

revising the first sentence of paragraph (b)(4)(ii), to read as follows:

- ***
 (b) Priority 2. ***
 (1) Essential agricultural users. ***
 (ii) ***
 (D) Includes with respect to any essential agricultural user to which Subpart C applies the data and calculations necessary to determine alternative fuel volumes under § 281.304.

- (4) Subsequent request. ***
 (ii) For years subsequent to 1979, the data required by this paragraph must be filed only to the extent that there has been a change in essential agricultural requirements.

§ 281.216 [Amended]

4. Section 281.216 is amended by designating the existing paragraph as paragraph (a) and by adding paragraph (b) to read as follows:

- (a) ***
 (b) The Data Verification Committee shall submit its report not later than October 23, 1980, if the pipeline has elected under § 281.204(b)(4) to file its revised index of entitlements on November 1, 1980.

§ 281.303 [Amended]

5. Section 281.303 is amended by adding in paragraph (a) the words "or thereafter acquired" between "1979," and "the", and by adding at the end of paragraph (h) the words "and § 281.208(b) of this Part."

§ 281.304 [Amended]

6. Section 281.304(a)(2) is amended by adding the term "or thereafter acquired," between "1979" and the word "the".

7. Section 281.305 is revised to read as follows:

§ 281.305 General Rule.

Any essential agricultural user subject to this subpart that has requested from any direct supplier priority 2 classification for volumes for any essential agricultural use establishment shall reduce its essential agricultural requirements calculated under § 281.208 to reflect the exclusion of volumes of natural gas for which its essential agricultural establishment has alternative fuel volumes under § 281.304.

Appendix A.—Comparison of Selected Fuel Price Data, FPC Form No. 423 versus Monthly Energy Review, 1976—January 1980

Type of fuel	FPC form No. 423 price data ¹					Monthly energy review price data ²				
	1976	1977	1978	1979	Jan. 1980	1976	1977	1978	1979	Jan. 1980
Cents per MMBtu										
Fuel Oil:										
No. 2.....	235.1	264.3	271.9	402.1	564.4	226.4	257.3	268.2	403.1	537.2
Low Sulfur No. 6.....	207.1	229.1	225.1	320.2	453.3	193.6	221.3	216.8	322.4	466.5
High Sulfur No. 6.....	168.7	199.9	186.7	264.7	361.4	165.9	195.2	186.1	261.5	349.6
All No. 6.....	195.9	220.4	212.3	299.7	423.5	182.8	210.4	202.7	297.0	417.7
Coal: All Grades.....	84.8	94.7	111.6	122.4	128.7	(3)	(3)	(3)	(3)	(3)
Natural Gas.....	103.4	130.0	143.8	175.4	194.8	97.2	131.9	154.1	201.8	237.3
Actual price difference (fuel oil and coal versus natural gas)										
Fuel Oil:										
No. 2.....	131.7	134.3	128.1	226.7	369.6	129.2	125.4	114.1	201.3	299.9
Low Sulfur No. 6.....	103.7	99.1	81.3	144.8	258.5	96.4	89.4	62.7	120.6	229.2
High Sulfur No. 6.....	65.3	69.1	42.9	89.3	166.6	68.7	66.3	32.0	59.7	112.3
All No. 6.....	92.5	90.4	68.5	124.3	228.7	85.6	78.5	48.6	95.2	180.4
Coal: All Grades.....	(18.6)	(35.3)	(32.2)	(53.0)	(66.1)	(3)	(3)	(3)	(3)	(3)
Price difference ratio ³ (fuel oil and coal versus natural gas)—ratio										
Fuel Oil:										
No. 2.....	1.274	1.033	.891	1.292	1.897	1.329	.951	.740	.998	1.264
Low Sulfur No. 6.....	1.003	.762	.565	.826	1.327	.992	.678	.407	.598	.966
High Sulfur No. 6.....	.632	.538	.298	.509	.855	.707	.480	.208	.296	.473
All No. 6.....	.895	.695	.476	.709	1.174	.881	.595	.315	.472	.760
Coal: All Grades.....	(.180)	(.272)	(.224)	(.302)	(.339)	(3)	(3)	(3)	(3)	(3)

¹ As reported in DOE/EIA Energy Data Report entitled *Cost and Quality of Fuels for Electric Utility Plants* (Annual summary data 1976–1979) and Monthly Report for January 1980. Note: All prices are delivered prices to steam electric plants. Prices paid for No. 6 fuel oil include prices paid for minor amounts of No. 4 and No. 5 fuel oil, crude and topped crude.

² Fuel oil prices are reported on FEA Form P302-M-1, "Petroleum Industry Monthly Report for Product Prices." Natural Gas Prices are those paid by industrial customers of major interstate pipeline companies as reported on FPC Form No. 11, "Natural Gas Pipeline Company Monthly Statement."

³ The price data for coal is the same as shown under FPC Form No. 423 price data.

⁴ Mathematically the price difference ratio is $P_2 - P_1 / P_1$, where P_2 = the price of fuel oil or coal and P_1 = the price of natural gas. The ratio indicates the percent difference between natural gas and alternate fuel prices. For example in January 1980 electric utilities reported that in that month they paid 1.897 times more (189.7 percent) for No. 2 fuel oil than they paid for natural gas.

As determined in Docket No. RM79-40 NOPR issued June 3, 1980, corrected for clerical/typographical error.

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18 CFR Part 282

[Docket No. RM80-10]

Incremental Pricing; Order Denying Rehearing and Revoking Amendments Made by Order No. 80

Issued: August 1, 1980.

AGENCY: Federal Energy Regulatory Commission.**ACTION:** Order Denying Rehearing and Revoking Amendments Made by Order No. 80.

SUMMARY: On June 5, 1980, the Consumer Energy Council of America filed a petition for rehearing of Order No. 80, raising a single issue—whether the legislative veto provisions of section 202 of the Natural Gas Policy Act of 1978 (NGPA) are constitutional. In this order denying rehearing, the Commission finds that sound administrative practice requires it to presume the constitutional validity of all provisions of the NGPA. Nevertheless, since the constitutional issue raised here has not yet been spoken to by the Supreme Court, the Commission notes that it is possible that the legislative veto of section 202 could eventually be held to be invalid. In view of this potential, the Commission also acts in this order to revoke the amendments made by Order No. 80, on the basis that the underlying premise of its decision to promulgate the order would no longer apply without the legislative veto mechanism.

EFFECTIVE DATE: August 1, 1980.**FOR FURTHER INFORMATION CONTACT:**

Tom S. Runge, Office of the Chairman, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, D.C. 20426, (202) 357-8335.

Stephen Melton, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, D.C. 20426, (202) 357-8467.

In Order No. 80, issued on May 6, 1980, the Commission promulgated a rule in this docket and submitted it to Congress as required by section 202(c) of the Natural Gas Policy Act of 1978 (NGPA). That rule would have expanded the scope of incremental pricing from its present coverage of industrial boiler fuel facilities to include "any industrial facility which is within a category defined by the Commission." The rule proposed to Congress would have extended the incremental pricing program "to all industrial users except those specifically exempted." (Order No. 80 at 6)

In Order No. 80, the Commission did not "second-guess the social and

economic judgments that Congress made in enacting Title II." (Order No. 80 at 5) On the contrary, it saw its role as a more limited one, i.e., it brought "its technical expertise to bear on the design of a workable Phase II rule that [could] best advance the purposes set by Congress." (*Id.*) The Commission believed, however, that in the last analysis the Congress had reserved to itself the question "whether this Phase II submittal meets adequately the social and economic goals of the incremental pricing program or, indeed, whether those goals are still appropriate." (*Id.*)

On May 6, 1980, the Commission transmitted the rule to Congress. On May 20, 1980, the House of Representatives passed a Resolution of Disapproval (H. Rep. 655),¹ which under the language of section 202 of the NGPA makes the rule ineffective.

On June 5, 1980, the Consumer Energy Council of America, *et al.* ("CECA"), filed a timely petition for rehearing of Order No. 80. In that petition, CECA raises a single issue—whether the legislative veto provision of section 202 is constitutional.² On July 8, 1980, the Commission granted rehearing solely for the purpose of further consideration.

We recognize that the constitutional issue concerning the validity of the legislative veto mechanism is one which has not been decided by the Supreme Court of the United States, and is one on which there is great diversity of view both within the Federal government and among legal scholars. Nevertheless, it was, at the time order 80 was promulgated and today remains, our view that sound administrative practice requires that presumption of constitutional validity of the statutes entrusted to this Commission for implementation.³

If section 202(c) of the NGPA containing the Congressional review and legislative veto mechanism is eventually held to be invalid, an

argument can be made that Order No. 80 would take effect at the expiration of 90 days after the 30-day Congressional review period. This is CECA's position. In view of this potential (a matter squarely presented to us in this application for rehearing), the Commission has examined the underlying premise of its decision to prescribe Order No. 80 in its present form. As we noted in Order No. 80, many commenters suggested that no section 202 rule, or the narrowest possible section 202 rule, be prescribed. We refused to entertain these arguments, stating:

The Commission believes that it was neither requested nor authorized to second-guess the social and economic judgments that the Congress made in enacting Title II. The role of the Commission under Section 202 is more limited. Instead, the Commission is instructed to bring its technical expertise to bear on the decision of a workable Phase II rule that can best advance the purposes set by the Congress. It is up to the Congress to decide whether this Phase II submittal meets adequately the social and economic goals of the incremental pricing program or indeed, whether those goals are still appropriate. (Order No. 80, p. 5)

Clearly, if section 202(c)'s Congressional review provisions are constitutionally invalid, then our premise for refusing to consider these arguments, namely that it "is up to Congress to decide whether this Phase II submittal meets adequately the social and economic goals of the incremental pricing program", is equally invalid, and cannot be the basis for such refusal. If the Commission refused to consider material arguments made in the course of the rulemaking because of this faulty premise, then Order No. 80 cannot be the product of reasoned decisionmaking and the Commission is neither authorized nor required to place it in effect. Thus this question seems largely academic at this point, and Order No. 80 cannot take effect under its terms at the conclusion of the 90-day period which follows the conclusion of the 30-day Congressional review period.

As previously pointed out, the Commission has not yet independently evaluated whether the Phase II rule meets the social and economic goals of the Title II incremental pricing program.

But we question whether the marketplace should be left exposed to the potential of significant disruption should the courts not share this view of the law. We think such an exposure to be most inadvisable. Hence, we propose to adopt an administrative course which should remove this jeopardy.

Moreover, if the Commission were to make that independent social and

¹ This is the only instance where Congress has exercised its veto in relation to the incremental pricing program.

² CECA raises this issue by requesting the Commission to strike the following language from the Order:

"... if neither House of Congress passes a Resolution of Disapproval of the regulations transmitted to them in this Order within 30 days of Congressional review, as determined in accordance with section 507(b) of the NGPA" (Order No. 80, p. 93)

Petitioners apparently believe that the elimination of this language could make the rule effective in accordance with its remaining terms.

³ See *Califano v. Sanders*, 430 U.S. 99, 109 (1976); *Ostereich v. Selective Board*, 393 U.S. 233, 242, (1968) (Justice Harlan concurring in the result); *Buckeye Industries, Inc. v. Secretary of Labor*, 587 F.2d 231 (5th Cir. 1979); and *Speigel, Inc. v. Federal Trade Commission*, 540 F.2d 287 (7th Cir. 1976).

economic evaluation—and we stress that we have not made it previously and do not make it here today—we believe as an initial matter that we might well have very serious reservations as to the wisdom of making the Phase II rule effective. As we pointed out in Order No. 80, there are serious questions of general social and economic policy that deserve to be addressed. For example, we noted in the order that the rule there prescribed did not appear to be capable of carrying out the market ordering function of incremental pricing.⁴

Moreover, we note that the rule in its present form⁵ might be an imperfect instrument for sheltering high-priority users from the economic impacts of rapidly increasing natural gas prices. Perhaps a better mechanism can be devised but if so, we were not able to discover it in the strict statutory period for implementation of incremental pricing.

In order to fairly make a broader judgment on the social and economic desirability of the rule as a sheltering device, or as a market-ordering device, the Commission would also have to consider and weigh much more imponderable and possibly countervailing factors—for example, the possibility that these fairly minimal savings to millions of high-priority users will be more than offset, in a broad social and political sense, by the significant surcharges and the increased costs of required reporting and accounting measures that would be imposed on the natural gas users subject to the Phase II rule.

A related and equally difficult social policy judgment that should properly be made by the Commission—if the Congress cannot constitutionally make it by way of the section 202(c) legislative veto—is whether the projected savings for high-priority users in annual gas costs might not be largely offset, in a strictly monetary sense, by increased prices for consumer goods possibly caused by passed-on Phase II incremental pricing surcharges.

These imponderables, and the other major social and economic issues raised by Order No. 80, simply must be assessed, and a reasoned judgment reached upon them, before the rule takes effect. The House of Representatives made a judgment to reject this proposal after consideration of these and other social and economic issues. The

Commission has not made and does not today attempt an independent evaluation of them.

Moreover, such an evaluation in the future would be aided by an opportunity to judge the implementation of the Phase I over the coming months and the accompanying opportunity to address and resolve any administrative problems that may be encountered.

This seems to us the wiser administrative course of action, one that would minimize the risk of economic dislocations to the industrial sector and avoid adding at this time further recessionary pressures on American industry. It is the administrative course which we would choose, if the choice were ours to make.

In order to assure that an opportunity to evaluate Phase I, and the impacts of Phase II as proposed in the event section 202(c) is held invalid, the Commission will exercise its authority under sections 201 and 202 to amend the rule under section 201 to revoke the amendments made by Order No. 80. Revocation will permit the Commission in the future to carefully weigh these considerations and if appropriate prescribe a Phase II rule which it finds to be in the public interest.

The Commission's authority to amend is clear. Section 201 directs the Commission to prescribe an incremental pricing rule applicable to industrial boiler fuel facilities, and authorizes the Commission "from time to time" to amend the rule. Section 202 requires the Commission to amend the 201 rule to expand its applications to such other categories of industrial facilities as it may define. The amendment required by section 202 to the section 201 rule is part of the section 201 rule. Thus, the amendment may, by the terms of section 201, be amended "from time to time." By the terms of 202(a)(2), the amendment required by section 202 and all amendments "applicable to facilities to which the amendments required by this section applies (other than technical and clerical amendments)" are subject to the Congressional review procedure in section 202(c), if those procedures are constitutionally valid. However, the amendment made by this order will have legal effect only if section 202(c) is invalid. Moreover, if section 202(c) is invalid, then the Congressional review procedure it sets out is inoperative. The amendment shall, in this event, take effect immediately on issuance without submission to either House of Congress.⁶

⁶It is similarly clear, if section 202(c) is invalid, that there is no requirement that Order No. 80 be made effective at any particular time or at all. Section 202(a)(1) requires the Commission, within 18

The Commission orders: (A) The petition for rehearing is denied.

(B) The amendments made by Order No. 80 (45 FR 31622, May 13, 1980) to the Commission's regulations are revoked, effective on issuance of this order

By the Commission.

Kenneth F. Plumb,
Secretary.

[FR Doc. 80-24131 Filed 8-15-80; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 416

Pass Along of Federal Supplemental Security Income Benefit Cost-of-Living Increases to Recipients of State Supplementary Payments; Limitations on State Costs for Hold-Harmless States

AGENCY: Social Security Administration, HHS.

ACTION: Final rule.

SUMMARY: These final regulations provide the rules we will use to implement the pass-along provisions of the social security amendments enacted October 21, 1976 (section 2 of Pub. L. 94-585). Generally, these provisions require that States that supplement the Federal SSI benefit "pass along" Federal cost-of-living increases to individuals who are eligible for State supplementary payments. In order to meet this requirement, States that make supplementary payments on or after June 30, 1977, must agree to continue making these payments and to keep them at certain levels. If a State does not agree, or if the State agrees but does not keep the payments at the required levels, the State shall be determined by the Secretary to be ineligible for Medicaid reimbursement under title XIX of the Social Security Act. However, the State will not be found to be out of compliance because it did not keep its payments at the required level if it maintains its total annual expenditures for State supplementary payments. Another provision, known as the "preservation of hold-harmless provision," protects certain States

months after the enactment of the NGPA, to "prescribe" an amendment to the rule under section 201. However, under section 202(a)(2), the amendment prescribed "shall take effect only as provided in subsection (c) [of section 202]." If section 202(c) is invalid, the statutory mechanism for placing the rule in effect no longer exists, and the Commission is not required to place Order No. 80 in effect.

⁴Order No. 80, pp. 57-66.

⁵As Order No. 80 pointed out, at p. 71, sheltered high-priority users would, on the average, probably be spared a total of about \$14 per Mcf of purchased gas. For the average household using natural gas for heating or cooking purposes, this translates into a savings of about \$18 per year.

(currently Hawaii, Massachusetts, and Wisconsin) from an increase in their State expenditures when they pass along cost-of-living increases in Federal SSI benefits.

In these regulations, we describe (1) the requirements that States must meet under the "pass-along" amendments, (2) the general content of the agreements between the States and the Secretary, and (3) the basis for our finding that a State is not in compliance and the effect of this finding on the State. In addition, we (1) remove the parenthetical phrase in the definition of State supplementary payments that refers to burn-outs, utility turn-offs, etc., because it is no longer necessary, and (2) amend the regulations on hold-harmless protection so that they provide protection for "passing along" Federal cost-of-living increases.

EFFECTIVE DATE: These final regulations shall be effective August 18, 1980.

FOR FURTHER INFORMATION CONTACT: Clara B. Powell, Legal Assistant, Office of Operational Policy and Procedures, Office of Regulations, Social Security Administration, Baltimore, Maryland 21235 (301) 594-7459.

SUPPLEMENTARY INFORMATION: On March 27, 1979, these rules were published in the *Federal Register* (44 FR 18238) as a Notice of Proposed Rulemaking (NPRM) with a 60-day comment period. We received a total of 12 comments that we discuss following our discussion of the provisions of the regulations.

Which States Must Comply With The Provisions

If a State makes supplementary SSI payments on or after June 30, 1977, the State must comply with the provisions of section 1618 of the Social Security Act (the pass-along amendment). Generally, this section requires that States have in effect an agreement with the Secretary to continue to make supplementary payments at least at the same levels as the supplementary payment levels in effect in December 1976. If the State did not make supplementary payments in December 1976, the levels that the State must maintain are the levels for the first month after December 1976 in which the State makes supplementary payments. If a State does not meet these requirements, the State shall be determined by the Secretary to be ineligible for Medicaid reimbursement. However, a State with an agreement will not be found to be out of compliance because it did not maintain its payment levels if its total expenditures for supplementary payments in the 12-month period

beginning with each effective date of Federal SSI cost-of-living increases are at least equal to the State's total expenditures for supplementary payments in the immediately preceding 12-month period.

Purpose of the Amendment

The purpose of the pass-along amendments is to encourage States to pass along to individuals who are eligible for State supplementary payments under the SSI program the amount of the Federal cost-of-living increase. Some States have not done this in the past. Instead, when Congress enacted cost-of-living increases in the Federal SSI benefit amount, some States would reduce the levels of the State supplementary payments by amounts up to the amount of the Federal increase. The SSI beneficiaries in these States would receive the same or slightly more in Federal/State benefits as before the increase, and therefore would not receive all the additional money provided by the Federal cost-of-living increase.

We are adding new §§ 416.2095-416.2098 to the SSI regulations. These provisions describe (1) the scope and substance of the requirements that States must meet under the pass-along amendments, (2) the general content of the agreements between the States and the Secretary, (3) the conditions for meeting the pass-along requirements, and (4) the basis for our finding that a State is not in compliance and the effect of this finding on the State. We also are making a technical change in § 416.2001(a) that defines "supplementary payments," a term used in the pass-along amendments, and amending § 416.2080 to give full protection to hold-harmless States in passing along Federal SSI cost-of-living increases.

State Supplementary Payments That Are Covered by the Pass-Along Requirements

The pass-along requirements apply to the type of payments described in section 1616(a) of the Act. These payments are known as optional supplementary payments. The law states that these payments must be made (1) in cash, (2) by a State or political subdivision, (3) on a regular basis, (4) to individuals who are eligible, or would be eligible except for their income, for Federal SSI benefits under title XVI of the Social Security Act, (5) as assistance based on need, and (6) in supplementation of Federal SSI benefits, as determined by the Secretary.

The pass-along requirements also apply to State supplementary payments

made under section 212 of Pub. L. 93-66 and § 416.2001(c) of the regulations. These payments are known as mandatory minimum supplementary payments. They are available only to individuals who received aid for the month of December 1973 under a State plan approved under title I, X, XIV, or XVI (AABD) of the Social Security Act.

Optional or mandatory minimum supplementary payments may be administered by the State or by the Federal government at the State's option. The pass-along requirements apply whether the State or the Federal government administers the payments. They also apply whether the person who receives those payments receives both a Federal SSI benefit and a State supplementary payment or, because of his or her income, receives only a State supplementary payment. The pass-along requirements apply to the latter type of payment, known as "supplement-only payments," because they are specifically referred to in the description of supplementary payments in section 1616(a) of the Act and because they are required under the formula for mandatory minimum supplements under section 212 of Pub. L. 93-66. A person who has countable income and receives a supplement-only is in the same relative financial position as a person who receives both the Federal SSI benefit and a State supplementary payment. The pass-along requirements do not apply to vendor payments, interim assistance payments, or payments made under other Federal programs such as title IV, XIX, or XX of the Social Security Act. None of these payments is a supplementary payment of the type described in section 1616(a) of the Act or section 212 of Pub. L. 93-66. Vendor payments are not made directly to the individual but rather to the vendors of goods and services provided to the individual. Benefits under other titles and interim assistance payments are not made in supplementation of Federal SSI benefits.

State Agreement With the Secretary and Conditions for Compliance

In § 416.2096, we discuss the State agreement with the Secretary. Basically, the State must have an agreement with the Secretary to continue making supplementary payments and maintain these payments at least at the same levels in effect in December 1976. If a State that has entered into an agreement does not maintain these levels, but does make total State supplementary payments (that is, total expenditures) in the 12-month period beginning with the date of Federal cost-of-living increase that are at least equal to the total

payments made in the preceding 12-month period, we shall consider that the State has complied with its agreement with the Secretary.

In § 416.2096, we have added a discussion of the conditions for compliance with the pass-along requirement by a State that did not maintain payment levels or total expenditures during a relevant 12-month period. The conditions include a provision that if a State's total expenditures during a relevant 12-month period are less than its total expenditures in the immediately preceding 12-month period (a "shortfall"), a State may make up the shortfall by increasing its total expenditures within the 12-months following the relevant period. For example, a State's expenditures in the period July 1982 through June 1983 totalled \$3,000,000. In the preceding 12-month period (July 1981 through June 1982) the State's total expenditures were \$3,090,000. Thus, \$3,090,000 is the amount the State should have expended during the period July 1982 through June 1983. Therefore, the State must spend \$90,000 in the following 12-month period over the required total expenditures for that period in order to be considered to have complied with the pass-along requirement during July 1982 through June 1983. The \$90,000 used to make up the shortfall in the period July 1982 through June 1983 will be treated as an expenditure in that period only. Further total expenditures for the period July 1983 through June 1984 will be the actual total expenditures less \$90,000.

As an alternative, § 416.2096 also includes the condition that the State may restore each of the payment levels that it failed to maintain retroactively to the beginning of the 12-month period in question and make a single retroactive benefit payment to each of the affected beneficiaries. Therefore, if the only alternative open to a State were to try to meet the total expenditures test, it would have to greatly overspend to make sure it did not suffer a shortfall. Since we do not believe that this was what the Congress intended as evidenced in the legislative history of the pass-along provisions, we have provided special provisions to permit a State to make retroactive adjustments.

We believe these rules recognize the intent of the pass-along provision which, in effect, allows a State to either maintain payment levels or maintain total expenditures. The legislative history of the provision notes that the pass-along provision will not require a State to spend more for supplementary benefits but only prevents a State from

reducing its expenditures when Federal SSI benefits are raised. Because of the various factors that affect actual benefit payments during a 12-month period, it is virtually impossible for a State to precisely meet in a current period total expenditures for the preceding 12-month period. For example, a State's total expenditures are affected by a reduction in total number of beneficiaries, increases in beneficiaries' incomes that cause reductions in benefit payment amounts, changes in beneficiaries' payment levels due to changes in living arrangements, and refunds of overpayments by beneficiaries. Therefore, even if a State budgeted for expenditures in a 12-month period (or increased some of its supplementary payment levels) with the intent to maintain its total expenditures, these factors, as experience has shown, could cause a State to fall short in meeting the expenditures test of compliance during any particular period. Moreover, whether a State has met the expenditures test for a particular 12-month period can only be ascertained after that period.

In addition, because States were required to make fiscal decisions and set their payment levels without the benefit of final regulatory guidelines, and recognizing the administrative burden that would result if States were required to make retroactive adjustments to its expenditures or payment levels for a 3-year period, we have provided a special rule for correcting noncompliance with respect to the 36-month period ending June 30, 1980. Under this rule, excess State expenditures during any of the 12-month periods from July 1977 through June 1981 measured against total expenditures in the period July 1976 through June 1977 may be balanced (or offset) against shortfalls in any of the 12-month periods from July 1977 through June 1980. This rule is being given limited application because of the reasons stated. With the publication of the regulations, the basis for continuance of this exception will no longer exist.

In a recent court case *Reichenthal v. Harris*, U.S. District Court (E.D. NY), No. 79 C 1632, involving the pass along of cost-of-living increases to New York recipients of State supplements, the Court noted the absence of regulations, and discussed noncompliance with the pass-along requirement as well as the severity of terminating a State's Medicaid funding for noncompliance. In this regard, the Court indicated that under regulations interpreting the pass-along provisions we may find compliance if reasonable efforts were

made to comply and the shortfall in expenditures was *de minimus*. Further, substantial compliance could also be found in light of subsequent over-expenditures.

Accordingly, the foregoing policies are also in response to public comments discussed below and the views expressed in the *Reichenthal* opinion.

State Supplementary Payment Level

In § 416.2097, we define the supplementary payment level as the amount of the State supplementary payment that an individual in each payment category would have received for December 1976 if the individual had no countable income. States must maintain these levels to comply with the pass-along requirements.

For example, the Federal SSI benefit amount in June 1977 for an individual having no income was \$167.80 per month. If a State made a \$50 optional supplementary payment per month to the individual in this situation, he or she would receive a total payment of \$217.80 per month under the SSI program. In July 1977, the Federal cost-of-living increase was \$10 and the Federal SSI benefit amount was increased to \$177.80 per month. A State would maintain the level of its supplementary payment to this individual if the State continued to make a \$50 supplementary payment per month above the Federal SSI benefit level. Thus, the individual would receive a total payment of \$227.80 per month under the SSI program, and the Federal cost-of-living increase of \$10 per month would be passed along to him or her.

This is the only definition of supplementary payment level that would carry out the intent of the statute. If we defined the supplementary payment level as the total amount of the Federal and State payments before the Federal cost-of-living increase (in our example, \$217.80 per month), the States could do exactly what Congress enacted section 1618 to discourage them from doing. When the Federal benefit increased, the State could decrease its supplementary payment and the total Federal plus State level still would be maintained. However, the SSI beneficiary would not receive the added money that he or she should receive from the Federal cost-of-living increase and there would be no pass-along.

Also, it would be contrary to the intent of the statute if we defined the "level" that must be maintained in terms of the amount of the State supplementary payment that the particular individual received (rather than the amount the State paid to individuals in that category who had no countable income). A definition

requiring each individual's December 1976 payment to be maintained would not accommodate changes in current countable income. Further, it would not give pass-along protection to individuals who become eligible for SSI payments after December 1976. The definition of State supplementary payment level in the regulations will allow for changes in actual payments to individual beneficiaries because of changes in their income.

Some examples follow that show what will happen to SSI benefits after a cost-of-living increase under these rules. For these examples, the Federal SSI standard payment amount is \$168 before the cost-of-living increase and \$178 after the increase. The State supplementary payment level is \$50.

	Federal SSI cost-of-living increases	
	Before	After
Example 1		
Receipt of Federal SSI benefits, no outside income:		
Income	0	0
Federal benefits	\$168	\$178
State supplementary payment	50	50
Total	218	228
Example 2		
State supplement only, countable income \$195 remains constant:		
Income	195	195
Federal benefits	0	0
State supplementary payment	23	33
Total	218	228
Example 3		
State supplement only, countable income title II benefit \$195 (title II benefit is increased by same percentage as SSI following a cost-of-living increase):		
Income (title II)	195	208
Federal SSI	0	0
State supplementary payment	23	20
Total	218	228

We have already explained Example 1. Where an individual is receiving a Federal SSI benefit and has no outside income, the State maintains its supplementary payment level by continuing to pay \$50 per month. The same principle would apply if the individual did have income, but not enough to reduce the Federal SSI benefit to zero.

Example 2 and Example 3 show what happens when an individual has enough income to offset the entire Federal SSI benefit but not the State supplementary payment as well. These are the State "supplement only" cases. In these situations, the State must again maintain a level of payment \$50 above the increased Federal level, i.e., to a total of \$228. In Example 2, the individual's outside income has not increased.

Therefore, to maintain its payment level, the State must increase its supplementary payment by \$10.

However, Example 2 is not the typical case. Most individuals who receive only a State supplementary payment do so because they also receive title II social security benefits. These benefits are automatically increased by increases in the cost-of-living. Example 3 shows that if the title II benefits rise by \$13, the State can maintain its supplementary level up to \$228 while actually reducing the State payment by \$3. Since there are far more Example 3 cases than Example 2 cases, we believe that the States generally can maintain their payment levels for the individuals receiving only State supplementary payments and at the same time can reduce their total expenditures.

State Compliance with the Pass-Along Requirements

In § 416.2098, we discuss what we will require that the States do to show that they are complying with the pass-along rules. Generally, a State must keep records and provide information about (1) its supplementary payment levels in December 1976 and following months, (2) its total expenditures for supplementary payments in the 12-month period beginning July 1976 through June 1977 and following 12-month periods, and (3) its advance estimates of the total State supplementary payment expenditures in each 12-month period covered by the agreement. If a State is not complying with the pass-along rules, the State shall be determined by the Secretary to be ineligible for reimbursement under title XIX of the Social Security Act beginning with the first quarter it fails to comply.

Provision for "Hold-Harmless" States

The Congress also provided, in section 2(b) of Pub. L. 94-585, that certain States, referred to as hold-harmless States, shall be able to pass along Federal increases in SSI payments to beneficiaries without increasing a State's fiscal liability. The States currently protected by this provision are Hawaii, Massachusetts, and Wisconsin.

Because of this provision in Pub. L. 94-585, we have changed the regulations in § 416.2080 to allow the disregard of the amount of any Federal SSI benefit increase becoming effective after June 30, 1977, in the formula for determining fiscal liability. In almost all cases, these States are permitted to pass on the increases entirely at Federal expense whether the individual is receiving a Federal SSI benefit plus a State supplement or is receiving the State supplement only. In the latter case,

either (1) the individual would be receiving Federal SSI benefits except that he or she had other income that prevented payment of the Federal SSI benefit, or (2) the increase would enable the individual to become eligible for Federal SSI benefits. For hold harmless purposes, payments will be counted in the period when paid regardless of whether any of the payments are credited to the immediately preceding 12-month period for purposes of determining the State's compliance with the pass-along requirements under the rules in § 416.2096.

Change in Definition of State Supplementary Payments

We have changed the definition of "State supplementary payments" in § 416.2001(a) to delete the parenthetical phrase in § 416.2001(a)(2) that refers to payments for burn-outs, utility turn-offs, etc. We do not believe that inclusion of these payments in the definition is appropriate for pass-along purposes. These payments were included previously to make sure that they were not counted as income. At that time, State supplementary payments were the only State payments based on need that were excluded from countable income. Since section 1612(b)(6) of the Social Security Act now specifically excludes from countable income any payments (regular or not) made by a State or locality based on need, specific mention of those payments as State supplementary payments is no longer necessary.

Discussion of Comments

On March 27, 1979, these rules were published in the *Federal Register* (44 FR 18238) as an NPRM with a 60-day comment period. We received 12 comments on the Notice of Proposed Rule Making, 7 from States, 3 from groups providing legal aid for the elderly, 1 from a senior citizen action coalition, and 1 from an attorney on behalf of several States. The comments and suggestions we received are summarized as follows:

1. Support for the Regulations

Comment: One group wrote to give support to the regulations.

Response: This comment requires no response.

2. Purpose of Amendment

Comment: One commenter argued that we understand the effect on the pass-along amendment by saying in the preamble that the purpose of the amendment is to encourage States to pass along the Federal increase. The commenter suggested that the law

"requires," not "encourages," the States to pass along the increases.

Response: As provided in section 1618 of the Social Security Act and in § 416.2096 of the regulations, a State is required to comply with pass-along provisions only if it wishes to be eligible for Medicaid reimbursement.

3. Levels of Supplementary Payments Not Set by State

Comment: One group complained that the pass-along provisions do not apply to a State whenever the optional supplementary payment levels are set by a political subdivision rather than by the State.

Response: The statutory requirement that a State agree to maintain the levels of its supplementary payments presupposes the State's authority to control the levels of payments. Therefore, a provision (§ 416.2095(b)(5)(i)) was included in the regulations that would exempt from the mandatory pass-along requirement those supplementary payments made by a political subdivision where the levels of the political subdivision's payments are not set by the State.

4. "Total State Expenditures"

Comment: One State official suggested that the phrase "total State expenditures for supplementary payments" as used in § 416.2096(b)(1), and defined in § 416.2096(b)(2), be interpreted to include the Federal "hold-harmless" contribution.

Response: The commenter's interpretation is correct. However, since § 416.2080 indicates that the Federal contributions are considered a share of "State supplementary payments," we do not believe any change in the wording of these sections is required.

Comments: Another State official argued that the regulations in § 416.2096(b) interpret the law too strictly by requiring that a State maintain its total expenditures for supplementary payments "in" the 12-month period. The commenter believed that a reasonable interpretation of the law would be maintenance of total expenditures "for" the 12-month period. Several commenters stated that the regulations should be modified to allow for post-year end adjustments in total State expenditures and objected to our "prohibiting retroactive adjustments."

Response: The regulation has been revised to provide for post-year-end adjustments.

Comment: Another State official suggested that the regulations are not clear as to how the "annual expenditures test" would operate. The official noted that in § 416.2096(b) total

State expenditures are payments made "in" the 12-month periods, whereas in § 416.2098(a)(2) payments can be made "for" the periods. The same commenter suggested a 5 percent tolerance in meeting the total expenditures test or that the State be allowed to count total expenditures "for" a period.

Response: We believe we have addressed the commenter's concerns by providing for post-year-end adjustments.

5. "State Supplementary Payment Levels"

Comments: One commenter recommended that the language in § 416.2095(a)(2) be amended to include "supplementary payments at the December 1976 level." One commenter stated that the statute requires the State to maintain its supplementary payments rather than levels and that under no circumstances is a State required to increase its supplementary payments. Another commenter objected to "forcing States to increase need levels."

Response: Section 416.2095(a)(2) refers to § 416.2096 that includes the suggested language regarding maintenance of supplementary payments at the December 1976 level. In reference to the comment concerning statutory provisions, section 1618 requires that a State agree to maintain the levels of its supplementary payments as distinguished from the individual supplementary payment amounts. This requirement to maintain payment levels can result in an increase or decrease in the actual payment amount, depending on the individual's countable income. The State supplementary payment level, however, must remain fixed at whatever it was in December 1976, unless the State voluntarily raises it. The whole concept of SSI (unlike the former programs it replaced) is based on uniform benefit amounts, not individually budgeted grants.

Comment: One commenter objected to the "application of the pass-along requirements to mandatory minimum supplementary levels."

Response: The law is specific as to the applicability of the pass-along provisions to mandatory minimum supplements. We cannot change this requirement by regulations.

6. Variations Based on Living Arrangements

Comment: One commenter argued that our treating each optional State supplement payment variation based on living arrangements as a separate supplementary payment level is an example of a general failure of the proposed regulations to expand upon the legislation to cope with the

complexity of federally administered State supplementary payments.

Response: This regulatory provision reflects the statutory requirement that States continue their supplementary payments at the December 1976 levels. These levels correspond to the payment variations chosen by the State.

7. "State Supplement-Only" Cases

Comments: One commenter stated that the regulations indicated that the instances in which "State Supplemental Program only" cases arise are not typical. That State had 20.6 percent of its cases in that category. Several commenters argued that the statute does not require that the pass-along provisions apply to "State supplement-only" cases. Some acknowledge that this may be a possible interpretation. Some believe that States that chose of supplement the basic SSI benefit are being penalized because of the effect of the pass-along amendment on State supplement-only cases. Others say that the regulations would improperly compel States to increase payments in State supplement-only cases. One commenter stated that a disparity exists in our regulations in that we indicate in one section that States must maintain a minimum supplementary payment level, while in another we declare that this level is before the consideration of the cost-of-living increase which means increased expenditures in all State supplement-only cases.

Response: In the preamble to the NPRM published on March 27, 1979 (44 FR 18238), we merely pointed out that State supplement-only cases where the person's income remained constant (i.e., the person is not receiving title II Social Security benefits) are not typical cases. Where an individual receives only a State supplement under the SSI program and also receives a title II benefit, the State can likely maintain its payment level while actually reducing the State payment. Therefore, in the aggregate, State supplement-only cases would not ordinarily require additional State expenditures, and inclusion of these cases under the pass-along provisions does not penalize the States.

With respect to the applicability of the statute to State supplement-only cases, section 1618 of the Social Security Act provides the pass-along requirements apply to " * * * any State which makes supplementary payments of the type described in section 1616(a) * * *." The description of the payments in section 1616(a) includes those made " * * * to individuals who are receiving benefits under this title or who would but for their income be eligible to receive benefits under this title * * *."

Therefore, section 1618 necessarily applies to "State supplement-only" cases and the regulations implement the mandate of the law. Payments in State supplement-only cases may increase or decrease—depending on changes in the amount of the individual's income. These fluctuations in payments result from the requirement that the States maintain levels, not payments. Payment levels need never increase as a result of the pass-along requirement.

8. Vendor Payments

Comments: Several commenters suggested that the regulations be modified to permit inclusion of vendor payments as part of a State's total expenditures. One commenter argued that not including vendor payments in total annual expenditures is harmful to the SSI program and unrealistic because vendor payments are made to meet living arrangements for individuals who are in no way capable of managing their own financial affairs. The commenter further pointed out that the Keys Amendment, Pub. L. 94-566, October 20, 1976, excludes vendor payments from countable income in the SSI program. Another commenter asserted that our regulations are in conflict with the Keys Amendment. Still another commenter objected to sanctions being taken from Medicaid funds.

Response: Although the Keys Amendment changed the income exclusion for "assistance based on need" to include vendor payments (section 1612(b)(6)), it did not change the definition of State supplementary payment (section 1616(a)). It is not possible to include vendor payments in State supplementary payments because section 1618 of the Social Security Act refers to supplementary payments as described in section 1616(a). Since vendor payments are not paid to the individuals who are receiving SSI benefits, as provided in section 1616(a), they are not "supplementary payments" within the meaning of the Act. Therefore, they cannot be included in determining "total State expenditures for supplementary payments."

For this same reason, States are not required to agree to continue to make vendor payments or to maintain any particular level with respect to them.

The withholding of Medicaid funds as a result of a State's noncompliance with the pass-along provisions is specifically required by section 1618.

9. Raising Need Levels

Comment: One commenter argued that the regulations effectively require an increase in combined Federal-State need levels in all SSI related cases and

could increase the overall caseload by making new cases eligible for State financial assistance.

Response: This increase in need levels stems from the statutory requirement that State maintain the levels of their supplementary payments when the Federal levels are increased. The Federal cost-of-living increases reflect rising costs and need levels, and section 1618 encourages the State to pass along the Federal increases. There are many factors in the economy that will affect the number of people who will be eligible for SSI payments and State supplementary payments. Other sources of income rise to help offset inflation, i.e., title II social security benefits, increased wages, and retirement and pension benefits. However, for those persons whose other income is low enough to permit payment of a State supplementary payment, the law and implementing regulations are designed to reduce the likelihood that those individuals, whether current or potential recipients, will have to become accustomed to a lower life style.

10. Requesting Records

Comment: One commenter recommended that § 416.2098(b) include language that stipulates that the Department will not request State supplementary payment Records for inspection with regard to those States that enter into an agreement with SSA to administer the State's supplementary payments.

Response: We agree with this recommendation and § 416.2098(b) has been revised to reflect this change.

11. Noncompliance

Comment: One commenter stated that it is not clear in § 416.2098(c) what month would be "the first month that the State does not comply" if a State elects the total expenditures option.

Response: The "first month that a State does not comply" in this context means the first month that a State does not maintain its supplementary payments at levels at least equal to the December 1976 levels. Under the statute, a State must agree to maintain its December 1976 levels, but will not be found to be out of compliance if it maintains total expenditures. Therefore, if a State fails to satisfy either of the provisions in the law, the noncompliance begins with first month the State fails to keep the terms of the agreement with Secretary, i.e., fails to maintain December 1976 levels.

Comments: One commenter wanted to know what the guidelines are for determining noncompliance, i.e., time table and methods, and another wanted

the regulations expanded to include a section detailing exactly how noncompliance can be corrected.

Response: Guidelines for determining and correcting noncompliance, including time limits, are provided in §§ 416.2096-416.2098.

12. Special Payment Amount

Comment: One commenter pointed out that the SSI program has never raised the \$25 standard in institution cases.

Response: The Federal benefit rates for persons in certain medical treatment facilities (\$25 for eligible individuals) are set by section 1611(e)(1)(B). Section 1617 of the Social Security Act, which provides for cost-of-living increases in SSI benefits does not apply to the benefit amounts in section 1611(e)(1)(B). A legislative change would be necessary to increase the \$25 amount and legislative proposals to do so have been unsuccessful. These regulations do not directly concern the \$25 payments.

13. Alternative Ways of Complying With the Statute

Comment: One group argued that we have construed the statute in such a way that a State has two alternative ways of complying with the Act—either (1) by maintaining the December 1976 levels of benefits, or (2) by maintaining the same total expenditures in a current year as the year before. The group argued further that the application of this interpretation would seriously undermine congressional intent. Another commenter took the opposite position by suggesting that we do not make it clear that the States have an option to maintain total expenditures or maintain all supplementary payment levels at the December 1976 levels.

Response: The statute requires the State to agree to maintain its December 1976 supplementary payment levels, but then provides that the Secretary shall not find that a State has failed to maintain its payment levels if it maintains its total annual expenditures. Thus, the statute is structured to provide a specific undertaking in the agreement, but two alternative methods of complying. As long as a State has agreed to maintain its supplementary payment levels but instead maintains total expenditures, the Secretary will not find it to be out of compliance. Moreover, the legislative history of the statute clearly states that it is not intended to require a State to increase its total expenditures.

Comment: One commenter suggested that the regulations are silent on the issue as to whether a State could switch back and forth between the two methods of complying. The commenter

asked whether, if a State were to switch back and forth, it would be required to make retroactive adjustments to all supplementary payment levels based on the 1976 levels.

Response: There is nothing in the law or regulations that would prevent a State from changing its method of complying with the pass-along requirements from year to year. The choice would be for the State to make taking a number of factors into consideration, such as whether the caseload is increasing or decreasing. If a State were to change from maintaining total expenditures to maintaining payment levels, all payment levels for that year would have to be set at least as high as the State's December 1976 levels. The State, in effect, would be passing through to all current beneficiaries all intervening Federal cost-of-living increases.

14. Regulations in Conflict With State Agreements

Comment: One commenter suggested that the regulations are inconsistent with the pass-through agreements that have been or are in the process of being executed by the States. The commenter stated that one of the matters agreed to in the course of the negotiations was that the States would be free under the agreement to utilize any method they chose, including the income disregard method, to comply with the pass-through requirements.

Response: SSA never agreed to a proposal that would allow States to utilize any method not provided by the law to comply with the pass-through requirements.

Summary of Changes Made in Final Rules

We have made several policy and clarifying changes in these final regulations from the rules proposed on March 27, 1979 (44 FR 18238). A summary of these changes follows:

(1) As a result of public comments and the opinion of the U.S. District Court in the case of *Reichenthal v. Harris* (E.D. NY, May 22, 1980) we are expanding § 416.2096 to provide for post-year-end adjustments that will allow States to meet the pass-along requirements.

(2) We are adding an example to § 416.2097(e) to illustrate how we arrive at the optional supplementary payment level for per diem based grant amounts.

(3) As a result of public comments, we are making substitutions in the language of § 416.2098(a)(2) to make that section fully consistent with the statutory definition of the total expenditures test.

(4) Also, as a result of public comments, we are changing

§ 416.2098(b) to show that the State need not maintain records about its supplementary payment levels and total 12-month expenditures in those instances where the Secretary administers the payments.

(5) In § 416.2098(c) we are clarifying the provision that any State that does not have an agreement in effect shall be determined by the Secretary to be ineligible for payments under title XIX of the Act. We also provide more specific guidance describing when ineligibility begins.

(6) We are adding § 416.2098(d) to provide for the issuance of a timely notice to a State concerning its potential noncompliance, and advising the State of available corrective actions.

Accordingly, the rules with these changes and editorial changes are adopted as shown below.

(Secs. 1102, 1601, 1616, 1618, and 1631(d) of the Social Security Act, as amended; 49 Stat. 647 as amended; 86 Stat. 1465, 86 Stat. 1474, as amended; 90 Stat. 2901; 86 Stat. 1476; (42 U.S.C. 1302, 1381, 1382e, 1382g, 1383(d)(1); sec. 401 of Pub. L. 92-603, as amended by section 504 of Pub. L. 94-566; and sec. 2 of Pub. L. 94-585)

(Catalog of Federal Domestic Assistance Program No. 13.807, Supplemental Security Income Program)

Dated: August 7, 1980.

Herbert R. Doggette, Jr.,

Acting Commissioner of Social Security.

Approved: August 12, 1980.

Nathan J. Stark,

Acting Secretary of Health and Human Services.

Chapter III of Title 20 of the Code of Federal Regulations is amended as set forth below:

1. In § 416.2001, paragraph (a)(2) is revised to read as follows:

§ 416.2001 State Supplementary payments; general.

(a) *State supplementary payments; defined.* * * *

(2) Regularly, on a periodic recurring, or routine basis of at least once a quarter; and

* * * * *

2. In § 416.2080, paragraphs (c), (d), (e)(1), and (f) are revised to read as follows:

§ 416.2080 Limitation of fiscal liability of States.

* * * * *

(c) *State fiscal protection.* Except as provided in paragraph (e) of this section, the provisions of paragraphs (a) and (b) of this section apply only to that portion of the State supplementary payments made by the Secretary on behalf of a State under an agreement for any month that does not exceed, in the case of any

individual (or couple), the difference between—

(1) The adjusted payment level as defined in § 416.2085 under the appropriate approved State plan(s) as in effect for January 1972; and

(2) An amount equal to—

(i) The benefits paid for the current month under title XVI; plus

(ii) Any income not excluded under Subpart K of this part; less

(iii) The amount of any cost-of-living increase in Federal benefits under section 1617 of the Social Security Act (or any general increase enacted by law in the dollar amounts referred to in section 1617) becoming effective after June 30, 1977.

(d) *Unprotected payments.* Except as provided in paragraph (e) of this section, the State shall make entirely at State expense that portion of the State supplementary payment that is, in the case of any individual, more than the difference between (1) the State's January 1972 adjusted payment level and (2) the Federal benefit plus income counted under Federal eligibility rules and less the amount of any cost-of-living or general increase in the Federal benefits becoming effective after June 30, 1977.

(e) *Credits and debits.* For purposes of determining the extent of protected payments where State supplementary payments are paid at varying levels, to the extent that payments above the adjusted payment level do not exceed the difference by which variations in payment levels (variant payment levels) are established below the adjusted payment level, payments count toward the amount of a State's fiscal liability protection. This provision is explained as follows:

(1) The variant payment levels must be both above and below the adjusted payment level. The variant payment level is the sum of the Federal benefit plus income counted under Federal eligibility rules; less the amount of the cost-of-living and general increases in the Federal benefits becoming effective after June 30, 1977; plus the State supplementary payment.

* * * * *

(f) *Fiscal limit not applicable.* The limitation on the fiscal liability provision does not apply to any State supplementary payments, that are made to individuals or couples within any category for which the adjusted payment level is less than, or equal to the Federal monthly benefit rate (excluding the cost-of-living and general increases in the Federal benefits becoming effective after June 30, 1977) for an eligible individual or eligible

couple as specified in §§ 416.410 and 416.412. Further, the provisions of paragraph (a) of this section do not apply to the amount of any State supplementary payment that results from the application of additional income exclusions specified by the State in its agreement with the Secretary (see § 416.2025(c)). In addition, the provisions of paragraph (a) of this section do not apply with respect to supplementary payments to any individual (or couple) who—

(1) Is not required to be included in the agreement administered by the Secretary (see § 416.2010(a)); and

(2) Would have been ineligible (for reasons other than income) for payments under the appropriate approved State plan as in effect for January 1972.

3. Subpart T of Part 416 is amended by adding new §§ 416.2095 through 416.2098 to read as follows:

§ 416.2095 Pass-along of Federal cost-of-living increases.

(a) *General.* This section and the three that follow describe the rules for passing along the cost-of-living increases in the Federal SSI benefit to recipients of State supplementary payments.

(1) Section 416.2095(b) indicates when the pass-along rules apply to State supplementary payments.

(2) Section 416.2096 describes the basic pass-along rules. The States must have an agreement to "pass along" cost-of-living increases in Federal SSI benefits. A State passes along an increase when it maintains (rather than decreases) the levels of all its supplementary payments after a Federal cost-of-living increase has occurred. Generally, a pass-along of the increase permits recipients to receive an additional amount in combined benefits equal to the Federal cost-of-living increase. A State can change its payment levels if it meets an annual expenditures test.

(3) Section 416.2097 explains how to compute a supplementary payment level.

(4) Section 416.2098 discusses what information the States must provide to the Secretary concerning their supplementation programs so that the Secretary can determine whether the State is in compliance. That section also discusses the basis for findings of noncompliance and what will occur if a State is found out of compliance.

(b) *When the pass-along applies.* (1) The pass-along requirements apply to all States (and the District of Columbia) that make supplementary payments after June 29, 1977, and wish to participate in the Medicaid program.

(2) The pass-along requirements apply to both optional supplementary payments of the type described in § 416.2001(a) and mandatory minimum supplementary payments as described in § 416.2001(c), whether or not these State supplementary payments are Federally administered.

(3) The requirements apply to State supplementary payments for both recipients who also receive Federal SSI benefits and recipients who, because of countable income, receive only a State supplementary payment.

(4) The requirements apply to State supplementary payments for recipients eligible for a State supplementary payment on or after June 30, 1977.

(5) Supplementary payments made by a State include payments made by a political subdivision (including Indian tribes) where—

(i) The payment levels are set by the State; and

(ii) The payments are funded in whole or in part by the State.

§ 416.2096 Basic pass-along rules.

(a) *State agreements to maintain supplementary payment levels.* In order to be eligible to receive Medicaid reimbursement, any State that makes supplementary payments on or after June 30, 1977, must have in effect an agreement with the Secretary. In this agreement—

(1) The State must agree to continue to make the supplementary payments; and

(2) The State must agree to maintain the supplementary payments at levels at least equal to the December 1976 levels (or, if a State first makes supplementary payments after December 1976, the levels for the first month the State makes supplementary payments). The Secretary will find that the State has met this requirement if the State complies with the conditions in either paragraph (b) or (c) of this section. The Secretary will consider a State to have made supplementary payments on or after June 30, 1977, unless the State furnishes evidence to the contrary that is satisfactory to the Secretary.

(b) *Meeting the pass-along requirement—Supplementary payment levels.* (1) We shall consider a State to have met the requirements for maintaining its supplementary payment levels (described in § 416.2097) for a particular month or months if the supplementary payment levels have not been reduced below the levels in effect in December 1976 (or if a State first makes supplementary payments after December 1976, the levels in effect the first month the State makes supplementary payments).

(2) If a State reduced its supplementary payment levels for a month or months within any 12-month period beginning with the effective date of a Federal cost-of-living increase, we shall consider the State to meet the requirement to maintain its supplementary levels if—

(i) Within 12 months after the relevant 12-month period, the State restores the levels retroactively; and

(ii) The State makes a single retroactive benefit payment to each of the beneficiaries eligible for the retroactive payment.

(c) *Meeting the pass-along requirement—Total expenditures.* (1) If a State does not meet the conditions in paragraph (b) of this section, we shall consider a State to have met the requirement for maintaining supplementary payment levels for a particular month or months if total State expenditures for supplementary payments in the 12-month period within which the month or months fall, beginning on the effective date of a Federal cost-of-living increase, are at least equal to the total State expenditures for supplementary payments in the 12-month period before the Federal cost-of-living increase.

(2) If total State expenditures in the relevant 12-month period are less than the total expenditures in the preceding 12-month period (a "shortfall"), we also shall consider a State to have met the requirement for maintaining supplementary payment levels for the relevant 12-month period if within the following 12 months the State increases its total expenditures by an amount at least equal to the amount of the shortfall in the relevant 12-month period. The increased amount up to the amount needed to correct the shortfall shall be deemed to be an expenditure in the relevant 12-month period.

(3) Exception for 12-month periods ending before July 1980: If a State does not meet any of the conditions in paragraph (b) or (c) (1) and (2) of this section, we shall consider a State to have met the maintenance of supplementary payment levels requirement before July 1980 under the following conditions—

(i) Total State expenditures in each of the 12-month periods ending June 30, 1978, June 30, 1979, or June 30, 1980, at least equal total State expenditures in the 12-month period ending June 30, 1977; or

(ii) Total State expenditures in one or more of the 12-month periods equals the total State expenditures in the 12-month period ending June 30, 1978, June 30, 1979, June 30, 1980, or June 30, 1981, exceeded total expenditures in the 12-

month period ending June 30, 1977, and the excess amount when apportioned to the expenditures in the 12-month period or periods in which the State had a shortfall, makes up the shortfall so that the total State expenditures for each of the three 12-month periods equals the total State expenditures in the 12-month period ending June 30, 1977.

(4) Total State expenditures for supplementary payments are the State's total payments for both mandatory minimum and optional supplementary payments in the appropriate 12-month period less the amount of any payments recovered and other adjustments made in that period. Total State expenditures do not include State administrative expenses, interim assistance payments, vendor payments, or payments made under other Federal programs, such as title IV, XIX, or XX of the Social Security Act.

(5) Adjustments in total State supplementary payments made after the expiration of the relevant 12-month period for purposes of meeting total State expenditures under paragraph (c) of this section shall be considered a State expenditure in the relevant 12-month period only for purposes of the pass-along requirement. For purposes of § 416.2080, which discusses the rules for limitation on fiscal liability of States (hold harmless), these retroactive adjustments are State expenditures when made and shall be counted as a State expenditure in the fiscal year in which the adjustments are made.

§ 416.2097 Supplementary payment levels.

(a) *General.* The supplementary payment level is the total State payment for December 1976 that a State provides an eligible individual (or couple) with no countable income in excess of the Federal SSI benefit for December 1976. We compute supplementary payment levels according to rules described in paragraphs (b)–(e) of this section. When applying these rules to States that did not make supplementary payments in December 1976, we base the supplementary payment level on the payment for the first month after December 1976 in which a State makes supplementary payments.

(b) *Mandatory minimum supplementary payment level.* The mandatory minimum supplementary payment level is a recipient's December 1973 minimum income level plus any State increases prior to January 1977, less any reductions made at any time after December 1973 due to changes in special needs or circumstances, less the December 1976 Federal standard payment amount.

(c) *Optional supplementary payment level for flat grant amounts.* The optional supplementary payment level for flat grant amounts is the total amount that an eligible individual (or couple) with no countable income received for December 1976 in excess of the Federal SSI benefit for December 1976. If the State varied its payment levels for different groups of recipients (e.g., paid recipients different amounts based on eligibility categories, geographic areas, living arrangements, or marital status), each variation represents a separate supplementary payment level.

(d) *Optional supplementary payment level for individually budgeted grant amounts.* The optional supplementary payment level for individually budgeted grant amounts is the amount that the State budgeted for December 1976 in excess of the December 1976 Federal SSI benefit for an eligible individual (or couple) having the same needs and no countable income.

(e) *Optional supplementary payment level for per diem based grant amounts.* The optional supplementary payment level for a particular calendar month for per diem grant amounts is the total dollar amount that the State would have paid to an eligible individual (or couple) with no countable income for that month at rates in effect for December 1976 (number of days in the calendar month multiplied by the December 1976 per diem rate plus any December 1976 personal needs allowance) in excess of the December 1976 Federal SSI benefit.

Example:

DECEMBER 1976	
\$6.90	per diem rate.
× 31	days in month.
—	
\$213.90	
+ 34.00	personal needs allowance.
—	
\$247.90	
– 167.80	Federal SSI benefit.
—	
\$80.10	State Supplementary level.
APRIL 1977	
\$6.90	per diem rate.
× 30	days in month.
—	
\$207.00	
+ 34.00	personal needs allowance.
—	
\$241.00	
– 167.80	Federal SSI benefit.
—	
\$73.20	State Supplementary level.
The 31-day month level to be maintained is \$80.10; the 30-day month level to be maintained is \$73.20.	

§ 416.2098 Compliance with pass-along.

(a) *Information regarding compliance.* Any State required to enter into a pass-along agreement with the Secretary shall provide appropriate and timely information to demonstrate to the Secretary's satisfaction that the State is meeting the pass-along requirements. The information shall include—

(1) The State's December 1976 supplementary payment levels, any subsequent supplementary payment levels, and any change in State eligibility requirements. If the State made no supplementary payments in December 1976, it shall provide information about the first month in which it makes supplementary payments; and

(2) The total State expenditures for supplementary payments in the 12-month period beginning July 1976 through June 1977, in each subsequent 12-month period, and in any other 12-month period beginning on the effective date of a Federal SSI cost-of-living increase. The State shall also submit advance estimates of its total supplementary payments in each 12-month period covered by the agreement.

(b) *Records.* Except where the Secretary administers the payments, the State shall maintain records about its supplementary payment levels and total 12-month expenditures for supplementary payments and permit inspection and audit by the Secretary or someone designated by the Secretary.

(c) *Noncompliance by the States.* Any State that makes supplementary payments on or after June 30, 1977, and does not have a pass-along agreement with the Secretary in effect, shall be determined by the Secretary to be ineligible for payments under title XIX of the Act. A State does not have an agreement in effect if it has not entered into an agreement or has not complied with the terms of the agreement. Ineligibility shall apply to total expenditures for any calendar quarter beginning after June 30, 1977, for which a State has not entered into an agreement. A State that enters into an agreement but does not maintain its payment levels or meet the total expenditures test, in a particular 12-month period, shall be determined by the Secretary not to have an agreement in effect for any month that the State did not maintain its payment levels during that particular 12-month period. The State shall then be ineligible for title XIX payments for any calendar quarter containing a month for which an agreement was not in effect. If a State first makes supplementary payments beginning with a month after June 1977, ineligibility shall apply to any calendar quarter beginning after the calendar quarter in which the State first makes payments.

(d) *Notices to States about potential noncompliance.* Within 90 days after the end of the relevant 12-month period, the Secretary shall send a notice to any State that has not maintained its supplementary payment levels and that appears not to have maintained its total

expenditures during the period. The notice will advise the State of the available methods of compliance and the time within which corrective action must be taken in order to avoid a determination of noncompliance. If the State fails to take the corrective action, the Secretary shall make a timely determination of noncompliance.

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INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

22 CFR Parts 220, 221, 222

Personnel Regulations

AGENCY: Agency for International Development, IDCA.

ACTION: Final rule.

SUMMARY: Pursuant to Section 401 of the International Development and Food Assistance Act of 1978, Pub. L. 95-424, 92 Stat. 956, as amended by section 503 of the International Development Cooperation Act of 1979, Pub. L. 96-53, 93 Stat. 378, the President on May 1, 1979, submitted to the Congress regulations affecting the personnel system of the Agency for International Development. On May 4, 1979, the regulations were published as a proposed rule in the *Federal Register* at 44 FR 26726.

Pursuant to section 401, the regulations could not become effective until after the end of the 90-day period beginning on the date of submission to the Congress, i.e., May 1, 1979, and could not become effective then if, during such 90-day period, either House of Congress adopts a resolution stating in substance that it disapproves the personnel system proposed to be established by the regulations. Since neither House adopted a resolution of disapproval within the 90-day period, the regulations became effective on October 1, 1979.

DATE: Effective as of October 1, 1979.

FOR FURTHER INFORMATION CONTACT: Mr. Jan Miller, Office of the General Counsel (202) 632-8277.

Dated: August 5, 1980.

Norman L. Holmes,
General Counsel.

Accordingly Parts 220, 221 and 222 are added to 22 CFR Chapter II to read as follows:

PART 220—GENERAL PROVISIONS

Sec.

220.01 Statement of authority.

Sec.

220.02 Purpose.

220.03 Definitions.

220.04 Position management.

Authority: Sec. 401, International Development and Food Assistance Act of 1978, Pub. L. 95-424, 92 Stat. 956, as amended by sec. 503, International Development Cooperation Act of 1979, Pub. L. 96-53, 93 Stat. 378.

§ 220.01 Statement of authority.

This subchapter of Chapter II is promulgated pursuant to section 401 of the International Development and Food Assistance Act of 1978, October 6, 1978, Pub. L. 95-424, 92 Stat. 956, 22 U.S.C. 2385a, and section 625 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2385.

§ 220.02 Purpose.

The purpose of this subchapter is to extend the Foreign Service personnel system to all employees of the Agency for International Development (A.I.D.) in the United States and abroad who are responsible for planning and implementing A.I.D.'s overseas development programs and activities, so that those persons will have significant overseas experience or understanding of the overseas development process. An extended application of the Foreign Service personnel system within A.I.D. is intended to ensure that—

(a) The employees of A.I.D. effectively serve the interests of the United States, both in the United States and abroad;

(b) A.I.D.'s personnel system can better adjust to frequently changing program and work-force composition requirements;

(c) A framework is provided to meet the particular requirements of A.I.D., including the need to have personnel serve overseas and meet language and technical skill requirements; and

(d) All employees who work in the United States and abroad within a single structure of positions, and in common endeavor to plan, carry out and directly support A.I.D.'s overseas program, may be brought within a single personnel system.

§ 220.03 Definitions.

(a) "A.I.D." means the Agency for International Development, or any successor agency primarily responsible for administering programs under part I of the Foreign Assistance Act of 1961, as amended.

(b) "Administrator" means the Administrator of A.I.D.

§ 220.04 Position Management.

(a) Under such regulations as he may prescribe, the Administrator may, notwithstanding the provisions of Chapter 51 of title 5 of the United States

Code, classify positions in A.I.D., both abroad and in the United States, that he designates as Foreign Service positions to be occupied by Foreign Service employees of A.I.D., and establish such positions in relation to the grades provided for the Foreign Service of the United States: *Provided*, That such actions shall be carried out in a manner consistent with the purposes of this Subchapter and with the principles of position classification established in Chapter 51 of title 5 of the United States Code.

(b) As of the effective date of this Subchapter, each position in A.I.D. shall be reviewed and redesignated, if necessary, as to the service in which the incumbent should serve. A position shall be designated as a General Schedule position rather than a Foreign Service position only if the position is in the United States, and if it is determined (1) that the functions of such position are primarily of a clerical, administrative or program support character and can be performed without significant overseas experience or understanding of the overseas development process; or (2) that such position requires continuity of incumbency and specialized knowledge and skill to the extent that it is not practicable for incumbents of such position to be assigned abroad. Any person aggrieved by the designation made pursuant to this subsection of a position in which he or she is serving may appeal the designation to the Administrator. Such designation shall remain in effect pending the appeal provided for herein and pending any other appeal an employee may make, and shall be set aside only if arbitrary or capricious.

(c) A position designated as a Foreign Service position in accordance with paragraph (b) of this section which becomes vacant may be occupied thereafter only by a Foreign Service employee: *Provided, however*, That at any time when the number of non-Foreign Service employees filling positions in A.I.D.'s headquarters office in the United States which are designated as Foreign Service positions does not exceed 10 per centum of the number of such positions, such a position, when it becomes vacant, may, at the discretion of the Administrator, be filled by a non-Foreign Service employee.

(d) A position designated as General Schedule in accordance with paragraph (b) of this section may be temporarily designated Foreign Service whenever the Administrator deems it advisable in order to administer properly the rotation policies provided for in § 221.02 of this