Resources and Environmental Control will not have a significant economic impact on a substantial number of small entities, since this rule only approves State actions. It imposes no new requirements on small entities.

(42 U.S.C. 300)

Dated: March 28, 1984.

William D. Ruckelshaus,

Administrator.

[FR Doc. 84-9090 Filed 4-4-84; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 271

[SW-4-FRL 2558-7]

Tennessee; Hazardous Waste Management Program; Request for Extension of Phase I Interim Authorization

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of extension of phase I interim authorization period.

SUMMARY: The State of Tennessee recently requested a further extension beyond the April 1, 1984, deadline previously granted for continued approval of their Phase I interim authorization under the Resource Conservation and Recovery Act (RCRA), as amended (48 FR 33870, July 28, 1983). EPA is granting the requested extension. A delay in adopting amendments to the State Hazardous Waste Statute necessary for Tennessee's Final authorization has resulted in the State missing the April 1, 1984, deadline for submitting its application for Final authorization. The delay was caused by a two-month special session of the Tennessee General Assembly which only considered special items and did not include the needed hazardous waste legislation. The regular session has now begun; however, the Legislature has not had sufficient time to act upon the proposed changes to the Hazardous Waste Management Act.

This extension allows Tennessee to retain Phase I interim authorization pending submission of a complete application for Final authorization.

EFFECTIVE DATE: April 1, 1984.

FOR FURTHER INFORMATION CONTACT: Allan E. Antley, Chief, Waste Planning Section, Residuals Management Branch, Air & Waste Management Division, Region IV, 345 Courtland Street, Atlanta, Georgia 30365, (404) 881-3016.

SUPPLEMENTARY INFORMATION:

Background

40 CFR 271.122(c)(4) (formerly § 123.122(c)(4): (47 FR 32377, July 26, 1982) requires that States which have received any but not all Phases/Components of interim authorization amend their original submissions by July 26, 1983, to include all Components of Phase II 40 CFR 271.137(a) (formerly § 123.137(a)); (47 FR 32378, July 26, 1982) further provides that on July 26, 1983, interim authorizations terminate except where the State has submitted by that date an application for all Phases/Components of interim authorization.

Where the authorization (approval) of the State program terminates, EPA is to administer and enforce the federal program in those States. However, the Regional Administrator may extend, for good cause, the July 26, 1983, deadline for termination of the approval of the State program to allow Tennessee time to make statutory, regulatory, and administrative changes necessary to qualify for either Final authorization or Phase II, interim authorization. The most significant issues include: The Tennessee Hazardous Waste Management Act T.C.A. Sec. 68-46-103 (1) and (2) allows exemptions for air emissions and water discharges; T.C.A. Sec. 68-46-106(a)(3) does not subject owners of treatment, storage, and disposal facilities to utilization of the manifest system; Sec. 68-46-108(b) limits the transporter requirements to the reporting of information; and the State of Tennessee does not provide for citizen intervention in State civil enforcement actions as a matter of right.

Note.—40 CFR Part 123, including the July 26, 1982, amendments (47 FR 32373), was recodified an April 1, 1983, as 40 CFR Part 271 (48 FR 14248).

Anticipating enactment of the necessary legislation and promulgation of regulations, Tennessee has committed to the following schedule for applying for Final authorization:

May 1, 1984—Submit a draft application for Final authorization which contains the following:

1. A signed Attorney General's Statement.
2. Legislation that is lawfully adopted, fully effective, and signed by the Governor of Tennessee.
3. Regulations that are fully effective and not subject to change (except for regulations based on legislation passed in the 1984 General Assembly).
4. Proposed regulations that are based on the new legislation passed during the 1984 General Assembly.
5. Draft Program Description and Memorandum of Agreement.

July 31, 1984—Submit a complete application for Final authorization as required in 40 CFR Part 271.

Decision

Considering the above schedule, immediate reversion of Phase I due to failure to meet the previous deadline was not in the best interest of the State, this Agency, the regulated community, or the citizens of Tennessee. I found there was good cause to grant the State's request for a further extension beyond the April 1, 1984, deadline previously granted for applying for Final authorization. Therefore, Tennessee must officially submit a draft application for Final authorization on or before May 1, 1984, and a complete application for Final authorization on or before July 31, 1984. If the State fails to submit draft and complete applications by the above respective dates, approval of the State program will terminate and administration of the hazardous waste management program will revert to EPA.

Executive Order 12291

The Office of Management and Budget (OMB) has exempted this rule from the requirements of Section 3 Executive Order 12291.

List of Subjects in 40 CFR Part 271

Hazardous materials, Indian-lands, Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control, Water supply, Intergovernmental relations, Penalties, Confidential business information.

Authority: This notice is issued under the authority of Sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C 6912(a), 6926 and 6974(b).

Dated: March 30, 1984.

George L. Harlow,

Acting Regional Administrator.

[FR Doc. 84-9079 Filed 4-4-84; 8:45 am]

BILLING CODE 6560-50-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 435 and 436

Medicaid Program; State Residency Requirements

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

ACTION: Final rule.

SUMMARY: We are revising Medicaid regulations to clarify State residency requirements for Medicaid eligibility. The rule will assist States in making determinations of residency for individuals receiving out-of-State care, and will establish more uniform requirements pertaining to the medical documentation needed to establish that an individual is incapable of indicating intent to reside.

EFFECTIVE DATE: July 5, 1984.

FOR FURTHER INFORMATION CONTACT: Marinos Svolos, (301) 594–9050.

SUPPLEMENTARY INFORMATION:

I. Background

The current regulations concerning residency became effective October 15, 1979 (for the various States, the District of Columbia and the Northern Mariana Islands, see 42 CFR 435.403; and for Guam, Puerto Rico, and the Virgin Islands, see 42 CFR 436.403). The regulations were intended to achieve uniform application of rules on residency, thereby insuring that no eligible individual is denied Medicaid because a State fails to recognize him or her as a resident. They were also designed to protect those States with superior medical facilities against the costs of caring for an influx of individuals from States that provide less adequate institutional care.

However, despite these regulations, States have informed us that problems are still encountered involving determination of residency in situations where an eligible resident receives out-of-State care. These problems are particularly notable with respect to institutionalized individuals because of the relatively higher cost of care involved. Members of Congress and recipient representatives, as well as States, have requested that we further clarify the current regulations to allow States to utilize interstate agreements for cases of disputed residency, and for other administrative purposes.

II. Provisions of the Proposed Rule

On September 30, 1982, we published in the **Federal Register** a proposed rule which would amend current Medicaid regulations that govern State residency requirements for Medicaid eligibility (47 FR 43095). The rule proposed amending regulations at 42 CFR 435.403 and 436.403 to clarify what constitutes State placement of an individual in a medical institution and the policy pertaining to medical documentation for an individual incapable of indicating intent to reside.

Specifically, the proposed rule included:

- A requirement that a State agency must furnish Medicaid services to State residents who are absent from the State.
- A definition of the term "institution" for State residency purposes.
- A requirement that medical documentation would be acceptable to serve as evidence that an individual is incapable of acknowledging intent to reside only if it is provided by a physician, psychologist, or other person licensed by the State in the field of mental retardation.
- A definition of State placement and identification of certain agencies as acting for the State in making placements.
- A provision that allows the State of residence for institutionalized individuals under age 21 or those who became incompetent before age 21 to be based on: (1) Their actual location; (2) the parents'/guardians' State of residence at the time of placement; (3) the parents'/guardians' current State of residence if it is the State in which the individual is institutionalized.
- A provision that classifies emancipated individuals under age 21 as residents of the State in which they are institutionalized.
- A provision that allows States broad use of interstate agreements.

III. Summary and Discussion of Public Comments

We received 19 letters in response to the proposed rule. The comments were from State agencies, a law center representing a beneficiaries' group, a training school for retarded children and an association for retarded citizens.

In addition to the specific comments on the provisions, comments were also received on the organization of the proposed rule. The commenters suggested that the rule would be clarified if it were organized in terms of the age of the individual, rather than their institutional or non-institutional status. We agree and have adopted this suggestion in this final rule. We are also making whatever other minor editorial revisions that are necessary to conform the rule to the new format. A summary of the additional specific comments received and our responses follows:

1. General

Comment: One commenter suggested that we clarify that the residence of military personnel and their families is the State where the member of the military is stationed.

Response: We do not agree that special residency requirements for military personnel are necessary, since military personnel and their families are subject to the same residency requirements and protections as all other persons applying for Medicaid benefits. Moreover, section 153 of Pub. L. 97–248, the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982 amended section 406(a)(1) of the Social Security Act (the Act) and altered the effect on absence due to military service on Aid to Families with Dependent Children (AFDC). AFDC is no longer available to families if the parent is absent from the home solely by reason of the performance of active duty in the uniformed services of the United States.

Comment: Another commenter requested we clarify whether the regulations at § 435.403(g) regarding the residence of institutionalized persons take precedence over the regulations at § 435.118 regarding title IV–E (Adoption Assistance) payments by States for Medicaid when the child and his or her family move to another State.

Response: We are accepting this comment and are clarifying the regulations at §§ 435.403(g) and 436.403(f) to specify that the State making the title IV–E payment must provide Medicaid even when the individual and his or her family move to another State. This clarification conforms the regulations with § 435.118. Also, we are further clarifying in the regulations at §§ 435.403(k) and 436.403(j) that States may use interstate agreements for purposes other than disputed residency to facilitate the placement and adoption of title IV–E individuals, where States have enacted interstate agreements as provided for in Section 101(a)(4)(B) of Pub. L. 96–272 or other State statutes to provide for reciprocal provision of medical assistance for title IV–E children as allowed under that program.

Comment: Two commenters suggested that we include in the regulation a discussion of the parent's State of residence versus the legal guardian's. One commenter suggested that the residence of the parents should take precedence over that of the guardian, absent a termination of parental rights. The commenter indicated that there are a variety of guardian situations that exist including: (a) General guardian of property; (b) guardian *ad litem* appointed for a specific and limited purpose; and (c) probate guardian, usually the Commissioner of Public Welfare. These types of guardian situations do not evolve from the fact of residence. The second commenter believed that the residence of a child under age 21 or an individual over age 21 who became incapable of indicating

intent before age 21 be restricted to the parents' State of residence, not the legal guardian's.

Response: While we agree that there are a variety of guardian situations, we are adding a statement at the end of the paragraphs at §§ 435.403 (h)(4)(ii) and (i)(2)(iii) and 436.403 (g)(4)(ii) and (h)(2)(iii) to specify if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of that of the parent's. In some instances, the courts will appoint a legal guardian for a child who has been abandoned by the parents. However, it is also possible that a legal guardian may not be appointed. Therefore, we are adding new paragraphs at §§ 435.403 (h)(4)(iii) and (i)(2)(iv) and 436.403 (g)(4)(iii) and (h)(2)(iv) to specify that the State of residence of the individual or party who files an application is used if the individual has been abandoned by his or her parent(s), does not have legal guardian and is institutionalized in that State.

2. Definition of Institution

Comment: One commenter suggested that the reference to a foster care home in the regulations should specify that the foster care home must be licensed in the State in which it is located.

Response: We agree with the comment and are adding language to the regulations at §§ 435.403(b) and 436.403(b) to specify that a foster care home must be licensed as set forth in the regulations at 45 CFR 1355.20 (48 FR 23114, May 23, 1983).

3. Medical Documentation for Incompetency

Comment: Several commenters objected to the proposed regulations at §§ 435.403(c) and 436.403(c) on various grounds: One commenter expressed concern that States will be forced to add many out-of-State residents to their Medicaid roles. The commenter noted that its residents often bring their aged relatives who have never been diagnosed as being incompetent into the State. However, the commenter added that it would not have to accept these out-of-State residents given the regulation's requirement that such individual's State of residence is where they were located at the time they became incapable of indicating intent. Another commenter believed the proposed rules do not provide adequate guidance for dealing with conflicting medical opinions regarding competency. This commenter suggests that the regulation focus on the types of acceptable evidence as well as the source. A third commenter objected to any specific documentation requirements.

Response: We do no agree with any of these comments. As stated in the preamble to the proposed rule, we wish to reduce the wide variation in approaches taken by States to document whether an individual is capable of indicating intent to reside. We believe the requirement as written will adequately decrease the number of disagreements between States that otherwise would arise from the use of lay opinions or statements.

Since a finding of incompetency is a controlling factor in determining the State of residence, especially for the institutionalized, we believe the regulations as proposed will decrease disagreements about acceptable documentation because they allow only documentation from a physician, psychologist or other person licensed by the State in the field of mental retardation to serve as evidence that an individual is incapable of acknowledging intent to reside in a State.

Furthermore, we believe that any attempt to identify specific types of acceptable evidence and their relative priority would unnecessarily hinder State flexibility in the vast majority of decisions where the findings are not challenged. In the event that the State agencies disagree over the conclusion based on medical documentation, and additional acceptable documentation does not resolve conflicting opinions, our regulations provided that the State of residence is where the individual is physically located.

Comment: One commenter wrote to confirm his belief that the use of specific documentation requirements is limited to persons who are under age 21 or who became incapable of indicating intent before age 21.

Response: The commenter is wrong in his understanding. There was nothing in the proposed regulations that specified that the application of the documentation requirements is limited only to persons under age 21. The documentation requirements for incompetency apply regardless of the individual's age.

4. Placement by States in an Out-of-State Institution

Comment: The regulations provide that a State arranging or actually making a placement is considered as the individual's State of residence. Three commenters suggested that we identify in the regulations the specific actions that would constitute proof that a State arranged or made a placement in an out-of-State institution. For example, in some cases, States are requested by family members to relocate an incapacitated individual to the State in which the family resides. In other cases, a capable individual might independently decide to move to another State and merely requests assistance from the current State of residence in locating an institution in another State. Finally, if an individual placed by a State decides to move to another facility in a different State would this relieve the State that made the initial placement of future responsibility? If so, the individual's State of residence for Medicaid purposes should become the State where the independently chosen facility is located.

Response: We agree that these cases raise doubts as to the level of State involvement in making placements. Therefore, we have revised the regulations at §§ 435.403(e) and 436.403(e) to provide more specificity on State placement. The regulations will state a general rule and specify those actions which do not constitute a State placement. In general, only actions that go beyond merely providing information would constitute a State placement. When placement is made by States because they lack appropriate facilities, the State arranging or making the placement is the individual's State of residence. Similarly, a State which provides reimbursement for transportation to the other State would be considered as having placed the individual and would be responsible for the individual's care. As a result of this comment, we are also adding a statement that an independent move by a competent individual following an initial State placement will result in residency being determined based on where the individual is physically located.

Comment: One commenter was concerned that the regulation does not resolve the problems encountered when placements are made by both private agencies, and agencies of the State and Federal governments. The commenter proposed that the definition of State agencies be extended to any agency making placements within the State, whether or not under contract to the State, and with or without specific authorization from the Medicaid State agency.

Response: The regulation will specify at §§ 435.403(e)(1) and 436.403(e)(1) that any agency of the State, including an entity recognized under State law as being under contract with the State for such purposes (including private agencies and agencies of the Federal

government), that arranges for an individual to be placed in an institution or located in another State is recognized as acting on behalf of the State in making a placement.

Comment: One commenter recommended that the regulations be revised to indicate that a competent individual should always have the right to make a choice and receive assistance in locating an institution in another State from any State without mandating that the State assume financial responsibility for the cost of care.

Response: We agree and have revised the regulations to clarify that State assistance in locating an institution in another State does not necessarily require State assumption of financial responsibility for the cost of care, if a competent individual asks for such service.

Comment: One commenter suggested that the definition of institution be broadened for purposes of State placement to include adult care facilities, family type homes for adults, shelters for adults and intermediate care facilities. This commenter believed when an individual is placed by another State in one of the above facilities, the financial burden upon the receiving State can be quite significant.

Response: We agree and have clarified the regulations at §§ 435.403(e)(4) and 436.403(e)(4) to provide that if the State making a placement provides for Medicaid coverage for individuals in the above referenced living arrangements, and the State lacks facilities to provide services to its residents, that State would be financially responsible unless an interstate agreement between the two States provide otherwise.

5. Institutionalized and Non-institutionalized Individuals

Comment: One commenter wanted to know the rationale for considering blindness or disability (redesignated in these final regulations at §§ 435.403(h)(2) and 436.403(g)(2)) in determining the State of residence of a child under age 21 without regard to whether the individual is institutionalized or not.

Response: Under the SSI program and in most States, there are no age limitations imposed for persons to be considered blind or disabled. This particular provision concerns persons under age 21 who seek to establish Medicaid eligibility on the basis of either blindness or disability. As stated previously, the State of residence for non-institutionalized persons is determined by physical presence. The provision for SSI eligible individuals is identified specifically in this section to contrast it with non-blind or disabled children who qualify for Medicaid as ADFC eligible and therefore are covered by AFDC rules.

Comment: One commenter asked whether an individual under age 21 is always a child for purposes of 45 CFR 233.40 or whether an individual loses his or her status as a child for purposes of this section.

Response: The intent of these regulations is to adopt the criteria in 45 CFR 233.40 for determining residency, not to follow AFDC's definition of child. Therefore, for any non-institutionalized person under age 21, whether or not that person is considered a child by AFDC, the criteria in 45 CFR 233.40 govern the determination of residency for Medicaid purposes.

Comment: One commenter expresed concern that prior protection that was afforded to those States with higher quality facilities in the October, 1979, regulations was removed in the NPRM. The commenter also felt it would be an unfair burden on those States that have the higher quality facilities to be required to provide assistance for out-of-State individuals because bed availability is better in that State than the individual's own State.

Response: It was not the intent of this regulation to impose an unfair burden on any State. We have sought to achieve a more equitable balance between the interests of the individual and the State by adopting a more flexible policy for determining residency of institutionalized individuals. As mentioned previously, we have revised the regulations to state that where placement is made by States because they lack appropriate facilities, the State arranging or making the placement is the individual's State of residence. The regulations also provide more flexibility for the States to deal with these kinds of situations through use of interstate agreements, if they choose.

Comment: One commenter requested clarification of the rules used to determine the parents' or legal guardian's State of residence, where they live in different States.

Response: We are clarifying the regulation following §§ 435.403(h)(4)(ii) and 436.403(g)(4)(ii) by adding that absent a legal termination of the parents' right, the State of residence of the parent making application is used instead of the legal guardian's State of residence.

Comment: One commenter expressed concern that the proposed rule does not contain any provision which would encourage removal of disincentives on the part of States to develop their own long term care resources, thereby reducing the influx of recipients from States with lesser quality resources to those with higher quality resources.

Response: We recognize that this is a problem. However, the primary intent of this regulation is to set forth requirements for determining an individual's State of residency. The balance between patient needs and State resources is primarily a matter for the States to determine. The regulation allows States to deal with this issue through use of interstate agreements, if States find such agreements would be helpful.

6. Emancipated and Married Individuals Under Age 21

Comment: One commenter noted a conflict between § 435.403 (h)(3) and (h)(4) of the proposed rule. Both paragraphs applied to an individual under age 21 but § 435.403(h)(4) also applied to those married or otherwise emancipated. It is not clear whether the parents' or legal guardian's State of residence should be considered for married or emancipated individuals under age 21.

Response: We agree with this comment and are providing further clarification in the regulations at §§ 435.403(h)(1) and 436.403(g)(1).

Comment: Another commenter questioned whether it is correct to assume that emancipation for the purpose of this regulation, is as defined by State law.

Response: Yes. Unless otherwise indicated in these regulations, definition of terms and other related policies are matters of State discretion.

Comment: One commenter supported the proposals regarding emancipated individuals but was concerned that the concept of placement seems to be disregarded. This commenter suggested that emancipated individuals be treated as adults and thereby remove emancipated minors from the under age 21 category.

Response: We believe that the clarification in the proposed regulation adequately addresses this concern.

Comment: One commenter proposed that the regulation consider only the standards for emancipation in the parents' State of residence for individuals under age 18 instead of a uniform national standard.

Response: We disagree, since parental responsibility for the purpose of establishing residence extends to age 21 in some States. Where a person is emancipated at age 18, the regulation takes this into account by not linking residency to parents or guardians.

Comment: Another commenter requested clarification regarding which State law determines whether a person is married or emancipated, the State in which the individual is institutionalized or the State where the individual's legal parent or guardian lives.

Response: In the case where the person is not married, the State law where the individual, not the parent or legal guardian, physically resides would determine emancipation. If an individual is legally married then the individual is emancipated for purposes of this regulation regardless of the State in which the individual resides.

7. Temporary Absence

Comment: One commenter recommended that the provision of proposed § 435.403(j)(3) and 436.403(i)(3) apply only to persons whose residence is based on their intent, i.e., the persons covered under § 435.403(h) and 436.403 (g)(2), (g)(3), and (h)(4).

Response: We disagree with the recommendation. Sections 435.403(j)(3) and 436.403(i)(3) of this final regulation require that an agency may not deny or terminate an individual's Medicaid eligibility because that individual is temporarily absent from the State if the individual intends to return when the reason for the absence has been accomplished. The commenter's recommendation does not take into account that there may be many situations which could involve incapacitated individuals being temporarily absent from the State. We believe it would be unfair to limit this regulation as the commenter suggests.

Comment: One State requested further clarification for proposed §§ 435.403(i)(3) and 436.403(h)(3) regarding temporary absence from a State. The commenter proposed that the regulation be more specific and require a two month absence as the length of time an individual can be out-of-State and remain eligible for Medicaid coverage.

Response: This suggestion would, in effect impose a durational residency requirement. A State may not deny or terminate Medicaid due to temporary absences from the State if the individual intends to return to the State when the purpose of the absence has been accomplished. The regulations were written in this manner so as not to limit the right of an individual to move freely from one State to another.

Additionally, the AFDC, SSI and non-cash assistance individuals, the State may not arbitrarily terminate Medicaid benefits without contacting, or attempting to contact, the individuals. Where the individual's whereabouts are unknown, States must follow the provisions of 42 CFR 431.213, 431.231, and 435.916.

8. Interstate Agreements

Comment: One commenter proposed that a mechanism be established for the resolution of interstate disputes, e.g., use of a regional staff attorney with disputed matters to be submitted in writing.

Response: We agree that the regulation should be clarified, but do not feel that a federal administrative review mechanism should be established, since the reasons for disputes vary and there are no clear cut guidelines that any arbiter can use to resolve the issues. Instead, the regulation will be revised to state that where two or more States cannot resolve which State is the State of residence, the State where the individual is physically located is the State of residence.

Comment: One commenter recommended that the interstate agreement requirements as they pertain to placement and disputed residency be eliminated.

Response: We do not want to eliminate interstate agreements. There may be instances when interstate agreements are necessary to resolve disputed residency situations that may not have been an issue in the past.

9. Grandfather Clause Provision

Comment: One commenter suggested that a permanent grandfather clause provision be added to the regulations. The commenter was concerned that without a permanent provision, many individuals may be displaced or lose effective use of the benefits to which they are entitled.

Response: We do not agree because we do not want to create a permanent special classification of Medicaid individuals who would not be subject to the rules otherwise applicable in the program. A temporary exemeption was necessary to ease already institutionalized individuals into the changes necessitated by the new regulations and to ensure that all eligible institutionalized individuals are determined to be residents of some State for Medicaid purposes. The regulation required States to continue to provide Medicaid to an institutionalized individual who, as a result of the changes in the residency regulations that were published in October 1979, would be considered a resident of a different State. This grandfather clause initially expired October 13, 1981 and was formally extended to June 23, 1983 by a notice published in the **Federal Register** on June 23, 1982 (47 FR 27078). We are again extending this provision to allow States additional time to conclude establishing residency for their institutionalized population and arranging for either placement in the resident State or reimbursement by the resident State. The extension is effective from June 24, 1983 to 90 days after date of publication of this regulation.

IV. Provisions of the Final Regulations

We are revising regulations located at 42 CFR 435.403 and 436.403 to clarify what constitutes State placement of an individual in a medical institution and the policy pertaining to medical documentation for incapability of indicating intent. Technical changes to update cross references and other information also are being made.

The current regulations (§§ 435.403(a) and 436.403(a)) state that the agency must provide Medicaid to "otherwise eligible" residents of the State. The phrase was intended to apply to resident individuals who are absent from the State. Therefore, we are amending the regulations to clearly state that the agency must furnish Medicaid to financially and categorically eligible State residents who are absent from the State. We have added a cross reference to the regulation that sets forth the conditions under which States are responsible for paying for out-of-State care.

We are adding a new paragraph to define the term "institution" for State residency purposes. The term will have the same meaning as that provided in 42 CFR 435.1009 for purposes of determining the conditions under which Federal financial participation (FFP) is available for persons in public institutions. In addition, we are adding a requirement that a foster care home must be licensed as set forth in 45 CFR 1355.20.

We are revising the current regulations to allow only medical documentation from a physician, psychologist, or other person licensed by the State in the field of mental retardation to serve as evidence that an individual is incapable of acknowledging intent to reside. This revision should decrease instances of disagreements between States concerning acceptable documentation and will help resolve cases of disputed residency since it will eliminate the possibility of documentation by a nonprofessional that may not be valid. Where disputes still occur and cannot be resolved, the State where an individual is physically present shall be the State of residence.

We are also clarifying the regulation to define those actions that do not constitute a State placement, and to specify that any entity recognized under State law as acting for the State is an agency of the State for placement purposes. (The proposed regulation only recognized entities under contract with the State.) We believe that Medicaid recipients and their families will also benefit from this revision because they will be assisted by States in obtaining placements.

We are clarifying the regulations at §§ 435.403(e) and 436.403(e) to specify that if a competent individual leaves the facility in which he or she was placed by a State, that individual's State of residence for Medicaid will be the State where the individual is physically located.

We also are revising the regulations to make the State of residence for an institutionalized individual who is under 21, or became incompetent before age 21, the State in which the parent or legal guardian making application lived at the time of placement or the parent's or legal guardian's current State of residence, if the individual is institutionalized in that State. Some States have objected to being responsible for reimbursement for services provided to individuals in institutions in other States. The revision (§§ 435.403(h)(4), 436.403(g)(4)) is intended to alleviate problems by adopting a flexible policy under which residency would not always be based on the parents' or guardian's current State of residence. This revision is expected to ease the administrative burden on States because the State does not have to make a new residency determination as required under current regulations when a parent moves to another State.

Sections 435.403(h)(1) and 436.403(g)(1) are being revised and redesignated to state that individuals under age 21 who are married or who have been emancipated from parental control under State law are also residents of the State in which they reside with the intent to remain.

We are revising the regulations at §§ 435.403(k) and 436.403(j) to allow States the option to use interstate agreements for administrative purposes in other than cases of disputed residency. Some States have entered into reciprocal agreements wherby each State agrees to treat the other State's residents as its residents. To facilitate administration of the program and to provide maximum State flexibility, we are making a technical change to the regulations to allow States the option of using interstate agreements for purposes of facilitating administration of the program in addition to resolving residency disputes. States also are allowed to use interstate agreements for purposes other than disputed residency to facilitate the adoption and placement of title IV–E individuals. A State making a title IV–E payment must provide Medicaid even when the individual and his or her family move to another State. However, States which enter into interstate compacts as provided for under Pub. L. 96–272 may establish reciprocal agreements for providing medical assistance for individuals receiving adoption assistance payments.

We are extending the grandfather provision in §§ 435.403(j) and 436.403(i). The extension is effective from June 24, 1983 until 90 days after date of publication of this regulation.

IV. Impact Analyses

A. Executive Order 12291

The Secretary has determined that the regulations do not meet the criteria for a "major rule" as defined by section 1(b) of Executive Order 12291. That is, these regulations will not—

- Have an annual effect on the economy of $100 million or more;
- Result in a major increase in costs or prices for consumers, any industries, any government agencies, or any geographic regions; or
- Have significant adverse effects on competition; employment, investment, productivity, innovation; or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or import markets.

Since we are primarily clarifying procedures already in effect, this rule will result in little economic impact. We believe there will be neligible changes in the current Medicaid expenditures with respect to affected individuals.

B. Regulatory Flexibility Act

The Secretary certifies, under 5 U.S.C. 605(b), enacted by the Regulatory Flexibility Act (Pub. L. 96–354) that the proposed regulations will not have a significant economic impact on a substantial number of small businesses, non-profit entities or small local governments.

As defined by the Regulatory Flexibility Act, the term "small entities" includes "small governmental jurisdictions". The latter term is defined as local governments (cities, counties, towns, townships, villages, school districts, or other special districts) with a population of less than fifty thousand persons. State governments are not included in this definition.

These regulations will clarify the definitions of "State resident" and "incompetency", and will make technical changes to requirements for State placement. Although we are uncertain of the number of institutions or beneficiaries that might be affected by these regulations, we do not believe that the number will be substantial nor the effect economically significant. We intend that these revisions benefit State agencies by clarifying administrative requirements.

List of Subjects

42 CFR Part 435

Aid to Families with Dependent Children, Aliens, Categorically needy, Contracts (Agreements—State Plan), Eligibility, Grant-in-Aid program—health, Health facilities, Medicaid, Medically needy, Reporting requirements, Spend-down, Supplemental security income (SSI).

42 CFR Part 436

Aid to Families with Dependent Children, Aliens, Contracts (Agreements), Elilgibility, Grant-in-Aid program—health, Guam, Health facilities, Medicaid, Puerto Rico, Supplemental security income (SSI), Virgin Islands.

42 CFR Parts 435 and 436 are amended as set forth below:

PART 435—ELIGIBILITY IN THE STATES, DISTRICT OF COLUMBIA AND THE NORTHERN MARIANA ISLANDS

The authority citation for Part 435 reads as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302), unless otherwise noted.

1. Section 435.403 is revised to read as follows:

§ 435.403 State residence.

(a) *Requirement.* The agency must provide Medicaid to eligible residents of the State, including residents who are absent from the State. The conditions under which payment for services is provided to out-of-State residents are set forth in § 431.52 of this chapter.

(b) *Definition.* For purposes of this section—"Institution" has the same meaning as "Institution" and "Medical institution", as defined in § 435.1009 of this chapter. For purposes of State placement, the term also includes "foster care homes", licensed as set forth in 45 CFR 1355.20, and providing food, shelter and supportive services to one or more persons unrelated to the proprietor.

(c) *Incapability of indicating intent.* For purposes of this section, an individual is considered incapable of indicating intent if the individual—

(1) Has an I.Q. of 49 or less or has a mental age of 7 or less, based on tests acceptable to the mental retardation agency in the State:

(2) Is judged legally incompetent; or

(3) Is found incapable of indicating intent based on medical documentation obtained from a physician, psychologist, or other person licensed by the State in the field of mental retardation.

(d) *Who is a State resident.* A resident of a State is any individual who:

(1) Meets the conditions in paragraphs (e) through (i) of this section; or

(2) Meets the criteria specified in an interstate agreement under paragraph (k) of this section.

(e) *Placement by a State in an out-of-State institution.* (1) *General rule*—Any agency of the State, including an entity recognized under State law as being under contract with the State for such purposes, that arranges for an individual to be placed in an institution located in another State, is recognized as acting on behalf of the State in making a placement. The State arranging or actually making the placement is considered as the individual's State of residence.

(2) Any action beyond providing information to the individual and the individual's family would constitute arranging or making a State placement. However, the following actions do not constitute State placement:

(i) Providing basic information to individuals about another State's Medicaid program, and information about the availability of health care services and facilities in another State.

(ii) Assisting an individual in locating an institution in another State, provided the individual is capable of indicating intent and independently decides to move.

(3) When a competent individual leaves the facility in which the individual is placed by a State, that individual's State of residence for Medicaid purposes is the State where the individual is physically located.

(4) Where a placement is initiated by a State because the State lacks a sufficient number of appropriate facilities to provide services to its residents, the State making the placement is the individual's State of residence for Medicaid purposes.

(f) *Individuals receiving a State supplementary payment (SSP).* For individuals of any age who are receiving an SSP, the State of residence is the State paying the SSP.

(g) *Individuals receiving Title IV–E payments.* For individuals of any age who are receiving Federal payments for foster care and adoption assistance under title IV–E of the Social Security Act, the State of residence is the State making the payment.

(h) *Individuals Under Age 21.* (1) For any individual who is emancipated from his or her parents or who is married and capable of indicating intent, the State of residence is the State where the individual is living with the intention to remain there permanently or for an indefinite period.

(2) For any individual not residing in an institution as defined in paragraph (b) whose Medicaid eligibility is based on blindness or disability, the State of residence is the State in which the individual is living.

(3) For any other non-institutionalized individual not subject to paragraph (h)(1) or (h)(2) of this section, the State of residence is determined in accordance with 45 CFR 233.40, the rules governing residence under the AFDC program.

(4) For any institutionalized individual who is neither married nor emancipated, the State of residence is—

(i) The parent's or legal guardian's State of residence at the time of placement (if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the parent's); or

(ii) The current State of residence of the parent or legal guardian who files the application if the individual is institutionalized in that State (if a legal guardian has been appointed and parental rights are terminated, the State or residence of the guardian is used instead of the parent's).

(iii) The State of residence of the individual or party who files an application is used if the individual has been abandoned by his or her parent(s), does not have a legal guardian and is institutionalized in that State.

(i) *Individuals Age 21 and Over.* (1) For any individual not residing in an institution as defined in paragraph (b), the State of residence is the State where the individual is—

(i) Living with the intention to remain there permanently or for an indefinite period (or if incapable of stating intent, where the individual is living); or

(ii) Living and which the individual entered with a job commitment or seeking employment (whether or not currently employed).

(2) For any institutionalized individual who became incapable of indicating intent before age 21, the State of residence is—

(i) That of the parent applying for Medicaid on the individual's behalf, if the parents reside in separate States (if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the parent's);

(ii) The parent's or legal guardian's State of residence at the time of placement (if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the parent's); or

(iii) The current State of residence of the parent or legal guardian who files the application if the individual is institutionalized in that State (if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the parent's).

(iv) The State of residence of the individual or party who files an application is used if the individual has been abandoned by his or her parent(s), does not have a legal guardian and is institutionalized in that State.

(3) For any institutionalized individual who became incapable of indicating intent at or after age 21, the State of residence is the State in which the individual is physically present, except where another State makes a placement.

(4) For any other institutionalized individual, the State of residence is the State where the individual is living with the intention to remain there permanently or for an indefinite period.

(j) *Specific prohibitions.* (1) The agency may not deny Medicaid eligibility because an individual has not resided in the State for a specified period.

(2) The agency may not deny Medicaid eligibility to an individual in an institution, who satisfies the residency rules set forth in this section, on the grounds that the individual did not establish residence in the State before entering the institution.

(3) The agency may not deny or terminate a resident's Medicaid eligibility because of that person's temporary absence from the State if the person intends to return when the purpose of the absence has been accomplished, unless another State has determined that the person is a resident there for purposes of Medicaid.

(k) *Interstate agreements.* A State may have a written agreement with another State setting forth rules and procedures resolving cases of disputed residency. These agreements may establish criteria other than those specified in paragraphs (c) through (i) of this section, but must not include

criteria that result in loss of residency in both States or that are prohibited by paragraph (j) of this section. The agreements must contain a procedure for providing Medicaid to individuals pending resolution of the case. States may use interstate agreeements for purposes other than cases of disputed residency to facilitate administration of the program, and to facilitate the placement and adoption of title IV–E individuals when the child and his or her adoptive parent(s) move into another State.

(l) *Continued Medicaid for institutionalized recipients.* If an agency is providing Medicaid to an institutionalized recipient who, as a result of this section, would be considered a resident of a different State—

(1) The agency must continue to provide Medicaid to that recipient from June 24, 1983 until July 5, 1984, unless it makes arrangements with another State of residence to provide Medicaid at an earlier date: and

(2) Those arrangements must not include provisions prohibited by paragraph (h) of this section.

(m) *Cases of disputed residency.* Where two or more States cannot resolve which State is the State of residence, the State where the individual is physically located is the State of residence.

PART 436—ELIGIBILITY IN GUAM, PUERTO RICO, AND THE VIRGIN ISLANDS

The authority citation for Part 436 reads as follows:

Authority: Section 1102 of the Social Security Act (42 U.S.C. 1302), unless otherwise noted.

2. Section 436.403 is revised to read as follows:

§ 436.403 State residence.

(a) *Requirement.* The agency must provide Medicaid to eligible residents of the State, including residents who are absent from the State. The conditions under which payment for service is provided to out-of-State residents are set forth in § 431.52 of this chapter.

(b) *Definition.* For purposes of this section—"Institution" has the same meaning as "Institution" and "Medical institution", as defined in § 435.1009 of this chapter. For purposes of State placement, the term also includes "foster care homes", licensed as set forth in 45 CFR 1355.20, and providing food, shelter and supportive services to one or more persons unrelated to the proprietor.

(c) *Incapability of indicating intent.* For purposes of this section, an individual is considered incapable of indicating intent if the individual—

(1) Has an I.Q. of 49 or less or has a mental age of 7 or less, based on tests acceptable to the mental retardation agency in the State;

(2) Is judged legally incompetent; or

(3) Is found incapable of indicating intent based on medical documentation obtained from a physican, psychologist, or other person licensed by the State in the field of mental retardation.

(d) *Who is a State resident.* A resident of a State is any individual who:

(1) Meets the conditions in paragraphs (e) through (h) of this section; or

(2) Meets the criteria specified in an interstate agreement under paragraph (j) of this section.

(e) *Placement by a State in an out-of-State institution.* (1) *General rule*—Any agency of the State, including an entity recognized under State law as being under contract with the State for such purposes, that arranges for an individual to be placed in an institution located in another State, is recognized as acting on behalf of the State in making a placement. The State arranging or actually making the placement is considered as the individual's State of residence.

(2) Any action beyond providing information to the individual and the individual's family would constitute arranging or making a State placement. However, the following actions do not constitute State placement:

(i) Providing basic information to individuals about another State's Medicaid program, and information about the availability of health care services and facilities in another State.

(ii) Assisting an individual in locating an institution in another State provided the individual is capable of indicating intent and independently decides to move.

(3) When a competent individual leaves the facility in which the individual is placed by a State, that individual's State of residency for Medicaid purposes is the State where the individual is physically located.

(4) Where placement is initiated by a State because the State lacks a sufficient number of appropriate facilities to provide services to its residents, the State making the placement is the individual's State of residence for Medicaid purposes.

(f) *Individuals receiving title IV–E payments.* For individuals of any age who are receiving Federal payment for foster care and adoption assistance under title IV–E of the Social Security Act, the State of residence is the State making the payment.

(g) *Individuals Under Age 21:* (1) For any individual who is emancipated from his or her parents or who is married and capable of indicating intent, the State of residence is the State where the individual is living with the intention to remain there permanently or for an indefinite period.

(2) For any individual not residing in an institution as defined in paragraph (b) whose Medicaid eligibility is based on blindness or disability, the State of residence is the State in which the individual is living.

(3) For any other non-institutionalized individual not subject to paragraph (h)(1) or (h)(2) of this section, the State of residence is determined in accordance with 45 CFR 233.40, the rules governing residence under the AFDC program.

(4) For any institutionalized individual who is neither married nor emancipated, the State of residence is—

(i) The parents' or legal guardian's current State of residence at the time of placement; or

(ii) The current State of residence of the parent or legal guardian who files the application, if the individual is institutionalized in that State. If a legal guardian has been appointed and the parental rights are terminated, the State of residence of the guardian is used instead of the parent's.

(iii) The State of residence of the individual or party who files an application is used if the individual has been abandoned by his or her parent(s), does not have a legal guardian and is institutionalized in that State.

(h) *Individuals Age 21 and Over.* (1) For any individual not residing in an institution as defined in paragraph (b), the State of residence is the State where the individual is—

(i) Living with the intention to remain there permanently or for an indefinite period (or if incapable of stating intent, where the individual is living); or

(ii) Living and which the individual entered with a job commitment or seeking employment (whether or not currently employed).

(2) For any institutionalized individual who became incapable of indicating intent before age 21, the State of residence is—

(i) That of the parents applying for Medicaid on the individual's behalf, if the parents reside in separate States;

(ii) The parent's or legal guardian's State of residence at the time of placement; or

(iii) The current State of residence of the parent or legal guardian who files

the application, if the individual is institutionalized in that State. If a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the legal parent's.

(iv) The State of residence of the individual or party who files an application is used if the individual has been abandoned by his or her parent(s), does not have a legal guardian and is institutionalized in that State.

(3) For any institutionalized individual who became incapable of indicating intent at or after age 21, the State of residence is the State in which the individual is physically present, except where another State makes a placement.

(4) For any other institutionalized individual, the State of residence is the State where the individual is living with the intention to remain there permanently or for an indefinite period.

(i) *Specific prohibitions.* (1) The agency may not deny Medicaid eligibility because an individual has not resided in the State for a specified period.

(2) The agency may not deny Medicaid eligibility to an individual in an institution, who satisfies the residency rules set forth in this section, on the grounds that the individual did not establish residence in the State before entering the institution.

(3) The agency may not deny or terminate a resident's Medicaid eligibility because of that person's temporary absence from the State if the person intends to return when the purpose of the absence has been accomplished, unless another State has determined that the person is a resident there for purposes of Medicaid.

(j) *Interstate agreements.* A State may have a written agreement with another State setting forth rules and procedures resolving cases of disputed residency. These agreements may establish criteria other than those specified in paragraphs (c) through (h) of this section, but must not include criteria that result in loss of residency in both States or that are prohibited by paragraph (i) of this section. The agreements must contain a procedure for providing Medicaid to individuals pending resolution of the case.

States may use interstate agreements for purposes other than cases of disputed residency to facilitate administration of the program, and to facilitate the placement and adoption of title IV–E individuals when the child and his or her adoptive parent(s) move into another State.

(k) *Continued Medicaid for institutionalized recipients.* An agency is providing Medicaid to an institutionalized recipient who, as a result of this section, would be considered a resident of a different State—

(1) The agency must continue to provide Medicaid to that recipient from June 24, 1983 until July 5, 1984 unless it makes arrangements with another State of residence to provide Medicaid at an earlier date; and

(2) Those arrangements must not include provisions prohibited by paragraph (g) of this section.

(l) *Cases of disputed residency.* Where two or more States cannot resolve which State is the State of residence, the State where the individual is physically located is the State of residence.

(Catalog of Federal Domestic Assistance Program No. 13.714, Medical Assistance)

Dated: December 8, 1983.

Carolyne K. Davis,

Administrator, Health Care Financing Administration.

Approved: March 12, 1984.

Margaret M. Heckler,

Secretary.

[FR Doc. 84–8989 Filed 4–4–84; 8:45 am]

BILLING CODE 4120–03–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[Docket No. 21136; FCC 84–105]

Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations

AGENCY: Federal Communications Commission.

ACTION: Policy amendment.

SUMMARY: On reconsideration, the Commission amends its policy governing underwriting and donor acknowledgments aired by public broadcast stations to permit the use of brand and trade names as well as product or service listings. This action will enhance the ability of public stations to generate more of their own financial support and thereby maintain and improve the quality of their service in the face of declining governmental funding. Prior Commission limitations in this regard were based upon the legislative history of the Public Broadcasting Amendments Act of 1981, which indicated that enhanced donor acknowledgments should only be allowed after further study of alternative funding sources was undertaken. That study has now been completed by submission of the final report of the Congressionally created Temporary Commission on Alternative Financing for Public Telecommunications. Additionally, the language of the *Memorandum Opinion and Order* in Docket No. 21136, 90 FCC 2d 895 (1982) (August 19, 1982; 47 FR 36171), is modified to clarify that public broadcasters are generally prohibited from engaging in fundraising activities that suspend or alter regular programming on behalf of any entity other than the station itself. Finally, it is clarified that both donor acknowledgments and underwriting credits are subject to the same restrictions regarding their scheduling and the information that they may include.

EFFECTIVE DATE: March 28, 1984.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Lane Howard Moten, Mass Media Bureau (202) 632–7792.

SUPPLEMENTARY INFORMATION:

Memorandum Opinion and Order

In the matter of Commission policy concerning the noncommercial nature of educational broadcasting stations; Docket No. 21136, FCC 84–105.

Adopted: March 28, 1984.

Released: March 28, 1984.

By the Commission.

Background

1. The *Second Report and Order* in Docket No. 21136 ("*Second Report*")[1] concluded a two year proceeding designed to evaluate the financial needs of public broadcasters and examine alternative methods of fundraising within the framework of providing a noncommercial service. The Commission liberalized prior restrictions upon public broadcasters' fundraising activities by amending 47 CFR 73.503 and 47 CFR 73.621. Subsequently, Congress enacted the Public Broadcasting Amendments Act of 1981 ("1981 Amendments") to ensure that the public telecommunications media remained financially viable in the wake of substantial reductions in Federal funding by expanding public broadcasters' ability to generate increased private financial support.[2] The legislation contained in Section 399A[3]

[1] 86 FCC 2d 141 (1981).

[2] Section 1231 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35, 97th Cong., 1st Session (1981), amended the Communications Act of 1934.

[3] Sectir n 399A provides:

(a) For purposes of this section, the term "business or institutional logogram" means any

Continued

and Section 399B [4] of the 1981 Amendments (47 U.S.C. 399A and 399B) closely paralleled the Commission's *Second Report*.[5] However, the Commission noted that the subsequently enacted legislation differed from the *Second Report* in several respects, and thus modified and clarified its rules and policies to conform to the Congressional mandate. *Memorandum Opinion and Order* in Docket No. 21136 ("*1982 Order*"), released July 30, 1982.[6] Among other things, the *1982 Order* reiterated Commission policy that donor acknowledgements could include informational—but not promotional—messages, and further clarified that policy to prohibit the specific mentioning, listing or promoting of a donor's product lines or services, thereby reconciling an apparent inconsistency between the *Second Report* and Section 399A. The Commission also construed the 1981 Amendments as not permitting the use of brand or trade names in underwriting acknowledgements aired by public broadcasters.[7]

2. Several petitions for reconsideration have been filed with the Commission regarding its clarification of the above policy. Additionally, an informal request for interpretation of the general impact and effect of the *1982 Order* has been filed. In the interest of expediting consideration of the issues raised, we will address both the petitions for reconsideration and the request for interpretation.

Petitions for Reconsideration

3. *Arguments.* The petitioners [8] requested that the Commission reconsider the *1982 Order* and permit the inclusion of brand or trade names of products or services in donor acknowledgements. It is argued that a specific reference to a donor's product or service does not compromise or jeopardize the noncommercial nature of public broadcasting, nor is it necessarily promotional in the absence of comparative or qualitative language. Rather, the inclusion of such references in donor acknowledgements is useful, and often necessary, where a brand or trade name has recognition value and a corporate underwriter's name does not.[9] NPR, PBS and NAPTS also represented that public broadcasters interpreted the *Second Report* to allow the nonpromotional identification of a specific product and/or service in donor acknowledgements, and revised their underwriting rules accordingly. They contended that this change resulted in a dramatic increase in donations and underwriting.[10] The elimination of specific references to products and/or services in donor acknowledgements, they stated, will hinder public broadcasters in their efforts to generate additional financial support from the private sector that is vital to their continued survival. Finally, most of the parties considered the Commission's posture in the *1982 Order* and its interpretation of the recent legislation to be unnecessarily restrictive, particularly in light of: (1) The broad statutory language of Section 399A which delineates the information that may be included in donor acknowledgements; and (2) the explicit grant of authority to the Commission to further regulate in this area.[11] They contended that the legislation marks a starting point from which the Commission could and should explore and expand public broadcasters' opportunities to broaden their financial base of support by attracting new, diverse sponsors and donors. In this respect, it should be noted that NPR differs from the other petitioners in that it construed Section 399A(c) as proscribing the Commission's power to regulate the content of donor announcements, confining our authority to the "manner" (*i.e.*, timing and frequency) of donor announcements. Finally, all the petitioners urged that a more liberalized approach to donor acknowledgements would serve the spirit and intent of the Public Broadcasting Amendments Act of 1981 by enhancing public recognition of donors as well as contributions from the business community.

4. In a related context, PBS, NAPTS and Schwartz sought reconsideration of that aspect of the *1982 Order* concerning logograms. They believe that it is

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aural or visual letters or words, or any symbol or sign, which is used for the exclusive purpose of identifying any corporation, company, or other organization, which is not used for the purpose of promoting the products, services, or facilities of such corporation, company or other organization.

(b) Each public television station and each public radio station shall be authorized to broadcast announements which include the use of any business or institutional logogram and which includes a reference to the location of the corporation, company, or other organization involved, except that such announements may not interrupt regular programming.

(c) The provisions of this section shall not be construed to limit the authority of the Commission to prescribe regulations relating to the manner in which logograms may be used to identify corporations, companies or other organizations.

[4] Section 399B provides, in pertinent part:

(a) For purposes of this section, the term 'advertisement' means any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended—

(1) To promote any service, facility or product offered by any person who is engaged in such offering for profit;

(2) To express the views of any person with respect to any matter of public importance or interest; or

(3) To support or oppose any candidate for political office.

(b)(1) Except as provided in paragraph (2), each public broadcast station shall be authorized to engage in the offering of services, facilities or products in exchange for remuneration.

(2) No public broadcast station may make its facilities available to any person for the broadcasting of any advertisement.

* * * * *

[5] Essentially, the *Second Report:* (1) Eliminated the "name only" requirement for donor and sponsor acknowledgements and provided for the inclusion of informational, but not promotional, messages; and (2) permitted the broadcast of promotional announcements deemed in the public interest for which no consideration was received. Similarly, Section 399A permitted informational, but not promotional, messages in donor and sponsor acknowledgements and Section 399B prohibited the broadcast of promotional announcements for remuneration.

[6] 90 FCC 2d 895 (1982).

[7] Additionally, the Commission revised its rules to: (1) Restrict the scheduling of donor acknowledgements so that regular programming is not interrupted, consistent with section 399A; and (2) allow promotional announcements *sponsored* by nonprofit entities, consistent with Section 399B. The Commission also further clarified its policy to permit aural, as well as visual logograms in donor acknowledgements.

[8] Petitions for reconsideration were filed by National Public Radio (NPR); the National Association of Public Television Stations (NAPTS) and the Public Broadcasting Service (PBS); the Corporation for Public Broadcasting (CPB) and the law firm of Schwartz, Woods & Miller (Schwartz) on behalf of several public broadcast licensees.

[9] As NPR stated, "[T]here are many situations where attempted identification of a contributor without reference to its product by trade name is practically meaningless. For instance, the Great Water Company of France, Inc., is unknown to most people. But to say it is the bottler of 'Perrier' mineral water clearly identifies the company to many."

[10] In this regard, NPR stated:

Total revenues for NPR member stations from program underwriting grants for the year ending June 30, 1981, are estimated to have been about $4.2 million. This figure increased dramatically to about $7 million for the year ending June 30, 1982, due largely to the new more relaxed policies concerning acknowledgements, of which the use of trade names was a key factor. By being able to identify donors more clearly and explicitly radio licensees were able to increase support from the business community by nearly 75% in just one year. [They] project that there currently exist program underwriting agreements with public radio stations with a total value of over $1 million which specifically involve mentioning the program underwriter's product or service by trade name. Further, at the time of the release of the [1982] Order, public radio stations were involved in negotiations with prospective program underwriters on agreements with a total value of $2.5 million specifically contemplating the use of trade names in the acknowledgement announcements and which, in the judgment of the stations, are likely not to be consumated in view of the *[1982] Order* restricting the use of trade names.

[11] Section 399A, as proposed in H.R. 3238, was fully adopted by the Conference Committee. However, the Conference Committee also added the provision contained in Section 399A(c) empowering the Commission to further regulate in this area. *See* n.3, *supra.*

unnecessary and inappropriate to distinguish logograms that promote (as unacceptable) from those that merely identify (as acceptable), and that such distinctions only create confusion and uncertainty. Schwartz noted:

> [L]ogograms serve a critical identifying function which transcends whatever slight promotional element may inhere in them. The only rational approach in this area is to view all *bona fide* logograms as proper devices which serve the fundamental purpose of generic identification.

Moreover, according to NAPTS and PBS, corporations mainly contribute funds to public broadcasting to improve their image by association with quality programming, and that their logograms not only identify corporations but project their image by representing their "face[s] to the world." They concluded that inclusion of all logograms, as with brand and trade names, would encourage and facilitate greater contributions to public broadcasting and would more fully identify corporate donors.

5. As an alternative to further liberalizing Commission rules to permit the inclusion of a brand or trade name and all logograms in donor announcements, NPR, CPB and Schwartz offered various suggestions. NPR also believed that the *1982 Order* cast a heavier burden upon public radio than public television since it did "not appear to limit the use of pictorial designs or symbols which may also be trademarks of donors in the acknowledgement announcements broadcast by public television stations, "yet public radio stations, which cannot make use of such visual symbols or signs, were granted no equivalent flexibility. NPR, thus, recommends that the Commission afford public radio stations greater opportunities to attract financial support by allowing them to broadcast "trade names in acknowledgement announcements in lieu of the visual trademark which television stations are still able to use."

6. Unlike the other petitioners, CPB viewed a general rule permitting a brand or trade name in every announcement as unnecessarily broad and contrary to the "identification vs. promotion" test established by the *Second Report* and ratified by Congress in Section 399A. CPB proposed a more limited standard, whereby a brand or trade name would be allowed if the underwriter does not offer products or services under its corporate name. CPB declared that "this standard provides an objective test of whether an underwriter will be recognized under its corporate name, and, therefore, whether use of the trade name is necessary for the purpose of identifying the underwriter to the public."

7. Finally, Schwartz suggested that if the Commission determines not to modify its underwriting rules, a transitional period for the implementation of the *1982 Order* is warranted. Since public broadcasters had construed the *Second Report* as sanctioning the inclusion of a brand or a trade name in donor announcements, they had changed their underwriting rules and, "produced programs, or made commitments to produce programs, which include such credits." Schwartz stressed that "it would be unfair to require that substitute credits be produced for this programming, because of the cost involved and because of the problems which might be created with respect to some underwriters which expected credit in the form normally provided by the licensees as of the date of their donation commitments."

8. *Discussion.* Essentially the issues raised by the petitions involve statutory construction. At the outset, we note that, contrary to NPR's assertion, we do not believe that Section 399A(c) undercuts our authority to regulate commercial speech on public broadcasting stations. 47 U.S.C. 303 (a) and (b) generally empowers the Commission to classify radio stations and to determine and prescribe the nature of the service rendered by each designated class of licensed stations. Pursuant to that power, the Commission's authority to "establish categories of communications services, confine their use to particular frequencies and determine the kinds and types of communications which fall within the authorized categories"[12] is well recognized and long established.[13] Rather than constraining this authority, we construe Section 399A(c) as explicit recognition of the Commission's general regulatory function, specifically directing us to further exercise our rule making authority in a manner consistent with the 1981 Amendments.

9. Section 399A ratified and codified the "identification vs. promotion" standard for donor acknowledgements enunciated in the *Second Report.* In delineating the information which these acknowledgements may incorporate, section 399A provided for the nonpromotional use of visual or aural logograms (*i.e.*, any "letters or words, or any symbol or sign, which is used for the exclusive purpose of identifying" the donor and "which is not used for the purpose of promoting the [donor's] products, services or facilities" and permitted identification of the donor's location. But, as we observed in the *1982 Order*, Section 399A did not address the permissibility of including information regarding the donor's specific product lines or services.[14] Since the statute was silent, we reviewed the associated legislative history carefully. Because the Senate and the Conference Committee accepted the House provisions without issuance of explanatory reports, the *House Report* became the source for our analysis. The *House Report* declared that "logograms [and slogans should] be value neutral, and solely for the purpose of generic identification . . ." and that "products or services [or the listing of products or services should not be] included as part of such announcements at this time."[15] The subsequent examples given of permissible and impermissible donor acknowledgements under this standard clearly indicated that the use of brand or trade names was not allowed.[16]

10. Given this explicit language, we determined in our *1982 Order* that it was inappropriate at that time to allow the use of trade names, or product and service listings. It is important to note, however, that the concerns expressed in the *House Report* were not based on a finding that expanded donor acknowledgements were incompatible with public broadcasting service or that this mechanism would prove ineffective as a means of enhancing self-generated financial support for public stations. To the contrary, after describing the Commission's *Second Report*, in which we initially sanctioned enhanced underwriting acknowledgements, the *House Report* stated:

> The Committee endorses this effort, particularly in light of declining Federal funds, and supports the Commission's belief that these changes will not change the nature of the noncommercial service that stations have been licensed to serve.[17]

Rather, the restrictions imposed by the *House Report* on such enhanced donor acknowledgement techniques as product or service listings were founded on a perception that the *Second Report* "went too far *in a single step*" (emphasis added). This sensitivity to the timing,

[12] *First Report and Order* in Docket No. 21136, 69 FCC 2d 200, 204 (1978).

[13] *See, e.g., Gross* v. *FCC*, 460 F. 2d 1288 (2d Cir. 1973) (FCC has the power to prohibit commercial messages on amateur radio station facilities); and *Lafayette Radio Electronics Corp.* v. *U.S.*, 345 F. 2d 278 (2d Cir. 1965) (FCC has the power to limit the uses of Citizens Radio stations).

[14] *1982 Order* at 902.

[15] *House Report, supra* at 24.

[16] "[A] logogram * * * could not contain: 'KXYZ Oil Corporation, of New York, manufacturers of Super 94 unleaded gasoline.'" *House Report, supra* at 23.

[17] *House Report, supra* at 23.

rather than the substance, of permitting more expansive underwriting acknowledgements was repeatedly underscored elsewhere in the *House Report*. It stated, for example, that:

> In limiting the Commission's decision to allow listings of products and services, the Committee intends that no such listings be allowed *until* the changes made in the legislation are more fully evaluated. The Committee intends to review this area more fully as part of its consideration of the Commission (TCAF) study required by the bill (emphasis added).[18]

11. Almost three years have passed since the enactment of the 1981 Amendments. There are now substantial indications that expanded underwriting acknowledgements can significantly benefit public broadcasters.[19] Moreover, the Temporary Commission on Alternative Financing for Public Telecommunications (TCAF), established by the 1981 Amendments, has completed its study and has submitted its final report to Congress.[20] TCAF exhaustively studied and evaluated funding sources that would augment the dwindling Federal support available for public broadcasting. Part of their statutory charge was to make recommendations for new funding sources that would enhance public broadcasting's income from private sources while still preserving the independence and quality of public broadcasting programs.[21] After concluding its comprehensive review of not only alternative funding sources but also the public broadcasting industry and the public it serves, TCAF found that broadened guidelines for program underwriting would indeed help to provide much needed revenues for public broadcasting services. The *TCAF Report* specifically recommended that Congress:

> Direct the Federal Communications Commission to modify its policies concerning underwriting acknowledgements to permit public broadcasters to identify supporters by using brand names, trade names, slogans, brief institutional type messages and public service announcements.[22]

12. In view of these developments, we believe that the conditions set forth in the *House Report* as the basis for its limitations on the use of enhanced donor acknowledgements by public broadcasters have now been met and that the restraints imposed by our *1982 Order* in response to the *House Report* are ripe for reexamination. In this regard, we again note that the statutory language of Sections 399A and 399B does not itself restrict enhanced underwriting acknowledgements as herein described and that the provisions of Section 399A(c) support our belief that we are not constrained statutorily from exercising our general rule making power in this area.

13. After reviewing the restrictions embodied in our *1982 Report*, the arguments presented by the parties to this proceeding, and the specific findings and recommendations of the TCAF, we are persuaded that it is now advisable as a matter of policy and permissible as a matter of statutory authority to authorize public broadcast stations to expand the scope of their underwriting announcements. As we recognized in the *Second Report*, and as both the *House Report* and the *TCAF Report* indicated, this mechanism offers significant potential benefits to public broadcasters in terms of improving the financial self-sufficiency of the service, yet, properly limited, does not threaten its underlying noncommercial nature. Accordingly, we are granting the petitions for reconsideration to the extent that henceforth public broadcast stations will be permitted to use trade and brand names, as well as product and service listings, in their donor acknowledgements. We emphasize, however, that such announcements may not include qualitative or comparative language and that this action is not to be construed as allowing advertisements, as defined in Section 399B, to be carried by public broadcasting stations. To summarize, donor acknowledgements utilized by public broadcasters may include (1) logograms or slogans which identify and do *not* promote, (2) location, (3) value neutral descriptions of a product line or service, (4) brand and trade names and product or service listings.

Request for Interpretation or Clarification

14. The State of Wisconsin-Educational Communications Board and Ohio State University, licensees of noncommercial stations ("licensees"), filed an informal request for interpretation of the *1982 Order*, in which they posed the following questions for our consideration:

(1) How often may underwriting announcements be broadcast and in what manner with respect to program format?

(2) In the context of announcement schedules, what constitutes regular programming?

(3) Are public broadcasting licensees now permitted to interrupt regular programming to raise funds for non-station purposes?

The licensees expressed concern that public broadcasters "may be unnecessarily inconvenienced" if these questions remain unresolved. In the interest of avoiding possible confusion and inconvenience, we will address the licensee's concerns and discuss each question separately.

15. First, the licensees claimed that public broadcasters should be allowed to schedule underwriting announcements, as opposed to donor acknowledgements, at their discretion—unhampered by the limitation that such announcements shall not interrupt programming. They suggested that public broadcasters should be permitted to schedule underwriting announcements "at places in the sponsored program and with such frequency as full disclosure and identification of the sponor may warrant." In this regard, they noted that underwriting announcements are mandatory under 47 U.S.C. 317 and 47 CFR 73.1212 if consideration (in the form of programming, material, money, services or other valuable consideration) is provided as an inducement for the broadcast of specific programming, whereas announcements acknowledging general monetary or other in-kind contributions are discretionary. Given the mandatory nature of underwriting sponsorship indentification announcements and the importance of informing the public by whom they are being persuaded [23], they declared that such announcements should be accorded different treatment.

16. The *Second Report* eliminated all timing and frequency restrictions for the broadcast of underwriting and donor acknowledgements since audience resistance was viewed as a sufficient deterrent to the excessive scheduling of acknowledgements. However, the subsequently enacted legislation, contained in Section 399A, not only delineated that information which may be included in credit acknowledgements, but further contained a caveat: the scheduling of such acknowledgements may not

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[18] *House Report, supra* at 24.

[19] *See* n. 10, *supra*.

[20] *Temporary Commission on Alternative Financing for Public Telecommunications*, Report to Congress (October 1, 1983). Hereafter *TCAF Report*.

[21] Omnibus Budget Reconciliation Act of 1981, *supra* n.2 at § 1232(a)(3).

[22] *TCAF Report, supra* at 45. Moreover, we note that in a joint letter to the Commission dated March 8, 1984, both the Chairman of the Senate Subcommittee on Communications and the Chairman of the House Subcommittee on Telecommunications, Consumer Protection and Finance concluded that it would be appropriate at this time for the Commission to review its policy concerning underwriting acknowledgements aired by public broadcast stations.

[23] Applicability of Sponsorship Identification, 40 FCC 2d 141 (1963).

interrupt regular programming. Section 399A did not distinguish between underwriting and donor acknowledgements, rather, both types of acknowledgements are treated alike. As previously stated in our *1982 Order*, we changed our rules to conform to the legislation, and accordingly imposed the same restriction upon the scheduling of underwriting and donor aknowledgements. Therefore, irrespective of the different nature and underlying purpose of underwriting acknowledgements, as opposed to donor acknowledgements, all such acknowledgements are subject to the same restrictions regarding: (1) Information that may be included; (2) scheduling.

17. Second, the licensees asserted that the limitation upon the scheduling of acknowledgements (*i.e.*, underwriting and donor acknowledgements) may inhibit station fundraising activities which include—but are not limited to—auctions, marathons, and pledge weeks. They stated that the scheduling limitations on acknowledgements should not apply to fundraising activities, since such activities are not considered part of the station's regular programming.

18. In the *1982 Order*, "regular programming" was refered to and discussed in terms of its conventional meaning. Clearly, regular programming encompasses those programs which the public broadcaster ordinarily carries, but does not encompass those fundraising activities that suspend or alter their normal programming fare. Thus, during periods in which such fundraising activities are being conducted the restriction that acknowledgements shall not be scheduled so as to interrupt regular programming would neither be applicable nor appropriate, and the public broadcasters are free to broadcast acknowledgements as often and for as long as they choose, so long as the content of the acknowledgements is consistent with the governing legislative and regulatory rules.

19. Third, the licensees stated that in the *1982 Order* we instituted a substantive change, without any discussion, of our prior policy regarding the prohibition against on-the-air suspended fundraising activities on behalf of other organizations. They cited the *1982 Order* as providing that "* * * public broadcasters are generally prohibited from engaging in fundraising on behalf of any entity *other than the licensee* where such activities substantially alter or suspend regular programming" *(emphasis added)* [24] and compared that language to that of the *Second Report* which provided that "* * * station fundraising activities which significantly alter a station's normal programming, including auctions, marathons, membership drives, etc. should be carried on for the benefit of the *station only*, and not for other organizations *(emphasis added)*.[25] They contended that the substitution of the term "licensee" for that of "station" extends the permissible area of suspended programming beyond those activities designed to raise support for the station's operations to include activities designed to benefit the licensee's other non-station institutional business or state operations. Consequently, they feared that "stations licensed to such entities may be increasingly importuned to conduct fundraising appeals for other departments of agencies of the licensees."

20. The licensees' point is well taken. In the *1982 Order* the terms noncommercial or public broadcasting stations or licensees were used interchangeably. However, in the context of suspended fundraising activities the substitution of "licensees" for "station" had the unintended effect of expanding potential beneficiaries beyond that of the station, itself. Therefore, we will henceforth interpret and limit the language of the *1982 Order* as applying to *station operations* only. In the absence of a waiver, noncommercial stations are prohibited from conducting any fundraising activity which substantially *alters* or *suspends* regular programming and are designed to raise support for any entity other than the station itself.[26]

Conclusion

21. In accordance with the Public Broadcasting Amendments Act of 1981, we are granting the Petitions for Reconsideration to allow the broadcast of specific brand or trade names and product or service listings. Therefore, donor acknowledgements may include: (1) A logogram or slogan that identifies but does not promote; (2) locations; and (3) value neutral descriptions of a product line or service; (4) trade names, product or service listings that aid in identifying the donor. Additionally, the language of the *1982 Order* [27] is modified, to clarify that public broadcasters are generally prohibited from engaging in fundraising activities which suspend or alter regular programming on behalf of any entity other than the station itself.

Accordingly, it is ordered that, the "Petitions for Reconsideration" are granted, to the extent indicated above.

It is further ordered that, the "Request for Interpretation or Clarification" is granted, to the extent indicated above.

It is further ordered that, the Secretary shall cause this *Memorandum Opinion and Order* to be printed in the FCC Reports.

(Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Federal Communications Commission.

William J. Tricarico,

Secretary.

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[24] *1982 Order, supra* at 907.

[25] *Second Report, supra* at 158.

[26] It should also be noted that the licensees urged that 47 CFR 73.503 and 73.621 be revised. The pertinent language as changed by the *Second Report*, is as follows: "Moreover, acknowledgements of contributions *can* be made" (emphasis added). They recommended that "may" be substituted for "can," since the sentence acknowledges the permission for such announcements, not their ability to be broadcast." We agree that the suggested change is grammatically correct. However, we do not believe that amendment of the rules to incorporate this change is warranted. It is evident that our rules are not intended as mere observations concerning the physical capacity of public stations to transmit these announcements, but instead are intended to address the permissibility of airing them. In any event, both of the subject rule sections contain note references to the *Second Report* and the *1982 Order*, should further clarification of this point be required.

[27] *1982 Order* at 907.

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 23

Giant Panda and Indian Snakes Added to Appendices of Endangered Species Convention

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of amendments to appendices; final rule.

SUMMARY: The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) regulates international trade in certain wild animal and plant species. Appendices I, II, and III to this treaty contain lists of species for which trade is controlled.

The Republic of India recently added seven species of snakes to Appendix III, for which the listing takes effect on February 12, 1984: the olive keelback water snake, dog-faced water snake, checkered keelback water snake, Indian rat snake, Indian cobra, king cobra, and Russell's viper. Also, the People's