

prepared, they must be made up as unique 3-digit city packages and must be secured with one or two rubber bands as provided by 368.312. Cities with unique 3-digit ZIP Code prefixes are listed in Exhibit 122.633. Yellow label C must be affixed to the left of the address side of the top piece of each package within one inch of the left edge of the address side of the top piece.

#### .432—Trays

Unique 3-digit city mail plus any packages for 5-digit ZIP Code delivery units within those cities not trayed, as provided for by 368.422, must be prepared in unique 3-digit city trays. A unique 3-digit city tray label must be firmly affixed to the end of each tray. Unique 3-digit trays must be labeled in the following manner:

Line 1: City, State, 3-Digit Destination

Line 2: Class, Contents

Line 3: Mailer, Mailer Location

Sample:

Philadelphia PA 191

FCM ZIP+4 Presorted

FR Q Mailers Balto MD

**Note.**—Mail left over after filling trays must be bundled in the packages and placed in an SCF tray.

#### .44—3-Digit Packages and SCF Trays

##### .441—Packages

When there are 50 or more pieces, but less than a full tray, remaining for the same 3-digit ZIP Code prefix after the packages required by 367.422 and 367.431 have been prepared, they must be bundled as packages to that 3-digit ZIP Code prefix. The pieces in the packages must be faced in the same direction and secured with one or two rubber bands as provided by 368.312. Green label 3 must be affixed to the left of the address on the top piece in each package within one inch of the left edge of the address side of the top piece.

##### .442—Trays

3-digit packages plus any 5-digit and unique 3-digit city packages not trayed, as provided for by 367.422 and 367.432 and which are destined for the same SCF must be prepared in SCF trays. An SCF tray label must be firmly affixed to the end of each tray. SCF trays must be labeled in the following manner:

Line 1: SCF, State Lowest 3-Digit Served by the SCF

Line 2: Class, Contents

Line 3: Mailer, Mailer Location

#### Sample:

SCF Philadelphia PA 190

FCM ZIP+4 Presorted

FR Q Mailers Balto MD

ZIP+4 Presorted mail left over after filling SCF trays must be bundled. It is recommended, but not required, that these be placed in area distribution center (ADC) trays. If ADC trays are not prepared, bundles must be placed in mixed ADC trays.

#### .45—Area Distribution Center Trays

It is recommended, but not required, that packages remaining after traying, in accordance with 367.422, 367.432 and 367.442 be sorted to ADC's and placed in ADC trays (See Exhibit 367.24). A tray label in the format shown below must be firmly affixed to the end of the tray.

Line 1: Area Distribution Center, Code

Line 2: Class, Contents

Line 3: Mailer, Mailer Location

Sample:

Dis St. Paul MN 550

FCM ZIP+4 Presorted

FR Q Mailers Balto MD

#### .46—Mixed ADC Trays

Packages remaining after traying in accordance with 367.422, 367.432, 367.442 and 367.45 must be prepared in mixed ADC trays. A mixed ADC tray label in the following format must be firmly affixed to the end of the tray:

Line 1: Area Distribution Center, Code

Line 2: Class, Contents

Line 3: Mailer, Mailer Location

Sample:

DIS St. Paul MN 550

ZIP+4 Presorted Mixed ADC

FR Q Mailers St. Paul MN

#### .47—Nonqualifying Pieces

All nonqualifying pieces in a ZIP+4 Presort mailing are residual and are subject to full First-Class ZIP+4 rates. See Exhibit 310. Nonqualifying pieces must be trayed, sorted and prepared according to 367.5.

#### .48—Separation of Rate Categories

When a mailing consists of more than one rate category (i.e., ZIP+4 presort, non-presort ZIP+4, or carrier route First-Class), trays for each rate category must be physically separated by rate category at the time of mailing.

#### Part 372—Matter Mailed at ZIP+4, Presort First-Class and First-Class Carrier Route Rates

The first line of 372.1 is changed to read "Matter mailed at the presort or ZIP+4 rates must be deposited at."

#### Part 382—ZIP+4, Presort and Carrier Route Rates

Title is changed to read "ZIP+4, Presort and Carrier Route Rates."

The first two lines of section 382.4 (Mailing Statement) are changed to read, "Mailers who qualify for the First-Class presort rate or ZIP+4 rates (see 323 and 324) must complete and submit one of the following mail."

(FR Doc. 83-27437 Filed 10-6-83; 8:45 am)

BILLING CODE 7710-12-M

#### ENVIRONMENTAL PROTECTION AGENCY

##### 40 CFR Part 717

[OPTS-83001C; BH-FRL 2446-1]

#### Records and Reports of Allegations of Significant Adverse Reactions to Health and the Environment; Open Meeting

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Rule related notice; Notice of open meeting.

**SUMMARY:** EPA will hold an open meeting to explain in detail the rule on recordkeeping and reporting of allegations of adverse reactions required under section 8(c) of the Toxic Substances Control Act which was published in the Federal Register of August 22, 1983 (48 FR 38178).

**DATES:** The meeting will take place on Thursday, November 10, 1983, with registration at 8:00 a.m., the first session at 9:00 a.m., and adjournment by 2:00 p.m. Registration is required before October 20, 1983.

**ADDRESS:** This meeting will be held at the Twin Bridges Marriott Hotel, 333 Jefferson Davis Highway, Arlington, VA.

**FOR FURTHER INFORMATION CONTACT:** Jack P. McCarthy, Director, TSCA Assistance Office (TS-799), Office of Toxic Substances, Environmental Protection Agency, Rm. E-543, 401 M St., SW., Washington, D.C. 20460; toll free: (800-424-9065); in Washington, D.C.: (554-1404); outside the USA: (Operator-202-554-1404).

To Register: Telephone the TSCA Assistance toll free number (800-424-9065); in Washington, D.C.: (544-1404); outside the USA: (Operator-202-554-1404).

A block of rooms has been reserved at the Twin Bridges Marriott Hotel for the night of November 9, 1983. To reserve a room, telephone (202-628-4200) before October 20, 1983. Mention the EPA 8(c) seminar.

**SUPPLEMENTARY INFORMATION:** Final rules, published in the *Federal Register* of August 22, 1983 (48 FR 38178) under the Toxic Substances Control Act, require manufacturers and certain processors of chemical substances and mixtures to keep records of significant adverse reactions to health or the environment alleged to have been caused by a substance or mixture. EPA may also inspect and require reporting of such records. This meeting provides a forum for industry, public interest groups, union representatives, trade associations, and other interested parties to ask questions and discuss the rule requirements. Three industry representatives will tell how their companies plan to keep 8(c) records.

Dated: September 29, 1983.

Marcia Williams,

Acting Director, Office of Toxic Substances.

(FR Doc. 83-27302 Filed 10-6-83; 8:45 am)

BILLING CODE 6560-50-M

## DEPARTMENT OF ENERGY

### Office of the Secretary

#### 41 CFR Parts 9-4 and 9-51

#### Amendments to Procurement Regulations; Correction

##### Correction

In FR Doc. 83-26513 beginning on page 44785 of the issue of Friday, September 30, 1983, make the following corrections:

1. On page 44786, the first column, in § 9-4.909, the first sentence of paragraph "1." should have read as follows:

1. On page 16451, in the third column, two lines from the bottom of the first paragraph, the words "9-4.909 (f) and (g) are removed." are added after the word "revised".

2. In the same column, the amendment to § 9-51.101 should have read as follows:

##### § 9-51.101 [Corrected]

2. On page 16456, third column, in section 9-51.101, the drafter erroneously removed paragraphs (a) (1) and (2). Paragraphs (a) (2) and (3) should have been removed. The text of paragraph (a) (1) is restored. The corrected text of Change 7.9 should read as set forth below:

##### Change 7.9

Section 9-51.101(a) (2) and (3) are removed as they involve organizations, Resource Applications and Energy Technology, which no longer exist. Therefore, Section 9-51.101 is amended

by removing and reserving paragraphs (a) (2) and (3) as follows:

##### § 9-51.101 General instructions regarding submissions to Headquarters

(a) \* \* \*

(1) The offices at Schenectady and Pittsburgh will communicate through the Director, Division of Naval Reactors.

(2)-(3) [Reserved]

BILLING CODE 1505-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Care Financing Administration

#### 42 CFR Part 405

#### Medicare Program; Administrator's Review of Provider Reimbursement Review Board Decisions

**AGENCY:** Health Care Financing Administration (HCFA), HHS.

**ACTION:** Final rule.

**SUMMARY:** These regulations set forth several changes in the procedures relating to the Administrator's review of Provider Reimbursement Review Board (the Board) decisions. These regulations: (1) Specify procedures and criteria for the Administrator's review of Board decisions; (2) authorize the Administrator to remand cases to the Board; (3) specify that the Administrator may review a Board's decision concerning jurisdiction to hear a case; and (4) clarify the time period available to a provider seeking judicial review if the Administrator declines to review a Board decision. The purpose of this final rule is to inform providers of criteria used by the Administrator in reviewing decisions and to clarify procedures and policies that have been identified through experience as subject to differing interpretations.

**EFFECTIVE DATE:** December 6, 1983.

**FOR FURTHER INFORMATION CONTACT:** Irwin Cohen, the Attorney Advisor, Health Care Financing Administration, (301) 594-5132.

##### SUPPLEMENTARY INFORMATION:

##### I. Background

Under the Medicare program, the amount paid to a provider of services is the reasonable cost of items and services furnished to beneficiaries. To be reimbursed for covered services, a provider must file a cost report with its fiscal intermediary who determines the amount of reimbursement. If a provider is dissatisfied with the amount of reimbursement (or if the intermediary

does not make its determination within 12 months after receiving a cost report), the provider has the right to request a hearing before one or more hearing officers designated by the intermediary (42 CFR 405.1811), or before the Provider Reimbursement Review Board (the Board) if the amount in controversy is \$10,000 or more (42 CFR 405.1835).

The Board was established by Section 1878 of the Social Security Act (the Act), 42 U.S.C. 1395oo. Regulations implementing that provision and prescribing procedures for determinations and decisions, and related matters, are published at 42 CFR 405.1801-405.1889.

Section 1878(f) of the Act authorizes the Secretary to reverse, affirm, or modify a decision of the Board. This review authority has been delegated to the Administrator of HCFA (42 FR 13262, March 9, 1977, and 42 FR 57351, November 2, 1977). The Administrator in turn re-delegated this authority to the Deputy Administrator. "Interim Procedures" governing the Administrator's review of Board decisions were published on September 6, 1977 (42 FR 44599), but have not been made a part of the regulations. If a provider is dissatisfied with the Administrator's decision (or the Board's decision if it is not reviewed by the Administrator), the provider may request review of the final agency decision by a United States district court. A determination or decision made at any level in this process is "final" unless it is appealed within specified time limits. (See 42 CFR 405.1811(a), 405.1841, 405.1877.)

##### II. Current Experience

Each Board decision is examined by HCFA staff in order to recommend to the Administrator whether he or she should exercise the authority to reverse, affirm, or modify the decision. This examination is presently conducted for the Administrator by HCFA's Office of the Attorney Advisor.

Since January 1976, the HCFA Administrator has declined to review the Board's decision in about 54 percent of the issues decided by the Board. The Administrator has affirmed about 25 percent and has reversed or modified about 21 percent. Recently, providers have sought judicial review in a growing number of cases in which the Board or the Administrator ruled against the provider. As of January 25, 1983, there were 247 cases pending in the Federal district courts.

Based on our experience gained over the last seven years and concerns expressed by the provider community

about the Administrator's review process, we have examined a number of areas where improvements or clarifications in the current procedures appear to be needed. An additional source of information was the consideration of comments obtained as a result of the Notice of Proposed Rulemaking published in the *Federal Register* on February 14, 1980 (45 FR 9953). This proposed rule invited public comment on several proposals involving the Board and also included proposed changes concerning the Administrator's review of Board decisions. (Final rules concerning proposed changes in Board procedures are still under consideration and will be published in other documents.)

### III. Purpose of the Regulation

Our overall objective in making the changes set forth in this final rule is to improve the effectiveness of the Administrator's review of Board decisions, while safeguarding the rights and interests of providers. We have attempted to develop a process which is open, even-handed, and responsive to the needs of all parties. We have sought to avoid unnecessary delays in the process and, wherever possible, to place disputed issues in the forum where they can be resolved most effectively and expeditiously.

We believe, however, that a proper assessment of these procedures must rest on an understanding that while the Board was created by Congress to provide an unbiased forum for fact-finding and issue resolution with respect to individual controversies, it is designed to do this within the context of the law and regulations. It is not designed to substitute or replicate independent judicial review, which is specifically authorized upon completion of the administrative appeals process.

We are issuing these changes as a final rule because all the significant changes were proposed in the Notice of Proposed Rulemaking (NPRM) referred to in section II above. The only modifications to the NPRM either were based on public comments or more fully describe procedures already established.

#### Procedures for Administrator's Review

Section 1878(f)(1) of the Act provides, in part, that a decision of the Board shall be final unless the Secretary, on his or her own motion, and within 60 days after the provider of services is notified of the Board's decision, reverses, affirms, or modifies the Board's decision.

This provision is implemented in our current regulations in § 405.1875, but

detail is lacking. HCFA published interim procedures for the Administrator's review (42 FR 44599, September 6, 1977) which supplied some of the detail needed by parties to Board hearings. The February 1980 *Federal Register* notice proposed placing in regulations many of the interim procedures and explained our proposed changes. This rule supersedes the interim procedures and finalizes several proposed changes.

Generally, these amendments will: (1) Make it clear that any party to a Board hearing or HCFA may request the Administrator to review a decision of the Board; (2) provide that the Administrator could decide to review a Board decision without having been asked to do so by any of the parties or HCFA; (3) provide the criteria the Administrator will apply in deciding whether to review a Board decision; (4) provide that the Administrator will promptly notify the parties of a decision to review or not to review a Board decision; (5) provide for written submissions by the parties upon receipt of the Administrator's notice to review a Board decision; (6) prohibit *ex parte* communications with the Administrator by a party or by a HCFA component other than the Office of the Attorney Advisor about a Board decision under review; (7) provide that a party need not send a copy of material prepared for the Administrator to HCFA, unless HCFA has previously submitted written material to the Administrator, with a copy sent to each party; and (8) clarify that submittal of a request for review will not automatically cause the Administrator to review a case.

As stated in the proposed rule, our intent is to focus the Administrator's review on a smaller percentage of the Board's decisions by creating a uniform review threshold and by requiring a party desiring review to make a showing that such a review is warranted. In the notice of proposed rulemaking, we suggested superseding those interim procedures that accord HCFA the opportunity to submit exceptions to the Board's decision or proposed findings of fact or conclusions of law, and supporting reasons for the exceptions or proposed findings and conclusions. This proposal, however, was a conforming change which was made consistent with our proposal to substitute the Bureau of Program Policy, HCFA for the intermediary as the party in Board hearings. Because we are not now finalizing that proposal to make HCFA a party in Board hearings, the final rule in § 405.1875 continues HCFA's right to request the Administrator to affirm, modify, reverse or remand a Board

decision and to make additional, written submissions. The Director, Bureau of Eligibility, Reimbursement and Coverage (BERC), formerly the Bureau of Program Policy, has the authority to make such requests on behalf of HCFA in actions involving the Administrator's review of Board decisions. Copies of the written submissions that must be sent to "HCFA" should be mailed to BERC, 100 East High Rise, 6325 Security Boulevard, Baltimore, Maryland 21207. (Copies must be sent to HCFA if HCFA has requested review or commented about a decision under review by the Administrator.)

The final rule provides that a request to remand may include new and substantial evidence concerning issues presented to the Board or new issues that have arisen since the case was presented to the Board.

Additionally, we are making a conforming change in § 405.1871, to provide that the Board will also send HCFA a copy of its final decision at the same time copies are sent to the Administrator and to the parties.

Contrary to our proposal, we do not have the authority under the statute to allow a provider 60 days to seek judicial review after notification that the Administrator will not review a Board decision. The statute requires, in this case, that any request for court review be filed within 60 days of the provider's receipt of the Board decision.

### IV. Analysis and Response to Comments on the NPRM

Fifty-one commentors expressed general dissatisfaction with the main features of the proposed rule, which included details of the operation of the Board, as well as the Administrator's review of Board decisions. The tenor of many comments was that many of the changes would limit further the independent authority and integrity of the Board by extending and strengthening HCFA's control over the administrative appeals process. In the discussion that follows, we attempt to address, point-by-point, the specific comments concerning the Administrator's review of Board decisions in order to provide the clearest possible picture of how we intend these changes to work.

#### a. Definition of Administrator

In commenting on the proposed procedures for Administrator's review, six commentors stated their objections to the definition of "Administrator" in the proposed § 405.1801(a). The commentors pointed out that the definition appeared to permit unlimited

relegation of the Administrator's review authority. It was not our intent to permit unlimited delegation. Consequently, we are revising § 405.1801(a) to define "Administrator" as meaning the "Administrator or Deputy Administrator of HCFA". (See Section F.60.b of the Statement of Organization, Functions, and Delegations of Authority, Federal Register of November 2, 1977, 42 FR 57351.)

#### *b. Elimination of the Administrator's Review*

Five commentors suggested the elimination of the Administrator's review process to permit providers to seek immediate judicial review of the Board decision. We do not agree with the comment. Section 1878 of the Social Security Act (42 U.S.C. 1395oo) provides that the Secretary may review Board decisions on his or her own motion. Congress clearly did not intend for the Department to refrain from reviewing Board decisions or to do so only upon requests of providers.

Section 1878(f)(1) of the Act gives providers the authority to obtain judicial review of any final Board decision. This, however, will not prevent review by the Administrator. As a practical matter, we believe the continued exercise of review authority is both necessary and appropriate in applying the Medicare principles of reimbursement to provider claims. However, we believe that we can streamline the process and limit the occasions for Administrator's review through the use of threshold criteria.

#### *c. Review of Final Decisions Only*

Seven commentors stated that the language in the proposed § 405.1875(a) is so broad as to allow review of Board decisions made during the conduct of prehearing and hearing proceedings; for example rulings on discovery motions. To address this concern, we are revising the regulations to provide that the Administrator may review any "final" decision of the Board with one exception.

Under § 405.1842 a provider may request that a hearing by the Board be bypassed in order to obtain judicial review of any action of the fiscal intermediary that involves a question of law, regulation, or HCFA Ruling relevant to the matters in controversy that the Board is without authority to decide. The Board's determination concerning its authority is not subject to the Administrator's review under § 405.1875(a). However, if there is to be judicial review, the Office of the Attorney Advisor will examine the case only for the purpose of determining

whether there are any unresolved factual issues in dispute that are within the authority of the Board to decide. If there are unresolved factual issues, an appropriate motion to remand the case to the Board for further action will be filed with the Court.

#### *d. Review Role of HCFA Staff*

One commentor stated that the meaning of the word "review" may be misunderstood, since Board decisions would also be "reviewed" by designated HCFA staff (that is, the Office of the Attorney Advisor) in order to recommend whether the Administrator's authority should be exercised. Another commentor stated that the review role of the staff should be reflected in the regulation.

We agree with these comments and are clarifying § 405.1875(a) by including an explanation of the role of the Office of Attorney Advisor (to the Administrator) in the evaluation of Board decisions. Also, the regulation makes it clear that decisionmaking authority is reserved to the Administrator and the Deputy Administrator.

#### *e. Provider Requests for Review*

Two commentors stated their view that the Administrator should conduct a review of the Board's decision whenever a provider requests that it be done. We do not accept this comment. As stated above, all parties and HCFA have equal rights in this respect and will be required to make a showing that review is warranted. The criteria we have adopted should focus review on a smaller percentage of the Board's decisions. The denial of a provider's request for review does not limit the provider's rights to additional review. The provider may, if it wishes, still seek judicial review of any matter in the Board's decision with which it is dissatisfied. However, because of this comment, we are revising the introductory sentence in § 405.1875(c) to clarify that the criteria for deciding whether to review will apply whether or not a party or HCFA has requested review.

One commentor asked why we included a provision for provider requests to the Administrator to review a Board decision. The commentor indicated that the provision seemed unnecessarily cumbersome and suggested that the Administrator should decide whether to review a decision and then simply notify the parties accordingly. We do not agree with the comment. The amendment is intended to provide the parties and HCFA an equal opportunity to call to the

Administrator's attention their views concerning the need for a review of the Board's decision. We believe such requests should prove administratively useful in the review process. However, the Administrator will apply the criteria discussed below in deciding whether to review and will not agree to review merely because it has been requested.

#### *f. Time Period for Requesting Review*

Six commentors noted that the provisions in § 405.1875 (b) and (e), as proposed, permit the parties to file a request for review and to make other written submissions to the Administrator within a 15-day period. The commentors indicated that the provisions should be clarified to identify whether the materials must be mailed or actually filed within the stated time period. The use of the date of mailing was suggested. Another commentor stated that the provisions did not provide a method of determining the running of the various time periods provided for in the proposed rule. We are clarifying the regulation to respond to these comments. The time periods provided for in the law begin with the receipt by the provider of a Board decision or an Administrator's decision. Therefore, it is appropriate to establish a means for all interested persons to determine this date and, thus, other applicable time periods. To accomplish this, we are revising § 405.1801(a) to provide that the date of receipt will be the date on the return receipt of "return receipt requested" mail. The date of filing and the date for submitting materials will be satisfied by mailing materials within the prescribed period (as evidenced by the postmark) or hand-delivery of the materials (§ 405.1801(a)). Unless otherwise specified in the regulations, these two definitions will apply to all of 42 CFR Part 405, Subpart R, not just to the Administrator's review process.

#### *g. Criterion—Board Decision Is Not Supported by Substantial Evidence*

One commentor stated that a determination as to whether a Board decision is supported by substantial evidence cannot be made without a thorough review of the record—a mere threshold review will not suffice. The commentor proposed that § 405.1875(c)(2) be deleted. We do not agree with this comment. First, the Administrator will normally rely on the parties and HCFA to point out the need and basis for the review. Also, under § 405.1875(a), the Attorney-Advisor will thoroughly analyze the case record in order to assist the Administrator in

deciding whether to exercise this review authority. Therefore, the Administrator can decide to review a case on his or her conclusion that it *appears* the Board's decision is not supported by substantial evidence. The material submitted by the parties and HCFA, after notification of the Administrator's decision to review, may then demonstrate that there is substantial evidence, in which case the Administrator could affirm the Board decision. A provider dissatisfied with a Board decision, as affirmed by the Administrator, may still assert its argument in district court that the Administrator's decision is not supported by substantial evidence.

*h. Criterion—Significant Unsolved Policy Issue*

Four commentors stated that the criterion in § 405.1875(c)(3), under which the Administrator will consider whether it appears that the Board's decision involves a significant unresolved policy issue and review is likely to lead to an HCFA Ruling or a proposed regulation, seems to invite retroactive, *ad hoc* rulemaking. In response to this comment, we are revising this provision to clarify our intent. As revised, the Administrator will review a Board decision under this criterion when it appears that existing HCFA rules or policy instructions are in need of technical clarifications that will be of assistance to providers and the Board in understanding policy.

*i. Criterion—Jurisdiction and Authority of the Board*

We have added § 405.1875(c)(4) in order to clarify that when the Administrator is reviewing a Board decision to determine whether the Board has incorrectly assumed or denied jurisdiction (as specifically provided for in § 405.1875(a)), the Administrator will also consider whether the Board has incorrectly extended its authority beyond that allowed by statute, regulation, or HCFA Ruling. For example, although the Board may disagree with the provisions of a particular Medicare regulation, the Board cannot overrule the regulation; its decision must conform with the regulation.

Similarly, the Administrator will consider whether a decision of the Board that conflicts with a provision in a Medicare manual conforms with the requirements under the statute, regulations or HCFA Rulings.

*j. Criterion—Board Decision Needs Clarity*

We have added § 405.1875(c)(5), under which the Administrator will consider whether the decision of the Board requires clarification or amplification, or needs an alternative legal basis for the decision. This provision does not give the Administrator any additional basis for reviewing a Board decision because the prior § 405.1875 provided for the Administrator's review of any decision of the Board. We are adding § 405.1875(c)(5), as well as all of the other review criteria in § 405.1875(c), so that providers will be aware of the criteria that the Administrator will generally apply in deciding whether to review a Board decision.

*k. Time Period for Requesting Review*

Six commentors stated that the 15-day time periods for requesting review after receipt of the Board decision (§ 405.1875(b)) and for submitting materials to the Administrator after notification that the Administrator will review (§ 405.1875(e)(1)) are both too short. They noted that the parties would have the same 15-day period in which to rebut another party or HCFA's request for review of written submissions. It was suggested that the time periods be deleted or that additional time be provided.

We could not accept this comment and still assure completion of "own motion" review within 60 days. Although the 15-day time limits in paragraph (b) and (e) of § 405.1875 are short, they are necessarily so because the Administrator has only 60 days to complete his or her review. In view of the 60-days limit, we believe the 15-day response times are reasonable. The regulation does not preclude a party or HCFA from submitting a rebuttal to any material submitted to the Administrator, so long as the rebuttal is submitted within the prescribed 15-day period.

*l. Time Period for Notification That Administrator Will Review a Board Decision*

Six commentors suggested that § 405.1875(d) be revised to provide a specific time period during which the Administrator must advise the parties of his or her decision whether to review a decision of the Board. We do not agree with the comment. As stated in the proposed rule, we intend to notify the parties promptly of the Administrator's decision. The establishment of a specific time period would be inappropriate, since the Administrator must assure full consideration of requests from the parties or HCFA for a review of the

Board decision. Because, generally, our action will be taken within 60 days (that is, allowing the parties and HCFA 15 days to request review; notifying the parties and HCFA that the Administrator will review; allowing another 15 days for submission of supporting materials; and then considering and making the final agency decision), it necessarily follows that prompt notification will be made. Therefore, in most cases the parties can expect to be notified of the decision to review by the 45th day. The Administrator will take administrative measures to assure prompt notification.

*m. Supporting Views or Exceptions to the Board Decision May Be Submitted to the Administrator*

One commentor stated that § 405.1875(e) should be revised to make it clear that a party may submit a brief supporting the Board's decision. We accept this comment and are revising § 405.1875(e)(1)(ii) to provide that a party or HCFA may submit supporting views or exceptions to the Board decision. Unless a party or HCFA is requesting a remand action, a request for review and any supporting information must be limited to issues the Administrator has decided to review and confined to the record of the Board hearing.

*n. Written Submissions to the Administrator Will Be Sent Simultaneously to HCFA and the Parties*

One commentor suggested that § 405.1875(e)(4), requiring a party to send copies of its written submissions to the Administrator promptly to all other parties, be revised to provide that such action be done "simultaneously" rather than "promptly". It was also suggested that a party be required to certify that it has complied with this requirement. We are accepting the suggested wording change and are revising the regulation accordingly. The same rule shall apply to requests and submissions by HCFA.

*o. Prohibition of Ex Parte Communications With the Administrator*

Nine commentors stated that § 405.1875(f) in the NPRM should be revised to prohibit *ex parte* communications during the entire appeals process. Because this document only involves the Administrator's review, we are not addressing that change now. However, we intend to specifically prohibit *ex parte* communications with the Board when we revise regulations involving Board procedures. The new regulation section § 405.1875(f) prohibits *ex parte*

communications with the Administrator once the Board has issued a final decision. The regulation also requires that all communications contain a certification that a copy of the communication has been served to all other parties and HCFA, as appropriate.

A party must send a copy of any communication with the Administrator to HCFA (specifically, to the Director, Bureau of Eligibility, Reimbursement and Coverage) only if HCFA has already—

(1) Requested that the Administrator review a Board decision;

(2) Responded to a request for review; or

(3) Submitted material after the Administrator has announced that he or she will review a Board decision.

For example, when requesting that the Administrator review a Board decision, a party need not send a copy of that request to HCFA unless the party has received a copy of HCFA's request for the Administrator's review of the Board decision.

One commentator stated that there was no penalty for a violation of the prohibition against *ex parte* communication. The commentator suggested that a violation by a HCFA employee should be recorded in personnel files and that *ex parte* contacts be noted as part of the record and communicated to the parties. We do not accept the comment. We believe the Administrator's refusal to consider the content of any such communication or contact should be sufficient to discourage this practice.

#### *p. Standards for the Administrator's Decisions*

Two commentators stated that there is a need for standards in § 405.1875(g) that will govern how the Administrator will decide cases on review. The commentators indicate that the failure to specify which kinds of Board decisions might be reversed is surprising in view of our stated purpose in the NPRM to heighten the importance of Board decisions, promote a stronger, more self-reliant Board and promote greater public confidence in the overall adjudication process. We do not agree with this comment. In our view, the criteria for deciding whether to review, in paragraph (c) of this section, provides clear guidance as to the actions the Administrator may take on review. Also, we believe the establishment of specific standards for reversal would be unnecessarily restrictive. Having considered the criteria and having decided to review, the Administrator must retain sufficient latitude to decide whether to reverse or to take other

appropriate action in regard to the particular Board decision.

#### *q. Administrator's Decision Within 60 Days of Provider's Receipt of Board Decision*

One commentator stated that § 405.1875(g) should say that the Administrator will render a decision within 60 days after the provider receives the Board decision and that it will be mailed shortly thereafter, but not necessarily within the 60 days. We accept this comment. We are revising § 405.1875(g) to provide that the Administrator will render his or her decision within 60 days after the provider received notification of the Board decision and mail the decision shortly thereafter.

#### *r. Evidence that the Administrator Will Consider*

One commentator stated that § 405.1875(g) should state that any decision of the Administrator other than remand "must" be confined to the record of the Board, rather than "will" be confined. We do not accept this comment. "Will" and "must" have specific connotations in our regulations ("must" and "shall" are synonymous) because our general practice is to use "will" to represent a promise or commitment to action on the part of a HCFA or HHS employee. We use "must" or "shall" to impose requirements on others.

We have changed the language proposed in § 405.1875(g) to reflect the fact that in making any decision, including remand, the Administrator will consider: (1) The record of the Board; (2) Information contained in a request for review under § 405.1875(b); (3) Written submissions under § 405.1875(e)(i) in response to the Administrator's decision to review; and (4) Generally known facts that are not subject to reasonable dispute.

The Administrator may rely on prior decisions of the Board, the Administrator and the Courts, and other applicable law, whether or not cited by the parties and HCFA.

Additionally, in considering a request for remand, the Administrator will also consider submittals of new, substantial evidence concerning issues presented to the Board and new issues that have arisen since the case was presented to the Board.

#### *IV. Remands to the Board by the Administrator*

As noted above, section 1878(f)(1) of the Social Security Act authorizes the Secretary to reverse, affirm, or modify a decision of the Board provided he or she

does so within 60 days. The current regulations do not explicitly authorize the Administrator to remand a case to the Board. However, the U.S. District Court for the District of Columbia concluded that the Secretary's authority inherently includes remanding a case to the Board for further action consistent with the statute and regulations. *Gulf Coast Home Health Services, Inc. v. Califano*, No. 77-1507 (D.D.C. (October 10, 1978)); CCH Medicare-Medicaid Guide, ¶29,250.

In taking the above described position, the Court indicated that reviewing bodies, including administrative reviewers, are generally considered to have inherent power to remand to the initial decisionmaker, absent an explicit statutory ban.

In the NPRM, we proposed to amend the regulations to provide for the remand of a case to the Board by the Administrator. A decision by the Administrator to remand a case would have to be made within 60 days after the provider received notice of the Board's decision. The Administrator's remand would vacate the Board's decision. After remand, the Board would render a new decision which would be final, unless the Administrator exercised his or her review authority. The remand action would not be a final agency decision and would not be subject to judicial review. Also, the Administrator would have the same right to review a decision of the Board after remand as and original Board decision.

#### *a. Request for Remand Not Limited to Record of the Board*

Five commentators objected to the provisions in §§ 405.1875 (e) and (g) allowing requests for remand and Administrator decisions regarding remands to go beyond the certified record of the Board. Some suggested that requests not confined to the record of the Board should be accepted only upon a showing of good cause. We do not agree with these comments. The essential purpose of the remand authority is to have the Board consider additional evidence or issues essential to a full development of the record. Typically, the basis for a remand will not be in the record and the Administrator will not be in a position to exercise this authority properly if the parties cannot bring the issue to his or her attention. However, this is the only purpose for which material not in the record could be presented to the Administrator. Also, since a remand is warranted only where significant new evidence or new issues are to be considered, we do not believe that

further restrictions, for example, requiring a showing of "good cause", are necessary.

*b. Request for Remand Must Be Made Within 15 Days of Receipt of Administrator's Decision To Review*

Four commentors indicated that it was not clear whether a party's request for remand must be submitted within the same 15-day period for requesting the Administrator to review a Board decision (§ 405.1875(b)). We are revising § 405.1875(e)(3) to make it clear that a request for remand by a party or HCFA must be submitted within 15 days of the receipt of the Administrator's decision to review a Board decision.

*c. Board May Develop Additional Facts*

One commentor indicated that a remand action by the Administrator should not be used to direct a different Board decision. Also, it was suggested that the remand action direct the development of further facts or suggest the applicability of the law or regulations other than those considered by the Board. We accept this comment and are revising § 405.1875(h) to clarify that a remand action by the Administrator may direct the Board to take further action with respect to the development of additional facts, new issues, or the applicability of laws, regulations or HCFA Rulings other than those considered by the Board.

*d. Administrator's Power To Remand*

Eighteen commentors stated that there was no statutory authority or apparent statutory authority for a remand action by the Administrator. The commentors suggested that the proposal did one or more of the following: it interfered with the Board's decisionmaking authority; it delayed or prevented the provider from seeking judicial review; or it improperly extended the applicable 60-day period for Administrator's review.

We do not agree with the comments. We hold to the view expressed by the court in *Gulf Coast* that, absent an explicit statutory ban, the Administrator has the inherent power to remand to the previous decision maker. The court's ruling is especially applicable to the Administrator's review of Board decisions. The purpose of the Administrator's review is not to undertake a new hearing and it must not be used to retry the case. A decision not to review, or to affirm, reverse, or modify a Board decision must be confined to the record of the Board. Thus, we believe that it would be unreasonable to require or expect the Administrator to make a decision when he or she believes that there are

additional facts to be considered, new issues to be developed, or law, regulations or HCFA Rulings to be considered other than those already considered, that might affect the outcome. In such cases, further development of the case is best done before the Board where the evidence and issues can be tested in adversary proceedings, with adequate time for a fully considered determination based on the additional findings. The only way this can be accomplished is through the use of remand.

With respect to the views expressed by the commentors, we believe the provision for remand also recognizes that, upon receipt of a Board decision, a party or HCFA may become aware of significant new evidence or new issues that have arisen since it presented the case to the Board. Thus, the party or HCFA has the opportunity to call this to the attention of the Administrator, while it is still possible to take corrective action. The opportunity to perfect a case at the administrative level will benefit all parties and HCFA. However, we believe that it is inappropriate to remand a case for another Board hearing in certain circumstances that could have been prevented by a party or are best resolved without another Board hearing. Therefore, the following are not acceptable bases for a remand:

1. Presentation of evidence existing at the time of the Board hearing that was known or could reasonably have been known;
2. Introduction of a favorable court case that was either not available in print at the time of the Board hearing or was decided after the Board hearing;
3. Change of a party's representative before the Board;
4. Presentation of an alternative legal basis concerning an issue in dispute; or
5. Attempted retraction of a waiver of a right made before or at the Board hearing.

While we expect the need for remands to the Board to arise only rarely, such remands should result in final decisions that consider all relevant facts and issues. Moreover, proper use of this remand authority should expedite a final resolution of the case. If a case went directly to court, rather than being remanded to the Board by the Administrator, it is possible that the court would identify the same shortcomings in the development of the case and would remand it to the Board. However, in such a case, considerable delay would have likely occurred before the Court reached its conclusion to remand. In this situation, a remand by the Administrator would have substantially expedited the case.

*e. The Board Has Authority for Scheduling Remand Actions*

Twenty-eight commentors objected to the remand provision because there were no time limits within which the Board would be required to act and because the provision permits multiple remands. Thus, there is the potential for extended delays in the provider's opportunity to seek judicial review. Two other commentors stated that a remand should be a final decision which is subject to judicial review. We do not accept these comments. In our view, case management is a responsibility of the Board and we fully expect that the Board will deal with remands on a prompt and, where possible, priority basis. Nonetheless, we are revising § 405.1875(h) to state formally that the Board shall take appropriate action with respect to remands. We wish to say clearly and unequivocally that we do not intend to use the regulation to extend the administrative appeals process or to delay a provider's opportunity to seek judicial review. Our goal is precisely the opposite.

*f. Limits on Remand Decisions*

Sixteen commentors objected to the remand provision because there were no applicable standards or criteria for determining when remand may be requested or for limiting the Administrator's remand authority. Also, there was no requirement for the Administrator to state the reasons for remand. We have revised the language in § 405.1875(h) to explain fully the limits of a remand decision by the Administrator. The new language describes generally accepted administrative hearing authority and procedures that are already being used. This section now clarifies that: (1) A remand vacates the Board's decision; (2) The Administrator may direct the Board to develop additional facts or new issues, or to consider laws or regulations that have not been applied; and (3) The Board's new decision will constitute a final decision subject to the Administrator's review.

**V. Review of Board's Decision About its Jurisdiction**

Under current regulations at § 405.1873, the Board decides all questions relating to its jurisdiction to hear a case. The regulations did not specify whether the Administrator and the courts may review a Board finding of no jurisdiction, since there is no final Board decision preceded by a "hearing".

In *Cleveland Memorial Hospital v. Califano*, 444 F. Supp. 125 (E.D.N.C. 1978), the court held that a decision by

the Board denying jurisdiction is a "final decision," reviewable by the court. Otherwise, the court reasoned, the Board could effectively preclude any judicial review of its decisions simply by denying jurisdiction of those claims which it deems to be non-meritorious.

We think the court's conclusion is equally applicable to the question of whether the Administrator has authority to review a Board dismissal for lack of jurisdiction. We have therefore revised § 405.1875(c)(4) to provide clearly for such review authority. If a Board dismissal for lack of jurisdiction were overturned by a court, we think the court would normally remand the case through the Secretary to the Board for a hearing, rather than decide the case on its merits. We believe that a procedure whereby the Administrator may review a Board's dismissal and remand the case to the Board if the Administrator concludes the Board does have jurisdiction, will expedite the entire adjudicative process.

Sixteen commentors supported the basic provision. Another commentor supported the provision, but suggested that it be expanded to include review of Board decisions that it does have jurisdiction to hear a case. We accept this comment and are revising § 405.1875(c)(4) to clarify that such decisions of the Board may also be reviewed by the Administrator.

Five commentors stated that a decision of the Board that it lacks jurisdiction should be the final administrative decision and that the courts should decide any disputed question of jurisdiction. We do not accept this comment. In our view, the Administrator's ability to review a Board decision relating to its jurisdiction to grant a hearing is a proper exercise of the review authority granted under section 1878 of the Act. Also, as a practical matter, we expect that the Administrator's review of such decisions will be of benefit to the parties to the decision, since they can expect a prompt review decision, thereby possibly avoiding unnecessary and lengthy judicial actions.

#### VI. Timing of Judicial Review After Administrator Declines Review

As noted above, section 1878(f) of the Act gives the Secretary 60 days after the provider is notified of a Board decision in which to affirm, modify or reverse that decision. The same section of the Act, however, also gives the provider just 60 days after being notified of the Board decision, or 60 days after receiving the Secretary's affirmation, modification or reversal, in which to seek judicial review. There is a good

deal of concern and confusion because the Secretary's 60 days to act runs concurrently with the provider's 60 days to seek judicial review if the Secretary does not act. If the Administrator (acting for the Secretary) did not act promptly in deciding not to review a Board decision, a provider would be obliged to file a lawsuit (which may well turn out to be unnecessary) or take the risk that it will lose its right to judicial review. We expect to avoid this situation by notifying the provider promptly when the Administrator has declined review.

#### a. Sixty Days to Seek Review After Notification the Administrator Will Not Review

In the NPRM, we proposed to amend § 405.1877 to allow a provider 60 days in which to seek judicial review from the date it receives notification that the Administrator has declined review.

Nine commentors supported the basic proposal; however, one commentor urged that it include a specific statement that HCFA will not oppose a provider's seeking judicial review on the basis that the statutory time limit has expired.

We now believe that we do not have the authority under the statute to allow a provider 60 days to seek judicial review after notification that the Administrator will not review a Board decision. Section 1878(f)(1) of the Act provides that, to obtain judicial review of Board decision, a provider must file a civil motion within 60 days after notification of the Board's decision. However, section 1878(f)(1) of the Act contains an exception and allows an additional time period if the Administrator "reverses, affirms, or modifies the Board's decision". However, because an Administrator's decision not to review a Board decision cannot be considered a reversal, affirmation, or modification, HCFA does not have any authority to extend the time period the statute allows for a court appeal. Therefore, if the Administrator declines to review a Board decision, the provider must file its appeal within 60 days of its receipt of the decision of the Board.

#### b. Sixty Days to Seek Review if Administrator Fails to Make a Final Decision After Announcing that He or She Would Review a Board Decision

Three commentors observed that the proposed regulation fails to state the provider has 60 days in which to seek judicial review from the date the Administrator's time for taking action expires. We accept the comment and are revising the regulation to make clear HCFA's interpretation of the statute that the failure of the Administrator to make

a final decision within 60 days after the Administrator has notified the parties and HCFA that he or she has decided to review a Board decision constitutes an affirmation of the decision by the Board. In this situation, the provider has 60 days from the date the Administrator's time for taking action expired, in which to seek judicial review of the Board decision because section 1878(f)(1) of the Act allows a provider 60 days to seek judicial review after the Administrator affirms a Board decision. For example, if the 60 day period during which the Administrator may take action expires on July 1, and the Administrator notifies the parties and HCFA that he or she has decided to review a Board decision and then fails to make a final decision before that date, then HCFA will interpret the statute to mean that the provider will have until the following August 30th (that is, 60 days) to request judicial review.

#### c. General Concerns

Eleven commentors expressed the following general concerns about the authority for the proposal: (1) If the statute is not clear, it should be amended; (2) the regulation would not be binding on a U.S. Attorney or on the judiciary; (3) there is no guarantee that another interested party would refrain from issuing a challenge on the basis that the time limit had expired; (4) the provision represents an attempt to rewrite the statute. The majority of the commentors indicated that a better solution would be to require that notice of the Administrator's decision whether or not to review be issued within a specified period following the Board's decision.

We do not accept these comments and suggestions. We recognize that a regulatory interpretation of the statute would not necessarily bind a court. It would, however, bind HCFA and as a practical matter, its legal representative, the Department of Justice. Pending a clarifying change in the law, we believe that the proposed interpretation is a useful interim measure. Moreover, we do not believe that setting an arbitrary time limit, of less than 60 days, in which the Administrator must decide whether to review a Board decision would offer a realistic solution to providers' concerns about abbreviated judicial appeal deadlines.

#### VII. Regulatory Impact Analyses Executive Order 12291

We have determined that this final rule does not meet the criteria for a major rule that are set forth in section

1(b) of Executive Order 12291. That is, this rule will not:

(1) Have an annual effect on the economy of \$100 million or more (our estimate is that this rule will have a negligible economic impact in FY 93);

(2) Cause a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions, or

(3) Have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic export markets.

Because we do not expect this final rule to increase or decrease the number or complexity of cases that the Administrator reviews, there will be no additional costs to providers or the Federal government under this final rule.

#### *Regulatory Flexibility Analysis*

The Secretary certifies, under section 605(b) of the Regulatory Flexibility Act, Pub. L. 96-353, that this final rule that sets forth several changes in the procedures relating to the Administrator's review of Board decisions will not have a significant economic impact on a substantial number of small entities. The reason for the Secretary's certification is that the revised rule will neither increase nor decrease the number or complexity of review decisions made by the Administrator. Therefore, this rule will not have a significant economic impact on anyone.

#### *List of Subjects in 42 CFR Part 405*

Administrative practice and procedure, Certification of compliance, Clinics, Contracts (Agreements), End-Stage Renal Disease (ESRD), Health care, Health facilities, Health maintenance organizations (HMO), Health professions, Health suppliers, Home health agencies, Hospitals, Inpatients, Kidney diseases, Laboratories, Medicare, Nursing homes, Onsite surveys, Outpatient providers, Reporting requirements, Rural areas, X-rays.

#### **PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED**

42 CFR Part 405, Subpart R is amended as set forth below: Subpart R—Provider Reimbursement Determinations and Appeals, is amended as follows:

1. The table of contents for Subpart R is amended by revising the title of § 405.1875 to read as follows:

#### **Subpart R—Provider Reimbursement Determinations and Appeals**

Sec.  
405.1875 Administrator's review.

2. The authority citation for Subpart R is revised to read as follows:

Authority: Secs. 205, 1102, 1814(b), 1815(a), 1833, 1861(v), 1871, 1872, 1878 and 1886 of the Social Security Act (42 U.S.C. 405, 1302, 1395f(b), 1395g(a), 1395i, 1395x(v), 1395hh, 1395ii, 1395oo and 1395ww).

3. In § 405.1801, paragraph (a) is revised by placing the definitions in alphabetical order, adding definitions for "Administrator", "Administrator's review", "Date of filing" and "Date of receipt", and removing the definition for "Secretary's review" to read as follows:

#### **§ 405.1801 Introduction.**

(a) *Definitions.* As used in this subpart: "Administrator" means the Administrator or Deputy Administrator of HCFA.

"Administrator's review" means that review provided for in section 1878(f) of the Act (42 U.S.C. 1395oo(f)) and § 405.1875.

"Board" means the Provider Reimbursement Review Board established in accordance with section 1878 of the Act (42 U.S.C. 1395oo) and § 405.1845.

"Board hearing" means that hearing provided for in section 1878(a) of the Act (42 U.S.C. 1395oo(a)), and § 405.1835.

"Date of filing" and "date of submission of materials" mean the day of the mailing (as evidenced by the postmark) or hand-delivery of materials, unless otherwise defined in this subpart.

"Date of receipt" means the date on the return receipt of "return receipt requested" mail, unless otherwise defined in this subpart.

"Intermediary determination" means the following:

(1) With respect to a provider of services that has filed a cost report under §§ 405.406 and 405.453(f), the term means a determination of the amount of total reimbursement due the provider for items and services furnished to beneficiaries for which reimbursement may be made on a reasonable cost basis under Medicare for the period covered by the cost report.

(2) With respect to a hospital that has filed a cost report and receives payments for inpatient hospital services based on reasonable cost subject to the target rate system (§ 405.463), the term includes a determination of the total amount of payment due the hospital under that system for the period covered by the cost report.

(3) With respect to a hospital that receives payments for inpatient hospital services under the prospective payment system (§§ 405.470-405.477), the term includes a determination of the total amount of payment due the hospital under that system for the hospital's cost reporting period covered by the determination.

(4) For purposes of appeal to the Provider Reimbursement Review Board, the term is synonymous with the phrases "intermediary's final determination" and "final determination of the Secretary", as those phrases are used in section 1878(a) of the Act.

(5) For purposes of § 405.374 concerning claims collection activities, the term does not include an action by HCFA with respect to a compromise of a Medicare overpayment claim, or termination or suspension of collection action on an overpayment claim, against a provider or physician or other supplier.

"Intermediary hearing" means that hearing provided for in § 405.1809.

4. Section 405.1871 is amended by revising paragraph (a) as follows:

#### **§ 405.1871 Board hearing decision and notice.**

(a) The Board shall, as soon as practicable after the conclusion of its hearing, render a written decision based upon the record made at such hearing, the record established in support of the determination of the intermediary (see § 405.1803), and such other evidence as may be obtained or received by the Board. Such Board decision shall be supported by substantial evidence when the record of the Board hearing is viewed as a whole and shall cite applicable law, regulations, and HCFA Rulings. A copy of the decision shall be mailed to all parties to the hearing at their last known addresses and, at the same time, to the Administrator and HCFA.

5. Section 405.1875 is revised to read as follows:

#### **§ 405.1875 Administrator's review.**

(a) *General rule.* (1) Except for a Board determination under § 405.1842 that it lacks the authority to decide an issue, the Administrator, at his or her discretion, may review any final decision of the Board, including a decision under § 405.1873 about the Board's jurisdiction to grant a hearing. The Administrator may exercise this discretion on his or her own motion, in response to a request from a party to a

Board hearing or in response to a request from HCFA.

(2) The Office of the Attorney Advisory will examine the Board's decisions, the requests made by a party or HCFA and any submission made in accordance with the provisions of this section in order to assist the Administrator in deciding whether to exercise this review authority.

(b) *Request for review.* A party or HCFA requesting the Administrator to review a Board decision must file a written request with the Administrator within 15 days of the receipt of the Board decision.

(c) *Criteria for deciding whether to review.* In deciding whether to review a Board decision, either on his or her own motion or in response to a request from a party to the hearing or HCFA, the Administrator will normally consider whether it appears that:

(1) The Board made an erroneous interpretation of law, regulation or HCFA Ruling;

(2) The Board's decision is not supported by substantial evidence; or

(3) The case presents a significant policy issue having a basis in law and regulations, and review is likely to lead to the issuance of a HCFA Ruling or other directive needed to clarify a statutory or regulatory provision;

(4) The Board has incorrectly assumed or denied jurisdiction or extended its authority to a degree not provided for by statute, regulation or HCFA Ruling; and

(5) The decision of the Board requires clarification, amplification, or an alternative legal basis for the decision.

(d) *Decision to review.* (1) Whether or not a party or HCFA has requested review, the Administrator will promptly notify the parties and HCFA whether he or she has decided to review a decision of the Board and, if so, will indicate the particular issues he or she will consider.

(2) The Administrator may decline to review a case or any issue in a case even if a party has filed a written request for review under paragraph (b) of this section.

(e) *Written submissions.* (1) Within 15 days of receipt of a notice that the Administrator has decided to review a Board decision, a party or HCFA may submit to the Administrator, in writing:

(i) Proposed findings and conclusions;

(ii) Supporting views or exceptions to the Board decision;

(iii) Supporting reasons for the exceptions and proposed findings; and

(iv) A rebuttal of the other party's request for review or other submissions already filed with the Administrator.

(2) These submissions shall be limited to issues the Administrator has decided

to review and confined to the record of the Board hearing.

(3) A party or HCFA, within 15 days of a receipt of a notice that the Administrator has decided to review a decision, may also request that the decision be remanded and state reasons for doing so. Reasons for a request to remand may include new, substantial evidence concerning—

(i) Issues presented to the Board; and

(ii) New issues that have arisen since the case was presented to the Board.

(4) A copy of any written submission made under this paragraph shall be sent simultaneously to each other party to the Board hearing and to HCFA, if HCFA has previously—

(i) Requested that the Administrator review a Board decision or filed a written submission in response to a party's request for review.

(ii) Responded to a party's request for review; or

(iii) Submitted material after the Administrator has announced that he or she will review a Board decision.

(f) *Ex parte communications prohibited.* All communications from any of the parties or HCFA about a Board decision being reviewed by the Administrator must be in writing and must contain a certification that copies have been served on the parties and HCFA, as appropriate. The Administrator will not consider any communication that does not meet these requirements or is not submitted within the required time limits.

(g) *Administrator's decision.* (1) If the Administrator has notified the parties and HCFA that he or she has decided to review a Board decision, the Administrator will affirm, reverse, modify or remand the case.

(2) The Administrator will make this decision within 60 days after the provider received notification of the Board decision and will promptly mail a copy of the decision to each party and to HCFA.

(3) Any decision other than to remand will be confined to—

(i) The record of the Board, as forwarded by the Board;

(ii) Any materials submitted under paragraphs (b) or (e) of this section; and

(iii) Generally known facts that are not subject to reasonable dispute.

(4) The Administrator may rely on prior decisions of the Board, the Administrator and the courts, and other applicable law, whether or not cited by the parties and HCFA.

(h) *Remand.* (1) A remand to the Board by the Administrator vacates the Board's decision.

(2) The Administrator may direct the Board to take further action with respect to the development of additional facts or new issues, or to consider the applicability of laws or regulations other than those considered by the Board. The following are not acceptable bases for remand—

(i) Presentation of evidence existing at the time of the Board hearing that was known or reasonably could have been known;

(ii) Introduction of a favorable court case that was either not available in print at the time of the Board hearing or was decided after the Board hearing;

(iii) Change of a party's representation before the Board;

(iv) Presentation of an alternative legal basis concerning an issue in dispute; or

(v) Attempted retraction of a waiver of a right made before or at the Board hearing.

(3) After remand, the Board will take the action requested in the remand action and issue a new decision.

(4) The new decision will be final unless the Administrator reverses, affirms, modifies, or again remands the decision in accordance with the provisions of the section.

6. Section 405.1877 is amended by revising paragraph (a), redesignating paragraphs (b) through (e) as (d) through (g), respectively and adding new paragraphs (b) and (c) to read as follows:

#### § 405.1877 Judicial review.

(a) *General rule.* Section 1878(f) of the Act permits a provider to obtain judicial review of a final decision of the Board, or of a reversal, affirmation, or modification by the Administrator of a Board decision, by filing a civil action pursuant to the Federal Rules of Civil Procedure within 60 days of the date on which the provider received notice of—

(1) A final decision by the Board; or

(2) Any reversal, affirmation, or modification by the Administrator.

The Board's decision is not final if the Administrator reverses, affirms or modifies the decision within 60 days of the date on which the provider received notice of the decision.

(b) *Administrator declines to review a Board decision.* If the Administrator declines to review a Board decision, the provider must file its appeal within 60 days of receipt of the decision of the Board.

(c) *Administrator does not act after reviewing a Board decision.* If the Administrator notifies the parties that he or she has decided to review a Board

decision and then does not make a decision within the 60 days allotted for his or her review, this subsequent inaction constitutes an affirmation allowing a provider an additional 60 days in which to file for judicial review, beginning with the date the Administrator's time expires for taking action under § 405.1875(g)(2).

(Catalog of Federal Domestic Assistance Program No. 13.773, Medicare-Hospital Insurance; No. 13.774, Medicare-Supplementary Medicare Insurance)

Dated: May 11, 1983.

Carolyn K. Davis,

Administrator, Health Care Financing Administration.

Approved: August 19, 1983.

Margaret M. Heckler,

Secretary.

(FR Doc. 83-27300 Filed 10-6-83; 8:45 am)

BILLING CODE 4120-03-M

## INTERSTATE COMMERCE COMMISSION

### 49 CFR Part 1043

[Ex Parte No. MC-5; Sub-1]

#### Motor Carriers of Property Minimum Amounts of Bodily Injury and Property Damage Liability Insurance; Correction

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Modification of final rules; correction.

**SUMMARY:** At 48 FR 43331, September 23, 1983, the Commission adopted final rules to implement statutory requirements by adopting minimum amounts of insurance at levels prescribed by the Secretary of Transportation for for-hire interstate motor carriers of property regulated by the Commission. That notice contained 2 inadvertent errors, which this notice corrects.

#### FOR FURTHER INFORMATION CONTACT:

Alice K. Ramsay, (202) 275-0854

or

Delores Patterson, (202)275-0898.

The notice published at 40 FR 43331, is corrected as follows:

(1) Amendatory instruction (1), on page 43333, is corrected by changing the heading of § 1043.2 to read as follows:

§ 1043.2 Security for the protection of the public; Minimum limits.

(2) Amendatory instruction (2), on page 43334, is removed, and amendatory instructions (3) and (4) are corrected by

redesignating them as instructions (2) and (3).

Agatha L. Mergenovich,  
Secretary.

(FR Doc. 83-27428 Filed 10-6-83; 8:45 am)

BILLING CODE 7035-01-M

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 23

#### Export of American Ginseng Harvested in 1983 Season

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final findings and rule.

**SUMMARY:** The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is a treaty regulating the international trade of certain wildlife and plant species. Exports of wildlife or plants listed in Appendix II of CITES may occur if a Scientific Authority has advised a permit-issuing Management Authority that such exports will not be detrimental to the survival of the species, and if a Management Authority is satisfied that the wildlife or plants were not obtained in violation of laws for their protection. American ginseng (*Panax quinquefolius*) is listed on CITES Appendix II.

This notice announces final findings by the Scientific and Management Authorities for the United States concerning the export of American ginseng (*Panax quinquefolius*). These are final determinations for the States that have satisfied the Service's requirements on the export of specimens taken in the 1983 harvest season. Such findings are made on a State-by-State basis.

**DATE:** These findings are effective on October 7, 1983. The comment period remains open until December 31, 1983, for States that have not yet satisfied the Service's requirements.

**ADDRESS:** Please send correspondence concerning this notice to the Office of the Scientific Authority, U.S. Fish and Wildlife Service, Washington, D.C. 20240. Material received will be available for public inspection from 7:45 a.m. to 4:15 p.m., Monday through Friday, at the Office of the Scientific Authority, Room 536, 1717 H Street, NW., Washington, D.C., or at the Federal Wildlife Permit Office, Room 621, 1000 N. Glebe Road, Arlington, Virginia 22201.

**FOR FURTHER INFORMATION CONTACT:** Scientific Authority: Dr. Richard L.

Jachowski, Chief, Office of the Scientific Authority, U.S. Fish and Wildlife Service, Washington, D.C. 20240, Telephone (202) 653-5948.

Management Authority: Mr. Thomas J. Parisot, Chief, Federal Wildlife Permit Office, U.S. Fish and Wildlife Service, P.O. Box 3654, Arlington, Virginia 22203, Telephone (703) 235-1937.

Ginseng Export Program: Mr. S Ronald Singer, Federal Wildlife Permit Office, U.S. Fish and Wildlife Service, P.O. Box 3654, Arlington, Virginia 22203, Telephone (703) 235-2418.

**SUPPLEMENTARY INFORMATION:** This is the last of three notices concerning the Service's findings on export of American ginseng (*Panax quinquefolius*) taken in the 1983 season.

The first notice (48 FR 26651; June 9, 1983) announced the Service's intention to develop findings on export of 1983 ginseng and invited comment on the guidelines that it proposed to use in making such findings. The second notice (48 FR 40750; September 9, 1983) announced the proposed export findings for ginseng on a State-by-State basis. The present notice establishes final export findings for States that have satisfied the Service's requirements for current information about American ginseng population status, management, harvest and State controls. The comment period remains open for States that have not yet satisfied the Service's requirements for such information.

#### Information Considered

For American ginseng, the Service sought the following information in its August 31, 1982, proposal regarding each affected State:

1. Historic, present, and potential distribution of ginseng on a county basis, using county outline maps, and indicating the source(s) and accuracy of this information. Include also the distribution of preferred habitat on a regional or statewide basis, indicating recent trends in loss or protection of habitat.

2. Approximate number or density of ginseng populations per county or region and the approximate number of all known ginseng localities in the State, including also the source of this information.

3. Average population size (i.e., "stand" or "patch") or local abundance of wild ginseng on a county or regional basis in the State, indicating the source(s), general reliability and accuracy of the information. Include also any changes from previous years or differences from historical population sizes.