities. This estimate is based on a 1974 Social Security Administration Survey of Disabled and Nondisabled Adults. The above figure includes severely and partially disabled individuals who may require the following aids—wheelchairs, braces, crutches, and artificial limbs, are able to go out of doors without help and are currently looking for work or are on layoff. We have no data on the number of these handicapped persons who are receiving government assistance nor the number that might avail themselves of more accessible programs. However, when individuals move from being recipients of various types of welfare payments to skilled taxpaying workers, there are obviously many benefits not only for the individuals but for the whole society.

There are about 115,000 severely disabled and 25,000 partially disabled individuals who are not in the labor force. It is estimated that 40,000 severely disabled and all of the 25,000 partially disabled individuals may be employable. The total number of potential beneficiaries estimated thus includes both the unemployed and a portion of those not in the labor force with physical handicaps requiring wheelchairs, braces, crutches, and artificial limbs. It must be recognized that a portion of this latter group will probably not avail

themselves of CETA programs since they can receive more services from the Veterans Administration or the State vocational rehabilitation agencies.

Conclusion

The regulations will provide a wider range of employment and training services to the physically handicapped who have difficulties with architectural barriers. At the same time excessive financial burdens are not placed on local jurisdictions allowing them to provide comprehensive training to all in need of their services.

Appendix to Regulatory Analysis

Estimated Number of Additional Beneficiaries

From the Social Security Administration's Survey of Disabled Adults, it is estimated that there could be approximately 105,000 additional handicapped persons served by CETA programs due to 504 regulations.

It is assumed that the additional handicapped persons will be distributed across the types of CETA Services (CRT, OJT, PSE, WE) in a proportion similar to the current participant population. Such a distribution produces the following figures.

Distribution of Additional Handicapped Beneficiaries by Type of Program

| Type of service | Percent distribution of current population | Additional handicapped persons |
|-----------------|--|--------------------------------|
| CRT..... | 28 | 29,400 |
| OJT..... | 7 | 7,350 |
| PSE..... | 47 | 49,350 |
| WE..... | 18 | 18,900 |
| Total..... | | 105,000 |

Currently, about 4.5 percent of CETA participants are handicapped. It is assumed that these participants either have no problems with architectural barriers or are working in barrier free facilities. Therefore, there will be no additional cost to continuing service for these handicapped persons.

Estimated Number of Sites

This section discusses the derivation of the number of DOL employment and training sites, which is the base figure for determining modification needs. There are three basic kinds of sites: SESA (ES and UI) local offices;

CETA intake centers; and the sites at which CETA employment and training services are actually provided.

(a) There are about 2,500 local SESA offices.

(b) The estimated number of CETA intake centers is based on the size and type of prime sponsors. The size of a sponsor is based on its FY 1978 Title I funding level. All sponsors with less than \$6 million funding were assumed to have one intake center except for consortia which would have two centers. Sponsors with \$6 to \$19 million were assumed to have two centers except for consortia which would have three centers. All other sponsors were assumed to have one center for each \$10 million of funding. The total number of CETA intake centers is estimated at 1,280.

About 19 percent of prime sponsors have delegated all CETA intake activities to SESA's, so the above figures are reduced by a similar percentage, bringing the total estimated intake centers to 1,036.

(c) The number of employment and training sites in use by CETA prime sponsors in Titles II (ABCD) and VI is estimated by dividing the number of slots offered in each type of employment or training program—Classroom Training (CRT), On-The-Job Training (OJT), Public Service Employment (PSE) and Work Experience (WE)—by the approximate number of slots per site for each category. Training slots are equated with years of service.

For most CETA-run CRT facilities, the number of slots per site ranges from 20 to more than 100. An average of 60 CRT slots per site is used in this analysis. Based on CETA experience to date, slots per site are estimated at five for PSE and WE and three for OJT.

The slots involved in Individual Referral are excluded from the calculation of CRT sites on the assumption that sponsors have little or no control over these facilities and will be able to make their program accessible without their inclusion. Those with mobility handicaps would receive individual referrals only to organizations with facilities that are already barrier free.

Not all sites are used throughout the year. Turn over of positions, courses, and training programs enlarges the total number of sites beyond that which is in use at any given time. It is assumed that there is an average site turnover of 10 percent in CRT and PSE and 20 percent in OJT and WE.

Fiscal Year 1980 Sites in Use for CETA Titles II and VI Activities

| Category | Years of service (slots) | Slots per site | Average sites | Site turnover | Total sites |
|------------|--------------------------|----------------|---------------|---------------|-------------|
| CRT..... | 233,800 | 60 | 3,896 | 1.1 | 4,286 |
| OJT..... | 60,000 | 3 | 20,100 | 1.2 | 24,120 |
| PSE..... | 485,000 | 5 | 97,000 | 1.1 | 106,700 |
| WE..... | 104,400 | 5 | 20,880 | 1.2 | 25,056 |
| Total..... | 883,500 | | 141,876 | | 160,162 |

(d) Another major source of CETA activity is the youth programs under Title IV. During fiscal year 1981, the Summer Youth Employment Program (SYEP) is expected to

provide about 900,000 slots. In addition, there are expected to be about 163,000 years of service (slots) provided for youths in the Youth Employment and Training Program. A

recent GAO Report estimated that when SYEP was at a scale of 1 million enrollees, it provided youth with 165,000 work sites, or 1 site for each 6 enrollees. Total youth program sites are therefore 182,600.

(e) For fiscal year 1980-81, the *Private-Sector Initiatives Program* (PSIP) has the goal of training 125,000 persons in OJT-type positions, sometimes with a classroom training component. Because of the emphasis on involving small employers, it is estimated that there are an average of three trainees per facility. Assuming that a certain percentage of the contracts with small employers are for relatively short periods of time and further that there is a high program turnover and a relatively large number of employers, it is estimated that PSIP has a potential of 30,000 training sites.

(f) *Total Employment and Training Sites.* The total number of sites is about 376,298, as summarized in the following table.

| | |
|----------------------------------|---------|
| SESA local offices | 2,500 |
| CETA intake Centers | 1,036 |
| CETA Title II and IV sites | 160,162 |
| Youth Program sites | 182,600 |
| PSIP (Title VIII) sites | 30,000 |
| Total sites | 376,298 |

Estimated Costs

The estimated costs of bringing SESA local offices into compliance with the regulations is \$6,000,000 for capital improvements. These figures are based on a survey of SESA's. The amounts are to be considered only preliminary estimates because few of the SESA's have studied this problem in detail.

Based on the regulation's requirement that the application process must be accessible in all instances, it is assumed that all CETA intake centers will have to be modified for all types of handicapped participants. It is further assumed that one fourth of all intake centers are currently in compliance and will need only minor modifications plus teletypewriters (total estimated at \$1,500 per facility). The other 75 percent of the centers will need more extensive modifications and teletypewriters (total estimated at \$7,250 per facility).

Based on the size and type of sponsors, it is estimated that there are 1,036 CETA intake centers (excluding centers used jointly by SESA's and CETA). Twenty five percent of these will need minor accessibility modifications totaling \$388,500 and 75 percent will need major modifications totalling \$5,633,250.

Classroom Training. The potential additional handicapped participants are 29,400. It is assumed that the "most integrated setting" means that there should be no more than an average of 50 percent handicapped participants per site.

Using projected fiscal year 1980 years of service, an average of 60 slots per site and a 10 percent site turnover rate, total classroom training sites are estimated at 4,256 sites.

It is assumed that 10 percent of CRT sites (428) are in community colleges that are accessible and therefore appropriate locations for training handicapped

individuals. It is further assumed that these sites can easily accommodate 20 percent of the additional handicapped participants, 5,880 persons.

Additional CRT Sites Needing Accessibility Modifications

Total additional handicapped participants to be served by CRT—29,400.

Handicapped participants to be served by community colleges—5,880.

Remaining handicapped participants to be served—23,520.

The remaining handicapped participants to be served (23,500) are divided by the average of 30 handicapped individuals per site to give 784 additional CRT sites that need accessibility modifications. The cost of modifying 784 sites at an average of \$6,250 per site is \$4,900,000.

Public Service Employment. The potential additional handicapped participants are 49,250 persons. The most integrated setting is assumed to mean no more than an average of 50 percent handicapped participants per site.

Using projected FY 1981 years of service, an average of 5 slots per site and 10 percent site turnover, total PSE sites are estimated at 106,700 sites.

Thirty percent of PSE positions are within private nonprofit community organizations, 32,010 sites. Another 30 percent of PSE positions such as park maintenance, recreation, etc., are not site specific, 32,101 sites.

The remaining 40 percent of PSE positions are site specific and appropriate for training mobility-impaired handicapped individuals, 42,680 sites.

Facilities that are now accessible and available for serving those with mobility handicaps

It is assumed that 20 percent of private nonprofit sites are accessible and can handle an average of 2.5 handicapped persons per site.

Total private nonprofit sites—32,010
Percent accessible—20
Sites accessible to handicapped—6,402
Handicapped participants per site—2.5
Handicapped participants accommodated—16,005

It is assumed that PSE positions that are not site specific in general will not be appropriate for training mobility-impaired handicapped participants.

It is assumed that 20 percent of State and local government PSE sites are accessible and can handle an average of 2.5 handicapped persons per site.

Total PSE site specific sites—42,680
Percent accessible—20
Sites accessible to handicapped—8,536
Handicapped participants per site—2.5
Handicapped participants accommodated—21,340

Additional State and Local Government PSE Sites Needing Accessibility Modifications

Total additional handicapped participants to be served by PSE—49,350

Handicapped participants served in private nonprofits—16,005

Handicapped participants to be served in accessible sites—21,340

Remaining handicapped participants to be served—12,005

The remaining handicapped individuals to be served—(12,005)

are divided by the average of 2.5 handicapped participants per site to give 4,802 additional PSE sites that need accessibility modifications. The cost of modifying 4,802 sites at an average of \$6,250 per site is \$30,012,000.

Work Experience

The potential additional handicapped participants are 18,900. It is assumed that "the most integrated setting" means that there should be no more than an average of 50 percent handicapped participants per site.

Using projected FY 1981 years of service, an average of 5 slots per site and a 20 percent site turnover rate, total WE sites are estimated at 25,056 sites.

Thirty percent of WE positions such as school maintenance, recreation, etc., are not site specific and therefore in general not appropriate positions for individuals with mobility handicaps, 7,517 sites.

Seventy percent of WE positions are site specific and therefore appropriate for mobility-impaired handicapped trainees.

Facilities that are now accessible and available for serving handicapped individuals. It is assumed that 20 percent of State and local government WE sites are accessible and can serve an average of 2.5 handicapped persons per site.

Total WE site specific sites—17,539
Percent accessible—20
WE sites accessible—3,508
Average number handicapped participants per site—2.5
Handicapped participants accommodated—8,770

Additional State and Local Government WE Sites Needing Accessibility Modifications

Additional handicapped participants in WE—18,900

Handicapped participants to be served in accessible sites—8,770

Remaining handicapped participants to be served—10,130

The remaining handicapped individuals to be served (10,130)

are divided by the average of 2.5 handicapped participants per site to give 4,052 additional WE sites that need accessibility modifications. The cost of modifying 4,052 sites at an average of \$6,250 per site is \$25,326,000.

The handicapped enrollment in youth programs has been only about 2.5 percent primarily because the disability rate for 16 to 24 year olds is a relatively low 4.5 percent. For this reason and assuming that a large portion of youth participants work or train in local government or public education facilities, this analysis assumes that accessibility modifications on only 2½ percent of the sites will provide sufficient access to these programs.

Number of youth sites—182,600
Percent needing modification—2½

Number of youth sites needing modification—

4,565

The cost of modifying 4,565 youth sites at \$6,250 per site amounts to \$28,531,000.

Estimating the cost of OJT programs is more difficult and depends on the interpretation of the regulations. Based on experience with existing OJT programs, it is assumed that 95 percent of participating employers can be classified as small employers. It is assumed that the remaining five percent of the employers can provide accessible facilities and that the occupational training provided in such facilities meets the requirement that the program be readily accessible, when viewed in its entirety.

The per facility costs of modifications for the 5 percent of employers providing accessible facilities will probably be higher than the \$5,000 estimate for other CETA training facilities. The regulations require modifications not only to the immediate worksite but also to any general areas used by other employees or trainees such as cafeterias, libraries or recreational areas. Based on the estimated costs for CETA facilities, and the more extensive modifications to make common areas accessible, this analysis assumes a \$10,000 average cost for 5 percent of employers.

| Training category | Estimated number of employers | Percent needing modification | Number of OJT and PSIP employers needing modification |
|-------------------|-------------------------------|------------------------------|---|
| OJT..... | 54,120 | 5 | 2,706 |

The cost of modifying the above sites at \$10,000 per site amounts to \$27,060,000 in the OJT program.

The above estimates are based on an assumption that a local OJT program providing training in 15 occupations, five of which are provided in accessible facilities, would be considered "readily accessible, when viewed in its entirety". It is estimated that as many as 30 percent of the smaller employers would also have to make modifications at \$6,250 per site. (Cost assumes smaller size and fewer common areas—cafeterias, etc.)

| Training category | Number of small employers | Percent needing modification | Number of small employers needing modification |
|-------------------|---------------------------|------------------------------|--|
| OJT..... | 51,400 | 30 | 15,370 |

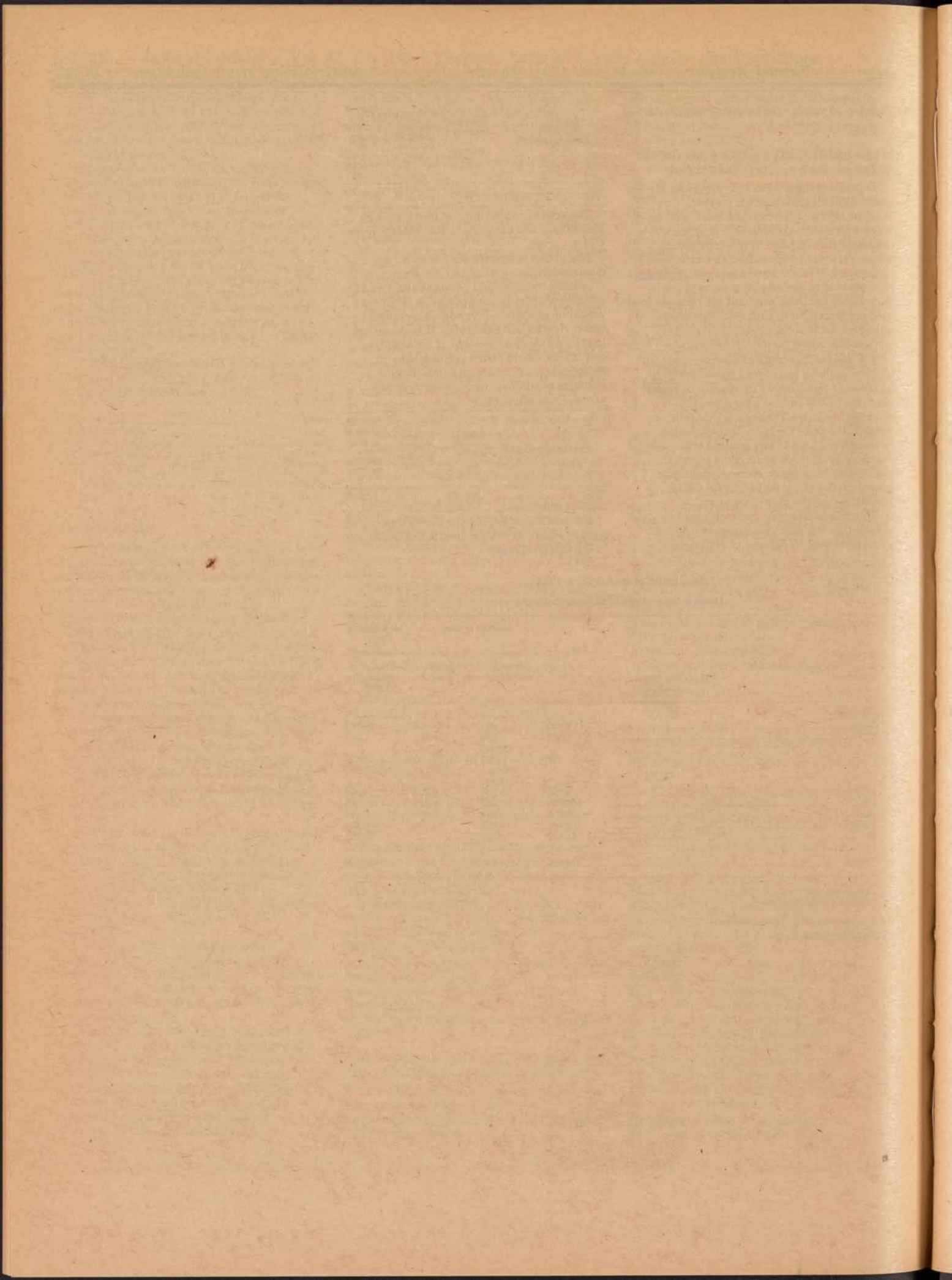
The cost of modifying the above number of sites at \$6,250 per site amounts to \$96,410,000 in the OJT program.

Calculation of Modification Costs

[Meeting "when viewed in its entirety" definition]

| Type of sites ¹ | Total | Number of sites | | Modification cost |
|----------------------------|---------|----------------------|-----------------------|--------------------------------|
| | | Needing modification | Per site (in dollars) | Total (in millions of dollars) |
| SESA..... | 2,400 | NA | NA | \$6,000 |
| CETA..... | 259 | 259 | \$1,250 | .388 |
| | 777 | 777 | 7,250 | 5,633 |
| | | (Minor) | | |
| | | (More extensive) | | |
| CRT..... | 4,286 | 784 | 6,250 | 4,900 |
| PSE..... | 106,700 | 4,802 | 6,250 | 30,012 |
| WE..... | 25,056 | 4,052 | 6,250 | 25,326 |
| Youth..... | 182,600 | 14,565 | 10,000 | 28,531 |
| OJT..... | 54,120 | 2,706 | | 27,060 |
| Total..... | 376,198 | 17,945 | NA | 127,850 |

¹ Large employers.² Excludes SESA local offices.



Federal Register

Tuesday
October 7, 1980

Part IX

**Environmental
Protection Agency**

**Ozone-Depleting Chlorofluorocarbons;
Proposed Production Restriction**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 762

[OPTS-62009 (TSH-FRL 1606-5)]

Ozone-Depleting Chlorofluorocarbons; Proposed Production Restriction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: Because of the destructive effect of chlorofluorocarbons (CFCs) on stratospheric ozone, EPA is considering restricting their production such that the potential for ozone depletion does not increase over present levels. Two major approaches to CFC emissions control are being considered: a Mandatory Controls Approach and an Economic Incentives Approach. The first would limit CFC production through mandatory controls or technology based standards. The second would limit CFC production through the distribution of marketable permits. Several options are being explored for the implementation of these strategies.

EPA solicits comments on the appropriateness of restricting the use of CFCs and on the feasibility of implementing the Mandatory Controls and Economic Incentives Approaches.

DATES: Written comments on or before January 5, 1981.

ADDRESS: Written comments should be sent to the Technical Information Specialist for this Advance Notice of Proposed Rulemaking: Joni T. Repasch, Office of Pesticides and Toxic Substances (TS-793), Environmental Protection Agency, Room E-447, 401 M St., SW, Washington, D.C. 20460, (202-755-8050).

FOR FURTHER INFORMATION CONTACT: Gordon R. Olson, Office of Pesticides and Toxic Substances (TS-794), Environmental Protection Agency, 401 M St., SW, Washington, D.C. 20460, (202-755-1260).

SUPPLEMENTARY INFORMATION:

I. Ozone Depletion and the Need for Regulatory Control

- A. Introduction.
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 - D. Rationale for Including All CFCs.
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- III. A Summary of Issues on which Comments are Requested.

I. Ozone Depletion and the Need for Regulatory Control

A. Introduction

Chlorofluorocarbons (CFCs) are a family of chemical compounds suspected of depleting stratospheric ozone. When ozone concentration is reduced, increased amounts of damaging ultraviolet light (DUV) are permitted to reach the earth's surface. This may have a number of harmful consequences, including higher incidence of skin cancer, decreased crop yields for several important species and adverse effects on the marine food chain.

In March of 1978 the Environmental Protection Agency and the Food and Drug Administration banned CFCs as propellants in nonessential aerosol uses (ref. 1). Several other nations have also already acted to restrict aerosol propellant applications of CFCs. However, continued world emissions of CFCs are still considered a significant and increasing threat to human health and the environment. The temporary emissions reduction achieved by the actions of the United States and other nations regarding CFC aerosol propellants has been nearly eliminated by rapid growth of CFC usage in nonaerosol applications in the United States and abroad, and by continued aerosol use in nations which have as yet taken no control actions.

At present there are five domestic producers of CFCs. The overwhelming percentage of CFC emissions occur in use rather than in manufacturing—approximately 98 percent and 2 percent, respectively—so the regulations are directed at controlling emissions in the various CFC applications.

The major non-aerosol uses of CFCs in the United States are:

1. As a refrigerant in mobile air conditioning units used in passenger vehicles;
2. As a solvent, primarily in industrial cleaning, drying, and solder flux removal applications;
3. As the blowing agent for closed-cell rigid foams, used in insulating and packaging applications;

4. As the blowing agent for open-cell flexible foams, used in bedding, furniture, automobile seat cushions, and carpet underlay;

5. As the refrigerant for large industrial and commercial chillers, home refrigerators, freezers and air conditioners, and retail food store refrigerators; and

6. In numerous miscellaneous uses such as liquid fast-freezing of food and hospital instrument sterilization.

Use of CFCs worldwide is projected to increase substantially over the next decade. Production of CFCs in the United States is expected to grow at a 7 percent annual rate (in the absence of any further regulation), from 600 million pounds in 1980, to 1.2 billion pounds in 1990, according to the report on CFC control written for EPA by the RAND Corporation. (ref. 2) Total world emissions, in the absence of any further regulation, are projected to grow at a 9 percent annual rate over the next decade, from 1.5 billion pounds in 1980 to 4.5 billion pounds in 1990, according to EPA analysis of data collected for the Chemical Manufacturers Association. (ref. 3)

The objective of Agency action is to limit CFC use in all applications such that the potential for ozone depletion does not increase over present levels. The proposed action will recognize the differential impact that individual CFC compounds have on ozone depletion (see Permit Pound Concept, Section II.B.2.a., below).

EPA is considering two major approaches to CFC control. The first is a Mandatory Controls Approach. This would put an indirect ceiling on CFC use through mandatory controls or technology-based standards. Three options for implementing these controls are discussed in Section II B 1. The second major approach is an Economic Incentives Approach. This would put a ceiling on total production, and be implemented through a system in which marketable rights to CFCs are distributed. Three different options for allocating these rights are discussed in Section II B 2. Based upon presently available information, EPA believes the latter approach to be a more efficient method of reducing the environmental and human health risk. The merits of each approach are discussed in more detail later.

This regulatory action would constitute the first United States control on CFCs since the ban on nonessential aerosol propellant uses that was promulgated jointly by EPA and the Food and Drug Administration in March 1978. EPA solicits comments on the approaches, options and issues

presented in this advance notice of proposed rulemaking.

EPA Phase II CFC regulations will be promulgated under the authority of Section 157 of the Clean Air Act, as amended, (42 U.S.C. 7450-7459), unless EPA finds under Section 6(c)(1) and Section 9(b) of the Toxic Substances Control Act (TSCA) (15 U.S.C. 2601) that it is in the public interest to use TSCA instead of the Clean Air Act.

B. A Summary of the Ozone Depletion Theory

The ozone layer is located in the stratosphere, 10 to 50 kilometers above the earth's surface. It is important to the natural environment because it prevents the more damaging wavelengths (290-320 nm) of solar radiation—those not screened out by other atmospheric constituents—from reaching the earth.

The concentration of ozone present in the stratosphere is determined by a dynamic balance between naturally occurring photochemical reactions producing it and other chemical processes destroying it. The rate of destruction of ozone is influenced by the presence of several chemical species containing hydrogen, nitrogen, or chlorine.

In view of the vital screening function of the ozone layer, any significant increase in the rate at which chlorine species are injected into the stratosphere should be of concern, because chlorine and chlorine oxide act as catalysts in certain reactions that destroy ozone. Two University of California scientists theorized in 1974 that CFCs slowly migrate to the stratosphere where they are photolytically dissociated, releasing free chlorine. The continued worldwide release of CFCs is therefore troublesome, it appears to significantly increase the chlorine concentration in the stratosphere and this in turn leads to ozone depletion. EPA has relied primarily upon the scientific analysis of the National Academy of Sciences (NAS) for support of this theory as well as for an assessment of the potential hazards posed by continued world emissions of CFCs.

Global CFC emissions are not large compared to the emissions of other chlorine-containing chemical compounds, but these other compounds are for the most part quickly destroyed or otherwise removed in the troposphere so that only a small percentage of ground-level emissions reach the stratosphere. In contrast, CFCs are very resistant to removal in the troposphere, so that most of the CFCs emitted at ground level eventually reach the stratosphere where, in the presence of

more intense and shorter-wavelength ultraviolet light, they are decomposed and release chlorine.

To better quantify the predicted effects of CFCs on ozone concentrations, several research groups around the world have undertaken computer simulations of the relevant atmospheric chemistry and physics. Because of the complexity involved in closely simulating such large-scale natural systems, simplifications have been introduced into these models. The most significant simplification has been to consider variations in the concentrations of chemical species only along the vertical dimension (altitude), assuming perfect mixing along the longitudinal and latitudinal dimensions. These are the so-called One-Dimensional Models (1-D Models).

The basic function of the 1-D Models is to solve a complex set of differential equations, providing vertical profiles of species concentrations at any moment in time. Included in the models are a large number of chemical reactions believed to be occurring in the atmosphere. The chemical reaction rate coefficients and the photolysis rate coefficients (measures of the speed with which reactions occur), the vertical diffusion coefficients (a measure of the speed of vertical transport), and other parameters needed to produce a numerical solution have generally been measured either in the field or in the laboratory. A few are estimates. The inputs to the models are based on both historical and predicted future annual emissions of CFCs at the earth's surface.

NAS used such a model to calculate future effects on the ozone concentration of various emissions scenarios for CFMs.¹ The four scenarios NAS considered all use the same historical emissions data, but differ in their predicted future emissions:

Scenario A assumes that future emissions would be fixed at 1977 levels;

Scenario B assumes that future emissions would remain at 1977 levels until 1983, when a reduction of 25 percent would occur, and that emissions after 1983 would remain fixed at that lower level;

Scenario C is identical to B, except that an additional 25 percent step reduction is assumed to occur in 1988—emissions after 1988 would then remain fixed at this new level;

¹ CFMs, or Chlorofluoromethanes, are a group of chemicals within the CFC family, which NAS considered because two of them, trichlorofluoromethane (CFC-11) and dichlorodifluoromethane (CFC-12), make up greater than 90 percent of world CFC production.

Scenario D assumes that emissions would grow at 7 percent a year until 2000, and then remain constant.

For these four scenarios, NAS predicts the following percentages of ozone depletion:

Table 1.—Predicted Percent Ozone Depletion¹

| Scenario | In 20 years (1996) | In 50 years (2028) | Steady-state ² |
|----------|--------------------|--------------------|---------------------------|
| A..... | 6.1- (±4.2) | 10.0- (±7) | 16.5- (±11.5) |
| B..... | 5.6- (±3.9) | 8.0- (±6) | 13.3- (±9.3) |
| C..... | 5.2- (±3.5) | 6.0- (±4) | 9.4- (±6.8) |
| D*..... | 9.0 | 28.0 | 57.0 |

¹ CFMs only.

² The steady-state gives the limiting equilibrium value for ozone depletion, and is equivalent to base year + about 100 years (theoretically infinity).

³ Error ranges are not provided for this scenario, nor are the average values for ozone depletion corrected for temperature and water-vapor feedbacks or tropospheric sinks.

Source: National Academy of Sciences.

NAS also estimated that historical emissions of CFMs may have already led to an ozone depletion of 2.1 (±1.5) percent.

C. The Risks of Continued World Chlorofluorocarbon Emissions

The National Academy of Sciences issued two sets of reports on this subject in 1976 and 1979. As shown above, the latest reports of the NAS, issued in November and December, 1979 (ref. 5, 6) conclude that continued world CFM emission at 1977 rates would eventually result in ozone depletion of about 16.5 percent (with a 95 percent probability that the eventual level would fall in the range from 5 to 28 percent depletion). One-fourth of this depletion would occur within 15 years, and one-half within 35 years. NAS also concludes that if emissions were to continue to increase between 1980 and 2000 by 7 percent annually, instead of leveling off at 1977 levels, there would be a 75 percent probability that ozone depletion would eventually exceed 30 percent (ref. 6, p. 99). Other studies report estimates of ozone depletion that differ somewhat from these in the NAS study, but that fall within the confidence interval of the NAS study.

Ozone depletion would substantially increase the average intensity of biologically damaging ultraviolet light (DUV) reaching the earth's surface. This increase could be as high as 44 percent at mid-latitudes for an ozone depletion of 16 percent. Such increases would be highly detrimental both to human health and to nonhuman biological systems.

Assuming continuation of present patterns of sunlight exposure, NAS predicts that a 16 percent ozone depletion would result in several

hundred thousand additional cases of non-melanoma skin cancer annually, and, with somewhat less certainty, in several thousand additional cases of melanoma skin cancer (often fatal) annually in the United States alone (ref. 6, p. 6). A relationship has been epidemiologically established between increased DUV exposure and incidence of non-melanoma skin cancer (ref. 8). For non-melanoma skin cancer, approximately a four percent increase in incidence can be expected for every one percent increase in ozone depletion on the average. For melanoma, this statistical relationship is less certain, but appears to be about two to one. (ref. 6, p. 99).

Other significant effects of increased DUV may include reduced crop yields from many important agricultural species, including tomatoes, sugar beets, and corn (ref. 6, p. 67); significant larval and juvenile killings of certain seafood species including anchovies, mackerel, shrimp and crab (ref. 6, p. 69); and adverse effects on the microorganisms constituting the base of the marine food chain. These and other environmental effects could be potentially more serious than the effects of ozone depletion upon human health. In addition, continued accumulation of CFCs in the lower atmosphere (troposphere) may induce a slight warming of the mean global surface temperature, but this is less than the warming predicted for a doubling of atmospheric carbon dioxide caused by fossil fuel combustion.

D. Rationale for Including All CFC's

NAS examined only two CFCs, CFC-11 (trichlorofluoromethane) and CFC-12 (dichlorodifluoromethane) because they represent the vast majority of all CFCs produced. NAS also briefly considered CFC-22 (chlorodifluoromethane), but excluded it from the analysis because, as a partially halogenated compound, its likelihood of reaching the stratosphere before dissociating is much less than that of fully halogenated compounds. However, the findings by NAS on the ozone depletion potential of CFC-11 and CFC-12 are relevant qualitatively for all chlorofluorocarbons.

EPA believes that any regulation of ozone depleters should be as comprehensive as possible, consequently this regulation would address all CFCs.

Potential ozone depleters found outside the CFC chemical family may eventually require regulatory action as well. However, the present set of regulations would be limited to CFCs only because there does not exist sufficient information on other ozone depleters, and because the long lifetime

in the troposphere of CFCs makes them particularly suspect of increasing the concentration of chlorine in the stratosphere.

The proposed regulatory action would cover chemicals with the following general formula:



This formula characterizes all alkanes that contain at least one chlorine and one fluorine, including CFC-11, CFC-12, CFC-113, CFC-114, CFC-115, and CFC-22, as well as several other CFCs not presently manufactured or manufactured only in very limited quantities. The proposed regulatory action intends to take into account the differing ozone depletion potential of the various CFC compounds. EPA is considering including the bromofluorocarbons at a later date if future research substantiates the initial NAS finding that bromine is as effective an ozone depletor as chlorine. (ref. 6, p. 193) EPA solicits comment on this approach to classification of CFCs.

E. CFCs as an International Problem

Ozone depletion truly is a global problem. Regardless of where CFCs actually are emitted, tropospheric mixing results in worldwide CFC distribution with some small differences between the hemispheres caused by the transport from Northern Hemisphere sources to the Southern Hemisphere. Therefore, the danger presented by all CFCs emitted will be spread around the globe. This means that any damage caused by CFC emissions will not be limited within the boundaries of the source country.

The use and production of CFCs are widely distributed around the world, as shown by Table 2.

Table 2.—World Chlorofluorocarbon Production and Use—1977

| Nation | Percent of total world | |
|---------------------------|------------------------|------------|
| | Use | Production |
| United States..... | 35.8 | 39.0 |
| EEC ¹ | 30.2 | 39.1 |
| Japan..... | 6.5 | 7.3 |
| Others ² | 27.5 | 14.6 |
| Total..... | 100.0 | 100.0 |

¹ European Economic Community manufacturers of CFCs are, in decreasing order, Federal Republic of Germany, France, Great Britain, Italy, and The Netherlands.

² Other world manufacturers are, in decreasing order, the Communist Bloc, Canada, Australia, Spain, Mexico, Argentina, Brazil, South Africa, India, Israel, Greece, and Venezuela.

Source: EPA analysis of RAND Corporation and CMA data.

As is evident from the above data, no single nation accounts for a large enough portion of world use or production to be able unilaterally to control ozone depletion. If CFC use increases as forecast (about 9%

annually), even the United States, which presently represents about one-third of the world market, can have only a small impact in limiting ozone depletion, when acting alone. The limited impact of a unilateral United States reduction (assuming this 9% annual growth) is shown in Table 3.

Table 3.—Percentage Ozone Depletion Projected Under 3 Growth Scenarios¹

| Regulatory option (action taken in 1980) | Contribution toward steady-state ozone depletion (in percent) | | |
|--|---|---------------|-------|
| | United States | Rest of world | Total |
| I. No action; uncontrolled growth until 1990..... | 7.5 | 24.5 | 32.0 |
| II. Freeze on Production (1980 levels) U.S. only..... | 4.5 | 24.5 | 29.0 |
| III. Significant Reductions (70 percent from 1980 levels) U.S. only..... | 1.5 | 24.5 | 26.0 |

¹ Assumes that emissions continue indefinitely at 1990 levels.

Source: EPA analysis of Lawrence Livermore Laboratory modelling.

II. Approach to Chlorofluorocarbons Control

A. Choosing a Strategy

To protect health and environment in the United States, EPA both must use its ability to regulate domestic CFC activities and must actively encourage other nations to take similar control actions. Domestic reductions without corresponding international action would be insufficient. Accordingly, the U.S. domestic emissions reduction strategy *must* be chosen not only on the basis of a balancing between risk to the U.S. health and environment (including the relative risk of CFC substitutes), and economic costs, as the law requires, but also on the basis of what effect the choice will have on other nations' decisions in this area. EPA considers that there are three general strategies which it could adopt regarding future emissions.

1. *Wait-and-see*—The United States takes no action until better evidence of the ozone depletion theory is obtained.

This is the least economically burdensome strategy in the short term, since it would avoid the administrative and resource costs imposed by further regulatory control, but it also means that the Agency uses none of its regulatory powers to protect the U.S. health and environment from possible future harm.

It is highly likely that if the United States adopts the "Wait-and-See" strategy, the great majority of other producing and using nations will follow suit. Therefore, a domestic strategy of "Wait-and-See" is likely to be equivalent to a world strategy of "Wait-and-See." This approach of inaction

would most likely result in continuing large growth in the use of CFCs worldwide.

2. No-Growth—The United States limits production to present levels (adjusted for ozone depletion potential) and takes no further action until international conditions and further evaluation of the credibility of the ozone depletion theory warrants.

This strategy is more economically burdensome, but it does signal to other CFC-producing and using nations that the United States is concerned enough about the risks entailed in depletion of the ozone layer that it is willing to take serious action on the basis of present knowledge. At the same time, the strategy makes clear that the United States realizes it cannot solve the problem by unilateral action.

3. Substantial Emissions Reductions—The United States reduces its production to some fraction of the level predicted to be necessary on a worldwide basis to achieve an acceptably low level of ozone depletion.

This strategy would result in substantial economic costs, but would demonstrate that EPA believes the problem is serious enough to adopt stringent regulatory actions to protect the United States health and environment from possible future harm. However, it is possible that adoption of this strategy could strengthen the "Wait-and-See" attitude abroad by creating the impression that other nations could afford to wait before taking action.

There are two critical problems which make adopting the "Wait-and-See" strategy unacceptable. First, validation of the ozone depletion theory through environmental monitoring is limited because a minimum ozone change of approximately five percent over a period of ten years would be required before a depletion could be observed with statistical confidence. If such measurements were required before regulatory action and, upon availability of these measurements, the nations of the world immediately reduced production, depletion would still continue to increase substantially (an "overshoot") before falling back slowly to more acceptable levels. This overshoot would be primarily be attributed to the CFCs already in the atmosphere. These two factors combined could result in a peak depletion level where unacceptable biological damage would result if action is delayed until ozone depletion is in fact measured.

Second, while it is true that the pursuit of a "Wait-and-See" strategy has no immediate economic cost attached to it, it would make the attainment of a

long-term ozone depletion reduction goal much more difficult and costly when and if regulation is eventually undertaken. If world CFC consumption were allowed to grow uncontrolled through 1990, a 65 percent reduction in 1990 use would be required to achieve the equivalent of a 50 percent reduction from present levels. In addition, failure to limit continued CFC growth in the next decade could lead to large capital investments in CFC-dependent technologies. Such investments represent an undesirable allocation of resources if significant reductions are then required in 1990.

The health and environmental problems resulting from adoption of the "no-growth" strategy are essentially the same as those associated with the "wait-and-see" strategy—overshoot possibly leading to unacceptable biological damage, and the higher cost of subsequent actions. If adequate confirmation of the theory is taken to require *measurable* depletion of the ozone layer, the "no-growth" strategy entails precisely the same risks as the "wait-and-see" strategy, except that confirmation would take longer because of reduced annual emissions in the interim. If a decision to act is instead based on cumulative studies of risk coupled with improvements in the modelling of ozone depletion, a "no-growth" strategy would still result in an unacceptable level of risk—assuming such information requires several years. Furthermore, NAS predicts a "no-growth" strategy would result in a four percent level of depletion within a decade.

Consequently, EPA believes that, given the extreme caution which should be exercised because substantial evidence already indicates that the ozone layer is threatened with depletion, the only acceptable long-term strategy is "substantial emissions reductions."

However, if the "substantial emissions reduction" strategy were implemented immediately, this would likely weaken the United States' effort to produce international action of the same magnitude, and virtually nullify the Agency's domestic actions. By comparison, the "no-growth" strategy, while not providing adequate long-term protection, would put the United States in a more moderate position when it presents its case to other nations.

Therefore, EPA considers it advisable to adopt a "no-growth" strategy in the short-term, limiting United States production to present levels, to convince other nations to agree to concerted international action. EPA would consider following this action with a

"significant emissions reduction" policy if international conditions warrant, and if there has been no significant diminution in the present credibility or predictions of the ozone depletion theory.

B. Approaches To Implementing a No-Growth Strategy

EPA has identified two major approaches to achieving a production limitation. The Mandatory Controls Approach would control domestic use of CFCs by regulating final product use or production techniques through product bans and technology-based standards. The Economic Incentives Approach would limit domestic use of CFCs by allocating CFC rights among manufacturers or end users. Each of these two major approaches to control is discussed in greater detail below.

1. Mandatory Controls Approach

One way to limit CFC growth is by banning certain uses or by requiring specific control technologies. While a limit on production would not be achieved directly through this strategy, it could be approximated. This approach would be comparable to other regulatory programs administered by EPA under the Clean Air and Clean Water Acts, where EPA has relied primarily on technological controls. EPA could pursue a similar approach to CFC control either instead of or in addition to a direct production limitation. Three options within this approach are discussed briefly below, along with an outline of their advantages and disadvantages. The options could be used either singly or in combination.

Option 1: Technology-Based Control

One option is mandatory control technology standards. These standards would be comparable to EPA Clean Water Act effluent limitations: for each CFC-using production process, EPA would identify and mandate the use of the "best available technology" (BAT) or the "best practicable technology" (BPT). Examples of possible mandatory controls include:

1. Recovery and recycle of CFCs from flexible urethane and rigid non-urethane foam production using carbon adsorption techniques;
2. Performance standards on solvent degreasing equipment;
3. Conversion to CFC-502 (a less effective ozone depletor) in retail food store refrigeration;
4. Use of CFC-22 or helium as a test gas in refrigeration equipment manufacture;

5. Recovery and recycle of CFCs during mobile air conditioning servicing and repair.

Each of these possibilities, as well as others not mentioned above, has varying emissions reduction potential. Furthermore, they are in various stages of technical development, and requiring them would have differential economic impacts depending on firm size and other factors. Through efficient development and enforcement of these and similar standards, it is possible that EPA could meet its desired goal.

The problem with technical standards is that growth in the CFC-using industries could, in a manner analogous to that following the aerosol ban, offset any gains made through the implementation of such standards. The CFC-using industries are sufficiently varied and dynamic so that implications of this problem are not insignificant. The simultaneous implementation of more than one of the mandatory control options may mitigate this problem somewhat.

EPA requests comment on the feasibility and cost of these control options, as well as their applicability to the CFC problem.

Option II: Selective Product Bans

EPA could establish criteria through which to weigh the utility of various CFC-using products against their contribution to stratospheric ozone depletion and ban or restrict those products which were determined to have the least social utility compared to risk. By placing outright bans on certain products or uses of CFCs and mandating periodic review of the remaining uses, EPA might be able to achieve its goal of zero growth in ozone depletion potential.

EPA would employ factors such as the following in deciding which products ought to be subject to a ban:

1. The risk to health, safety and the environment, taking into account the type and quantity of CFC used in the product or process;
2. Availability of another product or process which can make the product or provide a similar service;
3. Relative efficiency and effectiveness of substitutes;
4. Essentiality of CFC use in providing a health, safety, or environmental benefit to the American public;
5. The environmental risk posed by substitutes.

Specific product bans have some of the same disadvantages as technology-based standards. Most importantly, growth in other existing uses and the development of new uses could quickly offset any gains achieved by bans. Also,

given the absolute nature of a ban, economic efficiency could be lost, since the prohibited uses may be overcontrolled while other exempted uses incur no controls at all—not even those which would be available at low cost.

The above list of factors is not definitive, but it does illustrate the issues that would have to be addressed in making comparisons of utility. EPA requests comment on the appropriateness of specific product bans to address the CFCs problem, and on the factors used to evaluate specific products.

Option III: Use Ceiling Combined With a SNUR

Under this option, EPA would collect use data from individual users of CFCs. A given percentage of historical use would establish a baseline for each user, and any user wishing to exceed its baseline would be required to file a Significant New Use Rule (SNUR) notice. EPA would evaluate all notices received, and prohibit or limit some fraction of them, such that total use in a given year would not exceed the desired levels. Transfers of use rights from one user to another would also require the filing of a SNUR notice. This would allow EPA direct and continuing control over domestic allocation of CFCs. EPA has the authority to implement a SNUR plan under Section 5 of the Toxic Substances Control Act, if the Agency determines it is in the public interest to act under TSCA rather than under the Clean Air Act.

The disadvantages of using a SNUR in this instance are substantial: first, the Agency would have to obtain massive amounts of data through the use of TSCA Section 8 to establish baselines; and second, the filing and evaluation of SNUR notices would absorb substantial amounts of Agency and industry resources.

2. Economic Incentives Approach

An economic incentives approach would function by directly restricting CFC production, causing prices to increase to ration allowed production. As CFC prices rise, firms must decide whether to continue to use CFCs and pay the higher price, or switch to substitute chemicals or processes to reduce CFC consumption. The firm's decision would be a function of the cost and availability of substitutes, the potential for control and the new increased price of CFCs. Those firms for which control is relatively inexpensive would control more extensively. They would have the incentive to continue increasing control until the cost of an

additional "unit" of control was equal to the cost of an additional unit of CFC. Alternatively, firms for which control measures are unavailable or exceedingly expensive would take little or no action to control emissions, choosing instead to incur the higher costs of continued CFC use. If the firms involved are generally profit-maximizers, higher prices would provide them the incentive to search for new control options. It is the different control options available to firms and their desire to minimize costs which gives an economic incentive approach its superior efficiency.

EPA is also investigating a use of a tax or surcharge on CFC use to increase the effective price of CFC use. Although this option is less likely to be employed, the Agency welcomes comment on its relative merit.

A production restriction combined with marketable CFC use rights requires a method by which the initial quota would be distributed. There are several ways in which EPA could distribute CFC production or use rights. One is through direct allocation of production permits, either to manufacturers or to users. The other is through an auction system, under which the transfer or "scarcity" payments would flow to the government. The advantages, drawbacks, and specifics of each method are discussed further below.

Option IV. Direct Allocation to Manufacturers

EPA would obtain, possibly under the authority of Section 8(a) of the Toxic Substances Control Act (TSCA) of 1976, specific information on the production of CFCs, as well as on the production or purchase of CFC precursor chemicals, from each of the major domestic manufacturers. Using this information, EPA would establish a production ceiling for the industry based on a particular base year or some formula combining several years. This production ceiling would be measured in "permit pounds," a unit which would allow a producer to vary his mix of products among the various CFCs according to the relative depletion potential of each. (This concept is described in Section II.B.2.a.) Sales of allocations among the manufacturers, or to potential new entrants into the industry, would be permitted.

As described above, the imposition of a production ceiling on CFC manufacturers would induce them to raise the price charged for CFC to allocate the reduced quantity of CFC among users. This increased cost would create an incentive for users to develop CFC conservation techniques or to

switch to substitutes. EPA anticipates that such price increases and the resulting profits to manufacturers would be small initially since the anticipated shortfall in production created by the ceiling would not be large. If the production ceiling were to continue for several years, however, the transfer payments accruing to manufacturers could become quite large. The RAND Corporation estimates that total transfer payments will eventually exceed \$2 billion. EPA would consider methods which minimize the windfall to manufacturers and minimize impacts on users.

Option V. Direct Allocation of CFC Permits to Users

Instead of allocating permits to manufacturers as outlined above, EPA could make a direct allocation of CFC permits to user industries. This allocation could be made according to historical use, capacity, or some other measure. While insufficient information on the number and size of firms in user industries would make an equitable allocation extremely difficult to implement, this method of allocation might be the most effective in reducing the volume of explicit transfer payments either to manufacturers or to the government. EPA recognizes that, depending on the market structure and the dynamic interrelationship among using and producing industries, a substantial portion of the transfer payments might ultimately accrue to manufacturers even under a system of allocating permits to users. EPA specifically requests comment on this issue.

Option VI. Government Auction of Permits

Rather than issuing permits *gratis*—and thereby creating the possibility that manufacturers would capture the full volume of transfer payments—an alternative would be for EPA to sell permits to the manufacturers in an auction. This method would allow the government to recoup a large portion of the transfer payments from the manufacturers. This option would be administratively simple, and would be less likely than Option I to freeze the market shares of the manufacturers. Also, a new entrant to the CFC-producing industry would be able to enter the market for permits without the additional cost disadvantage he would encounter if permits were allocated to existing manufacturers rather than auctioned.

Another alternative would be to auction permits to CFC users (those firms which use CFCs in their

production processes or as end products). This option would effectively eliminate the producer's share of the transfer payments. In addition, it would maintain the present level of competition among manufacturers, would be administratively simple, and would not significantly deter competition, entry, or exit for either manufacturers or users.

To make matters even simpler administratively, EPA could auction permits in an unrestricted market to manufacturers, users and other potential participants. Users would buy what they could afford to meet their needs. Manufacturers would buy permits to capture some portion of the market, and perhaps to supply CFCs to those users too small to enter the auction or the permit aftermarket. This type of auction would be the easiest to conduct, since monitoring of participation would not be required.

EPA solicits comments on the efficiency and efficacy of the three major incentives-oriented approaches to CFC control outlined above, and especially, comments on possible methods of direct allocation to users or manufacturers; methods of auctioning permit rights; and the impact and incidence of transfer payments.

2.a. The Permit Pound Concept

EPA recognizes that different CFC compounds present varying potential for depletion of stratospheric ozone. Indeed, EPA would structure the production ceiling regulation in such a way as to provide incentives for industry users to shift from those CFCs most harmful to the stratosphere toward those CFCs posing a lesser threat.

EPA would provide this incentive by establishing the production ceiling in terms of "permit pounds". Under this strategy, each type of CFC would be weighted according to its ozone depletion potential relative to the other CFCs. Ozone depletion potential is primarily a function of molecular chlorine content by weight and the lifetime in the atmosphere of the various CFC compounds. Research to date results in the permit pound conversion factors shown in Table 4.

Table 4 compares the ozone depletion potential of other CFCs with that of CFC-11. For example, according to the chlorine content criteria, CFC-115 is only 20% as harmful to the ozone layer as an equivalent weight of CFC-11.

Table 4.—Depletion Potential Factor

| Type of CFC | (CFC-11=1) |
|-------------|------------|
| CFC-11 | 1.00 |
| CFC-12 | .79 |

Table 4.—Depletion Potential Factor—Continued

| Type of CFC | (CFC-11=1) |
|-------------|------------|
| CFC-113 | .77 |
| CFC-114 | .49 |
| CFC-115 | .20 |
| CFC-22 | .18 |

¹CFC-22 cannot be correctly measured strictly according to chlorine content. CFC-22 is partially halogenated, which means that relatively little of the emitted compound ultimately reaches the stratosphere, because of its shorter lifetime.

Source: Lawrence Livermore Laboratory.

2.b. Establishing a Production Ceiling

In setting a production ceiling, EPA would use the permit pound concept in the following manner: production of each CFC in the base year would be multiplied by its respective depletion factor, and the resulting products would be added to yield the allowable ceiling on ozone depletion potential. Under an economic incentives approach, ozone depletion would remain constant, although the use of permit pounds would allow actual poundage to vary. The substitution of less-depleting CFCs allows the overall production level of CFCs to increase without adding to the ozone depletion potential. (See Table 5 and discussion following.)

Table 5.—Ozone Depletion Equivalents of a Hypothetical Base Year Production

| Type of CFC | Hypothetical base year production (millions of lbs.) | Ozone depletion factor | Ozone depletion equivalent (millions of lbs.) |
|-------------|--|------------------------|---|
| CFC-11 | 100 | 1.00 | 100 |
| CFC-12 | 100 | .79 | 79 |
| CFC-113 | 100 | .77 | 77 |
| CFC-114 | 100 | .49 | 49 |
| CFC-115 | 100 | .20 | 20 |
| CFC-22 | 100 | .18 | 18 |
| Total | 600 | | 343 |

Applying the ozone depletion factors to a hypothetical total base year production of 600 million pounds distributed equally among the major CFCs yields an ozone depletion equivalent of 343 million pounds. This may be considered an "allowable stratospheric chlorine ceiling." Such a ceiling holds potential CFC damage to the stratosphere constant while allowing individual firms to alter their production of individual CFCs within the bounds of the ceiling.

EPA would issue production permits under any of the three options outlined above. Compliance monitoring would consist of a comparison of manufacturers' CFC production records with the amounts of permits that they (a) were allocated under Option I, plus those purchased from other manufacturers; (b) received in

production orders from users, under Option II or III; or (c) directly bought in auction, under Option III, plus purchases from others.

Permits, whether auctioned or allocated directly to users or manufacturers, would be in permit pound units. In the example given above, this allocation is stated in CFC-11 equivalent units. For purposes of determining production mix, firms would be allowed to produce relatively more of those CFCs which have less ozone depletion potential compared with the base compound. The multiplier determining the allowable production equivalent per permit pound is equal to the *inverse* of the ozone depletion factor for each CFC. In short, the less depleting a given CFC, the more would be allowed to be produced per permit pound. For example, the ozone depletion factor for CFC-12 is 0.79 and its inverse is 1.26. Therefore, for each permit pound it is allowed under the production ceiling, a firm could produce 1.26 pounds of CFC-12 compared with only 1.00 pound of CFC-11. The production equivalents derived from Table 4 are shown in Table 6.

Table 6.—Derivation of Production Equivalents

| Type of CFC | Ozone depletion factor | Production equivalent |
|--------------|------------------------|-----------------------|
| CFC-11..... | 1.00 | 1.00 |
| CFC-12..... | .79 | 1.26 |
| CFC-113..... | .77 | 1.36 |
| CFC-114..... | .49 | 2.04 |
| CFC-115..... | .20 | 5.00 |
| CFC-22..... | .18 | 5.56 |

EPA anticipates that the permit pound concept would provide a strong incentive for CFC manufacturers and users, where technically feasible, to seek ways in which to shift their products and processes toward those CFCs with less ozone depletion potential.

EPA requests comments on the permit pound concept, its implementation, and the methods to be used to determine the production ceiling and the production equivalent multipliers.

2. c. Exports Under the Production Ceiling

The global nature of the risks from CFC emission bears heavily on the question of how to treat United States' exports under any regulatory action being considered by EPA. As discussed in Section I.E. above, CFC emissions anywhere around the world contribute equally (depending on the type of CFC and the volume of emissions) to the potential for ozone depletion, which in turn affects all areas of the globe.

Under a production ceiling, EPA's current thinking is that firms could continue to export CFCs in bulk form or in nonaerosol articles, provided that the additional amount would not exceed their quota under the production ceiling. However, it appears unlikely that firms would continue exporting because they would be placed in an unfavorable pricing position in the foreign CFC market. In uses where large amounts of CFCs are contained in the article, such as centrifugal chiller, exporters would probably alter the present practice of shipping the article overseas fully charged with CFCs. Manufacturers might find it advantageous to ship units charged with a test gas, which is then exchanged for the CFC overseas. Such action, however, would depend on the quantity of CFCs contained in the article and the degree to which the increased cost of domestically purchased CFCs could be passed through to the overseas importers.

Under this approach of including exports in the production ceiling, foreign firms could conceivably increase their production to offset any decrease in United States' exports, which would run counter to the long term goal of reducing global CFC emissions. However, some nations have already taken action to limit their capacity to produce CFCs and have indicated that they will consider taking additional actions. EPA, in cooperation with the Department of State and other concerned agencies, will continue to encourage other countries to reduce global releases of CFCs. Furthermore, the alternative, of excluding exports from the production cap and granting exporters additional permits equal to their present level of exports, might have serious international ramifications. The global problem may be exacerbated if the United States is in the position of encouraging other nations to take further actions to control CFC emissions while at the same time not controlling United States' CFC exports.

A theoretical third alternative would be to selectively exclude certain use categories of exports from the production cap and include others, but this would appear to be incompatible with the general philosophy of an economic incentives approach; would be difficult to defend on a use category basis (especially since the desirability of receiving CFCs for certain uses or in certain products would vary among countries); would not solve the problem of bulk shipments of CFCs for unknown uses; and would be difficult to administer.

EPA requests comments on these three alternative approaches to export control, considering business and economic effects, effects on global CFC emissions, international ramifications, and ease of administration. EPA also requests comments on the applicability of Section 12(a)(2) of TSCA to the question of CFC exports. This section empowers the Administrator to control exports if he finds that they would present an unreasonable risk of injury to health or the environment in the United States. Releases from CFCs produced for export will have the same effect on the health and environment of the United States as chemicals produced for domestic use.

2.d. Imports of CFC and CFC-Containing Articles

CFCs are presently imported both in bulk form and in articles. For the production ceiling regulation to be fully efficient, a mechanism must be devised to regulate imports of CFCs and CFC-containing articles so that imports are neither given an advantage nor placed at a disadvantage in comparison to domestic manufacturers. Mechanisms to control imports of these items include: 1. Freezing imports at current levels;

2. Establishing a permit system for imports;

3. Accounting for imports in establishing the production ceiling and including importers in the established allocation system.

The first alternative would operate like a quota system with the allotment equal to the amount of bulk CFCs or CFC-containing articles imported in the base period. CFC imports would be tied to the level of imports for a previous year with both the mix of CFCs and the articles containing CFCs remaining unchanged. This alternative would favor existing importers and virtually prohibit new entrants to the import market. It also would enable importers to enjoy some small profit advantage since they would not be operating under a production ceiling similar to that under which domestic manufacturers of CFCs would be operating. Domestic manufacturers and retailers are not expected to be significantly penalized by this alternative since domestic demand is expected to exceed the supply of CFCs from all sources.

The second alternative would be implemented by establishing a separate ceiling for importers and requiring them to purchase permits equal to the amount of pounds of CFCs they want to import either in bulk form or in articles. Their permit price would likely reflect the domestic permit price. This alternative would remove the possibility of an

unfair competitive advantage accruing to foreign manufacturers due to domestic CFC regulation. It would also permit the sale of permits between firms importing to the United States. Under this alternative, current importers of CFCs should not have any advantage over those attempting to enter the import market. Furthermore, importing firms would be permitted the same flexibility in CFC use and product mix allowed to domestic firms.

The third alternative could be implemented by including imports under the domestic production ceiling and allowing importers to compete in the permit market along with domestic firms. Like the second alternative, this option would allow the transfer of CFC permits and also would remove the possibility of importers enjoying a cost advantage over domestic manufacturers. It would also allow flexibility in the mix of CFCs originating domestically and abroad, since these two groups would be competing in the same permit market. EPA solicits comments on these options for controlling imports and exports under the proposed production cap.

2.e. Anticipated Technical Responses to an Economic Incentives Approach to a Production Ceiling

EPA has undertaken research to attempt to predict the measures that CFC-consuming industries might take to stay within the production ceiling. The RAND Corporation has identified a number of steps that industry may take to reduce CFC consumption. These steps do not necessarily exhaust the options for recovery and recycle or substitutions that may be available in the future. Indeed, EPA expects that additional options will become available to industry as research and innovative techniques are stimulated by higher CFC prices.

Initial Actions

- Large molded foam plants would install recycle and recovery systems;
- CFC-12 would be replaced by CFC-502 in the manufacture, installation, and servicing of medium temperature refrigeration systems, and by CFC-22 in leak testing in the servicing of retail food refrigeration systems;
- Solvent cleaning and drying units would either conserve through recycling or find substitutes, and some units would be modified to reduce losses;
- Flexible slabstock foam plants would convert to methylene chloride.

Intermediate Actions

- Polystyrene sheet plants would install recycle and recovery systems;
- All solvent cleaning and drying units would further substitute other solvents, and medium-sized units would also recycle more intensively;
- Molded foam plants and flexible slabstock plants would install recycle and recovery systems where CFC-11 was still used.

Later Actions

- All flexible foam plants would

improve their collection efficiencies;

b. Polystyrene sheet plants would convert to pentane blowing agent;

c. All solvent cleaning and drying units would further substitute other solvents, and large units would increase their recycling efforts.

These three sets of actions are anticipated to produce the following reductions (from projected levels) in CFC use from 1981 to 1983. (Reductions are given in both real and permit pounds).

Table 8.—Reductions From Uncontrolled Growth

[In millions of pounds]

| Phase | 1981 | | 1982 | | 1983 | |
|----------------------|-------------|---------------|-------------|---------------|-------------|---------------|
| | Real pounds | Permit pounds | Real pounds | Permit pounds | Real pounds | Permit pounds |
| Initial action: | | | | | | |
| a..... | 13.2 | 13.2 | 13.9 | 13.9 | 14.5 | 14.5 |
| b..... | 0.0 | 3.6 | 0.0 | 3.8 | 0.0 | 4.0 |
| c..... | 20.7 | 15.9 | 21.3 | 16.4 | 22.0 | 16.9 |
| d..... | 15.0 | 15.0 | 15.8 | 15.8 | 16.5 | 16.5 |
| Total..... | 48.8 | 47.7 | 51.0 | 49.9 | 53.0 | 51.9 |
| Intermediate action: | | | | | | |
| a..... | 7.6 | 6.0 | 8.0 | 6.4 | 8.4 | 6.7 |
| b..... | 4.9 | 3.8 | 5.2 | 4.0 | 5.6 | 4.3 |
| c..... | 6.0 | 5.2 | 6.3 | 5.4 | 6.6 | 5.7 |
| Total..... | 18.5 | 15.0 | 19.5 | 15.8 | 20.6 | 16.7 |
| Later action: | | | | | | |
| a..... | 6.5 | 6.5 | 6.8 | 6.8 | 7.2 | 7.2 |
| b..... | 7.6 | 6.0 | 6.0 | 6.4 | 8.4 | 6.7 |
| c..... | 13.6 | 10.5 | 14.6 | 11.2 | 15.5 | 11.9 |
| Total..... | 27.4 | 23.0 | 27.4 | 24.4 | 31.1 | 25.8 |
| Grand total..... | 90.0 | 81.8 | 95.1 | 86.4 | 100.3 | 91.1 |

NOTE.—Figures may not sum due to rounding.
Source: Rand Corporation.

III. A Summary of Issues on Which Comments Are Requested

EPA welcomes general comment on all aspects of chlorofluorocarbon regulations, from members of industry and the general public. EPA especially solicits comment on the following issues:

- Scientific validity of the ozone depletion theory. Comments on the two 1979 reports of the National Academy of Sciences, and the NASA Report 1049, December 1979.
- Risks of continued world chlorofluorocarbon emissions. Comments on how these risks, both to human health and the environment, should be quantified and evaluated.
- Strategies for level of CFC control. Comments on the validity of a Production Ceiling Strategy, as contrasted with Wait-and-See, and Substantial Emissions Reduction.
- International aspects of CFC regulatory effort. Comments on how to

improve the level of international cooperation on this issue and issues related to the import and export of CFCs.

5. Approaches to achieving a production ceiling domestically: comments on economic incentives approaches to chemical regulation; desirability of the various auction and allocation methods; the permit pound concept; and methods of directly allocating quotas or permits to manufacturers or to users. Comments also on the mandatory controls approach to CFC regulation, including production bans, technology based standards, and SNURs.

Douglas Costle,
Administrator,
September 30, 1980.

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