PLACE: 450 5th Street, NW., Washington, DC.

DATE PREVIOUSLY ANNOUNCED: Monday, November 16, 1987.

CHANGES IN THE MEETING: Additional item.

The following additional item was considered at a closed meeting on Thursday, November 19, 1987, at 10:00 a.m.:

Litigation matter.

Commissioner Peters, as duty officer, determined that Commission business required the above change.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Kevin Fogarty at (202) 272–3195.

Jonathan G. Katz,

Secretary.

November 20, 1987.

[FR Doc. 87–27518 Filed 11–25–87; 12:57 pm]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meetings during the week of November 30, 1987:

A closed meeting will be held on Tuesday, December 1, 1987, at 10:30 a.m.

The Commissioners, Counsel to the Commissioners, the Secretary of the Commission, and recording secretaries will attend the closed meeting. Certain staff members who are responsible for the calendared matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10), permit consideration of the scheduled matters at a closed meeting.

Commissioner Grundfest, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the closed meeting scheduled for Tuesday, December 1, 1987, at 10:30 a.m., will be:

Formal orders of investigation.
Settlement of injunctive action.
Institution of injunctive action.
Opinion.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Nancy Morris at (202) 272–2468.

Jonathan G. Katz,

Secretary.

November 23, 1987.

[FR Doc. 87–27519 Filed 11–25–87; 12:57 pm]

BILLING CODE 8010–01–M

Corrections

Federal Register
Vol. 52, No. 229
Monday, November 30, 1987

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 436 and 442

[Docket No. 87N-0317]

Antibiotic Drugs; Cefuroxime Axetil Tablets

Correction

In rule document 87-25584 beginning on page 42431 in the issue of Thursday, November 5, 1987, make the following corrections:

§ 436.215 [Corrected]

1. On page 42432, in the first column, in § 436.215(c)(9)(i), in the third line, "weight" should read "weigh".

§ 442.19 [Corrected]

2. On the same page, in the third column, in § 442.19(b)(1)(i)(A), in the third line, "ammonium" should read "of ammonium".

3. On the same page, in the same column, in § 442.19(b)(1)(i)(D), in the 10th line "methoxy-" was misspelled, and in the 11th line "iminoacetamido" was misspelled.

4. On page 42433, in the first column, in § 442.19(b)(1)(iv)(A), in the formula, the bottom line should read "$R_s \times C_u \times (100—m)$"

§ 442.119 [Corrected]

5. On page 42434, in the first column, in § 442.119(b)(1)(iii), in the formula, the top line should read "$R_u \times P_s \times d$".

BILLING CODE 1505-01-D

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Policy Development and Research

[Docket No. N-87-1746; FR-2389]

Supplemental Assistance for Facilities to Assist the Homeless; Program Guidelines and Notice of Funds Availability

Correction

In notice document 87-24242 beginning on page 38880 in the issue of Monday, October 19, 1987, make the following corrections:

1. On page 38881, in the first column, in paragraph (a), in the ninth line, "positions" should read "provisions".

2. On page 38882, in the third column, in paragraph (3), in the fourth line, "The term does not" should begin a new line.

3. On page 38892, in the first column, in paragraph (9), in the fourth line, after "person" insert "or".

4. On the same page, in the same column, in the same paragraph, in the sixth line, after "individual," insert "family,".

5. On page 38898, in the first column, in paragraph (4), in the first line, after "force" insert "or".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 208

Sale of Federal Royalty Oil

Correction

In rule document 87-25103 beginning on page 41908 in the issue of Friday, October 30, 1987, make the following correction:

§ 208.2 [Corrected]

In § 208.2, on page 41914, in the second column, in the 13th line, "eligible" should read "ineligible".

BILLING CODE 1505-01-D

federal register

Monday
November 30, 1987

Part II

Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1910

Electrical Safety-Related Work Practices; Proposed Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket S-016]

Electrical Safety-Related Work Practices

AGENCY: Occupational Safety and Health Administration, U.S. Department of Labor.

ACTION: Proposed rule.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is proposing a new standard on electrical safety-related work practices for general industry. This performance-oriented proposal would complement the existing electrical installation standards. The proposal includes requirements for work performed on or near exposed energized and deenergized parts of electrical equipment; use of electrical protective equipment; and the safe use of electric equipment. Compliance with these safe work practices will reduce the number of electrical accidents resulting from unsafe work practices by employees.

OSHA is also proposing amendments to the general industry standards which would: (1) Change existing regulations referring to the 1971 National Electrical Code so that they would refer instead to OSHA's electrical standards; (2) remove existing electrical work-practice requirements from other parts of the general industry standards so that all general electrical safety-related work practices would be covered in the electrical safety standards; and (3) remove an existing provision relating to construction from the general industry electrical safety standards. These changes would promote uniformity and reduce redundancy among the general industry standards.

DATES: Written comments and requests for a hearing on these proposed rules must be postmarked by February 29, 1988.

ADDRESS: All comments, objections and hearing requests should be sent in quadruplicate to Docket Officer; Docket S-110, Rm. N3670; OSHA, U.S. Department of Labor; 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Mr. James F. Foster; U.S. Department of Labor, Occupational Safety and Health Administration, Room N3637; 200 Constitution Avenue, NW., Washington, DC 20210 (202-523-8148).

SUPPLEMENTARY INFORMATION:

I. Background

A. Electric Shock

It is well known that the human body will conduct electricity, and that if direct contact is made with an electrically energized part while a similar contact is made simultaneously with another conductive surface which is maintained at a different electrical potential, a current will flow, entering the body at one contact point, traversing the body and then exiting at the other contact point, usually the ground. Each year many workers suffer pain, injuries, and death from such electric shocks. OSHA estimates that there are more than 300 electrical fatalities in general industry each year.

The effects that electric shock will have on an individual will depend upon the type of circuit, its voltage, resistance, and amperage, the pathway through the body, and the duration of the contact. For example, electric shocks produced by alternating currents of powerline frequency (normally 60 Hertz) passing through the body of an average adult from hand to foot for 1 second can cause various effects, starting from a condition of being barely perceptible at 1 milliampere to involuntary muscular control from 9 to 25 milliamperes. The passage of still higher currents can produce ventricular fibrillation of the heart (cessation of rhythmic pumping action) from 75 milliamperes to 4 amperes, and finally immediate cardiac arrest at over 4 amperes. Nearly instantaneous fatalities from electrical shock can result from either direct paralysis of the respiratory system (at 20 milliamperes or more), failure of the heart to pump due to ventricular fibrillation (at 75 milliamperes or more), or immediate and complete heart stoppage (at 4 amperes or more). Even if the shocking current does not pass through vital organs or nerve centers, severe injuries such as deep internal burns can still occur. In some cases, injuries caused by electric shock can be a contributory cause of delayed fatalities.

Burns suffered in electrical accidents are also of great concern. These burns may be of three basic types: electrical burns, arc burns and thermal contact burns. Electrical burns are the result of the electric current flowing in the tissues and may be either skin deep or may affect deeper layers (muscles, bones, etc.) or both. Tissue damage is caused by the heat generated from the current flow; if the energy delivered by the electric shock is high, the body cannot dissipate the heat and the tissue is burned. Typically, such electrical burns are slow to heal. Arc burns, on the other hand, are the result of high temperatures produced by electric arcs or by explosions in close proximity to the body. These burns are similar to burns and blisters produced by any high temperature source. Finally, thermal contact burns are those normally experienced from the skin's contacting hot surfaces of overheated electrical conductors, conduits, or other energized equipment. All types of burns may be produced simultaneously.

Electric shock currents, even at levels as low as three milliamperes, can also cause injuries of an indirect or secondary nature. In this case, the involuntary muscular reaction from the electrical shock can cause bruises, bone fractures, and even death resulting from collisions or falls.

B. Hazards Associated With Electricity

Most electrical systems use the earth to establish an electrical voltage reference system with respect to ground. This is done by connecting a portion of the circuit to ground. Since these systems use conductors which have voltages to ground, a shock hazard exists for persons who are in electrical contact with the earth and are exposed to the conductors. If a person comes in contact with an ungrounded conductor while that person is in contact with the ground, he or she becomes part of the circuit and current passes through his or her body.

In addition to the shock hazard, electricity poses other hazards to employees. For example, when a short circuit occurs or current flow is interrupted, hazards are created from the resultant arcs. If the current involved is great enough, these arcs can cause injury or can start a fire. Fires can also be created by overheating equipment or by conductors carrying too much current. Extremely high-energy arcs can damage equipment causing fragmented metal to fly in all directions. In atmospheres which contain explosive gases or vapors or combustible dusts, even low-energy arcs can cause violent explosions.

C. Nature of Electrical Accidents

Electrical accidents, when initially studied, often appear to be caused by circumstances which are varied and peculiar to the particular incidents involved. However, further consideration usually reveals the underlying cause to be a combination of three possible factors; i.e., work involving unsafe equipment and installations, workplaces made unsafe by the environment, and unsafe work performance (unsafe acts).

For purposes of convenience, the first and second accident causing situations are sometimes combined and simply referred to as unsafe conditions. Thus, electrical accidents can be generally considered as being caused by unsafe conditions, unsafe acts, or, in what is usually the case, combinations of the two. It should also be noted that inadequate maintenance can cause equipment or installations which were originally considered safe to deteriorate, resulting in an unsafe condition.

Some unsafe electrical equipment and installations can be identified, for example, by the presence of faulty insulation, improper grounding, loose connections, defective parts, ground faults in equipment or unguarded live parts. The environment can also be a contributory factor to electrical accidents in a number of ways. For example, environments containing flammable vapors, liquids or gases, areas containing corrosive atmospheres and wet and damp locations are some unsafe environments affecting electrical safety. Finally, some unsafe acts can be recognized as, typically, the failure to deenergize electrical equipment when it is being repaired or inspected, the intentional use of obviously defective and unsafe tools, or the use of tools or equipment too close to energized parts.

D. Protective Measures

There are various general ways of protecting employees from the hazards of electric shock, including insulation and guarding of live parts. Insulation provides an electrical barrier to the flow of current. To be effective, the insulation must be appropriate for the voltage, and the insulating material must be undamaged, clean, and dry. Guarding prevents the employee from coming too close to energized parts. It can be in the form of a physical barricade, or it can be provided by installing the live parts out of reach from the working surface. (This technique is known as "guarding by location.")

Grounding is another method of protecting employees from electric shock; however, it is normally a secondary protective measure. To keep guards or enclosures at a common potential with earth, they are connected, by means of a grounding conductor, to ground. In addition, grounding also provides a path of low impedance and of ample capacity back to the source to pass enough current to operate the overcurrent devices in the circuit. If a live part accidentially comes in contact with a grounded enclosure, any current flow is directed back to earth, and the circuit protective devices (e.g., fuses and circuit breakers) can interrupt the circuit.

These protective measures help ensure the safe installation of electric equipment and are prescribed by the regulations presently contained in Subpart S. Addressing common unsafe conditions, these rules cover such safety considerations as guarding and insulation of live parts, grounding of equipment enclosures, and protection of circuits from overcurrent.

However, even though equipment may be in compliance with the installation requirements of Subpart S, the employee is still exposed to electrical hazards. An unsafe work practice can increase the gravity of the hazards, while under normal conditions the hazards would be controlled and would pose no serious risk to the worker. For example, an employee carrying a ladder could approach exposed live parts guarded by installation beyond normal reaching distance. The employee's bringing the ladder close to the live parts exposes the worker to hazards greater than those present under usual working conditions. When employees are working with electric equipment, they must use safe work practices. Such safety-related employee work practices include keeping a prescribed distance from exposed energized lines, avoiding the use of electric equipment when the employee or the equipment is wet, and locking-out and tagging equipment which is deenergized for maintenance.

Another important safety practice involves the use of electrical protective devices, such as rubber gloves and rubber mats for the purpose of insulation against live parts, or live-line tools for purposes of both insulation and manipulation of energized parts from a distance. However, to assure the protection of the employee, this equipment must be properly manufactured and maintained. Regular maintenance is an important consideration in order to keep this equipment for deteriorating into an unsafe condition.

E. Need for Proposed Regulation

The current electrical safety standards contained in Subpart S of Part 1910 provide employees protection from hazards posed by electrical installations. By requiring such protective measures as guarding of live parts and grounding of equipment enclosures, the current regulations make most types of electrical equipment reasonably safe under normal conditions.

However, even normally safe equipment can pose hazards under certain conditions. A few illustrations may help to underscore this point. To guard overhead power line from contact by the public, electric utility companies install the lines at heights which cannot be reached by persons standing on the ground. This protective measure serves its purpose well, until someone approaches a power line with a long ladder or a crane. Since the overhead power lines were not designed to provide complete protection under such circumstances, safe work practices (e.g., maintaining a safe distance) must be used to minimize the hazards involved.

Another common example of a normally safe installation posing hazards is equipment undergoing maintenance. Under normal operating conditions, live parts of equipment are required to be guarded from contact by employees. However, when the equipment must be disassembled for maintenance or repair, the normally enclosed electrical parts become exposed. Therefore, during maintenance, certain work practices must be used to prevent contact with the necessarily exposed parts while they are energized. Typical safety-related work practices used in such situations include equipment deenergizing, lockout and tagging procedures, and the use of personal protective equipment.

Electric equipment can also be used under circumstances that pose unexpected hazards. For example, using an ordinary portable electric drill, a worker can ignite flammable vapors from paint thinner being used nearby. The existing electrical safety standards contain provisions dealing with electrical installations in hazardous locations. However, they do not directly address the hazards involved with the use of electric equipment in areas in which hazardous concentrations of flammable gases or vapors may accumulate temporarily and infrequently. In such circumstances, safety-related work practices must be used to control the hazards involved. With respect to the electrical hazards, such practices could include the use of additional ventilation or the shutdown of electric equipment while hazardous quantities of the vapors are present.

As previously noted, the current electrical standards in Subpart S of the General Industry Standards cover electrical installations rather than work practices; the few safety-related work practice standards that do exist are distributed in other subparts of Part 1910. However, although unsafe work practices appear to be involved in most workplace electrocutions, OSHA has very few regulations addressing work practices necessary for electrical safety.

Unsafe work practices appeared to be a factor in over half of the electrocutions that were analyzed in OSHA's limited survey which is discussed in the next section of the preamble. Because of this, OSHA has concluded that undertaking rulemaking procedures to minimize these hazards is most appropriate.

Various national consensus standards address electrical safety-related work practices for particular types of equipment and operations. For example, American National Safety Code for Crawler, Locomotive, and Truck Cranes, ANSI B30.5, requires a minimum clearance of 10 feet for cranes operated near overhead power lines. Similarly, ANSI Z49.1, Safety in Welding and Cutting, contains electrical work practice requirements for the use of welders. OSHA has previously adopted these two consensus standards (in §§ 1910.180 and 1910.252, respectively); and, in some part, they have helped reduce electrical accidents. However, these "specialized" standards are limited in their areas of concern and do not address safe electrical work practices generally. Recently, though, the National Fire Protection Association recognized the need for a general electrical safety-related work practice standard by adopting Part II of NFPA 70E, Electrical Safety Requirements for Employee Workplaces.

Based on the considerable number of electrocutions occurring in situations for which no OSHA safety standards exist, OSHA has determined that a significant risk of death or serious injury exists (even in workplaces in compliance with existing OSHA standards), and the Agency has decided that a comprehensive electrical safety-related work practice standard is necessary for the protection of employees. Toward this end, the Agency has evaluated Part II of NFPA 70E and has determined that that national consensus standard is appropriate for OSHA to use as a basis for its proposed rule.

F. Accident Patterns

A survey of OSHA preliminary fatality/catastrophe event reports (Form OSHA-36) was undertaken to observe trends and patterns relative to causes of occupational electrocutions. These forms covered the period from January 1977 to June 1978. However, for various reasons, the OSHA fatality reports did not record all occupational electrocutions occurring in this period. For example, despite reporting requirements, some fatalities are simply never reported to OSHA. There is also evidence that, in the past, some electrocutions have been mistakenly identified as heart attacks. Presumably, this could have occurred during the period in question. Additionally, in this survey, the reporting of fatalities from states with their own approved OSHA programs is incomplete because the reports were not required to be submitted to the Federal OSHA. In fact, only two fatalities from such states are included. Despite this under-reporting, the available fatality information indicates that there is a serious problem.

In reviewing the forms, OSHA divided them into industry groups, as given in Table 1.

The Agency is limiting this proposed rulemaking to the prevention of accidents in general industry and maritime because to include other industrial sectors (such as construction) would seriously impede the rulemaking process. Inclusion of other industries in the proposal would require the Agency to consider many possible diverse situations requiring safety-related work practices that are likely to be germane only to these industries. The construction industry, for example, is an extensive user of temporary wiring, which is frequently moved and is often used under a wide range of environmental conditions. Such situations often affect the type of electrical safety-related work practices recommended for use. Additionally, under the Construction Safety Act and 29 CFR 1911.12, OSHA is required to consult with the Advisory Committee for Construction Safety and Health before issuing proposed rules affecting construction, to assure that the unique aspects of construction work are taken into consideration by the Agency. Furthermore, OSHA has recently revised its electrical standards for construction, Subpart K of Part 1926, which incorporate various electrical safety-related work practices in addition to installation safety requirements (51 FR 25294). Reasons for excluding work on electric power generation, transmission, and distribution installations are given in Section III of this preamble.

Following promulgation of the standard for electrical safety-related work practices for general industry, the Agency plans to consider the specific safety practices needed for the electric power industries.

Therefore, of particular interest at this time are the 111 fatalities occurring in general industry. A general breakdown of the accidents, by type, is given in Table 2. A review of the circumstances surrounding the accidents appears to indicate that an unsafe work practice, or a combination of unsafe work practices, was involved in over half of the electrical fatalities.

TABLE 1.—ELECTRICAL FATALITIES BY INDUSTRY

[January 1977 to June 1978]

Industry	Applicable standard (29 CFR)	No. of fatalities
General Industry [1].	Part 1910, Subpart S.	111
Construction [1].	Part 1926, Subpart K.	92
Telecommunications.	§ 1910.268	3
Power Transmission and Distribution.	Construction—Part 1926, Subpart V; Operation & Maintenance—Future Rulemaking.	40
Maritime	Parts 1915-1918 and Part 1910, Subpart S.	3

[1] Excluding Telecommunications and Power Transmission and Distribution.

TABLE 2.—ELECTRICAL FATALITIES BY UNSAFE EVENTS GENERAL INDUSTRY—JANUARY 1977 TO JUNE 1978

Category No.	Unsafe event	Number of fatalities
(i)	Use of equipment or material too close to exposed energized lines:—Total.	47
(a)	Vehicles (e.g., cranes and dump trucks).	26
(b)	Other mechanical equipment (e.g., augers and derricks).	7
(c)	Tools and materials [1] (e.g., ladders and tree limbs).	14
(ii)	Failure to use personal protective equipment.[1]	5
(iii)	Assuming an unsafe position.[1]	10
(iv)	Failure to deenergize (and lockout/tag) equipment.[1]	14
(v)	Use of visibly defective electric equipment.	3
(vi)	Blind reaching, drilling, digging, etc.	3
(vii)	No unsafe workpractice or not enough information to classify properly.	29
	Total	111

[1] These categories contain common elements and therefore overlap. For illustration, an accident (fictitious) occurs when a painter using a long-handled paint roller makes con-

tact with a power line. This accident could be placed into any of three categories, as follows: (1) He used a tool too close to the power line; (2) he did not use personal protective equipment so that he could safely work close to the line; or (3) he assumed a working position which allowed accidental contact with the line. In such cases, the fatality was placed in the category which seemed most appropriate. The example given would have been placed in the first category ((i)(c)).

Unsafe work practices may result from such factors as inattentiveness, lack of training, or poor supervision. From the aforementioned reports, it is not possible to determine the level of training involved, the employers' work rules, or other secondary factors which may have contributed to the accidents. Additionally, even though unsafe work practices were involved in many accidents, unsafe conditions were sometimes present at the same time. (For example, see category (v).) The data presented here are merely being used to demonstrate that unsafe work practices are significant contributors to electrical accidents and that they should be addressed in OSHA's regulations. It should be noted that, even with 100 percent compliance with OSHA's current General Industry Standards, most of the accidents (68 percent) given in categories (i) through (vi) in Table 2 would still have occurred.

Within each category in Table 2, the accidents are very similar in nature. From the fatality reports, OSHA can describe a typical accident for each of the first six categories as follows:

(i) *Use of equipment or material too close to exposed energized lines*—(a) *Vehicles.* Operating a truck-mounted boom, an employee of a local trucking company was unloading concrete blocks when the boom came in contact with a 7200-volt overhead power line.

(b) *Other mechanical equipment.* An oil well service rig loading and tubing machine was working over a 900-foot well. While lowering a pole, it came in contact with an overhead 7200-volt power line. The operator was burned and the helper, who was standing alongside the rig, received a serious electrical shock and later died.

(c) *Tools and materials.* An employee of a chemical manufacturing company was on a tank at a position about 18 feet above the ground. He was measuring the fluid level in the tank with a 20 foot long metal pole. When he removed it from the tank the pole came in contact with a 12,000-volt power line, which was about 16 feet above the tank.

(ii) *Failure to use personal protective equipment.* While trimming trees near power lines, an employee of a tree service company was electrocuted. His employer was cited for failure to provide personal protective equipment made necessary by the employee's close proximity to the lines.

(iii) *Assuming an unsafe position.* An electrician for a boiler shop was working on a bridge crane (doing repair work). He apparently gave instructions to turn on the power. When the line was energized, he was shocked, causing him to fall 30 feet to the cement floor.

(iv) *Failure to deenergize (and lockout/tag) equipment.* An employee of a steel pipe and tubing manufacturer was working on crane power lines. When he contacted one of the energized conductors, he was electrocuted.

(v) *Use of visibly defective electric equipment.* While using a vacuum pump to clear around a swimming pool, a life guard for a real estate management company was electrocuted. The employer was cited for not grounding the vacuum pump—it was equipped with a two-wire cord and was connected to the outlet by means of an extension cord with its grounding prong removed.

(vi) *Blind reaching, drilling, digging, etc.* An employee of a chemical manufacturing company climbed up on an industrial electrical outlet. While holding onto an I-beam, he reached inside a guard and accidentally contacted a 650-volt busbar.

G. Significant Risk

In order to promulgate safety regulations, OSHA must show that the hazard the Agency proposes to address presents a significant risk to employee safety. As part of the preliminary analysis for this electrical safety-related work practices proposal, OSHA has determined the population at risk, the industries and occupations presenting major risks, and the incidence and severity of the injuries attributable to the failure to establish safe work practices. Finally, in keeping with the purpose of safety standards to prevent accidental injuries and deaths, OSHA has estimated the number of accidents that would be prevented by the regulation.

Although nearly every worker in general industry is exposed to electrical hazards, some are at much greater risk than others. Employees at appreciably greater risk include, (a) those in industries that have the highest incidence rates of electrical accidents and (b) those in occupations considered high risk for electrical hazards. JACA Corporation, in their "Regulatory Assessment of the Impact of the Proposed Electrical Safety-Related Work Practices," characterized the frequency with which electrical accidents occur and tabulated the relative risk between industries. (This document is available for inspection and copying in the Docket Office.) Among industries covered by the proposal, the highest relative risks are encountered in the following industries: lumber and wood products; rubber and miscellaneous plastics products; stone, clay, and glass products; primary metal; and miscellaneous repair services. Industries with a relatively low risk are concentrated in the finance, insurance, and real estate industries. According to the JACA report and excluding jobs not addressed by the proposal, the highest electrical accident rates are faced by electricians and apprentices, stationary engineers, mechanics and repairmen, structural metal craftsmen and welders. Low rates are encountered by personnel in the sales and clerical fields.

OSHA has estimated that more than 1,500 injuries and over 100 fatalities (concentrated within a high risk group of about 4.8 million workers) could be prevented each year through compliance with the proposed safety-related work practices. (A detailed analysis of the benefits of the proposed standard and a description of the methodology used can be found in Chapter 5 of OSHA's preliminary regulatory analysis, which is available for inspection and copying in the Docket Office.)

The particular injuries that the proposed safe work practices will prevent include electric shocks, burns, and the indirect injuries that result when electric shocks occur. (Indirect injuries are typically bruises, bone fractures, and even deaths that occur when the victim falls due to the involuntary muscular reactions that follow electric shocks.) Although some injuries only involve minor shocks and burns, many victims suffer disabling effects, some are killed by electrocution, and still others die from the indirect injuries. Therefore, the frequency and seriousness of injuries to be prevented clearly demonstrate a significant risk which will be addressed by the proposed standard.

II. Development of Proposed Standard

A. Present Electrical Standards

In 1976, the National Fire Protection Association (NFPA) created the "70E Committee" to prepare a consensus standard for possible use by OSHA in developing a proposed revision of the Agency's electrical safety standards. The 70E Committee visualized a standard consisting of four major parts:

Part I—Installation Safety Requirements,
Part II—Safety-Related Work Practices,
Part III—Safety-Related Maintenance Requirements,

Part IV—Safety Requirements for Special Equipment.

The name given to this new document became NFPA 70E, "Electrical Safety Requirements for Employee Workplaces."

The NFPA 70E Committee derived Part I from the National Electrical Code (NEC). OSHA reviewed the 70E document, which the NFPA approved, and used it as the foundation for proposing a revision (44 FR 55274) to 29 CFR Part 1910, Subpart S—the electrical standards for General Industry. After a public comment period and an informal hearing, the revised Subpart S was published as a Final Rule in the **Federal Register** (46 FR 4034) on January 16, 1981. The standard covers the safe *installation* of electrical equipment.

While OSHA was revising its standards using NFPA 70E, Part I, the 70E Committee was completing its work on Part II.

After considering the views and recommendations of the experts on the committee and comments from the public, NFPA approved the 70E Committee's standard on electrical safety-related work practices. Thus, NFPA 70E, Part II, "Safety-Related Work Practices," become a national consensus standard.

B. Use of NFPA 70E, Part II, as a Base Standard

In the development of this proposal, OSHA evaluated NFPA's electrical safety-related work practice standard. In areas which overlapped other consensus standards not presently adopted by OSHA, the NFPA document was reviewed and was compared with those other standards with respect to consistency and with respect to effectiveness in providing employee safety. For example, the NFPA requirements on lockout of equipment were compared to ANSI Z244.1, Lockout/Tagout of Energy Sources, so that OSHA could determine what requirements could most effectively protect employees from electrical hazards. In this case, as in most others, the NFPA standard more directly addressed electrical hazards than did the ANSI document, although (in OSHA's view) NFPA 70E was sometimes overly detailed or too specification-oriented. In comparison to other national consensus standards, NFPA's electrical safety-related work practices appeared to be effective in providing employee safety and consistent with current industry practice.

OSHA also examined provisions of NFPA 70E which were comparable to existing OSHA regulations. For example, OSHA compared §1920.180(j), dealing with the operation of cranes near overhead lines, with similar requirements in the NFPA standard. As a result, OSHA discovered that, while the 70E committee referred to OSHA's regulations in § 1910.180(j) in providing for a 10-foot minimum clearance, they provided smaller clearance distances in NFPA 70E for other types of equipment used near overhead power lines. In this area, NFPA 70E seemed to be less effective in protecting employees. In most other areas, however, the 70E requirements were at least as protective as OSHA's.

Finally, OSHA evaluated whether the requirements of NFPA 70E, Part II, were directed towards the apparent causes of electrical accidents. In addition to the previously mentioned OSHA survey, the Agency also reviewed electrical accident data provided by California, Florida, and other States. For every requirement set forth in Part II of NFPA 70E, OSHA found injuries or fatalities which were directly relevant. For instance, the lockout/tagout requirements of Chapter 4 were found to relate specifically to accidents in category (iv) presented previously in Table 2. However, it was not always possible to relate every specification in the 70E provisions on lockout of equipment to a particular causative factor presented in the accident descriptions.

OSHA has thoroughly reviewed NFPA's consensus standard on Electrical Safety-Related Work Practices and has determined that it is an appropriate document on which to base a proposed rule. Although the format and outline of the NFPA standard are not entirely suitable, the basic requirements are generally valid and relate well to causes of electrical accidents. Where necessary, OSHA has reorganized and edited the national consensus standard to fit the Agency's regulatory needs. For the most part, however, the proposed standard contains the same requirements as Part II of NFPA 70E. A performance-oriented approach addressing the causes of these accidents is thus maintained. As a consequence, the methods of compliance remain flexible.

III. Summary and Explanation of Proposed Standard

This section discusses the important elements of the proposal and explains any differences between it and the source document, NFPA 70E, Part II.

(1) *§ 1910.331.* Section 1910.331 sets forth the scope of the proposal. According to this section, the standard would cover electrical safety-related work practices of employees who work on, near, or with electric circuits and equipment. Types of work performed by qualified persons which would not be covered by the proposal are also listed. Although the scope is similar to that of NFPA 70E and to existing § 1910.302(a), there is a key difference. Briefly, the NFPA standard and § 1910.302(a) state certain installations [1] are not covered. OSHA is proposing that the work practice standard not apply to "qualified persons" (as defined in § 1910.399 and discussed later in this preamble) performing work on or directly associated with these same types of installations, because the work practices in this proposal do not address the types of electrical hazards faced by such workers performing this type of work. However, employees who are working at these installations but who are not "qualified" would be covered by the proposal. Safety-related work practices used by qualified employees who are performing work not covered in this proposal are addressed in other standards, such as 29 CFR Part 1926, Subpart V (power transmission and distribution); 29 CFR 1910.268 (telecommunications); and ANSI C2 (electric supply). This last standard has not been adopted by OSHA, but the Agency is currently developing a separate proposed standard for work practices to be used with electric power generation, transmission, and distribution systems.

An example of electric distribution line work that is "directly associated" with distribution lines (but that is not work "on" the lines) is line clearance tree trimming. In this activity, the work is performed on trees, but the work is directly associated with the distribution system. Thus, line-clearance tree trimming performed by a qualified person would not be covered by the proposed standard.

"Qualified person" is currently defined in § 1910.399 as: "One familiar with the construction and operation of the equipment and the hazards involved." "Qualified persons" are intended to be only those who are well acquainted with and thoroughly conversant in the electric equipment and

[1] *Namely:* Installation in mines; in ships and other watercraft; in aircraft; in automotive vehicles, excluding mobile homes and recreational vehicles; in railway rolling stock, including railway facilities for generation, transformation, transmission and distribution of power used for rolling stock signaling and operation; in communication facilities and in facilities for electric energy generation, control, transformation, transmission and distribution located outdoors or in building spaces used exclusively for such purposes.

electrical hazards involved with the work being performed. As used in the proposal, the term connotes different qualifications for different tasks. For example, with respect to the statement in proposed § 1910.331(c)(1) which exempts qualified linemen working on transmission lines, a qualified person would be one who understands the construction and operating characteristics of the transmission line and who has a thorough knowledge of the hazards involved in the type of work being performed on the line. On the other hand, this provision would not ordinarily exempt a transportation worker using a boom mounted on a flat bed truck to unload concrete blocks at a site near overhead distribution lines. This type of employee would not normally be expected to understand the construction and operation of the lines, nor would this person likely be completely knowledgeable in the hazards involved.

With respect to companies that own and operate the types of installations listed in paragraph (a)(3) of proposed § 1910.331 (for example, an electric utility), it is assumed that all employees whose work is on or is directly related to these installations are "qualified." OSHA has found it to be a very rare practice for an employer to allow an unqualified worker to perform work on one of these types of installations. However, it is common for an unqualified employee, such as a painter, to be engaged in unrelated work near an overhead electric power line. Because, by definition, an unqualified employee lacks sufficient training and experience, he or she faces a greater risk of electric shock while working near an electric power line than a qualified employee.

Whether an employee is considered to be a "qualified person" will depend upon various circumstances in the workplace. It is possible and, in fact, likely for an individual to be considered "qualified" with regard to certain equipment in the workplace, but "unqualified" as to other equipment. For example, an employee may have received the necessary training to be considered qualified to work on a particular machine. However, if that same employee were to work on other types of equipment for which he has not received the necessary training, he would be considered unqualified for that other equipment.

Work performed by other than qualified persons would be covered by the work practices contained in this proposal, even if the electrical installations involved are not covered by the installation safety requirements of Subpart S. This is because unqualified persons, by definition, do not have the training nor the skills necessary to perform work safely very close of electrical installations. Additionally, there are no standards, other than the 10-foot clearance rule for cranes and similar equipment, to cover these situations at present. Work performed by other than qualified persons near these "exempted" installations (e.g., near an electric transmission line) would be covered by the proposed requirements. Thus, for example, a painter carrying a ladder near electrice transmission or distribution lines would have to comply with the provisions of § 1910.333(c)(3)(i), but a qualified lineman working on the lines would not be covered.

The present installation safety requirements in Subpart S do not cover "installations under the exclusive control of electric utilities * * * for the generation, control, transformation, transmission, and distribution of electric energy" (§ 1910.302(a)(2)(v)). This exclusion, which reflects the unique hazards and work practices involved in generation, transmission, and distribution of electric energy, mirrors the provisions of the National Electrical Code and NFPA 70E. The work practices in this proposal were designed to complement the installation safety provisions in Subpart S and were not intended to cover work practices for qualified persons who work on or near electric generation, transmission, or distribution installations. Therefore, paragraph (c)(1) of proposed § 1910.331 provides that qualified persons working on these installations are not covered by the proposal. Additionally, because these types of installations involve similar hazards and work practices whether or not they are controlled by electric utilities, OSHA has determined that the proposal should not apply to qualified persons who work on or near any such installations, regardless of who owns or controls the installations. A note is provided at the end of the paragraph to emphasize that this exclusion is limited to qualified persons whose work is on or directly associated with these installations. The note states that, for other types of installations where work is to be performed on or near exposed energized parts, even qualified persons must comply with the work practices contained in this proposal. In these cases, the standard covers qualified persons who work near the energized parts as well as those workers qualified to work on the energized parts. As noted previously, OSHA is currently developing a separate proposed rule on electric power generation and related areas.

Under proposed § 1910.331(c)(2), qualified persons engaged in telecommunications work are not covered by the proposal to the extent that the hazards are covered by § 1910.268. That section applies to employers providing telecommunication service, including but not limited to communications utilities. Since the proposal would not apply to work covered by § 1910.268, there would be no overlap between the proposed regulations and the present telecommunications standard.

The installations listed in paragraphs (c)(3) and (c)(4) of proposed § 1910.331 are provided for consistency with the coverage of the installation safety requirements of Subpart S, as set forth in existing § 1910.302(a)(2)(i) and (iii), respectively. For example, under § 1910.331(c)(3), automotive repair work involving electric conductors and equipment installed on self-propelled vehicles performed by qualified employees would not be covered by the proposal. As explained previously, whether an employee is considered to be qualified depends upon various circumstances in the workplace. For an automobile mechanic or other employee to be considered qualified (and thereby not covered under proposed § 1910.331(c)(3)), he or she would have to understand the construction and operating characteristics of automotive electrical systems and would have to have a thorough knowledge of the hazards they present.

The safety-related work practices contained in the proposed standard would in fact be implemented by employees, but it would be the responsibility of employers to ensure that these practices are followed by their employees. The employer must satisfy this obligation by providing adequate training and supervision of employees and by implementing safe work practices.

(2) *§ 1910.332.* This section proposes training requirements. Employees would be required to be trained in (1) the safety-related work practices of the standard, as well as any other practices necessary for safety from electrical hazards, and (2) safety-related elements of their workplace environment. Inasmuch as the standard would apply to work performed on or near exposed energized parts unrelated to power generation, transmission, and distribution, such work must be performed by qualified persons, and appropriate training is required. Proposed § 1910.332(b)(3) explicitly

states what OSHA intends as a basic training requirement for such qualified persons.

In order to be as flexible as possible, the OSHA proposal accepts both classroom and on-the-job training. The NFPA 70E standard is silent on the method by which training is to be provided.

The economic impact of the proposal is limited, and the expected benefits are optimized, because the training requirements would apply primarily to employees in occupations that traditionally carry relatively high risk of injury due to electrical hazards. A review of the accidents indicates that the greatest impact on reduction of accidents would result from training employees who work in jobs which expose them to electrical hazards to a greater degree than the average worker.[2] Upon searching the available accident data, OSHA has determined that employees in the occupations listed in Table 3 are more likely to face a higher than normal risk of electrical accidents. (The occupations listed in Table 3 are general categories taken from the specific occupational groups given in Table 4, in Section IV of this preamble, which lists the electrical injury incidence rate for each group.) OSHA requests public comment on whether these general categories and the specific occupational groups from which they have been derived appropriately identify the high risk employees and whether any groups should be redefined, deleted, or added. The occupational groupings listed include any qualified persons who perform work covered by this proposed standard, as well as unqualified persons who also face a high risk. It is primarily these employees who would be subject to the training requirements. However, in some cases, employees in other occupational groupings may also face a relatively high risk of injury due to electric shock, and these employees would also require training. For example, a production employee may work in an area containing exposed live parts that are guarded only by location (such as overhead lines). If this worker could come in contact with these lines in the course of his or her work, then he or she would have to be trained. Training in the basic areas of hazard recognition, proper work practices, and knowledge of the working environment can reduce the frequency of accidents involving employees in these categories, whereas training employees who face a minimal exposure to electrical hazards would result in a negligible increase in benefits. Therefore, OSHA has proposed that training be required only for employees who face the greatest risk of injury due to electric shock or other electrical hazards.

TABLE 3.—TYPICAL OCCUPATIONAL CATEGORIES OF EMPLOYEES FACING A HIGHER THAN NORMAL RISK OF ELECTRICAL ACCIDENTS

Occupation
Electricians.
Mechanics and repairers.
Electrical and electronic technicians.
Electrical and electronic equipment assemblers.
Stationary engineers.
Material handling equipment operators.
Electrical and electronic engineers.
Blue collar supervisors.
Welders.
Riggers and roustabouts.

(3) *§ 1910.333.* Paragraph (a) of § 1910.333 proposes general requirements on the selection and use of work practices. The requirements of this paragraph mainly address accidents which involve the hazards of exposure to live parts of electric equipment. A deenergized part is obviously safer than an energized one. Because the next best method of protecting an employee working on exposed parts of electric equipment (the use of personal protective equipment) would continue to expose that employee to a significant risk of injury from electric shock, proposed § 1910.333(a) would make equipment deenergizing the primary method of protecting employees. Under certain conditions, however, deenergizing need not be employed. Employees may be allowed to work on or near exposed energized parts, if the employer can demonstrate that deenergizing would be infeasible or would introduce additional or increased hazards, e.g., interruption of life-support equipment, shutdown of hazardous location ventilation systems, or complete removal of illumination. In any case, employees working on or near energized parts must use safe work practices as required by the standard.

Paragraph (b) of proposed § 1910.333 covers work on or near exposed deenergized electric parts and includes requirements for lockout and tagging of equipment disconnecting means. The need for adequate lockout and tagging procedures for electrical equipment is widely recognized, as demonstrated by the ANSI and NFPA standards in this area. The accidents in OSHA's survey which involved work on electrical equipment also indicate a need for proper work practices in this area. Although the lockout and tagging requirements of NFPA 70E are used as a basis, the OSHA proposal clarifies and simplifies the requirements of the NFPA standard by directing the coverage to the prevention of employee contact with energized equipment or circuits. While the NFPA 70E requirements for lockout and tagging are highly detailed, the proposed regulations are general and more performance-oriented in nature. Additionally, the NFPA requirements apply any time work is performed on or near deenergized circuit parts or equipment in any situation which presents a danger that the circuit parts or equipment might become unexpectedly energized. Thus, the NFPA requirements not only address the hazard of contact with energized parts, but also cover other hazards which are presented by unexpected start-up of equipment during maintenance operations. This is expressed in NFPA 70E, Part II, Section 1.B, second paragraph, which states:

> Where the work to be performed requires employees to work on or near exposed circuit parts or equipment, and there is danger of injury due to electric shock, *unexpected movement of equipment, or other electrical hazards*, the circuit parts and equipment that endanger the employees shall be deenergized and locked out or tagged out in accordance with the policies and procedures specified in paragraph B(1) and Chapter 4 through subparagraph B(7)(b)). [Emphasis added.]

The proposal is intended to cover employee exposure to electrical hazards which might occur from the unexpected energizing of circuit parts and would not cover other equipment-related hazards which do not involve exposed live parts. Thus, the proposal would protect an electrician working on a deenergized circuit but would not address the mechanic working on the mechanical parts of an electrically powered machine.

OSHA recognizes that equipment maintenance and repair present significant hazards to employees. These hazards, which are different from those addressed by the electrical work-practices standard, would be covered by OSHA's proposed standard on the control of hazardous energy sources (lockout/tagout), which is currently under development. OSHA has written the two proposals so that they

[2] For a more thorough discussion of the relative risk of electrical accidents among various categories of employees and of how training reduces this risk, see Chapter IV of OSHA's Preliminary Regulatory Impact Assessment of the Proposed Electrical Safety-Related Work Practices Standard. This document is available for inspection and copying in the Docket Office.

complement one another. It is the Agency's intent that there be no conflicts between the two standards, and OSHA solicits public comments on this issue.

The application of this proposal's lockout and tagging requirements is set forth in § 1910.333(b)(2), reading as follows:

(2) *Lockout and tagging.* While any employee is exposed to contact with parts of fixed electric equipment or circuits which have been deenergized, the circuits energizing the parts shall be locked out or tagged or both in accordance with the requirements of this paragraph * * *.

OSHA has drafted its electrical lockout and tagging provisions to be more performance oriented than are the corresponding provisions of NFPA 70E. Within the range of hazards covered by the proposal, OSHA believes that the proposed lockout and tagging provisions would provide employees with electrical safety which is comparable to that which would be afforded by NFPA 70E, Part II.

OSHA has limited the application of the proposed lockout and tagging provisions to fixed equipment. (It is not clear whether the NFPA standard would apply to other than fixed equipment.) Employees can safely work on cord- and plug-connected, portable and stationary equipment which is disconnected from the circuit. Generally, such equipment is returned to the shop for repair, and the danger of accidental energizing of equipment parts is greatly reduced. Additionally, OSHA has no data indicating that there are accidents resulting from the unexpected energizing of other than fixed equipment.

The basic intent of § 1910.333 is to require employers to take one of three options to protect employees working on electric circuits and equipment: (1) Deenergize the equipment involved and lock out its disconnecting means (paragraph (b)); or (2) deenergize the equipment and tag its disconnecting means, if the employer can demonstrate that tagging is as safe as locking (paragraph (b)); or (3) work the equipment energized if the employer can demonstrate that it is not feasible to deenergize it (see discussion of § 1910.333(a) for permissible applications of this option and § 1910.333(c) for precautions to be taken when work is performed on or near energized parts). These are the same options allowed under NFPA 70E.

Paragraph (b)(2)(i) addresses the deenergizing of equipment within the lockout and tagging process. After a procedure is set for safe deenergizing, the circuits and equipment on which work is to be performed would be required to be disconnected from all energy sources. This ensures that the circuits are completely disabled. Because they do not completely deenergize entire circuits, control devices would not be permitted to be used as the only disconnecting means. Lastly, capacitive elements in the circuit would be required to be relieved of their stored energy and would be required to be short-circuited and grounded if necessary. These requirements would protect employees from the release of electrical energy during their work on the circuits or equipment.

Paragraph (b)(2)(ii) proposes requirements on the application of locks and tags to circuit disconnecting means. To prevent the unauthorized reenergizing of a circuit on which work is being performed, the proposal would, in general, require a lock and a tag to be placed on each disconnecting means that could supply power to the circuit. The proposal would also require the tags used to contain a statement prohibiting unauthorized operation of the disconnecting means and prohibiting removal of the tag. This requirement would inform employees of the purpose of the lock and tag.

To permit maximum flexibility, the proposed requirements permit the use of locks alone or tags alone under certain conditions. Tags would be permitted to be used without locks if locks cannot be applied to a given installation or if the employer demonstrates that tagging procedures will provide safety equivalent to that of a lock. So that employees could quickly recognize the purpose of the tag, the proposal would require that tags used under these circumstances be of a standardized design that clearly indicates that the affected circuit is not to be reenergized. For this same reason, all persons who have access to the circuit controlling devices would have to be trained in and familiar with the employer's tagging procedures. However, because a person could operate the disconnecting means before reading or recognizing the tag, the standard also proposes that, where tags only are used, an additional safety measure be taken to ensure that the closing of the tagged single switch would not reenergize the circuit on which employees are working. The additional safety measure is necessary because, at least for electrical disconnecting means, tagging is significantly less safe than locking out. A disconnecting means could be closed by an employee who has failed to recognize the purpose of the tag. The disconnect could also be closed accidentally. Public comment is requested on whether the additional safety measure is necessary when a disconnecting means is tagged and on what measures can be taken to protect employees from the accidental closing of a tagged switch. OSHA also requests public comment on situations in which tagging procedures may provide safety equivalent to that provided by locks.

When the work to be performed involves only a simple circuit and can be completed in a short time, a lock can be used safely without a tag. The proposal would limit the use of this procedure to any situation that involves one circuit or a single piece of equipment and that involves a lockout period of no more than one work shift. Additionally, affected employees would be required to be trained in and familiar with this procedure. Public comment is requested on whether there are other situations in which a tag would not be necessary if a lock is used.

Proposed § 1910.333(b)(2)(iii) contains requirements for verifying that the correct circuits have, in fact, been deenergized. The requirement for determining whether a circuit has been opened can be satisfied by operating the controls for the equipment supplied by the circuit. This method has the advantage of not exposing employees to possibly energized parts. Therefore, the proposal makes this the first step in verifying the condition of the circuit.

Of course, operating the equipment controls is not a completely reliable indication that the circuit has been deenergized. It is possible to interrupt a portion of the circuit so that the equipment will not operate even though the rest of the circuit is still alive. Therefore, the standard proposes that a qualified person use test equipment to ensure that all parts of the circuit to which employees will be exposed are deenergized. Because it is also possible, under certain conditions, to feed circuits from the "load" side, the test would be required to check for any voltage backfeed which might be present.

Voltages over 600 volts are more likely than lower voltages to cause test equipment itself to fail, leading to false indications of no-voltage conditions. To prevent accidents resulting from such failure of test equipment, the proposal would require checking operation of the test equipment immediately before and after use.

Once work has been completed, it will be necessary to reenergize the circuit. Paragraph (b)(2)(iv) of proposed § 1910.333 addresses the procedure to be used for this task. The first step that must be taken is an inspection or test (or both) of the circuits and work areas to ensure that all tools, jumpers, grounds,

and other devices have been removed. Otherwise, energizing the circuits involved could result in a short-circuit condition that injures employees. The proposal would require that such inspections and tests, if necessary, be performed by a qualified person.

To protect employees from contact with reenergized circuit parts, the proposal would require that affected employees be notified to stay clear. After all locks and tags are removed, a visual determination that employees are clear of danger would be required. Once these procedures have been followed, it is safe to reenergize the circuits.

Paragraph (b)(3) of § 1910.333 proposes requirements that restrict the manner in which interlocks may be defeated. Interlocks deenergize circuits to prevent electric shock to persons using equipment or performing minor maintenance or adjustments. However, under some maintenance conditions, the interlocks must be rendered inoperative so that tests or adjustments can be made. To prevent injury to employees who may not realize the hazards involved, paragraph (b)(3) proposes that only qualified persons be permitted to defeat interlocks. Also, when the qualified person's work is completed, the interlock system would be required to be put back into an operative condition.

Paragraph (c) applies to work on or near exposed energized parts. This paragraph proposes requirements intended to prevent accidents due to the presence of exposed live parts. Requirements are given pertaining to work near overhead lines, illumination, confined work spaces, conductive materials and equipment, portable ladders, conductive apparel, and housekeeping duties. Additionally, the proposal would allow only qualified persons to work on energized electric equipment.

Since overhead lines are a major source of occupational electrocutions (47 of 111 electrocutions in OSHA's survey), regulations dealing with work near such lines are stressed. A number of these accidents involve employees engaged in activities which place them near electric power conductors installed above ground (e.g., a painter moving a ladder). The requirements of proposed § 1910.333(c)(3) have been expanded beyond those found in the NFPA 70E section on overhead lines and are more stringent. According to proposed § 1910.333(c) 3)(i), other than qualified persons would be required to maintain a 10-foot (350-cm) minimum clearance from unguarded energized overhead lines. This clearance distance is based on the 10-foot (305-cm) clearance rules presently contained in §§ 1910.67(b)(4), 1910.180(j), 1910.266(c)(6) (xxii), 1926.550(a)(15), and 1926.600(a)(6), which apply to the use of various mechanical equipment near electric power lines.

OSHA realizes that it is sometimes necessary for work to be performed closer to the lines than 10 feet (305 cm) when it is infeasible or impossible to deenergize them. However, since unqualified persons are not fully aware of the danger involved, such work may be performed only by qualified personnel. Therefore, for qualified persons, the proposal would allow smaller clearances, as given in Table S–5. These clearances are the same as those given in Table R–2 of § 1910.268, "Telecommunications." The smaller clearances allow qualified persons to perform tasks which require close approach to overhead lines. At the same time, the smaller clearances provide protection from arc-over with a sufficient safety factor for employees who are familiar with the construction and operation of overhead electric power lines and with the hazards involved. Additionally, if the work requires closer approach than even these smaller clearances allow, qualified persons would be permitted to approach the lines as close as necessary if insulation or guarding is provided.

Without differentiating between qualified and unqualified workers, the NFPA standard requires a "safe distance" to be maintained for any employee working in elevated positions near unguarded, energized lines but does not specify what this distance is. For employees on the ground, the consensus standard requires deenergizing or guarding any overhead line that might be contacted.

For vehicular and mechanical equipment (§ 1910.333(c)(3)(iii)), OSHA is proposing a minimum clearance of 10 feet (305 cm), while NFPA 70E allows equipment other than aerial lifts, mobile cranes, and derrick trucks [3] to come as close as 4 feet to exposed, energized overhead lines. In the OSHA proposal, approaches closer than 10 feet are allowed for (1) vehicles in transit; (2) lines protected by insulating barriers; and (3) aerial lifts operated by qualified persons. These closer approach distances are based on exceptions to the 10-foot (305-cm) clearance rules presently contained in the existing OSHA standards noted previously. All of OSHA's existing standards (e.g., § 1910.180(j)(1)) require a basic 10-foot clearance for the specific equipment covered. Additionally, § 1926.000(a)(6) of the Construction Standards requires all mechanical equipment to keep 10 feet away from power lines. Therefore, the proposal is consistent with OSHA's existing regulations and minimizes the confusion as to what clearances are required.

The clearance distances listed in NFPA 70, as well as those given in OSHA's proposal, protect against arc-over of current from the lines to the equipment. Assuming that the equipment would never come any closer than permitted by either standard, both would theoretically provide employees with protection. However, the main concern involved in operating mechanical equipment near exposed power lines is unintended movement of the equipment which may bring the equipment too close to the lines. A 10-foot clearance provides a more reasonable margin of error compared to the distances given in NFPA 70E. Additionally, the clearance distances in NFPA 70E vary according to the type of equipment in use and the voltage of the power lines. This is unnecessarily complicated and could cause confusion and accidents.

With respect to the hazards of overhead power lines, OSHA feels that its proposal provides greater safety than the national consensus standard. In view of the fact that 47 of the 111 electrocutions studied were due to the use of equipment or material too close to exposed energized overhead lines, OSHA believes that requirements to prevent such electrocutions are of the highest priority and should provide as much safety as possible. For these reasons, and in order to promote consistency within the OSHA standards, the proposal contains a basic 10-foot (305-cm) clearance rule, with certain exceptions. If information is forthcoming demonstrating ways in which specific operations can be performed safely with clearances less than 10 feet, OSHA will consider changing the rule to provide for such situations.

Paragraph (c)(4) of proposed § 1910.333 addresses the hazards associated with working near exposed live parts where visibility would be impaired. Adequate illumination would be required by proposed paragraph (c)(4)(i) to ensure that employees could see well enough to avoid contacting exposed live parts. Specific guidance is not provided in the proposal, but OSHA requests comments and supporting data with respect to levels of illumination that are necessary for safety.

[3] For these types of equipment only, NFPA refers to OSHA's existing standards, which require a minimum clearance of 10 feet.

Paragraph (c)(4)(ii) prohibits the act of blind reaching into areas containing exposed live parts. Obviously, if the live parts cannot be seen, it would be difficult to avoid contact with them. Therefore, the standard proposes that employees not be allowed to work in areas which contain exposed live parts that cannot be seen because of obstructions or poor lighting.

Some installations of electric equipment provide little working space for maintenance employees. Such cramped conditions can lead to employees' backing or moving into exposed live parts. To prevent this from occurring, proposed paragraph (c)(5) would require precautions to be taken to assure that accidental contact with the parts does not occur. For example, protective blankets could be used to shield some of the live parts, or portions of the electrical installation could be deenergized. Also, doors or panels that could knock into employees and cause them to contact exposed energized parts would have to be restrained.

Handling metal ladders and other conductive materials in the vicinity of overhead lines is a leading cause of occupational electrocutions. (See category (i)(c) in Table 2 of this preamble.) Proposed paragraphs (c)(6) and (c)(7) address the hazards associated with such material handling operations. To protect employees handling conductive tools or materials near exposed live parts, paragraph (c)(6) proposes that the conductive materials or equipment be handled in a manner that will prevent their contacting the energized parts. Because moving such long metal objects as pipes and ducts can be particularly hazardous in areas containing exposed energized conductors or circuit parts, the proposal would also require the employer to institute work practices that minimize the hazards associated with handling these objects. For example, the employer could require employees to handle metal irrigation pipes so that the pipes are always in a horizontal plane. This practice would prevent the material from contacting overhead power lines.

Metal ladders can also provide a path to ground for workers who directly contact live parts. In paragraph (c)(7), OSHA has proposed to prohibit the use of metal ladders by employees who would be working where they might contact exposed energized circuit parts. This should protect these workers from electric shock. In view of the accidents occurring when metal ladders contact overhead lines, the Agency is requesting comments on whether metal ladders should also be prohibited from being used where they might contact energized overhead electric power lines.

Proposed §1910.333(c)(8) would not allow employees to wear conductive objects, such as metallic jewelry, in a manner presenting an electrical contract hazard. Typical accident descriptions indicate that these metal objects short circuit live parts; and, as current flows through the objects, the employees wearing them are severely burned. Protective methods include wrapping the conductive apparel with nonconductive tape, use of rubber gloves, use of insulation on the live part, as well as removal of the conductive item. OSHA understands that compliance may present difficulties as many employees may not want to remove or cover certain articles of jewelry. However, given the severity of the possible consequences (e.g., loss of a finger, arm burns, or injury to adjacent coworkers), OSHA believes that some means of protecting the employee, as well as others nearby, must be provided.

Proposed paragraph (c)(9) addresses the hazards related to housekeeping duties (such as electric equipment cleaning or vegetation spraying, clipping, or trimming) performed near exposed energized circuit parts. The proposal would require the employer to adopt safeguards that prevent employees performing such duties from contacting energized parts, either directly or through conductive cleaning aids. Examples of protective measures include the use of protective insulating equipment or the provision of guards to prevent contract.

(4) *§1910.334.* Requirements of this section address the hazards of using electric equipment. Although the hazards common to the installation of electric equipment are covered in the existing Subpart S regulations, the accidents in OSHA's survey show that equipment is used improperly or is damaged in use. Such misuse and abuse of equipment creates hazards which the existing installation standards address only indirectly. The proposed requirements would cover these hazards more directly.

Paragraph (a) of §1910.334 proposes requirements on the use of cord- and plug-connected equipment, including extension cords, and addresses common hazards associated with their use. The proposal would require portable equipment to be handled in a manner which will not cause damage and would require visual inspection of cords, plugs, and receptacles. Additionally, paragraph (a)(2)(ii) would prohibit the use of the defective equipment. These requirements would protect employees from electric shocks caused by damaged equipment. Such defects as missing grounding prongs on attachment plugs and poor insulation on conductors have caused injuries to employees.

To prevent the connection of mismatched or misaligned plugs and receptacles, these devices would have to be checked to ensure that they are of compatible configurations and alignment. If this is not done, an employee might force a plug of one rating into a receptacle of a different rating, leading to a lack of proper overcurrent protection or, even worse, to the application of a higher than intended voltage on connected equipment.

In paragraph (a)(3), rules ensuring the continuity of grounding conductors for cord- and plug-connected equipment are also proposed. For example, clipping the grounding prong from a plug would be prohibited. Paragraph (a)(4) would require portable electric equipment used in highly conductive locations (e.g., those inundated with water) to be approved for the use: paragraph (a)(5) would imposed regulations on the connection of attachment plugs. The requirements proposed in §1910.334(a) should ensure that cord- and plug-connected equipment continues to meet the installation requirements currently containted in Subpart S and is used in its intended manner.

Proposed §1910.334(b) deals with electric circuits. To protect the operator from failure of a disconnect, the proposal would require devices used for opening circuits under load to be designed for the purpose. Circuits deenergized by the opeation of a protective device (such as a fuse or circuit breaker) would have to be checked to ensure that they could be safely reenergized. Without such a check, it is possible for an employee to be injured in case of failure of the protective device and damage to the protected circuit. Lastly, this paragraph would prohibit changing (for maintenance of other purposes) overcurrent protective devices in any manner which would violate § 1910.304(e), the installation safety requirement for overcurrent protection. This provision will prevent the use of a fuse or circuit breaker with a rating too high too protect the equipment or conductors involved. This provision is also intended to prevent the temporary bypassing of protective devices, which could lead to shock and fire hazards.

Paragraph (c) of proposed § 1910.334 sets forth requirements on the use, rating, and inspection of electrical test instruments and equipment. Because the use of test instruments can expose

employees to live parts of electric circuits, paragraph (c)(l) would require testing work on electric circuits or equipment to be performed by qualified persons.

To prevent injuries to employees resulting from exposed conductors or other defects in the test equipment, paragraph (c)(2) would require the visual inspection of such equipment before use. Of course, employees would not be permitted to use this equipment until it has been repaired.

Using test equipment on circuits with voltages or currents higher than the rating of the equipment or in improper environments can cause the equipment's failure. Since employees can be injured as a result of this failure, paragraph (c)(3) would require test equipment to be used within its rating and to be suitable for the environment in which they are to be used.

Paragraph (d) of § 1910.334 would require suitable protective measures to be taken to protect against the hazards of using flammable and ignitible materials occasionally in ordinary locations (those which are not covered by existing § 1910.307). While storage, manufacture, and other on-going presence of flammables are covered under the installation requirements for hazardous locations contained in Subpart S, temporary uses are not covered. The proposal would prohibit energizing electric equipment which might ignite the flammable or ignitible materials, unless suitable protective measures are taken. Protective measures could include ventilation and clearing accumulations of combustible dusts, as appropriate.

(5) *§ 1910.335.* The requirements of this section address accidents involving the failure to use protective equipment. Paragraph (a) of proposed § 1910.335 addresses the proper use of protective equipment. Requirements would include those on inspection, protection, and situations demanding the use of personal protective equipment. These proposed regulations are intended to ensure that the equipment will actually provide insulation of and safety to the employee.

OSHA's existing regulations [4] on the design of insulating protective equipment are contained in Subpart I of 29 CFR Part 1910, which references various American National Standards Institute (ANSI) standards.

Rubber protective equipment for electrical workers shall conform to the requirements established in the American National Standards Institute Standards as specified in the following list:

Item	Standard
Rubber insulating gloves	J6.6—1967
Rubber matting for use around electric apparatus.	J6.7—1935 (R 1962)
Rubber insulating blankets	J6.4—1970
Rubber insulating hoods	J6.2—1950 (R 1962)
Rubber insulating line hose	J6.1—1950 (R 1962)
Rubber insulating sleeves	J6.5—1962

NFPA 70E refers to more recent (but not the most recent) editions [5] of the same ANSI standards. However, in this rulemaking effort, OSHA is not proposing to make changes to Subpart I. OSHA has decided that it would be more appropriate to revise its regulations on the construction of insulating protective equipment as a part of another rulemaking effort. The revision of § 1910.137 is currently under development.

Since most new protective equipment meets the more recent ANSI standards, this action seems to make OSHA's standards appear to be inconsistent with current industry practices. However, as set forth in OSHA Instruction No. CPL 2.45A, under circumstances in which an OSHA standard incorporates an earlier edition of a national consensus standard that has since been revised by the standards writing organization, OSHA policy is generally not to cite employers who use equipment made in accordance with later editions of those standards.

Paragraph (a) of § 1910.335 also addresses the use of other types of protective equipment not specifically covered in Subpart I, such as fuse handling devices, nonconductive rope, and protective shields and barriers.

Paragraph (b) applies to alerting techniques. To inform employees about electrical hazards to which they are exposed, safety signs and symbols would be required. (Requirements for safety signs, symbols, and tags are contained in existing § 1910.145. The proposed requirement for safety signs, symbols, and tags does not increase the burden imposed by this existing standard.) This paragraph would also require the use of barricades to limit access to areas containing exposed, energized electric parts. If signs and barricades alone will not adequately protect employees, other means, such as an attendant, must be used to provide the necessary protection.

(6) *§ 1910.399.* OSHA is proposing to apply the definitions in existing § 1910.399 to the entire Subpart S and to remove the paragraph designations from the section. Also, the proposed standard would add a definition for the term "may".

An explanation of the use of the word "may" would also be added to the definitions. To conform to correct grammar and to existing usage in Subpart S, the words "may" and "shall" have been used as follows:

A. If a discretionary right, privilege, or power is conferred, the word "may" has been used. (For example: the employer may restrict access to equipment; i.e., it is permissible for the employer to do this.) Such rules are permissive in nature and are usually used as exceptions to requirements.

B. If a right, privilege, or power is abridged, or if an obligation to abstain from acting is imposed, the word "may" has been used with a restrictive "no," "not," or "only." (For example: (1) No unqualified person may enter restricted areas; (2) unqualified persons may not enter restricted areas; or (3) only qualified persons may enter restricted areas. For all three cases, persons who are not qualified are prohibited from restricted areas.) These requirements are mandatory.

C. If an obligation to act is imposed, the word "shall" has been used. (*For example:* employers shall restrict access to areas containing live parts. This rule is mandatory upon the employer to act.)

The use of these terms in the proposal is consistent with their use in the existing Subpart S.

(7) *Miscellaneous.* Various general industry standards have continued to reference the 1971 NEC, even though the latest revision of Subpart S makes such references unnecessary. Therefore, a number of miscellaneous amendments have also been proposed to substitute references to Subpart S for the current references to the NEC (§§ 1910.68(b)(4) and (c)(5)(iv)(*c*), 1910.94(a)(2)(iii), 1910.103(b)(3)(iii)(*e*), 1910.110 Table H-28, and 1910.178(c)(2)). Other changes

[4] *§ 1910.137 Electrical protective devices.*

[5] Blankets—ANSI/ASTM D1048—1977, Specifications for Rubber Insulating Blankets.
Hoods—ANSI/ASTM D1049—1977, Specifications for Rubber Insulating Covers.
Line Hoses—ANSI/ASTM D1050—1977, Specifications for Rubber Insulating Line Hoses.
Sleeves—ANSI/ASTM D1051—1977, Specifications for Rubber Insulating Sleeves.
Gloves—ANSI/ASTM D120-1977, Specifications for Rubber Insulating Gloves.
Mats—ANSI/ASTM D178—1977, Specifications for Rubber Insulating Matting.
ANSI—American National Standards Institute.
ASTM—American Society for Testing and Materials.

have been proposed to consolidate electrical safety-related work practices in Subpart S and, where possible, eliminate them from other subparts of Part 1910 (§§ 1910.26(c)(3)(viii), 1910.67(b)(4), 1910.180(j), 1910.181(j)(5), 1910.265(c)(12), and 1910.266(c)(6)(xxii). In five other places in Part 1910 (§§ 1910.106(h)(7)(iii)(*a*), 1910.179(g)(1)(i), 1910.252(a)(6)(iv)(*d*)(2), and 1910.261(g)(1)(iv) and (k)(16)), the regulations contain inaccurate references to the electrical standards. OSHA has proposed to revise these provisions so that they refer to Subpart S.

One other proposed revision would remove existing paragraph (b)(1) from § 1910.304. Since this provision relates only to construction work, its inclusion in the General Industry Standard is unnecessary. The same requirement is appropriately contained in § 1926.404(b)(1) of Subpart K of Part 1926, the Construction Safety and Health Standards.

IV. Regulatory Impact Assessment

The Preliminary Regulatory Impact and Flexibility Analysis for the proposed standard on electrical safety-related work practices for general industry was prepared in accordance with the requirements of Executive Order 12291 and the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.). Since the proposed standard is not likely: (1) To have an annual effect on the economy of $100 million; (2) to result in a major increase in costs or prices for consumers, industries, government agencies or geographic regions; or (3) to have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises, the proposal does not constitute a major rule under the cost criteria of Executive Order 12291. However, because of the wide ranging impact of the proposal, OSHA is treating this standard as if it were a major rule.

A. Affected Industries

The standard would apply in some respect to every major SIC economic division with the exception of agriculture, construction, and public administration. In 1984, these affected industries accounted for about 4.5 million firms and a total of 69 million employees.

B. Benefits

The analysis of the benefits of the proposed standard covered the four years from 1984 through 1987 and was performed relative to a baseline reflective of the levels of electrical safety training and electrical safety-related work practices currently found in general industry. OSHA estimates that under current practices, 243 deaths and 7,721 injuries will occur in 1987.

To estimate the potential benefits of the proposed standard or its probable effectiveness in preventing electrical contact injuries (e.g., shock, electrocution), an analysis of differential risk was first performed. The analysis revealed that, in 1987, an estimated 1753 nonfatal and 101 fatal injuries could be avoided if the standard were implemented. The injuries which could be avoided during the first through fourth years are as follows:

Year	No. of nonfatal/ fatal injuries avoided
1984	1,660/96
1985	1,691/97
1986	1,721/99
1987	1,753/101

C. Technical Feasibility and Costs

OSHA has determined that the proposal would be technologically feasible, as all of the provisions can be met by using currently available equipment, facilities, tests, inspections and work practices.

Current practices are used for the cost analysis baseline. In estimating the industrywide costs of complying with the proposed standard, it was assumed that workplaces would incur costs relating to:

—Providing appropriate training to employees, and
—Meeting the requirement of the lockout and tagging provision.

The annual cost of the proposed standard is estimated at $90.8 million (in 1985 dollars).

The allocation of training costs for OSHA's proposed electrical safety work practices standard is based on the categorization of occupations according to the actual or potential risk of injury associated with working on or near exposed live electrical circuitry. Occupations were grouped into high, elevated, and low risk categories based on the level of worker exposure to electrical hazards and the incidence rate of electrical injuries per occupation (see Table 4).

TABLE 4.—OCCUPATIONS REQUIRING TRAINING

Category	Annual electrical injury incidence rate [1]	Occupation	Population to be trained [2]
High Risk—1 hour Training	.933	Electrical Assemblers	337,506
	.933	Electrical Machinery Assemblers	114,406
	.821	Powerline Troubleshooters	166
	.821	Electricians	187,118
	.821	Line Installers/Cable Splicers	552
	.426	Stationary Engr. & Station Oper.	43,861
	.101	AirCond/Heating/Refrig Mechanic	254,227
	.101	Electrical Instrument Repairers	8,442
	.101	Electric Motor Repairers	24,883
	.101	Industrial Machine Repairers	308,857
	.101	Instrument Repairers	36,391
	.101	Maintenance Repairers	658,039
	.050	Computer Service Technicians	69,419
	.050	Electronic Wirers	44,437
	.050	Radio/TV Service Technicians	51,516
	.050	Electronic Technician	376,900

TABLE 4.—OCCUPATIONS REQUIRING TRAINING—Continued

Category	Annual electrical injury incidence rate [1]	Occupation	Population to be trained [2]
Elevated Risk—½ hour Training	.101	Appliance Installers	75,036
	.101	Office Machine Repairers	68,205
	.046	Blue Collar Supervisors	1,067,645
	.046	Petroleum Derrick Operators	19,708
	.046	Crane/Derrick/Hoist Operators	82,641
Low Risk—¼ hour Training	.101	Welders and Flame Cutters	433,721
	.101	Knitting Machine Repairers	8,713
	.101	Loom Fixers	14,604
	.053	Roustabouts	123,328
	.053	Truck Drivers	54,464
	.046	Riggers	17,459
	.010	Electrical Engineers	299,701
Total			4,781,945

[1] *Final Report, Regulatory Assessment of the Impact of the Proposed Electrical Safety-Related Work Practices Standard,* JACA Corporation, Fort Washington, PA, January 1984, Contract #J-9-F-2-0068, p. 4-10.

[2] U.S. Department of Labor, Bureau of Labor Statistics, *National OES Survey-Based Matrix, Industry-Occupation Employment, 1983 and projected 1995 Alternatives* (Washington, DC, U.S. GPO, 1983).

Populations to be trained were taken from the BLS *National OES Survey-Based Matrix, Industry-Occupation Employment, 1983 and Projected 1995 Alternatives.* Incidence rates for all occupations affected by the standard were determined by the following formula:

(Number of SDS Claims/Employment population)x1000.

Dept. of Labor Fatality/Catastrophe and Underwriters Laboratories (UL) electrical injury reports were also utilized to determine, qualitatively, occupations with high electrical hazard exposures. For example, of 208 serious electrical injury and death reports, Electricians accounted for 47 and Powerline Troubleshooters accounted for 38; these occupations were identified as high risk. Line Installers/Cable Splicers accounted for 18 injuries and deaths and Crane Operators accounted for 26; these were placed in the elevated risk category. In the low risk category, Welders and Flame Cutters accounted for 12 injuries and deaths, and Truck Drivers accounted for 15. The UL and Fatality/Catastrophe data sets were generally consistent with the SDS-generated injury incidence rates; occupations with a high incidence rate of electrical injury accounted for a relatively large proportion of the Fatality/Catastrophe and UL reports, and occupations with a low SDS incidence rate generally account for few injuries.

The high risk category includes occupations which require routine work on or near live parts of electric equipment. Injury incidence rates for these occupations ranged between 0.933 (Electrical Assemblers and Electrical Machinery Assemblers) and 0.426 (Power Station Operators and Stationary Engineers). However, some occupations in the high risk category had lower incidence rates ranging from 0.050 (Electrical Technicians and Electronic Wirers) to 0.101 (Electric Motor Repairers, Electrical Instrument Repairers, etc.). Although these occupational groups had relatively low injury incidence rates, they were placed in the high risk category because of their high exposure to electrical hazards.

The elevated risk category includes occupations in which work on or near live parts is not routine but frequent work on live circuitry is expected. This category includes such occupations as Appliance Installers/Repairers and Crane/Derrick/Hoist Operators, with incidence rates of 0.101 and 0.046, respectively.

The low risk occupations do some work on live circuitry but accidental contact is minimal compared with the other occupations. This category includes Welders/Flame Cutters, Knitting Machine Repairers, Loom Fixers, Roustabouts, Truck Drivers, Riggers, and Electrical Engineers. Incidence rates range from 0.101 for Welders to 0.010 for Electrical Engineers.

Based on this categorization scheme, one hour of annual training would be needed for the 2,516,720 employees in the high risk category, one-half hour of training for the 1,313,235 employees in elevated risk jobs, and one-quarter of an hour of training for the 951,990 employees at low risk (Table 4).

The proposed standard may require the training of additional employees who face a risk of injury due to electric shock or other electrical hazards. These employees may be found in occupations other than those listed in the PRIA. The Agency requests information on any individuals or occupational groups which may not have been included in the PRIA. Any comments received will be reviewed and evaluated for incorporation into the final rule and into the Regulatory Impact Assessment that will accompany the final rule.

OSHA did not calculate the cost of procuring electrical protective equipment for compliance with the proposal. Employers are already required to have adequate supplies of rubber insulating equipment by § 1910.132. Therefore, OSHA has concluded that the proposal would not result in a significant purchase of additional protective equipment. The Agency requests information concerning this conclusion, and any comments received will be reviewed and evaluated for incorporation into the final rule and into the Regulatory Impact Assessment that will accompany the final rule. Specifically, OSHA is requesting commenters to answer the following questions:

(1) Do employers possess adequate supplies of the personal and other protective equipment required to comply with the proposed standard?

(2) If not, what items are lacking and at what cost could the requirements be met?

D. Economic Feasibility and Impacts

OSHA has also determined that the proposal would be economically feasible. The potential impacts of compliance on individual firms were evaluated by using financial models of firms in two industries. Industries selected represented a range of diversity with respect to the degree of electrical hazard present and the amount of effort required to comply with the proposed standard. The first-year model firm costs ranged from $52 to $124 for small firms, and from $1,210 to $2,945 for large firms. The analysis revealed that even if the entire cost of compliance were passed forward, the impact would be extremely small. With respect to the standard's potential impact on the profitability of firms, the analysis showed that even if the compliance costs were fully absorbed, profitability as measured by return on assets and profit margin would not be significantly reduced. None of the reductions would exceed 1.0 percent.

E. Regulatory Flexibility Certification

Pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.), OSHA has assessed the impact of the proposed standard and certifies that it would not have a significant impact on a substantial number of small entities. The majority of the firms subject to the proposed standard are small. Using a definition of a small firm as one that employs fewer than 20 workers, nearly 86 percent of the covered firms fall into the "small'" category. The estimated cost of compliance with the proposed standard, however, would result in less than 1.0 percent decrease in profitability. OSHA has determined that, although many small firms would be affected by the proposal, the costs would be easily absorbed and there would be no significant or disproportionate impact on small entities.

F. Preliminary Regulatory Impact Analysis

The preceding discussion summarizes the key findings of the Preliminary Regulatory Impact Analysis (PRIA) of the proposed amendment to Subpart S, Part 1910, prepared by the Office of Regulatory Analysis of the Occupational Safety and Health Administration. The PRIA includes assessments of estimated compliance costs, estimated benefits, risks, small business impact, alternative regulatory and nonregulatory options and a profile of the industry. The PRIA is based on contract work performed for OSHA by JACA Corp. Their report, "Regulatory Assessment of the Impact of the Proposed Electrical Safety-Related Work Practices Standard, Final Report", January 20, 1984, and OSHA's Preliminary Regulatory Impact Analysis are available to the public in Docket S–016. The public is invited to comment on these documents. All comments and other information supplied will be carefully reviewed and evaluated for incorporation into the Regulatory Impact Assessment that will accompany the final rule.

With respect to the PRIA, OSHA is requesting public comment on the following specific issues:

(1) OSHA has estimated that this proposed standard would prevent 85 percent of injuries and fatalities which are "potentially preventable." (See PRIA) "Potentially preventable" means that the causes of the accidents are addressed in this proposed standard. The 85 percent effectiveness rate assumes that, if all covered employers complied with the standard, 15 percent of "potentially preventable" accidents would still occur because of (human error). The 85 percent effectiveness rate depends, in this proposed standard, largely on the assumed effectiveness of employee training in preventing accidents. OSHA requests public comment on whether the 85 percent effectiveness rate is appropriate. If not, what would be the appropriate rate? How effective will the required training be in preventing accidents?

(2) In the PRIA, OSHA assumed 2 minutes of lost productive time for each instance of lockout. (See PRIA) OSHA requests public comment on whether this amount of lost time is appropriate. If not, what is the appropriate amount of time that would be lost?

V. Recordkeeping

This proposal references the requirements for safety signs and tags contained in existing § 1910.145. The paperwork requirements of § 1910.145 have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980 and have been assigned OMB control number 1218–0132. Comments on these requirements as referenced in the proposed standard should be sent to: Desk Officer for OSHA, Room 3208, OMB, 726 Jackson Place NW., Washington, DC 20503.

VI. Public Participation

Interested persons are invited to submit written comments on the proposed standard and to file objections and request a public hearing.

Written data, views and arguments concerning the proposal must be postmarked on or before February 29, 1988, and submitted in quardruplicate to the Docket Office, Docket No. S–016, Rm. N–3670; U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Written submissions must clearly identify the provisions of the proposal which are addressed and the position taken with respect to each issue.

The data, views, and arguments that are submitted will be available for public inspection and copying in the Docket Office between the hours of 8:15 am and 4:45 pm. All timely written submissions received will be made a part of the record of this proceeding.

Under section 6(b)(3) of the Occupational Safety and Health Act, interested persons may file formal objections to the proposal, requesting an informal public hearing, in accordance with the following conditions:

1. The objections must include the name and address of the objector.

2. The objections must be postmarked on or before February 29, 1988, and submitted to the Docket Office, Docket S–016, Room N3670, OSHA, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210;

3. The objections must specify with particularity the provisions of the proposed rule to which objection is taken and must state the grounds therefor;

4. Each objection must be separately stated and numbered; and

5. The objections must be accompanied by a detailed summary of the evidence proposed to be presented at the requested hearing.

OSHA recognizes that there may be interested persons who, through their knowledge of safety or their experience in the operations involved, would wish to endorse or support certain provisions in the standard. OSHA welcomes such supportive comments, including any pertinent accident data or cost information which may be available, in order that the record of this rulemaking will present a balanced picture of the public response on the issues involved.

VII. State Standards

The 23 States and 2 Territories with their own OSHA-approved occupational safety and health plan must adopt a comparable standard within 6 months of the publication date of a final standard. These are: Alaska, Arizona, California,[6] Connecticut,[6] Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York,[6] North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah,

[6] Plan covers only State and local government employees.

Vermont, Virginia, Virgin Islands, Washington, Wyoming. Until such time as a State standard is promulgated, Federal OSHA will provide interim enforcement assistance, as appropriate.

VIII. List of Subjects in 29 CFR Part 1910

Electric power, Fire prevention, Flammable materials, Occupational safety and health, Safety, Signs and symbols, Tools.

IX. Authority

This document was prepared under the direction of John A. Pendergrass, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

Accordingly, pursuant to sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (84 Stat. 1593, 1599, 29 U.S.C. 655, 657), Secretary of Labor's Order No. 9–83 (48 FR 35736), and 29 CFR Part 1911, it is proposed to amend 29 CFR Part 1910 as set forth below.

Signed at Washington, DC this 23rd day of November 1987.

John A. Pendergrass,

Assistant Secretary of Labor.

Part 1910 of Title 29 of the Code of Federal Regulations would be amended as follows:

PART 1910—[AMENDED]

Subpart D—[Amended]

1. The authority citation for Subpart D of Part 1910 would continue to read as follows:

Authority: Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736), as applicable. Sections 1910.23, 1910.24, 1910.25, 1910.26, and 1910.28 also issued under 29 CFR Part 1911.

§ 1910.26 [Amended]

2. Paragraph (c)(3)(viii) of § 1910.26 would be removed.

Subpart F—[Amended]

3. The authority citation for Subpart F of Part 1910 would continue to read as follows:

Authority: Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736), as applicable.

Sections 1910.66, 1910.67, 1910.68, and 1910.70 also issued under 29 CFR Part 1911.

4. Paragraph (b)(4) of § 1910.67 would be revised to read as follows:

§ 1910.67 Vehicle-mounted elevating and rotating work platforms.

* * * * *

(b) * * *

(4) For operations near overhead electric lines, see § 1910.333(c)(3).

* * * * *

5. Paragraphs (b)(4) and (c)(5)(iv)(*c*) of § 1910.68 would be revised to read as follows:

§ 1910.68 Manlifts.

* * * * *

(b) * * *

(4) Reference to other codes and subparts. The following codes, and subparts of this part, are applicable to this section. Safety Code for Mechanical Power Transmission Apparatus ANSI B15.1–1953 (R 1958) and Subpart O; Subpart S; Safety Code for Fixed Ladders, ANSI A14.3–1956 and Safety Requirements for Floor and Wall Openings, Railings and Toeboards, ANSI A12.1–1967 and Subpart D.

* * * * *

(c) * * *

(5) * * *

(iv) * * *

(*c*) Where flammable vapors or combustible dusts may be present, electrical installations shall be in accordance with the requirements of Subpart S of this part for such locations.

* * * * *

Subpart G—[Amended]

6. The authority citation for Subpart G of Part 1910 would continue to read as follows:

Authority: Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736), as applicable.

Sections 1910.94 and 1910.99 also issued under 29 CFR Part 1911.

§ 1910.94 [Amended]

7. The words: "the National Electrical Code, NFPA 70–1971; ANSI C1–1971 (Rev. of C1–1968)" would be removed from paragraph (a)(2)(iii) of § 1910.94 and would be replaced with: "Subpart S of this part".

Subpart H—[Amended]

8. The authority citation for Subpart H of Part 1910 would be revised to read as follows:

Authority: Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736), as applicable. Sections 1910.103, 1910.106, 1910.107, 1910.108, 1910.109, and 1910.110 also issued under 29 CFR Part 1911.

9. Paragraph (b)(3)(iii)(*e*) of § 1910.103 would be revised to read as follows:

§ 1910.103 Hydrogen.

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(*e*) Electric equipment shall be in accordance with the requirements of Subpart S of this part for Class I, Division 2 locations.

* * * * *

10. Section 1910.106 would be amended to remove the acronym "NEC" from the boxheads in Tables H–18 and H–19, and paragraph (h)(7)(iii)(*a*) would be revised to read as follows:

§ 1910.106 Flammable and combustible liquids.

* * * * *

(h) * * *

(7) * * *

(iii) *Electrical.* (*a*) All electric wiring and equipment shall be installed in accordance with Subpart S of this part.

* * * * *

§ 1910.110 [Amended]

11. The words "National Electrical Code" would be removed from the boxhead in Table H–28 in § 1910.110.

Subpart N—[Amended]

12. The authority citation for Subpart N of Part 1910 would continue to read as follows:

Authority: Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736), as applicable.

Sections 1910.177, 1910.178, 1910.179, 1910.183, 1910.184, 1910.189, and 1910.190 also issued under 29 CFR Part 1911.

13. Paragraph (c)(2) of § 1910.178 would be revised to read as follows:

§ 1910.178 Powered industrial trucks.

* * * * *

(c) * * *

(2) For specific areas of use, see Table N–1 which tabulates the information contained in this section. References are to the corresponding classification as used in Subpart S of this part.

* * * * *

14. Paragraph (g)(1)(i) of § 1910.179 would be revised to read as follows:

§ 1910.179 Overhead and gantry cranes.

* * * * *

(g) *Electric equipment*—(1) *General.* (i) Wiring and equipment shall comply with Subpart S of this part.

* * * * *

15. Paragraph (j) of § 1910.180 would be revised to read as follows:

§ 1910.180 Crawler, locomotive, and truck cranes.

* * * * *

(j) *Operations near overhead lines.* For operations near overhead electric lines, see § 1910.333(c)(3).

16. Entire paragraph (j)(5) of §1910.181 would be revised to read as follows:

§ 1910.181 Derricks.

* * * * *

(j) * * *

(5) *Operations near overhead lines.* For operations near overhead electric lines, see § 1910.333(c)(3).

* * * * *

Subpart Q—[Amended]

17. The authority citation for Subpart Q of Part 1910 would be revised to read as follows:

Authority: Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736), as applicable.

Section 1910.252 also issued under 29 CFR Part 1911.

18. Paragraph (a)(6)(iv)(*d*)(*2*) of § 1910.252 would be revised to read as follows:

§ 1910.252 Welding, cutting, and brazing.

(a) * * *

(6) * * *

(iv) * * *

(*d*) * * *

(*2*) Wiring and electric electric equipment in compressor or booster pump rooms or enclosures shall conform to the provisions of Subpart S of this Part for Class I, Division 2 locations.

* * * * *

Subpart R—[Amended]

19.The authority citation for Subpart R of Part 1910 would be revised to read as follows:

Authority: Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736), as applicable.

Sections 1910.261, 1910.262, 1910.265, 1910.266, 1910.267, 1910.268, 1910.274, and 1910.275 also issued under 29 CFR Part 1911.

20. Paragraphs (g)(1)(iv) and (k)(16) of § 1910.261 would be revised to read as follows:

§ 1910.261 Pulp, paper, and paperboard mills.

* * * * *

(g) * * *

(1) * * *

(iv) Electric equipment shall be of the explosion-proof type, in accordance with the requirements of Subpart S of this part.

* * * * *

(k) * * *

(16) *Grounding.* All calender stacks and spreader bars shall be grounded as protection against shock induced by static electricity in accordance with Subpart S of this part.

* * * * *

§ 1910.265 [Amended]

21. Paragraph (c)(12) of § 1910.265 would be removed.

§ 1910.266 [Amended]

22. Paragraph (c)(6)(xxii) of § 1910.266 would be removed.

Subpart S—[Amended]

23. The authority citation for Subpart S of Part 1910 would be revised to read as follows:

Authority: Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 8–76 (41 FR 25059) or 9–83 (48 FR 35736), as applicable; 29 CFR Part 1911.

§ 1910.304 [Amended]

24. Entire paragraph (b)(1) of § 1910.304 would be removed.

25. Sections 1910.331 through 1910.335 would be added to Subpart S to read as follows:

Safety-Related Work Practices

§ 1910.331 Scope.

(a) *Covered work by both qualified and unqualified persons.* The provisions of §§ 1910.331 through 1910.335 cover electrical safety-related work practices for both qualified and unqualified persons working on, near, or with the following installations:

(1) *Premises wiring.* Installations of electric conductors and equipment within or on buildings or other structures, and on other premises such as yards, carnival, parking, and other lots, and industrial substations;

(2) *Wiring for connection to supply.* Installations of conductors that connect to the supply of electricity; and

(3) *Other wiring.* Installations of other outside conductors on the premises.

(4) *Optical fiber cable.* Installations of optical fiber cable where such installations are made along with electric conductors.

(b) *Other covered work by unqualified persons.* The provisions of §§ 1910.331 through 1910.335 also cover work performed by unqualified persons, on, near, or with the installations listed in paragraphs (c)(1) through (c)(4) of this section.

(c) *Excluded work by qualified persons.* The provisions of §§ 1910.331 through 1910.335 do not apply to work performed by qualified persons on or directly associated with the following installations:

(1) *Generation, transmission, and distribution installations.* Installations for the generation, control, transformation, transmission, and distribution of electric energy (including communication and metering) located in buildings used for such purposes or located outdoors.

Note.—Work associated with installations of utilization equipment used for other purposes (such as installations which are in office buildings, warehouses, garages, machine shops, recreational buildings, or other utilization systems and which are not an integral part of a generating plant, substation, or control center) is covered under paragraph (a) (1) of this section.

(2) *Communications installations.* Installations of communication equipment to the extent that the work is covered under § 1910.268.

(3) *Installations in vehicles.* Installations in ships, watercraft, railway rolling stock, aircraft, or automotive vehicles other than mobile homes and recreational vehicles.

(4) *Railway installations.* Installations of railways for generation, transformation, transmission, or distribution of power used exclusively for operation of rolling stock or installations of railways used exclusively for signaling and communication purposes.

§ 1910.332 Training.

(a) *Scope.* The training requirements contained in this section apply to employees in occupations listed in Table S–4. The training requirements in this section also apply to other employees who may reasonably be expected to face a risk of injury due to electric shock or other electrical hazards greater than or equal to the risk faced by employees in occupations listed in Table S–4.

(b) *Content of training*—(1) *Practices addressed in this standard.* Employees shall be trained in and familiar with the safety-related work practices required by §§ 1910.331 through 1910.335 that pertain to their respective job assignments.

(2) *Additional requirements for unqualified persons.* Employees who are covered by paragraph (a) of this section but who are not qualified persons shall also be trained in and familiar with any electrically related safety practices not specifically addressed by §§ 1910.331 through 1910.335 but which are necessary for their safety.

(3) *Additional requirements for qualified persons.* Qualified persons, i.e., those permitted to work on or near exposed energized parts, shall at a minimum be trained in and familiar with:

(i) The skills and techniques necessary to distinguish exposed live parts from other parts of electric equipment,

(ii) The skills and techniques necessary to determine the nominal voltage of exposed live parts, and

(iii) The clearance distances specified in § 1910.333(c) and the corresponding voltages to which the qualified person will be exposed.

Note 1: For the purposes of §§ 1910.331 through 1910.335, a person must have this training in order to be considered a qualified person.

Note 2: Qualified persons who work on energized equipment involving either direct contact or contact by means of tools or materials must also have the training needed to meet § 1910.333(c)(2).

(c) *Type of training.* The training required by this section shall be of the classroom or on-the-job type. The degree of training provided shall be determined by the risk to the employee.

TABLE S–4.—TYPICAL OCCUPATIONAL CATEGORIES OF EMPLOYEES FACING A HIGHER THAN NORMAL RISK OF ELECTRICAL ACCIDENTS

Occupation
Electricians.
Mechanics and repairers.
Electrical and electronic technicians.
Electrical and electronic equipment assemblers.
Stationary engineers.
Material handling equipment operators.
Electrical and electronic engineers.
Blue collar supervisors.
Welders.
Riggers and roustabouts.

§ 1910.333 Selection and use of work practices.

(a) *General.* Safety-related work practices shall be employed to prevent electric shock or other injuries resulting from either direct or indirect electrical contacts, when work is performed near or on equipment or circuits which are or may be energized. The specific safety-related work practices shall be consistent with the nature and extent of the associated electrical hazards.

(1) *Deenergized parts.* Live parts to which an employee may be exposed shall be deenergized before the employee works on or near them, unless the employer can demonstrate that deenergizing introduces additional or increased hazards or is infeasible due to equipment design or operational limitations.

Note 1: Examples of increased or additional hazards include interruption of life support equipment, shutdown of hazardous location ventilation equipment, or removal of illumination for an area.

Note 2: Work on or near deenergized parts is covered by paragraph (b) of this section.

(2) *Energized parts.* If the exposed live parts are not deenergized (i.e., for reasons of increased or additional hazards or infeasibility), then other safety-related work practices shall be used to protect employees who may be exposed to the electrical hazards involved. Such work practices shall protect employees against contact with energized circuit parts directly with any part of their body or indirectly through some other conductive object. The work practices that are used shall be suitable for the conditions under which the work is to be performed and for the voltage level of the exposed electric conductors or circuit parts. Specific work practice requirements are detailed in paragraph (c) of this section.

(b) *Working on or near exposed deenergized parts*—(1) *Application.* This paragraph applies to work on exposed deenergized parts or near enough to them to expose the employee to any electrical hazard they present. Conductors and parts of electric equipment that have been deenergized but have not been locked out or tagged in accordance with paragraph (b) of this section shall be treated as energized parts, and paragraph (c) of this section applies to work on or near them.

(2) *Lockout and tagging.* While any employee is exposed to contact with parts of fixed electric equipment or circuits which have been deenergized, the circuits energizing the parts shall be locked out or tagged or both in accordance with the requirements of this paragraph. The requirements shall be followed in the order in which they are presented (i.e., paragraph (b) (2) (i) first, then paragraph (b) (2) (ii), etc.).

Note: As used in this section, fixed equipment refers to equipment fastened in place or connected by permanent wiring methods.

(i) *Deenergizing equipment.* (A) Safe procedures for deenergizing circuits and equipment shall be determined before circuits or equipment are deenergized.

(B) The circuits and equipment to be worked on shall be disconnected from all electric energy sources. Control circuit devices, such as push buttons, selector switches, and interlocks, may not be used as the sole means for deenergizing circuits or equipment. Interlocks for electric equipment may not be used as a substitute for lockout and tagging procedures.

(C) Stored electric energy which might endanger personnel shall be released. Capacitors shall be discharged and high capacitance elements shall be short-circuited and grounded, if the stored electric energy might endanger personnel.

Note: If the capacitors or associated equipment are handled in meeting this requirement, they shall be treated as energized.

(ii) *Application of locks and tags.* (A) A lock and a tag shall be placed on each disconnecting means used to deenergize circuits and equipment on which work is to be performed, except as provided in paragraphs (b) (2) (ii) (C) and (b) (2) (ii) (D) of this section. The lock shall be attached so as to prevent persons from operating the disconnecting means unless they resort to undue force or the use of tools.

(B) Each tag shall contain a statement prohibiting unauthorized operation of the disconnecting means and removal of the tag.

(C) If a lock cannot be applied, or if the employer can demonstrate that tagging procedures will provide safety equivalent to that of a lock, a tag may be used without a lock. In such cases, the following additional requirements shall be met:

(*1*) The tags shall be of a distinctive, employer-standardized design that clearly prohibits unauthorized energizing of the circuits and removal of the tag.

(*2*) A tag may not be used without an additional safety measure such as the removal of an isolating circuit element, blocking of a controlling switch, or opening of an extra disconnecting device.

(*3*) All persons who have access to controlling devices shall be trained in and familiar with the employer's tagging procedures.

(D) A lock may be placed without a tag only under the following conditions:

(*1*) Only one circuit or piece of equipment is deenergized, and

(*2*) The lockout period does not extend beyond the work shift, and

(*3*) Affected employees are familiar with this procedure.

(iii) Verification of deenergized condition. The requirements of this paragraph shall be met before any circuits or equipment can be considered and worked as deenergized.

(A) A qualified person shall operate the equipment operating controls or otherwise verify that the equipment cannot be restarted.

(B) A qualified person shall use test equipment to test the circuit elements

and electrical parts of equipment to which employees will be exposed and shall verify that the circuit elements and equipment parts are deenergized. The test shall also determine if any energized condition exists as a result of inadvertently induced voltage or unrelated voltage backfeed even though specific parts of the circuit have been deenergized and presumed to be safe. If the circuit to be tested is over 600 volts, nominal, the test equipment shall be checked for proper operation immediately before and immediately after this test.

(iv) *Reenergizing equipment.* These requirements shall be met, in the order given, before circuits or equipment are re-energized, even temporarily.

(A) A qualified person shall conduct tests and visual inspections, as necessary, to verify that all tools, electrical jumpers, shorts, grounds, and other such devices have been removed, so that the circuits and equipment can be safely energized.

(B) All affected employees shall be notified to stay clear of circuits and equipment.

(C) Locks and tags shall be removed.

(D) There shall be a visual determination that all employees are clear of the circuits and equipment.

(3) *Interlocks.* Only qualified persons following the requirements of paragraph (c) of this section may defeat electrical interlocks, and then only temporarily while work is being performed on the equipment. The interlock system shall be returned to its operable condition when this work is completed.

(c) *Working on or near exposed energized parts.*—(1) *Application.* This paragraph applies to work performed on exposed live parts (involving either direct contact or contact by means of tools or materials) or near enough to them for employees to be exposed to any hazard they present.

(2) *Work on energized equipment.* Only qualified persons may work on electric circuit parts or equipment that have not been deenergized under the procedures of paragraph (b) of this section. Such persons shall be capable of working safely on energized circuits and shall be familiar with the proper use of special precautionary techniques, personal protective equipment, insulating and shielding materials, and insulated tools.

(3) *Overhead lines.* If work is to be performed near overhead lines, the lines shall be deenergized and grounded, or other protective measures shall be provided before work is started. If the lines are to be deenergized, arrangements shall be made with the person or organization that operates or controls the electric circuits involved to deenergize and ground them. If protective measures are provided such as guarding, isolating, or insulating, these precautions shall prevent employees from contacting such lines directly with any part of their body or indirectly through conductive materials, tools, or equipment.

(i) *Unqualified persons.* (A) When an unqualified person is working in an elevated position near overhead lines, the location shall be such that the person and the longest conductive object he or she may contact cannot come closer to any unguarded, energized overhead line than the following distances:

(*1*) For voltages to ground 50kV or below—10 ft. (305 cm);

(*2*) For voltages to ground over 50kV—10 ft. (305 cm) plus 4 in. (10 cm) for every 10kV over 50kV.

(B) When an unqualified person is working on the ground in the vicinity of overhead lines, the person may not bring any conductive object closer to unguarded, energized overhead lines than the distances given in paragraph (c)(3)(i)(A) of this section.

Note: For voltages normally encountered with overhead power lines, objects which do not have an insulating rating for the voltage involved are considered to be conductive.

(ii) *Qualified persons.* When a qualified person is working in the vicinity of overhead lines, whether in an elevated position or on the ground, the person may not approach or take any conductive object without an approved insulating handle closer to exposed energized parts than shown in Table S–5 unless:

(A) The person is insulated from the energized part (gloves or gloves with sleeves rated for the voltage involved are considered to be insulation of the person from the energized part on which work is performed), or

(B) The energized part is insulated from any other conductive object at a different potential and from the person, or

(C) The person is insulated from all conductive objects at a potential different from the energized part.

TABLE S–5.—ALTERNATING CURRENT—APPROACH DISTANCES

Voltage range (phase to phase)	Minimum approach distance
300V and less	(1)
Over 300V, not over 750V.	1 ft. 0 in. (30.5 cm).
Over 750V, not over 2kV.	1 ft. 6 in. (46 cm).
Over 2kV, not over 15kV.	2 ft. 0 in. (61 cm).
Over 15kV, not over 37kV.	3 ft. 0 in. (91 cm).
Over 37kV, not over 87.5kV.	3 ft. 6 in. (107 cm).
Over 87.5kV, not over 121kV.	4 ft. 0 in. (122 cm).
Over 121kV, not over 140kV.	4 ft. 6 in. (137 cm).

[1] Avoid contact.

(iii) *Vehicular and mechanical equipment.* (A) Any vehicle or mechanical equipment capable of having parts of its structure elevated near energized overhead lines shall be operated so that a clearance of 10 ft. (305 cm) is maintained. If the voltage is higher than 50kV, the clearance shall be increased 4 in. (10 cm) for every 10kV over that voltage. However, under any of the following conditions, the clearance may be reduced:

(*1*) If the vehicle is in transit with its structure lowered, the clearance may be reduced to 4 ft. (122 cm).

(*2*) If insulating barriers are installed to prevent contact with the lines, and if the barriers are rated for the voltage of the line being guarded and are not a part of or an attachment to the vehicle or its raised structure, the clearance may be reduced to a distance within the designed working dimensions of the insulating barrier.

(*3*) If the equipment is an aerial lift insulated for the voltage involved, and if the work is performed by a qualified person, the clearance may be reduced to the distance given in Table S–5.

(B) Employees standing on the ground may not contact the vehicle or mechanical equipment or any of its attachments, unless:

(*1*) The employee is using protective equipment rated for the voltage; or

(*2*) The equipment is located so that no part of its structure can come closer to the line than permitted in paragraph (c)(3)(iii) of this section.

(C) If any vehicle or mechanical equipment capable of having parts of its structure elevated near energized overhead lines is intentionally grounded, employees working on the ground near the point of grounding may not stand at the grounding location whenever there is a possibility of overhead line contact.

Additional precautions, such as the use of barricades or insulation, shall be taken to protect employees from hazardous ground potentials, depending on earth resistivity and fault currents, which can develop within the first few feet outward from the grounding point.

(4) *Illumination.* (i) Employees may not enter spaces containing exposed energized parts, unless illumination is provided to enable the employees to perform the work safely.

(ii) Where lack of illumination or an obstruction precludes observation of the work to be performed, employees may not perform tasks near exposed energized parts. Employees may not reach blindly into areas which may contain energized parts.

(5) *Confined or enclosed work spaces.* When working in confined or enclosed spaces (such as manholes or vaults) that contain exposed energized parts, employees shall take precautions (such as the use of protective shields, protective barriers, or insulating materials) to avoid inadvertent contact with these parts. Doors, hinged panels and the like shall be secured to prevent their swinging into an employee and causing the employee to contact exposed energized parts.

(6) *Conductive materials and equipment.* Conductive materials and equipment that are in contact with any part of an employee's body shall be handled in a manner that will prevent them from contacting exposed energized conductors or circuit parts. If employees handle long dimensional conductive objects (such as ducts and pipes) in areas with exposed live parts, the employer shall institute work practices which will minimize the hazard.

(7) *Portable ladders.* Portable metal ladders and ladders with longitudinal metallic reinforcement may not be used wherever the employee might contact exposed energized parts.

(8) *Conductive apparel.* Conductive articles of jewelry and clothing (such as watch bands, bracelets, rings, key chains, necklaces, metalized aprons, cloth with conductive thread, or metal headgear) may not be worn if they might contact exposed energized parts. The contact hazard may be eliminated if such articles are rendered nonconductive by covering, wrapping, or other insulating means.

(9) *Housekeeping duties.* Where live parts present an electrical contact hazard, employees may not perform housekeeping duties at such close distances to the parts that there is a possibility of contact, unless adequate safeguards (such as insulating equipment or barriers) are provided. Electrically conductive cleaning materials (including conductive solids such as steel wool, metalized cloth, and silicon carbide as well as conductive liquid solutions) may not be used in proximity of energized parts unless procedures are followed which will prevent electrical contact.

§ 1910.334 Use of equipment.

(a) *Portable electric equipment.* This paragraph applies to the use of cord- and plug-connected equipment, including flexible cord sets (extension cords).

(1) *Handling.* Portable equipment shall be handled in a manner which will not cause damage. Flexible electric cords connected to equipment may not be used for raising or lowering the equipment. Flexible cords may not be fastened with staples or otherwise hung in such a fashion as to damage the outer jacket or insulation.

(2) *Visual inspection.* (i) Portable cord- and plug-connected equipment and flexible cord sets (extension cords) shall be visually inspected before use on any shift for external defects (such as loose parts, deformed and missing pins, or damage to outer jacket or insulation) and for evidence of possible internal damage (such as pinched or crushed outer jacket). Cord- and plug-connected equipment and flexible cord sets (extension cords) which remain connected once they are put in place and are not exposed to damage need not be visually inspected until they are relocated.

(ii) If there is a defect or evidence of damage that might expose an employee to injury, no employee may use the defective or damaged item until necessary repairs and tests have been made.

(iii) When an attachment plug is to be connected to a receptacle (including any on a cord set), the relationship of the plug and receptacle contacts shall first be checked to ensure that they are of mating configurations.

(3) *Grounding-type equipment.* (i) A flexible cord used with grounding-type equipment shall contain an equipment grounding conductor.

(ii) Attachment plugs and receptacles may not be connected or altered in a manner which would prevent proper continuity of the equipment grounding conductor at the point where plugs are attached to receptacles. Additionally, these devices may not be altered to allow the grounding pole of a plug to be inserted into slots intended for connection to the current-carrying conductors.

(iii) Adapters which interrupt the continuity of the equipment grounding connection may not be used.

(4) *Conductive work locations.* Portable electric equipment and flexible cords used in highly conductive work locations (such as those inundated with water or other conductive liquids), or in job locations where employees are likely to contact water or conductive liquids, shall be approved for those locations.

(5) *Connecting attachment plugs.* (i) Employees' hands may not be wet when plugging and unplugging flexible cords and cord- and plug-connected equipment.

(ii) Locking-type connectors shall be properly secured after connection.

(b) *Electric power and lighting circuits*—(1) *Routine opening and closing of circuits.* Load rated switches, circuit breakers, or other devices specifically designed as disconnecting means shall be used for the routine opening, reversing, or closing of circuits under load conditions. Nonloadbreak cable connectors, fuses, terminal lugs, and cable splice connections may not be used for such purposes.

(2) *Reclosing circuits after protective device operation.* After a circuit is deenergized by a circuit protective device, the circuit may not be manually reenergized until it has been determined that the equipment and circuit can be safely energized. The repetitive manual reclosing of circuit breakers or reenergizing circuits through replaced fuses is prohibited.

(3) *Overcurrent protection modification.* Overcurrent protection of circuits and conductors may not be modified, even on a temporary basis, beyond that allowed by § 1910.304(e).

(c) *Test instruments and equipment*—(1) *Use.* Only qualified persons may perform testing work on electric circuits or equipment.

(2) *Visual inspection.* Test instruments and equipment and all associated test leads, cables, power cords, probes, and connectors shall be visually inspected for external defects and damage before the equipment is used. If there is evidence of defects or damage that might expose an employee to injury, the defective or damaged item shall be removed from service until any necessary repairs and tests have been made.

(3) *Rating of equipment.* Test instruments and equipment and their accessories shall be rated for the circuits and equipment to which they will be connected and shall be designed for the environment in which they will be used.

(d) *Occasional use of flammable or ignitible materials.* When flammable or ignitible materials are occasionally

used, or when work practices may result in hazardous accumulations of suspended or layered combustible dust in locations not classified as hazardous under § 1910.307, electric equipment capable of releasing sufficient electric or thermal energy to ignite these materials or dust accumulations may not be energized unless measures are taken to prevent hazardous conditions from developing.

§ 1910.335 Safeguards for personnel protection.

(a) *Use of protective equipment*—(1) Personal protective equipment. (i) Employees working in areas where there are potential electrical hazards shall be provided with electrical protective equipment that is appropriate for the specific parts of the body to be protected and for the work to be performed.

Note.—Personal protective equipment requirements are contained in Subpart I of this part.

(ii) Protective equipment shall be maintained in a safe, reliable condition and shall be periodically inspected or tested.

(iii) If the insulating capability of protective equipment may be subject to damage during use, the insulating material shall be protected. (For example, an outer covering of leather is sometimes used for the protection of rubber insulating material.)

(iv) Employees shall wear nonconductive head protection wherever there is a danger of head injury from electric shock or burns due to contact with exposed energized parts.

(v) Employees shall wear protective equipment for the eyes or face wherever there is danger of injury to the eyes or face from electric arcs or flashes or from flying objects resulting from electrical explosion.

(2) *General protective equipment and tools.* (i) When working near exposed energized conductors or circuit parts, employees shall use insulated tools or handling equipment if the tools or handling equipment might might make contact with such conductors or parts. If the insulating capability of insulated tools or handling equipment is subject to damage, the insulating material shall be protected.

(A) Fuse handling equipment, insulated for the circuit voltage, shall be used to remove or install fuses when the fuse terminals are energized.

(B) Ropes and handlines used near exposed energized parts shall be nonconductive.

(ii) Protective shields, protective barriers, or insulating materials shall be used to protect employees from shock, burns, or other electrically related injuries while they are working near exposed energized parts which might be accidentally contacted or where dangerous electric heating or arcing might occur. When normally enclosed live parts are exposed for maintenance or repair, they shall be guarded to protect unquilified persons from contact with the live parts.

(b) *Alerting techniques.* The following alerting techniques shall be used to warn and protect employees from hazards which could cause injury due to electric shock, burns, or failure of electric equipment parts:

(1) *Safety signs and tags.* Safety signs, safety symbols, or accident prevention tags shall be used where necessary to warn employees about electrical hazards which may endanger them, as required by § 1910.145.

(2) *Barricades.* Barricades shall be used in conjunction with safety signs where it is necessary to prevent or limit employee access to work areas exposing employees to uninsulated energized conductors or circuit parts. Conductive barricades may not be used where they might cause an electrical contact hazard.

(3) *Attendants.* If signs and barricades do not provide sufficient warning and protection from electrical hazards, an attendant shall be stationed to warn and protect employees.

26. The numbered paragraph designations (1) through (137) would be removed from the definitions in paragraph (a) of § 1910.399.

27. Reserved paragraphs (b), (c), and (d), of § 1910.399 would be removed, and both the paragraph (a) designation and the heading "Definitions applicable to §§ 1910.302 through 1910.330" would be removed from paragraph (a) of § 1910.399.

28. A definition of "may" between the definitions of "location" and "medium voltage cable" in § 1910.399 would be added to read as follows:

§ 1910.399 Definitions applicable to this subpart.

* * * * *

May. If a discretionary right, privilege, or power is conferred, the word "may" is used. If a right, privilege, or power is abridged or if an obligation to abstain from acting is imposed, the word "may" is used with restrictive "no," "not," or "only." (E.g., no employer may * * *; an employer may not * * *; only qualified persons may * * *.)

* * * * *

[FR Doc. 87-27285 Filed 11-27-87; 8:45 am]
BILLING CODE 4510-26-M

Federal Register

Monday
November 30, 1987

Part III

Department of Education

34 CFR Part 674

Perkins Loan Program; Final Regulations

34 CFR Part 673

Income Contingent Loan Program Demonstration Project; Notice of Proposed Rulemaking

DEPARTMENT OF EDUCATION

34 CFR Part 674

Perkins Loan Program

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary of Education amends Subpart C of the regulations for the Perkins Loan Program (formerly the National Direct Student Loan Program). The regulations are amended as a result of the Secretary's review of current regulations. These regulations are being amended to streamline the loan collection process, reorganize current regulations, and increase the effectiveness of current collection efforts in light of the Department's experience and the comments of the General Accounting Office regarding institutional loan management practices.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register** or later if Congress takes certain adjournments, with the exception of §§ 674.42, 674.43, 674.45, 674.47, 674.48, 674.49 and 674.50. Sections 674.42, 674.43, 674.45, 674.47, 674.48, 674.49, and 674.50 will become effective after the information collection requirements contained in those sections have been submitted by the Department of Education and approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Margaret O. Henry, Gail Cornish, or Kathy Gause, U.S. Department of Education, Office of Student Financial Assistance, 400 Maryland Avenue, SW., (Regional Office Building 3, Room 4018) Washington, DC 20202. Telephone number (202) 732–4490.

SUPPLEMENTARY INFORMATION: The Higher Education Amendments of 1986 (Pub. L. 99–498) changed the name of the National Direct Student Loan Program to the Perkins Loan Program. Under the Perkins Loan Program, title IV–E of the Higher Education Act of 1965, as amended (HEA), institutions of higher education may receive Federal funds to make loans to students. Subpart C of the Perkins Loan Program regulations requires each institution which participates in the program to inform borrowers of their rights and responsibilities, to attempt to collect from borrowers, and, under certain conditions, to sue defaulted borrowers.

There has been a growing concern about the number of borrowers who have failed to repay their Perkins Loans. Studies have indicated that institutions need to strengthen collection efforts in order to decrease the number of borrowers who default on their loans. The Secretary has amended Subpart C of the Perkins Loan regulations in an effort to strengthen the due diligence requirements. These regulations reflect changes made by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. 99–272, and adopted in the Higher Education Amendments of 1986, Pub. L. 99–498.

The following is a discussion of these final regulations. A summary of the comments received and the Department's response to those comments is attached as an appendix to these regulations.

Revisions to the Notice of Proposed Rulemaking

Only a few significant changes have been made to the Notice of Proposed Rulemaking (NPRM) published on February 26, 1985, 50 FR 7672.

Section 674.41 Due diligence—general requirements

- The Secretary has changed the time for billing the endorser of a promissory note, if there has been no satisfactory response from the borrower, from after the first overdue notice to after the final demand letter.

Section 674.42 Contact with the borrower

- The disclosures required under this section are revised slightly to reflect provisions regarding late charges and collection costs enacted in the recent amendments.
- Section 463A(a)(7) of the HEA was amended to include a requirement that the borrower be advised of the potential liability for collection costs in the event of default; that section already required disclosure of potential late charges imposed pursuant to section 464(c)(1)(H).
- Section 674.42 of these regulations has been revised to implement these expanded disclosure requirements regarding late charges and collection costs on defaulted loans. Corresponding changes have been made in §§ 674.43(b), 674.45(e), 674.47 (a) and (b).

Section 674.43 Billing procedures

- The Secretary has deleted the requirement that institutions must send final demand letters by certified mail.
- Section 464(c)(1)(H) of the HEA, as amended recently, increased the late charge to be assessed for missed installment payments for loans made for periods of enrollment beginning after January 1, 1986 to an amount, set in accordance with regulations, not to exceed 20 percent of the monthly payment. Institutions are permitted by revised section 464(c)(4) of the HEA to capitalize the late charge on the day after the installment due date, or to demand that the late charge be paid on or before the due date of the next installment. Consistent with the intent of this amendment, the final rule requires the institution to assess a late charge, and allows the institution discretion in the manner in which it calculates the amount of the charge, up to the statutory ceiling of 20 percent of the late payment.
- The Secretary has expanded this section to clarify the manner in which Perkins Loan funds must be deposited. These funds must be invested either in interest-bearing insured or collateralized bank accounts, or in low-risk income-producing securities such as obligations issued or guaranteed by the United States, and the institution must exercise the level of care in making these investments required of a fiduciary. The institution may deduct from the interest earned any charges directly related to the deposit of the funds in interest-bearing accounts.
- To provide adequate warning and notice of acceleration of a loan to the debtor, the Secretary has added the requirement that an institution that accelerates a loan must send the borrower both a notice of its intent to accelerate the debt and a second notice on or after the date of acceleration containing the actual date of the acceleration. The warning may be included in the final demand letter and the notice of actual date of accelaration, in subsequent correspondence.

Section 674.45 Collection procedures

- The proposed rule required an institution to select credit bureaus to receive information regarding defaulted loan accounts on the basis of the geographic area from which the institution drew its student body. The proposal was intended to ease the burden on the institution by assuming that a major portion of these students would return to that general area.
- Some schools can identify specific areas to which these students have relocated, and may wish to select bureaus that serve those areas instead. Section 674.50 has been revised to permit the institution to select reporting bureaus on the basis of either current graduate residence or drawing area.
- The Secretary has extended from 9 months to 12 months the period during

which the institution may permit a collection firm to attempt to bring a defaulted account into regular repayment status.

If the institution or the firm it engages fails to convert the defaulted account to regular repayment status after 12 months, the institution is required to litigate or make a second effort to collect the account in accordance with precedures described in these regulations.

• New section 484A of the Higher Education Act, added by Pub. L. 99–272, clarifies the consequences of default as subjecting the defaulting borrower to liability for reasonable collection costs, in addition to other charges specified in the law, such as late charges. The statute makes this liability effective without regard for any contrary provision of State law.

• These regulations strongly encourage, and in some cases require, the use of collection firms to attempt recovery from those debtors who have not responded to the institution's own efforts. Collection firms commonly charge institutions on a contingent fee basis; the Department has in the past encouraged, but not required, an institution to attempt to recover this charge from the borrower. Courts in some States limit the ability of a creditor to recover from the debtor the full amount of a contingent fee charge; however, these limitations, as a matter of Federal law, no longer apply to the collection of loans made under the Title IV HEA programs, including the NDSL and Perkins Programs. Section 484A(b) of the HEA specifically provides that "notwithstanding any provision of State law to the contrary," the debtor is liable for "reasonable collection costs." By specifically preempting *any* State law to the contrary, this Federal statutory authority displaces any State law that bars recovery from the debtor of collection costs is general. Furthermore, this authority also preempts any State law—including case law—that regards contingent fee charges as not "reasonable collection costs," and bars their recovery from the debtor. The determination of what constitutes "reasonable collection costs" for enforcement of Title IV loan obligations, including NDSL and Perkins program loans, is now a matter of Federal law, and Federal law and policy clearly support the imposition on the defaulting borrower of contingent fees charged for collecting student loans.

Federal policy with regard to collection of contingent fee charges is set forth in the statutes and regulations governing the collection activities of Federal agencies, including those of the Department with regard to the defaulted loans it holds. Federal law specifically authorizes Federal agencies to use collection contractors to collect their debts, 31 U.S.C. 3718, and to impose on delinquent debtors the costs of collecting those debts. 31 U.S.C. 3717(e). Congress clearly understood that these contractors would be paid on a contingent fee basis, Sen. Rep. No. 378, 97th Cong. 2d Sess. 19, 30, 31 (1982), and the Department of Justice and the General Accounting Office, in regulations governing Federal debt collection activity, direct agencies to charge debtors with the costs of collecting delinquent accounts, including the cost of using "a private debt collection contractor." 4 CFR 102.13(d). This authority to recover contingent fee charges from defaulters whose loans are held by the Department clearly establishes that under Federal law and policy, "collection costs" include contingent fees charged to collect any defaulted Title IV student loan, whether held by the Department or an institution.

The determination of what constitutes a "reasonable" collection cost is also governed by Federal law; based on the factors addressed in these statutes and regulations, the Secretary believes that this determination must be made on the basis of what is reasonable from the perspective of the holder of the federally financed student loan obligation; if the cost is reasonably incurred by the holder, the full amount of that cost is a "reasonable collection cost" within the meaning of section 484A(b) and recoverable from the debtor. Under this norm, the Secretary considers the full amount of contingent fees charged the institution to be reasonable collection costs for several reasons. First, the Secretary has determined, based on the Department's experience with its own debts and its experience with debt collection in the Perkins program, that the protection of the substantial Federal investment in the institution's student loan receivables warrants the use of commercial debt collection contractors, which provide added staff and expertise that many institutions lack to handle more difficult accounts. This resource is generally available only under a contingent fee contract; therefore, contingent fee costs are *reasonable* collection costs because they must be incurred to implement the Department's determination that collection firm services are necessary to protect the Fund.

Second, the contingent fee agreements reached by Federal agencies are the result of competitive selection process, as Congress directed; the resulting fee charges are thus reasonable when measured by the standard set by Congress. The Secretary therefore considers the full amount of a contingent fee resulting from a bona fide attempt by the institution to secure competitive rates for these services, by formal bidding procedures or other appropriate measures, to be a "reasonable" collection cost, as that term is used in section 484A(b).

Third, the Secretary considers contingent fees incurred in the manner descried here to be "reasonable" collection costs in light of the stage of delinquency and place in the collection process of loans on which they are incurred. These regulations direct institutions to work defaulted accounts through the billing cycle before engaging the more costly services of a collection firm. The debtor is given a reasonable opportunity to resolve the debt with the institution before the cost of the contingent fee is imposed, and the added cost of contingent fee liability is incurred by the institution only after less expensive means of collection have proven unsuccessful.

For these reasons, the Secretary concludes that regardless of any contrary provision of State law, Federal law authorizes institutions to charge debtors the full amount of reasonably-negotiated contingent fees charged to collect loans; moreover, to the extent that a debt collector seeks to recover these charges on behalf of the institution, this Federal preemption necessarily extends to its actions as agent of the institution with regard to these loans.

In the past, an institution that used a collection firm and intended to pass on to the debtor the cost incurred in paying the collection firm was directed to include in the promissory note a provision specifying that the amount charged the borrower would not exceed 25 percent of the outstanding principal and interest due on the loan. This direction was based on an interpretation by staff of the Federal Trade Commission that section 808 of the Fair Debt Collection Practices Act required a specific identification of the type and amount of such charges. The FTC has since revised this position, 45 FR 8027, March 7, 1986, and the Department has removed this provision from the model promissory note recently disseminated to the public for use for the 1987–88 award year.

Although institutions now have authority under section 484A to pass on the full amount of reasonable collection costs, they cannot do so where they have agreed in the promissory note to limit the amount charged the debtor.

Since 1981, many borrowers have received loans under promissory notes which contain the 25 percent limitation on liability for collection firm charges; these agreements limit the amount of the contingent fee which the institution may collect from the borrower to an amount which does not cover the cost typically incurred for collection firm services. In those instances in which a borrower who received advances under a promissory note which included the 25 percent limitation seeks new advances, however, the institution has an opportunity to remove this limitation. Under section 464(a)(1) an institution has the authority to establish the terms and conditions on which it will make loans to students, subject to limitations imposed by Department regulations.

The Secretary considers the securing of a borrower's agreement to pay all reasonable collection costs to be a singularly appropriate purpose for use of this institutional authority, and therefore the Secretary strongly encourages the institution to make new advances to a borrower whose note contains this 25 percent limitation, only if the borrower agrees that the terms of the new promissory note will apply to repayment of the funds previously advanced. The terms of the new note must include a general provision for payment of collection costs, as well as agreement to repay attorney fees incurred in collecting the loan.

The institution should list on the new promissory note the dates, amounts, and interests rates of those advances previously recorded on the old promissory note, secure the dated signature of the borrower as acknowledging the advances, and mark the old note to state clearly that the new note is substituted for the old note as the embodiment of the loan agreement. The same considerations obviously apply to the terms of any repayment agreements entered into by institutions with delinquent borrowers; such agreements should include comparable provisions for payment of late charges, collection costs, and attorney fees.

As with the treatment of costs incurred because of tardiness in making payments and imposed on the borrower as late charges, the institution has discretion to determine the amount of collection costs to be imposed on the borrower based on either the actual expenses incurred in handling that account, or on reasonably determined averages of costs it incurs handling similar loans in similar stages of delinquency. In either case, the institution should explain to the borrower the manner in which it calculates these costs, and be able to document the basis for the costs it assesses against the borrower. The latter is not a new program requirement; rather, the institution may now be called on to demonstrate to the borrower the same cost analysis it has previously used to support charges of these collection costs to the Fund. Collection costs not recovered from the borrower continue to be chargeable to the Fund, with certain limitations.

Section 674.46 Litigation procedures.

• The Secretary continues to believe that under certain circumstances, litigating accounts of as little as $200 is realistic and cost-effective. Current regulations require the institution to litigate when it determines that the debtor has resources sufficient to permit recovery of the amount owed on the loan. These final rules also require litigation when its cost does not exceed the amount recoverable from the debtor. To help finance this increased litigation responsibility, related changes have been made to § 674.47(e)(5) to permit the institution to charge to the Fund litigation costs, including attorney fees, in an amount not to exceed 50 percent of the amount of principal, interest and late charges collected.

The Secretary considers the benefits derived from the deterrent effect of litigation to warrant both the use of the Fund assets for these attorney fees, and the requirement that the institution, where necessary, pay any remainder not chargeable to the Fund.

Moreover, to increase the return to the Fund, particularly in cases in which litigation cost amounts are large in relation to the loan amount, these regulations require the institutions to attempt to recover all collection costs, including attorney fees, from the debtor, to the full extent permitted under applicable Federal and State law. As discussed earlier, this may require changes to the promissory note used.

Section 674.47 Costs chargeable to the Fund.

• The Secretary has revised the regulations to provide that the cost of credit bureau participation may be charged to the Fund in accordance with § 674.47(e)(2).

• The Secretary has revised the regulations to permit the institution to charge the Fund reasonable costs of successful address search.

• The Secretary continues to believe that, to the extent possible, the institution must shift the burden of collection costs from the taxpayer to the defaulting borrower, and the liability of the borrower for these costs is now clear as a matter of Federal law. 20 U.S.C. 1091a. However, the Secretary is aware that the ability to waive some or all collection costs (and late charges) is a valuable collection tool, and has modified the rule to allow the institution flexibility to waive collection costs; the institution may waive collection from the borrower of the same fraction of the accrued collection costs as the fraction of the past-due outstanding balance on the account that the debtor repays within thirty days of the date the debtor enters into a repayment agreement with the institution. Thus, if the defaulted borrower enters a new written repayment agreement with the institution, and repays one-half of the past-due outstanding principal and interest balance on his or her loan within thirty days of the date of that agreement, the institution may waive the collection on one-half of the collection costs that have been incurred through the date of, and pertaining to, that payment. Payment in full can permit a full waiver of collection costs. To the extent that these accrued costs have been waived under this rule, the institution may charge them against the Fund, subject to the limitation otherwise applicable under § 674.47.

These fund regulations retain the provisions of the proposed rule permitting an institution to charge the Fund up to 50 percent of the amount recovered in a second collection effort. The Secretary will consider whether this level is necessary to protect the Fund, and may propose that this limit be lowered in the future.

Section 674.48 Use of contractors to perform billing and collection or other program activities.

• Based on comments received, the Secretary has revised proposed § 674.48 (c)(1) and (d)(2) to reduce the number of items to be reported and to change the monthly statement to a quarterly statement. Quarterly statements from contractors must report the amount collected from the borrower, and any changes in the borrower's name, address, telephone number, and Social Security number.

• These rules require institutions to employ only bonded billing and collection firms to carry out billing and collection procedures. Institutions themselves are required to obtain and keep current adequate fidelity bond coverage in order to protect the Government's interest in the title IV funds they receive; the Secretary believes that it is reasonable to require institutions to assure the same sort of protection for the Federal and

institutional interest from third parties who handle loan funds. As under the NPRM, those collection firms which do not deduct their fees from borrower payments, and all billing firms, must be covered by a general fidelity bond or similar insurance coverage in an amount equal to the amount of repayments expected over a two-month period on accounts for which they are responsible. The final rule, however, permits the institution to allow collection firms to deduct their fees from repayments, if these firms meet higher bonding standards commensuate with the potential loss to the institution presented under that arrangement. If expected repayments exceed $100,000 over a two-month period, the institution must be named as beneficiary of the bond or policy; if less, the institution need not be the named beneficiary, but the amount of coverage must be large enough to avoid competition with other clients of the firms in the event of defalcation.

Section 674.49 Bankruptcy of borrowers

• Based on comments received, this section has been revised to present more clearly the actions required to protect the Fund's interest in the event of borrower recourse to bankruptcy. It is not the purpose of these regulations to attempt to set forth each provision of bankruptcy law that applies to student loan collection, and institutions must expect to retain counsel to handle enforcement of their loan accounts in bankruptcy. However, based on the comments and the Department's experience, the Secretary considers it appropriate to explain here those enforcement steps which institutions should be prepared to take in bankruptcy proceedings, the information they should consider in choosing whether or not to contest a bankruptcy, and the weight to be given to the cost of litigation. Moreover, because the regulations now permit institutions to charge to the Fund the costs of the litigation required in bankruptcy, it is appropriate to prescribe here the circumstances in which particular activities are reasonable and cost-effective.

Section 674.50 Assignment of defaulted loans to the United States

• Section 463 of the HEA has been amended to eliminate the requirement that a loan be in default for two years before an institution may assign it to the United States; if the borrower defaults on the loan, the institution may now assign a promissory note after following the procedures for a first collection effort as described in § 674.45 and litigation, if required under § 674.46.

• The Secretary has added the requirement that an institution shall include with any promissory note submitted for assignment the second acceleration notice containing the actual date on which the loan was accelerated.

• Under the proposed rule, institutions with default rates exceeding 10 percent were required to include proof of their collection activity on a loan with other documentation on a loan submitted to the Department for assignment. This provision was expressly based on the funding penalty threshold in effect at the time the proposed rule was published in 1985. The maximum default rate that an institution may have before suffering a funding penalty has been reduced to 7.5 percent by statutory and regulatory amendments in 1986. 20 U.S.C. 1087bb(f); 34 CFR 674.6a(c), 51 FR 28314, August 6, 1986. Because this requirement was intended to match the funding penalty threshold, the change in that threshold dictates a conforming change in this rule.

Waiver of Proposed Rulemaking

In accordance with section 431(b)(A) of the General Education Provisions Act (20 U.S.C. 1232(b)(2)(A)) and the Administrative Procedure Act, 5 U.S.C. 553, it is the practice of the Secretary to offer interested parties the opportunity to comment on proposed regulations. However, the enactment of COBRA and the Education Amendments of 1986 change certain provisions of law to be implemented in the proposed rules. These final regulations implement the new statutory provisions regarding the assessment of late charges on delinquent loans, collection costs on defaulted loans, and the assignment of defaulted loans to the Secretary. Since the regulations which incorporate these statutory changes merely implement provisions of the new law which Congress has already made effective, public comment could have no effect on the substance of these changes, and the Secretary finds that publication of a proposed rule regarding these provisions is unnecessary and contrary to the public interest under 5 U.S.C. 553(b)(B).

Paperwork Reduction Act of 1980

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, Room 3002, New Executive Office Building, Washington, DC. 20503; Attention: James D. Houser.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the Order.

Assessment of Educational Impact

In the Notice of Proposed Rulemaking the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 674

Education, Loan programs—education, Student aid, Reporting and recordkeeping requirements.

(Catalog of Federal Domestic Assistance Number 84.038 National Direct Student Loan Program)

Dated: November 24, 1987.

William J. Bennett,

Secretary of Education.

The Secretary amends Part 674 of Title 34 of the Code of Federal Regulations as follows:

PART 674—[AMENDED]

1. The authority citation for Part 674 is revised to read as follows:

Authority: 20 U.S.C. 1087aa–1087hh and 20 U.S.C. 421–429, unless otherwise noted.

2. Subpart C of Part 674 is revised to read as follows:

Subpart C—Due Diligence

Sec.

674.41 Due diligence—general requirements.
674.42 Contact with the borrower.
674.43 Billing procedures.
674.44 Address searches.
674.45 Collection procedures.
674.46 Litigation procedures.
674.47 Costs chargeable to the Fund.
674.48 Use of contractors to perform billing and collection or other program activities.
674.49 Bankruptcy of borrower.
674.50 Assignment of defaulted loans to the United States.

Subpart C—Due Diligence

§ 674.41 Due diligence—general requirements.

(a) *General.* Each institution shall exercise due diligence in collecting loans by complying with the provisions

in this subpart. In exercising this responsibility, each institution shall, in addition to complying with the specific provisions of this subpart—

(1) Keep the borrower informed, on a timely basis, of all changes in the program that affect his or her rights or responsibilities; and

(2) Respond promptly to all inquiries from the borrower or any endorser.

(b) *Due diligence with regard to endorser.* If a borrower does not respond satisfactorily to the final demand letter required in § 674.43(c)(2), an institution shall, in addition to pursuing the borrower, pursue recovery of the debt from any endorser using the steps described in this subpart.

(c) *Coordination of information.* An institution shall ensure that information available in its offices (including the admissions, business, alumni, placement, financial aid and registrar's offices) is provided to those offices responsible for billing and collecting loans, in a timely manner, as needed to determine—

(1) The enrollment status of the borrower;

(2) The expected graduation or termination date of the borrower;

(3) The date the borrower withdraws, is expelled or ceases enrollment on at least a half-time basis; and

(4) The current name, address, telephone number and Social Security number of the borrower.

(Authority: 20 U.S.C. 424, 1087cc)

§ 674.42 Contact with the borrower.

(a) *Exit interview.* (1) An institution shall conduct an exit interview with each borrower before he or she leaves the institution. If an individual interview is not feasible, the institution may conduct a group interview. During the interview the institution shall restate for the borrower the terms and outstanding balance of the loan held by the institution, and the borrower's duty to repay the loan in accordance with the repayment schedule. The institution shall explain to the borrower the consequences of defaulting including, at a minimum, possible referral to a collection firm, reporting to a credit bureau, and litigation. Furthermore, the institution shall explain the borrower's rights and responsibilities under the loan, including the following:

(i) The borrower's responsibility to inform the institution immediately of any change of name, address, telephone number, or Social Security number.

(ii) The borrower's right to deferment, cancellation or postponement of repayment, and the procedures for filing for those benefits.

(iii) The borrower's responsibility to contact the institution in a timely manner, before the due date of any payment he or she cannot make.

(2) An institution shall disclose the following information during the exit interview, and shall include it in the promissory note or in another written statement provided to the borrower:

(i) The name and the address of the institution to which the debt is owed and the name and address of the official or servicing agent to whom communications should be sent.

(ii) The name and the address of the party to which payments should be sent.

(iii) The estimated balance owed by the borrower on the loan held by the institution on the date on which the repayment period is scheduled to begin.

(iv) The stated interest rate on the loan.

(v) The repayment schedule for all loans covered by the disclosure including the date the first installment payment is due, and the number, amount, and frequency of required payments.

(vi) An explanation of any special options the borrower may have for loan consolidation or other refinancing of the loan, and a statement that the borrower has the right to prepay all or part of the loan at any time without penalty.

(vii) A description of the charges imposed for failure of the borrower to pay all or part of an installment when due.

(viii) A description of any charges that may be imposed as a consequence of default, such as liability for expenses reasonably incurred in attempts by the Secretary or the institution to collect on the loan.

(ix) The total of interest charges which the borrower will pay on the loan pursuant to the projected repayment schedule.

(3) At the time of the exit interview the institution shall—

(i) Have the borrower sign the repayment schedule;

(ii) Provide a copy of the signed promissory note and the signed repayment schedule to the borrower; and

(iii) Retain signed copies of both the note and the repayment schedule in the institution's files.

(4) The institution shall contact a borrower promptly after it determines that the borrower either has not attended an exit interview that he or she was scheduled to attend or has already left the institution, and shall—

(i) Provide the borrower, either in person or by mail the information described in paragraphs (a) (1) and (2) of this section; and

(ii) Provide a copy of the note and two copies of the repayment schedule to the borrower and request that the borrower promptly sign and return one of the schedules to the institution.

(b) *Contact with the borrower during the initial and post deferment grace periods.* (1)(i) For loans with a nine-month initial grace period (loans made before October 1, 1980, and loans made for periods of enrollment beginning after June 30, 1987 to borrowers with no outstanding balance on any Defense, Direct or Perkins loan made to the borrower prior to July 1, 1987, the institution shall contact the borrower three times within the initial grace period.

(ii) For loans with a six-month initial or post deferment grace period (loans not described in paragraph (b)(1)(i) of this section), the institution shall contact the borrower twice during the grace period.

(2)(i) The institution shall contact the borrower for the first time 90 days after the commencement of any grace period. The institution shall at this time remind the borrower of his or her responsibility to comply with the terms of the loan and shall send the borrower the following information:

(A) The total amount remaining outstanding on the loan account, including principal and interest accruing over the remaining life of the loan.

(B) The date and amount of the next required payment.

(ii) The institution shall contact the borrower the second time 150 days after the commencement of any grace period. The institution shall at this time notify the borrower of the date and amount of the first required payment.

(iii) The institution shall contact a borrower with a nine-month initial grace period a third time 240 days after the commencement of the grace period, and shall then inform him or her of the date and amount of the first required payment.

(Authority: U.S.C. 424, 1087cc, 1087cc-1)

§ 674.43 Billing procedures.

(a) The term "billing procedures," as used in this subpart, includes that series of actions routinely performed to notify borrowers of payments due on their accounts, to remind borrowers when payments are overdue, and to demand payment of overdue amounts. An institution shall use the following billing procedures:

(1) If the institution uses a coupon payment system, it shall send the coupons to the borrower at least 30 days before the first payment is due.

(2) If the institution does not use a coupon system, it shall send to the borrower—

(i) A written notice giving the name and address of the party to which payments are to be sent and a statement of account at least 30 days before the first payment is due; and

(ii) A statement of account at least 15 days before the due date of each subsequent payment.

(b)(1) An institution shall send a first overdue notice within 15 days after the due date for a payment if the institution has not received—

(i) A payment;

(ii) A request for deferment; or

(iii) A request for postponement or for cancellation.

(2) Subject to § 674.47(a), the institution shall assess a late charge for loans made for periods of enrollment beginning on or after January 1, 1986, during the period in which the institution takes any steps described in this section to secure—

(i) Any part of an installment payment not made when due, or

(ii) A request for deferment, cancellation, or postponement of repayment on the loan that contains sufficient information to enable the institution to determine whether the borrower is entitled to the relief requested.

(3) The institution shall determine the amount of the later charge imposed for loans described in paragraph (b)(2) of this section based on either—

(i) Actual costs incurred for actions required under this section to secure the required payment or information from the borrower; or

(ii) The average cost incurred for similar attempts to secure payments or information from other borrowers.

(4) The institution may not require a borrower to pay late charges imposed under paragraph (b)(3) of this section in an amount, for each late payment or request, exceeding 20 percent of the installment payment most recently due.

(5) The institution—

(i) Shall determine the amount of the late or penalty charge imposed on loans not described in paragraph (b)(2) of this section in accordance with § 674.31(b)(5) (See Appendix E); and

(ii) May assess this charge only during the period described in paragraph (b)(2) of this section.

6) The institution shall notify the borrower of the amount of the charge it has imposed, and whether the institution—

(i) Has added that amount to the principal amount of the loan as of the first day on which the installment was due; or

(ii) Demands payment for that amount in full no later than the due date of the next installment.

(c) If the borrower does not satisfactorily respond to the first overdue notice, the institution shall continue to contact the borrower as follows, until the borrower makes satisfactory repayment arrangements or demonstrates entitlement to deferment, postponement, or cancellation:

(1) The institution shall send a second overdue notice within 30 days after the first overdue notice is sent.

(2) The institution shall send a final demand letter within 15 days after the second overdue notice. This letter must inform the borrower that unless the institution receives a payment or a request for deferment, postponement, or cancellation within 30 days of the date of the letter, it will refer the account for collection or litigation, and will report the default to a credit bureau.

(d) Notwithstanding paragraphs (b) and (c) of this section, an institution may send a borrower a final demand letter if the institution has not within 15 days after the due date received a payment, or a request for deferment, postponement, or cancellation, and if—

(1) The borrower's repayment history has been unsatisfactory, e.g., the borrower has previously failed to make payment(s) when due or to request deferment, postponement, or cancellation in a timely manner, or has previously received a final demand letter; or

(2) The institution reasonably concludes that the borrower neither intends to repay the loan nor intends to seek deferment, postponement, or cancellation of the loan.

(e)(1) An institution that accelerates a loan as provided in § 674.31 (i.e., makes the entire outstanding balance of the loan, including accrued interest and any applicable late charges, payable immediately) shall—

(i) Provide the borrower, at least 30 days before the effective date of the acceleration, written notice of its intention to accelerate; and

(ii) Provide the borrower on or after the effective date of acceleration, written notice of the date on which it accelerated the loan and the total amount due on the loan.

(2) The institution may provide these notices by including them in other written notices to the borrower, including the final demand letter.

(f) If the borrower does not respond to the final demand letter within 30 days from the date it was sent, the institution shall attempt to contact the borrower by telephone before beginning collection procedures.

(g)(1) An institution shall ensure that any funds collected as a result of billing the borrower are—

(i) Deposited in interest-bearing bank accounts that are—

(A) Insured by an agency of the Federal Government; or

(B) Secured by collateral of reasonably equivalent value; or

(ii) Invested in low-risk income-producing securities, such as obligations issued or guaranteed by the United States.

(2) An institution shall exercise the level of care required of a fiduciary with regard to these deposits and investments.

(Authority: 20 U.S.C. 424, 1087cc)

§ 674.44 Address searches.

(a) If mail, other than unclaimed mail, sent to a borrower is returned undelivered, an institution shall take steps to locate the borrower. These steps must include—

(1) Reviews of records in all appropriate institutional offices;

(2) Reviews of telephone directories or inquiries of information operators in the locale of the borrower's last known address; and

(3) Use of the Department of Education's skip-tracing service.

(b) If an institution is unable to locate a borrower by the means described in paragraph (a) of this section, it shall—

(1) Use its own personnel to attempt to locate the borrower, employing and documenting efforts comparable to commonly accepted commercial skip-tracing practices; or

(2) Refer the account to a firm that provides commercial skip-tracing services.

(c) If the institution acquires the borrower's address or telephone number through the efforts described in this section, it shall use that new information to continue its efforts to collect on that borrower's account in accordance with the requirements of this subpart.

(d) If the institution is unable to locate the borrower after following the procedures in paragraphs (a) and (b) of this section, the institution shall make reasonable attempts to locate the borrower at least twice a year until—

(1) Litigation to collect the borrower's account is barred under the applicable statute of limitations;

(2) The account is assigned to the United States; or

(3) The account is written off under § 674.47(g).

(Authority: 20 U.S.C. 424, 1087cc)

§ 674.45 Collection procedures.

(a) The term "collection procedures," as used in this subpart, includes that series of more intensive efforts, including litigation as described in § 674.46, to recover amounts owed from defaulted borrowers who do not respond satisfactorily to the demands routinely made as part of the institution's billing procedures. If a borrower does not satisfactorily respond to the final demand letter or the following telephone contact made in accordance with § 674.43(f), the institution shall—

(1) Report the defaulted account to a credit bureau, unless specifically prohibited by State law; and

(2)(i) Use its own personnel to collect the amount due; or

(ii) Engage a collection firm to collect the account.

(b)(1) An institution shall select one or more credit bureaus for its information referrals with due regard for the coverage provided by the bureau or bureaus. An institution may select a bureau which serves—

(i) The areas from which the major portion of its students was drawn; or

(ii) The areas in which all or a major portion of its alumni/ae now reside.

(2) An institution shall report, according to the reporting procedures of the bureau, any changes in account status to the bureau to which it reported the defaulted account, and shall respond promptly and accurately to any inquiry from any bureau regarding the information reported on the loan account.

(c)(1) If the institution, or the firm it engages, pursues collection activity for up to 12 months and does not succeed in converting the account to regular repayment status, or the borrower does not qualify for deferment, postponement, or cancellation on the loan, the institution shall either—

(i) Litigate; or

(ii) Make a second effort to collect the account as follows:

(A) If the institution first attempted to collect the account using its own personnel, it shall, unless specifically prohibited by State law, refer the account to a collection firm.

(B) If the institution first attempted to collect the account by using a collection firm, it shall either attempt to collect the account using institutional personnel, or place the account with a different collection firm.

(2) If the collection firm retained by the institution does not succeed in placing an account into a repayment status described in paragraph (c)(1) of this section after 12 months of collection activity, the institution shall require the collection firm to return the account to the institution.

(d) If the institution is unable to place the loan in a repayment status described in paragraph (c)(1) of this section after following the procedures in paragraphs (a), (b), and (c) of this section, the institution shall continue to make annual attempts to collect from the borrower until recovery in litigation to collect the account would be barred under the applicable statute of limitations.

(e)(1) Subject to § 674.47(d), the institution shall assess against the borrower all reasonable costs incurred by the institution with regard to a loan obligation.

(2) The institution shall determine the amount of collection costs that shall be charged to the borrower for actions required under this section, and §§ 674.44, 674.46, 674. 48, and 674.49, based on either—

(i) Actual costs incurred for these actions with regard to the individual borrower's loan; or

(ii) Average costs incurred for similar actions taken to collect loans in similar stages of delinquency.

(3) The Fund must be reimbursed for collection costs initially charged to the Fund and subsequently paid by the borrower.

(f)(1) An institution shall ensure that any funds collected from the borrower are—

(i) Deposited in interest-bearing bank accounts that are—

(A) Insured by an agency of the Federal Government; or

(B) Secured by collateral of reasonably equivalent value; or

(ii) Invested in low-risk income-producing securities, such as obligations issued or guaranteed by the United States.

(2) An institution shall exercise the level of care required of a fiduciary with regard to these deposits and investments.

(Authority: 20 U.S.C. 424, 1087cc, 1091a)

§ 674.46 Litigation procedures.

(a)(1) If the collection efforts described in § 674.45 do not result in the repayment of a loan, the institution shall determine at least annually, until litigation to collect the account is barred under the applicable statute of limitations, whether—

(i) The total amount owing on the borrower's account, including outstanding principal, accrued interest, collection costs and late charges on all of the borrower's Perkins, National Direct and National Defense Student Loans held by that institution, is more than $200;

(ii) The borrower can be located and served with process;

(iii)(A) The borrower has sufficient assets attachable under State law to satisfy a major portion of the oustanding debt; or

(B) The borrower has income from wages or salary which may be garnished under applicable State law sufficient to satisfy a major portion of the debt over a reasonable period of time;

(iv) The borrower does not have a defense that will bar judgment for the institution; and

(v) The expected cost of litigation, including attorney's fees, does not exceed the amount which can be recovered from the borrower.

(2) The institution shall sue the borrower if it determines that the conditions in paragraph (a)(1) of this section are met.

(3) The institution may sue a borrower in default, even if the conditions in paragraph (a)(1) of this section are not met.

(b) The institution shall assess against and attempt to recover from the borrower—

(1) All litigation costs, including attorney's fees, court costs and other related costs, to the extent permitted under applicable law; and

(2) All prior collection costs incurred and not yet paid by the borrower.

(c)(1) An institution shall ensure that any funds collected as a result of litigation procedures are—

(i) Deposited in interest-bearing bank accounts that are—

(A) Insured by an agency of the Federal Government; or

(B) Secured by collateral of reasonably equivalent value; or

(ii) Invested in low-risk income-producing securities, such as obligations issued or guaranteed by the United States.

(2) An institution shall exercise the level of care required of a fiduciary with regard to these deposits and investments.

(d) If the institution is unable to collect the full amount owing on the loan after following the procedures set forth in §§ 674.41 through 674.46, the institution may—

(1) Submit the account to the Secretary for assignment in accordance with the procedures in § 674.50; or

(2) With the Secretary's approval, refer the account to the Department for collection.

(Authority: 20 U.S.C. 424, 1087cc)

§ 674.47 Costs chargeable to the Fund.

(a) *General: Billing costs.* (1) Except as provided in paragraph (c) of this

section, the institution shall assess against the borrower, in accordance with § 674.43(b)(2) the cost of actions taken with regard to past-due payments on the loan.

(2) If the amount recovered from the borrower does not suffice to pay the amount of the past-due payments and the late charges, the institution may charge the Fund only that portion of the late charges which represents the cost of telephone calls to the borrower pursuant to § 674.43.

(b) *General: Collection costs.* (1) Except as provided in paragraph (d) of this section, the institution shall assess against the borrower, in accordance with §§ 674.45(e) and 674.46(b), the costs of actions taken on the loan obligation pursuant to §§ 674.44, 674.45, 674.46, 674.48 and 674.49.

(2) If the amount recovered from the borrower does not suffice to pay the amount on the past-due payments late charges, and these collection costs, the institution may charge and Fund the unpaid collection costs in accordance with paragraph (e) of this section.

(c) *Waiver: Late charges.* The institution may waive late charges assessed against a borrower who repays the full amount of the past-due payments on a loan.

(d) *Waiver: Collection costs.* Before filing suit on a loan, the institution may waive that percentage of the collection costs applicable to the amount then past due on the loan equal to the percentage of that past-due balance that the borrower pays within 30 days of the date on which the borrower and the institution enter into a written repayment agreement on the loan.

(e) *Limitations on costs charged to the Fund.* The institution may charge to the Fund the following costs not paid by the borrower, including amounts waived under paragraph (d) of this section:

(1) A reasonable amount for the cost of a successful address search required in § 674.44(b).

(2) Costs related to the use of credit bureaus as provided in § 674.45(b)(1).

(3) For first collection efforts pursuant to § 674.45(a)(2), an amount that does not exceed 33⅓ percent of the amount of principal, interest and late charges collected.

(4) For second collection efforts pursuant to § 674.45(c)(1)(ii), an amount that does not exceed 50 percent of the amount of principal, interest and late charges collected.

(5) For litigation costs, including attorney's fees, court costs and other related costs, an amount which does not exceed—

(i) Actual costs incurred in taking specific actions in bankruptcy proceedings required or authorized under § 674.49;

(ii) That portion of costs of other actions in bankruptcy proceedings which, together with costs authorized and incurred under paragraph (e)(5)(i) of this section, do not exceed one-third of the total amount of the judgment obtained on the loan; and

(iii) In all other cases, 50 percent of the amount of the judgment obtained against the borrower.

(6) If a collection firm performs or contracts for the performance of both collection and litigation activities on a defaulted loan, an amount for both of the functions that does not exceed 33⅓ percent of the amount of principal, interest and late charges collected by a first collection effort as required in § 674.45(a), or 50 percent for a second collection effort as required in § 674.45(c)(1).

(f) *Records.* For audit purposes, an institution shall support the amount of collection costs charged to the Fund with appropriate documentation, including telephone bills and receipts from collection firms. The documentation must be maintained in the institution's files as provided in § 674.19.

(g) *Write-offs.* (1) An institution may write off an account if—

(i)(A) It carries out the procedures in §§ 674.43, 674.44 and 674.45; and

(B) The total amount owing on a borrower's loan account held by that institution, including outstanding principal, accrued interest, late charges and collection costs on all of the borrower's Perkins, Direct and Defense Student Loans is $200.00 or less; or

(ii)(A) The loan is discharged in bankruptcy; and

(B) The institution has exhausted the procedures in this subpart with regard to any endorser.

(2) An institution which writes off an account under this paragraph may no longer include the amount of the account as an asset of the Fund.

(3) If an institution receives a payment from a borrower after the loan has been written off, it shall deposit that payment into the Fund.

(Authority: 20 U.S.C. 424, 1087cc)

§ 674.48 Use of contractors to perform billing and collection or other program activities.

(a) The institution is responsible for ensuring compliance with the billing and collection procedures set forth in this subpart. The institution may use employees to perform these duties or may contract with other parties to perform them.

(b) An institution that contracts for performance of any duties under this subpart remains responsible for compliance with the requirements of this subpart in performing these duties, including decisions regarding cancellation, postponement, or deferment of repayment, extension of the repayment period, other billing and collection matters, and the safeguarding of all funds collected by its employees and contractors.

(c) If an institution uses a billing service to carry out billing procedures under § 674.43, the institution shall ensure that the service—

(1) Provides at least quarterly, a statement to the institution which shows—

(i) Its activities with regard to each borrower;

(ii) Any changes in the borrower's name, address, telephone number, and, if known, any changes to the borrower's Social Security number; and

(iii) Amounts collected from the borrower;

(2) Provides at least quarterly, a statement to the institution with a listing of its charges for skip-tracing activities and telephone calls;

(3) Does not deduct its fees from the amount is receives from borrowers;

(4)(i) Instructs the borrower to remit payment directly to the institution;

(ii) Instructs the borrower to remit payment to a lock-box maintained for the institution; or

(iii) Deposits those funds received directly from the borrower immediately upon receipt in an institutional trust account; and

(5) Maintains a fidelity bond or comparable insurance in accordance with the requirements in paragraph (f) of this section.

(d) If the institution uses a collection firm, the institution shall ensure that the firm—(1)(i) Instructs the borrower to remit payment directly to the institution;

(ii) Instructs the borrower to remit payment to a lockbox maintained for the institution; or

(iii) Deposits those funds received directly from the borrower promptly in an institutional trust account, after deducting its fees, if authorized to do so by the institution; and

(2) Provides at least quarterly, a statement to the institution which shows—

(i) Its activities with regard to each borrower;

(ii) Any changes in the borrower's name, address, telephone number and, if known, any changes to the borrower's Social Security number;

(iii) Amounts collected from the borrower; and

(3) Maintains a fidelity bond or comparable insurance in accordance with the requirements in paragraph (f) of this section.

(e) If an institution uses a billing service to carry out § 674.43 (billing procedures), it may not use a collection firm that—

(1) Owns or controls the billing service;

(2) Is owned or controlled by the billing service; or

(3) Is owned or controlled by the same corporation, partnership, association, or individual that owns or controls the billing service.

(f)(1) An institution that employs a third party to perform billing or collection services required under this subpart shall ensure that the party has and maintains in effect a fidelity bond or comparable insurance in accordance with the requirements of this paragraph.

(2) If the institution does not authorize the third party to deduct its fees from payments from borrowers, the institution shall ensure that the party is bonded or insured in an amount not less than the amount of funds that the institution reasonably expects to be repaid over a two-month period on accounts it refers to the party.

(3) In the institution authorizes the third party performing collection services to deduct its fees from payments from borrowers, the institution shall ensure that—

(i) If the amount of funds that the institution reasonably expects to be paid over a two-month period on accounts it refers to the party is less than $100,000, the party is bonded or insured in an amount equal to the lesser of—

(A) Ten times the amount of funds that the institution reasonably expects to be repaid over a two-month period on accounts it refers to the party; or

(B) The total amount of funds that the party demonstrates will be repaid over a two-month period on all accounts of any kind on which it performs billing and collection services; and

(ii) If the amount of funds that the institution reasonably expects to be repaid over a two-month period on accounts it refers to the party is more than $100,000, the institution shall ensure that the party has and maintains in effect a fidelity bond or comparable insurance—

(A) Naming the institution as beneficiary; and

(B) In an amount not less than the amount of funds reasonably expected to be repaid on accounts referred by the institution to the party during a two-month period.

(4) The institution shall review annually the amount of repayments expected to be made on accounts it refers to a third party for billing or collection services, and shall ensure that the amount of the fidelity bond or insurance coverage maintained continues to meet the requirements of this paragraph.

(Authority: 20 U.S.C. 424, 1087cc)

§ 674.49 Bankruptcy of borrower.

(a) *General.* If an institution receives notice that a borrower has filed a petition for relief in bankruptcy, usually by receiving a notice of meeting of creditors, the institution and its agents shall immediately suspend any collection efforts outside the bankruptcy proceeding—

(1) Against the borrower; and

(2) If the borrower has filed for relief under Chapter 12 or 13 of the Bankruptcy Code, against any endorser.

(b) *Proof of claim.* The institution shall file a proof of claim in the bankruptcy proceeding, unless, in the case of a proceeding under Chapter 7 of the Bankruptcy Code, the notice of meeting of creditors states that the borrower has no assets.

(c) *Borrower's request for determination of dischargeability.* (1) the institution shall follow the procedures in this paragraph if it is properly served with a complaint in a proceeding under Chapter 7, 11, or 12 of the Bankruptcy Code, or under 11 U.S.C. 1328(b), for a determination of dischargeability under 11 U.S.C. 523(a)(8)(B) on the ground that repayment of the loan would impose an undue hardship on the borrower and his or her dependents.

(2) If more than five years of the repayment period on the loan, excluding periods of deferment granted to the borrower, has passed before the borrower filed the petition for relief in bankruptcy, the institution may not oppose a determination of dischargeability requested under 11 U.S.C. 523(a)(8)(B) on the ground of undue hardship.

(3) If less than five years of the repayment period on the loan, excluding periods of deferment granted to the borrower, has passed before the borrower filed the petition for relief, the institution shall determine, on the basis of reasonably available information, whether repayment of the loan under either the current repayment schedule or any adjusted schedule authorized under Subpart B or D of this part would impose an undue hardship on the borrower and his or her dependents.

(4) If the institution concludes that repayment would not impose an undue hardship, the institution shall determine whether the costs reasonably expected to be incurred to oppose discharge will exceed one-third of the total amount owed on the loan, including principal, interest, late charges and collection costs.

(5) If the expected costs of opposing discharge of such a loan do not exceed one-third of the total amount owed on the loan, the institution shall—

(i) Oppose the borrower's request for a determination of dischargeability; and

(ii) If the borrower is in default on the loan, seek a judgment for the amount owed on the loan.

(6) In opposing a request for a determination of dischargeability, the institution may compromise a portion of the amount owed on the loan if it reasonably determines that the compromise is necessary in order to obtain a judgment on the loan.

(d) *Request for determination of non-dischargeability.* The institution may file a complaint for a determination that a loan obligation is not dischargeable and for judgment on the loan if the institution would have been required under paragraph (c) of this section to oppose a request for a determination of dischargeability with regard to that loan.

(e) *Chapter 13 repayment plan.* (1) The institution shall follow the procedures in this paragraph in response to a repayment plan proposed by a borrower who has filed for relief under Chapter 13 of the Bankruptcy Code.

(2) The institution is not required to respond to a proposed repayment plan, if—

(i) The borrower proposes under the repayment plan to repay all principal, interest, late charges and collection costs on the loan; or

(ii) The repayment plan makes no provision with regard either to the loan obligation or to general unsecured claims.

(3)(i) If the borrower proposes under the repayment plan to repay less than the total amount owed on the loan, the institution shall determine from its own records and court documents—

(A) The amount of the loan obligation dischargeable under the plan by deducting the total payments on the loan proposed under the plan from the total amount owed;

(B) Whether the plan or the classification of the loan obligation under the proposed plan meets the requirements of section 1325 of the Code; and

(C) Whether grounds exist under 11 U.S.C. 1307 to move for conversion or dismissal of the Chapter 13 case.

(ii) If the institution reasonably expects that costs of the appropriate actions will not exceed one-third of the dischargeable loan debt, the institution shall—

(A) Object to confirmation of a proposed plan that does not meet the requirements of 11 U.S.C. 1325; and

(B) Move to dismiss or convert a case where grounds can be established under 11 U.S.C. 1307.

(4)(i) The institution shall monitor the borrower's compliance with the requirements of the plan confirmed by the court. If the institution determines that the debtor has not made the payments required under the plan, or has filed a request for a "hardship discharge" under 11 U.S.C. 1328(b), and the institution holds a loan that entered repayment status more than five years, excluding periods of deferment, before the borrower filed the petition for relief in bankruptcy, the institution shall determine from its own records and information derived from documents filed with the court—

(A) Whether grounds exist under 11 U.S.C. 1307 to convert or dismiss the case; and

(B) Whether the borrower has demonstrated entitlement to the "hardship discharge" by meeting the requirements of 11 U.S.C. 1328(b).

(ii) If the institution reasonably expects that costs of the appropriate actions, when added to the costs already incurred in taking actions authorized under this section, will not exceed one-third of the dischargeable loan debt, the institution shall—

(A) Move to dismiss or convert a case where grounds can be established under 11 U.S.C. 1307; or

(B) Oppose the requested discharge where the debtor has not demonstrated that the requirements of 11 U.S.C. 1328(b) are met.

(f) *Resumption of collection from the borrower.* The institution shall resume bill and collection action prescribed in this subpart after—

(1) The borrower's petition for relief in bankruptcy has been dismissed;

(2) The borrower has received a discharge under 11 U.S.C. 727, 11 U.S.C. 1141, 11 U.S.C. 1228, or 11 U.S.C. 1328(b), unless—

(i) The court has found that repayment of the loan would impose an undue hardship on the borrower and the dependents of the borrower; or

(ii) (A) The loan entered the repayment period more than five years, excluding periods of deferment, before the filing of the petition, and

(B) The loan is not excepted from discharge under other applicable provisions of the Code; or

(3) The borrower has received a discharge under 11 U.S.C. 1328(a) after completion of a repayment plan which made no provisions with regard to either—

(i) The loan obligation; or

(ii) Unsecured claims in general.

(g) *Resumption of collection from the endorser.* The institution shall resume billing and collection action against an endorser of a borrower who has filed for relief under Chapter 12 or 13 of the Code after the borrower's case has been completed or dismissed, or the stay applicable to such action has been lifted.

(h) *Termination of collection and write-off.* (1) An institution shall terminate all collection action and write off a loan on which there is no endorser if it receives—

(i) A general order of discharge on a borrower owing a student loan obligation which entered the repayment period more than 5 years, exclusive of periods of deferment, from the date on which a petition for relief under Chapter 7, 11 or 12 of the Bankruptcy Code was filed;

(ii) A discharge order, other than an order under 11 U.S.C. 1238(b), in a case brought under Chapter 13 of the Code; or

(iii) A judgment that repayment of the debt would constitute an undue hardship, and that the debt is therefore dischargeable.

(2) If an institution receives a repayment from a borrower after a loan has been discharged, it shall deposit that payment in its Fund.

(3) An institution may write off a loan on which there is an endorser only after it has exhausted the procedures in this subpart with regard to the endorser.

(Authority: 20 U.S.C. 424, 1087cc)

§ 674.50 Assignment of defaulted loans to the United States.

(a) An institution may submit a defaulted loan note to the Secretary for assignment to the United States if—

(1) The institution has been unable to collect on the loan despite complying with the diligence procedures, including at least a first level collection effort as described in § 674.45(a) and litigation, if required under § 674.46(a), to the extent these actions were required by regulations in effect on the date the loan entered default;

(2) The total amount of the borrower's account to be assigned, including outstanding principal, accrued interest, collection costs and late charges, is greater than $200.00; and

(3) The loan has been accelerated.

(b) An institution may submit a defaulted note for assignment only during the submission period established by the Secretary.

(c) An institution shall submit to the Secretary the following documents for any loan it proposes to assign;

(1) An assignment form provided by the Secretary and executed by the institution, which must include a certification by the institution that it has complied with the requirements of this subpart, including at least a first level collection effort as described in § 674.45(a) in attempting collection on the loan.

(2) The original promissory note or a certified copy of the original note.

(3) A copy of the repayment schedule.

(4) A certified copy of any judgment order entered on the loan.

(5) A complete statement of the payment history.

(6) Copies of all approved requests for deferred and cancellation.

(7) A copy of the notice to the borrower of the effective date of acceleration and the total amount due on the loan.

(8) Documentation that the institution has withdrawn the loan from any firm that it employed for address search, biling, collection or litigtion services, and has notified that firm to cease collection activity on the loans.

(9) Copies of all pleadings filed or received by the institution on behalf of a borrower who has filed a petition in bankruptcy and whose loan obligation is determined to be nondischargeable.

(10) If the institution has a default rate as calculated under § 674.2 greater than 7.5 percent as of June 30 of the second year preceding the submission period, documentation that the institution has complied with all of the due diligence requirements described in paragraph (a)(1) of this section.

(d) Except as provided in paragraph (e) of this section, and subject to paragraph (g) of this section, the Secretary accepts an assignment of a note described in paragraph (a) of this section and submitted in accordance with paragraph (c) of this section.

(e) The Secretary does not accept assignment of a loan if—

(1) The institution has not provided the Social Security number of the borrower;

(2) The borrower has received a discharge in bankruptcy, unless—

(i) The bankruptcy court has determined that the loan obligation is nondischargeable and has entered judgment against the borrower; or

(ii) A court of competent jurisdiction has entered judgment against the borrower on the loan after the entry of the discharge order;

(3) The institution has initiated litigation against the borrower, unless the judgment has been entered against the borrower and assigned to the United States; or

(4) The borrower has been granted cancellation due to death or has filed for or been granted cancellation due to permanent and total disability.

(f)(1) The Secretary provides an institution written notice of the acceptance of the assignment of the note. By accepting assignment, the Secretary acquires all rights, title, and interest of the institution in that loan.

(2) The institution shall endorse and forward to the Secretary any payment received from the borrower after the date on which the Secretary accepted the assignment, as noted in the written notice of acceptance.

(g)(1) The Secretary may determine that a loan assigned to the United States is unenforceable in whole or in part because of the acts or omissions of the institution or its agent. The Secretary may make this determination with or without a judicial determination regarding the enforceability of the loan.

(2) The institution shall reimburse the Fund for that portion of the outstanding balance on a loan assigned to the United States which the Secretary determines to be unenforceable because of an act or omission of that institution or its agent.

(3) Upon reimbursement to the Fund by the institution, the Secretary shall transfer all rights, title and interest of the United States in the loan to the institution for its own account.

(h) An institution shall consider a borrower whose loan has been assigned to the United States for collection to be in default on that loan for the purpose of eligibility for title IV financial assistance, until the borrower provides the institution confirmation from the Secretary that he or she has made satisfactory arrangements to repay the loan.

(Authority: 20 U.S.C. 424, 1087cc)

Appendix—Public Comments and Departmental Responses

(Note—This appendix will not be codified in the Code of Federal Regulations)

Section 674.41 Due diligence—general requirements.

Comment: Several commenters disagreed with the proposal that institutions be required to use the same collection procedures to collect Perkins Loans that they use to collect other institutional debts. Several commenters indicated that the procedures used in collecting institutional debts should not be used in collecting Perkins Loans because the students may no longer be in school and because of the specialized provisions in the Perkins Loan Program such as deferment, postponement, and cancellation. Several commenters suggested that the determination as to which procedures to use should be left to the institution.

One commenter suggested that the regulations *require* the withholding of transcripts, grades, and further services regardless of institutional practices.

Response: A change has been made. The Secretary agrees with the commenters that using the same procedures to collect Perkins Loan debts as are used to collect other institutional debts may not be effective because of the dissimilarities between the two debts. Therefore, the proposal previously made in § 674.41(a)(3) that the institution use those collection procedures to collect Perkins Loans that it uses to collect other debts has been deleted. There is no statutory mandate that institutions withhold academic transcripts and other services; however, an institution may adopt that practice as its institutional policy.

Comment: Several commenters stated that the regulations should not mandate that all information be shared routinely among offices of the institution. The commenters suggested that institutional offices should be required to share information only as necessary to support billing and collection functions, and that the word "routinely" should be eliminated.

Response: A change has been made. The Secretary agrees with the commenters and in order to reduce regulatory burden, has reworded §674.41(c) to require institutional offices to share information as necessary to support billing and collection functions.

Comment: Several commenters believed that the proposed rule required the institution to share routinely current addresses obtained from the Internal Revenue Service (IRS) skip-tracing service. They stated that these addresses should not be "routinely shared" unless the lending institution receives independent verification of the address. Several commenters, based on the same reading of the rules, expressed concern that institutions that followed the rules as written would incur penalties for misuse of IRS skip-tracing information.

Response: No change has been made. The regulations required sharing of information "in order to determine" certain information needed by the institution for its billing and collection functions. When arranging the exchange of information among its offices, the institution can readily identify the student without disseminating the address derived from IRS reports. The regulation does not require the offices of the institution to share information for any other purpose, and neither authorizes nor permits disclosure of information derived from the IRS to components of the institution which are not directly responsible for collecting Perkins Loan accounts.

Comment: Many commenters supported the proposal in § 674.41(b) which directed the institution to attempt to collect from the endorser after a borrower fails to respond to the first overdue notice. Several of these commenters suggested that collections from endorsers should begin 90 days after the final demand letter. Others felt that the regulations should require endorsers on all loans unless the borrower is over 21 years of age, thus making the endorser (usually a parent) more aware of the responsibility that the student has undertaken.

Many of the commenters raised concerns regarding the use of an endorser on loans. Some of the concerns were: the extent to which the endorser is legally responsible for payment; when the endorser should be required to repay the debt; the amount to be repaid; and whether or not all the steps in the due diligence requirements should apply to the endorser.

The majority of the commenters believed that the decision on when an endorser should be required to make repayments should not be mandated early in the billing cycle, but should be at the institution's discretion.

Response: A change has been made. Based on the comments received, the Secretary has changed the regulation to require the institution to bill the endorser after the borrower fails to respond to the final demand letter rather than to the first overdue notice. The Secretary believes that contact with the endorser prior to the final demand letter is not cost-effective or appropriate because the borrower is the actual recipient and beneficiary of the loan and should be held primarily responsible for repayment to the extent possible. However, by his or her endorsement, the endorser agreed to be responsible for the amount advanced on the note if that amount was not repaid by the borrower. The sample promissory note contains no limitation on the endorser's promise to pay the amount due on the note, and the institution must therefore attempt at that point to collect from the endorser the full amount then due from the borrower.

Section 674.42 Contact with the borrower.

Comment: Several commenters stated that some institutions prepare a new promissory note with each advance to a student, and providing students with copies of all notes at the exit interview as required in § 674.42(a)(3)(ii), would needlessly duplicate paperwork.

Response: No change has been made. Borrowers may frequently have lost earlier copies provided to them. The Secretary believes that the burden of providing a borrower with a copy of his or her promissory notes at the exit interview is more than justified by the benefit derived from reinforcing the individual's awareness of the obligation to repay the debt.

Comment: Several commenters opposed § 674.42(a)(2)(vi) which states that an institution must disclose, at the exit interview, an explanation of any special options the borrower may have for loan consolidation or other refinancing of the loan and a statement that the borrower has the right to prepay all or part of the loans at any time without penalty. The commenters were opposed to this disclosure requirement because they believed it is not the institution's responsibility to make such information know to a borrower. It is the belief of several commenters that institutions have no control or direct involvement in these procedures, and therefore, run the risk of misinforming students.

Response: No change has been made. The requirement that the institution explain any special options the borrower may have for loan consolidation or other refinancing of the loan and the borrower's right to prepay all or part of the loans at any time without penalty is mandated by Section 463A of the Higher Education Act of 1965, as amended (HEA).

Comment: One commenter stated that it appears that the Secretary has no statutory authority for requiring that institutions provide, during the exit interview, disclosure information required under the Student Loan Consolidation and Technical Amendments Act of 1983 (Pub. L. 98–79). The statute provides only that this information must be disclosed "prior to the start of the repayment period."

Response: No change has been made. Although the statute does not specifically require disclosure of this information to the borrower during the exit interview, it does require disclosure prior to the start of the repayment period. The Secretary concludes that providing this information during the exit interview is well suited to protect the Government's interest in securing repayment of the loans. This forum provides a suitable opportunity for the debtor to raise questions regarding the debt and receive an individualized response on that basis, and plainly falls within the Secretary's authority to adopt requirements necessary to protect the Fund against unreasonable risk of loss.

Comment: One commenter suggested that the scope of the exit interview be expanded further to include information on (1) possible assignment of the notes to the Department, (2) an institution's option to deny deferment when forms are not filed on a timely basis, and (3) the Department's use of IRS Federal refund tax offset.

Response: No change has been made. At the exit interview, the institution must provide the borrower with a copy of the promissory note. The model promissory notes published as Appendices to Part 674 explain that notes may be assigned to the Department, and that the institution may deny a deferment if it is not requested in a timely manner. Because the Federal tax refund offset program is still a pilot program, the Secretary does not believe that the institution should be required to notify the borrower of this collection tool at this time.

Comment: Several commenters suggested deleting § 674.42(b)(2)(iii) which instructs an institution to contact a borrower with a nine-month grace period a third time at 240 days after the commencement of the grace period, because they believed that a third contact during the grace period would not encourage repayments. The commenters believed that a third notice would only serve to confuse a borrower who has begun repayment on a six-month grace period loan.

Several commenters recommended that the regulations require the institution to mail the second grace-period notice 180 days, instead of 150 days, after the commencement of the grace period in order to make the second notice correspond with the end of the grace period on six-month grace period loans and to space the notices on nine-month grace period loans more evenly. In addition, the commenters believed that the requirement to notify the borrower of the total amount to be repaid over the life of the loan in the first contact at 90 days should be deleted because it only repeats information provided the borrower in the exit interview.

Response: No change has been made. The grace period notifications were developed to ensure that the institution regularly communicates with the borrower before repayment is due to begin, in order to maintain contact with the borrower and ensure that the borrower understands his or her rights and responsibilities and therefore begins repayment or applies for appropriate deferment or cancellation benefits in a timely manner. The Secretary does not agree that the borrower should be sent the second grace period notification at the end of the grace period, as the purposes of the notice would not be served.

The spacing of the notifications was also established in order to limit institutional burden. In the case of a borrower with a six-month grace period, the borrower must be contacted twice during the grace period. The first notice, 90 days after the start of the grace period, serves as a useful reminder to the borrower of the responsibilities associated with the loan, including the duty to provide the institution with a current address. The second notice, 150 days into that period, is a second reminder timed to coincide with the billing notice required 30 days before the first payment is due. § 674.43(a).

In the case of a borrower with a nine-month grace period, the borrower must be contacted three times during the grace period: 90 days, 150 days, and 240 days after commencement of the grace period. As with six-month grace period loan, the last notice is timed to coincide with the initial 30 day billing notice. Further, the 150 day notices may be combined for those borrowers who have loans with both six-month and nine-month grace periods. For those borrowers with both a six-month and a nine-month grace period loan, moreover, the institution should be able, in the second (150 day) and third (240 day) contact letters, to explain clearly the difference in repayment obligations on the two kinds of loans and eliminate the confusion hypothesized by the commenter.

Section 674.43 Billing procedures.

Comment: Several commenters opposed deleting the requirement that the institution maintain a list of borrowers with overdue payments, updated monthly. The commenters stated that institutions are required to maintain information on overdue accounts in the general conduct of lending activity.

Response: No change has been made. The Secretary is seeking to reduce regulatory burden where possible, and therefore has deleted the requirement to maintain a list of borrowers with overdue payments. The institution may maintain such a list if it so desires.

Comment: Many commenters objected to changing the current requirement that the institution send a statement of account thirty days and ten days, respectively, before the first payment due date and all subsequent due dates to the proposed thirty-day and fifteen-day notices of the repayment schedule because the change would require complete reprogramming of their entire current billing system.

Response: No change has been made. The thirty-day notice required before the first payment is due is the last notice required in the grace period and repesents no change. Based on his experience, the Secretary concludes that a fifteen-day notice allows the borrower a more adequate response time than the current ten-day notice, and this justifies the initial costs of changing billing systems. Moreover, the institution can avoid this burden by using a coupon payment method.

Comment: Many commenters opposed the proposed rule which would require the institution to send final demand letters by certified mail.

Response: A change has been made. The Secretary concurs with the commenters and has deleted the requirement for use of certified mail for final demand letters.

Comment: Many commenters opposed the requirement that the debtor be given thirty days written advance notice before a defaulted loan is accelerated. These commenters stated that, in their opinion, the borrower would have already been given sufficient time to pay before the loan reached the point of acceleration. They also stated that a thirty-day response time would not convey an urgent need to contact the lender.

Response: No change has been made. Acceleration marks a serious stage of delinquency: after acceleration, cancellation rights lapse, and enforcement action begins. This procedure assures that the date of the acceleration coincides with the deadline for response to the final demand letter, and gives the institution additional flexibility to handle debtors who demonstrate some desire to avoid these consequences. The thirty-day advance notice allows the borrower one last chance to respond with sufficient payments to bring his or her account current, or arrange a satisfactory new repayment agreement with the institution. Moreover, because the institution can promptly send a final demand letter and notice of intent to accelerate to a debtor who has indicated unwillingness to cooperate in the past, § 674.43(d)(1), use of a 30-day warning period before acceleration will not necessarily delay collection action against these debtors.

Comment: One commenter suggested that the regulations specify when and under what conditions an institution may accelerate a loan.

Response: A change has been made. Section 674.31 states that an institution may demand immediate repayment of the entire loan (including any late charges and accrued interest) if the borrower fails to make a scheduled repayment on time or to file for deferment or cancellation on time. Therefore, for clarification, the Secretary has expanded § 674.43(e) to include a reference to § 674.31. The paragraph has also been expanded to provide for a written notice informing the borrower of the acceleration date.

Comment: One commenter urged the Secretary not to require an institution to accelerate a loan where a debtor does not respond satisfactorily to the final demand letter, if acceleration would cause the amount then due to be greater than the jurisdictional limit imposed by a small claims court in which the institution intends to enforce the debt.

Response: The comment presents a good collection tactic, and no change is necessary to permit use of this tactic. The final rule does not require acceleration at any particular point in the institution's collection process.

Comment: Many commenters objected to the proposed requirement of a telephone contact in the billing procedures. The commenters stated that this proposal was contradictory to the intent of reducing cost and burden, and that it merely moves the phone call from the collections to billing cycle. They objected on the basis of cost-effectiveness, citing long distance charges and staff time. One of the commenters stated that billing staff who process routine accounts are not trained to be collection personnel.

Response: No change has been made. Department experience with collecting student loans has proven that telephone contact with the borrower is a highly effective method of collection. The Secretary believes that if this contact is required prior to beginning the more costly collection procedures, the necessity for taking further action may be eliminated.

Comment: Numerous commenters objected to the proposed requirement that the institution deposit funds collected through billing (§ 674.43), collection (§ 674.45), and litigation procedures (§ 674.46) in an insured interest-bearing account. Many of the commenters stated that their institutions were required by the Treasurer of the State to depost all institutional funds to the State Treasuere's account. These funds are then invested by the Treasurer and become part of the State's General Fund. The commenters stated that none of the interest earned on such deposits accrues to the institution.

Response: No change has been made. Neither the statute nor the Perkins Loan regulations prescribe the location of accounts into which Perkins Loan funds are to be deposited, and neither bars their deposit in a State-administered account. Although this comment was apparently prompted by the requirement that institutions deposit funds in interest-generating accounts, it describes a practice which is in direct violation of the specific statutory requirement in 463(a)(2)(E) of the HEA that "any earnings of the funds" be deposited by the institution in the Fund. An institution that participates in the Perkins Loan program has received Federal funds from the Department on the basis of its agreement to administer those funds, loans made from them, collections from those loans, and any earnings on the funds in accordance with the statute and regulations. The institution, therefore, is responsible for depositing these earnings into the Fund, and under current law, without regard to this new regulatory requirement, is liable for any earnings by any party on those funds that are not deposited into the Fund. No provision of State law excuses the institution from responsibility for compliance with the agreement with ED and the statutory requirements it incorporates, and no provision of Federal law exempts such institutions from accountability for earnings not credited to the Fund.

Comment: Several commenters objected to depositing funds into interest-bearing accounts because the institutions rarely have any sizable balance in their Fund. These commenters expressed the concern that if they are required to keep funds in interest-bearing accounts, the banks will charge service fees and require that they keep compensating or minimum balances. At present, many banks do not require institutions to keep compensating balances, nor are they being charged service fees for those accounts.

Response: A change has been made. The Secretary continues to believes that an institution should use the same diligence in maximizing its return for the Fund as it would be expected to use on its own funds, and that this diligence requires constant comparation of charges and interest rates paid by competing financial institutions in order to find those which meet the needs of

the Fund at the lowest net cost. However, to defray those costs, the Secretary has revised § 674.8(a)(5) to require the institution to deposit into the Fund only the net earnings on Fund assets in these interest-bearing accounts and to offset bank charges against interest earnings.

Section 674.44 Address searches.

Comment: Many commenters remarked that use of the Department's skip-tracing service to locate borrowers would cause considerable delay and questioned whether institutions had to wait for results before beginning skip-tracing efforts as required in § 674.44(b). One commenter suggested that skip-tracing should be done by either an institution or commercial firm. Other commenters stated that the proposal was, in their view, redundant, overly expensive and largely nonproductive.

Response: No change has been made. There is no cost to the Fund to use the Department's skip-tracing services. The Secretary considers the Department's turnaround time of four to six weeks to be reasonable and effective. Commercial skip-tracing costs are chargeable to the Fund; if a borrower can be located by use of the Department's skip-tracing service, those costs need not be incurred. Therefore, an institution is required to use the Department's free service before proceeding to the steps in § 674.44(b), because use of this free service may spare additional charge to the Fund.

Comment: Several commenters expressed concern that requiring institutions to request an address correction from the U.S. Postal Service would be costly and ineffective. The commenters questioned whether the U.S. Postal Service is prepared to respond to all these requests and help defray the costs.

Response: A change has been made. Proposed paragraph (a)(3) regarding requests for an address correction from the U.S. Postal Service has been deleted. However, an institution is not prohibited from using this practice if the institution determines it to be an effective collection tool.

Comment: Many commenters suggested that reviewing telephone directories should be an institutional option, because small institutions with limited resources would not be able to comply with this proposal. They stated that institutions should be allowed to employ their own procedures. The commenters stated that if the telephone number is unlisted, the operator will not release any information. Directories are often out of date. One commenter suggested that the regulations say "telephone directories *or* inquiries of information operators * * *." The commenters also suggested that compliance with § 674.44(b) should be an alternative, rather than an addition to, compliance with § 674.44(a).

Response: A change has been made. The Secretary agrees with commenters regarding the need for an institution to retain flexibility to use directories or directory assistance to locate a borrower. Therefore, § 674.44(a)(2) has been changed to allow for institutional discretion. These regulations do not preclude institutions from employing their own procedures; however, Departmental experience with the collection of assigned loans shows that the steps proposed in this section are effective tools for locating the borrower.

Comment: Several commenters suggested that the regulations should state that an address search should begin as soon as the first piece of returned mail is received, and that § 674.44(a) be revised to read as follows: "If mail sent to a borrower is returned undelivered (other than unclaimed certified mail), an institution shall take steps to locate the borrower."

Response: A change has been made. The words "other than unclaimed mail" have been added to clarify the intent of the rule.

Comment: Many commenters opposed the proposal that an institution shall make reasonable attempts to locate the borrower at least twice a year until litigation procedures to collect would be barred under the statute of limitations. Many of these commenters questioned whether institutions would be required to maintain skip-tracing activities after the notes have been assigned to the United States and also if these proposed rules preclude notes from being assigned or written-off until the statute of limitations has expired. Several of these commenters stated that it is not a good practice to tie any collection procedure to the statute of limitations, especially when other sections of the regulations governing this program require that institutions prove due diligence prior to assignment. Two of these commenters suggested the paragraph be rewritten as follows: "The institution shall make reasonable attempts to locate the borrower at least twice a year until the account is written-off or assigned."

Response: A change has been made. The Secretary has rewritten, for clarity, the language in proposed § 674.44(d). By assigning a properly-executed note to the Department, an institution relinquishes all rights and responsibilities for the loan, except as otherwise provided in § 674.50. No further address search is required by the institution.

Section 674.45 Collection procedures.

Comment: Several commenters questioned why the regulations require a telephone contact as a part of the billing process rather than as part of the collection procedures. A few commenters opposed the proposal to delete a requirement of telephone contact as part of the collection process because they saw it as a valuable collection tool to personalize the contact and felt it provided a way to determine the proper course of future action.

Response: No change has been made. Institutions are free to continue to make telephone contacts during the collection process; however, because this can be an effective means of restoring a borrower to current repayment status, the Secretary has determined that this personal contact is necessary during the billing process, before the institution begins more costly collection procedures.

Comment: Many commenters were opposed to the requirement to report borrowers to credit bureaus. These commenters suggested that the only time information on a borrower's account should be reported is at the time of legal action or upon assignment of the note to the United States. The commenters felt that this proposal could prove very damaging to the student if information is not accurately reported, or if timely reports are not filed immediately upon payment, subjecting the lending institution to liability for damages. A few commenters stated that paperwork and the regulatory burden would be increased. Several commenters believed that no statute authorizes reporting to credit bureaus, and that the Family Educational Rights and Privacy Act of 1974 (Pub. L. 93–579) might preclude disclosure without a student's written consent. Many commenters opposed the reporting to credit bureaus if the costs are not chargeable to the Fund. Commenters stated that this proposal could be costly to institutions—as much as $555 per year/per institution for membership costs.

Response: No change has been made. The Secretary has interpreted the Family Educational Rights and Privacy Act of 1974 and its implementing regulations, especially 34 CFR 99.31(a)(4)(iv), to permit reporting delinquent or defaulted loans to credit bureaus without the borrower's consent. An institution that wishes to report other loans to credit bureaus could do so only with the consent of the borrower. The Department's experience with this

reporting has demonstrated that it is a relatively inexpensive yet effective collection tool. Moreover, the rule has been revised to clarify that the institution is to assess the cost of reporting the debt to a credit bureau against the debtor as with any other collection costs, and that such costs, if not paid by the debtor, can be charged to the Fund.

Comment: Some commenters questioned whether the term "account status" in § 674.45(b)(2) referred to the amount of the outstanding balance as affected by each payment made, or to the account as either outstanding or paid in full. One commenter stated that there is no legal requirement for monthly updating, and that this practice would be burdensome to the school—especially those with manual operations.

Response: A change has been made. The Secretary has expanded § 674.45(b)(2) to require the institution to report any changes in account status according to the reporting procedures of the credit bureaus to which the institution reported the debt.

Comment: Many commenters opposed the Department's proposal that a collection firm be permitted to retain a defaulted borrower's account for only nine months. The commenters felt that the institution should decide the period allowed the firm to collect the account, and believed that nine months was too short a time. The commenters also felt that this restraint will increase regulatory burden. A few other commenters suggested that each loan should be considered separately, and the Department should not hamper the institution's ability to deal with agencies.

Response: A change has been made. The Secretary has extended this period to 12 months to reduce regulatory burden, but based on the extensive experience of the Department with the use of collection agencies on defaulted loans, the Secretary continues to consider a time limit to be an essential incentive to diligent collection action.

Comment: Several commenters recommended that a second effort not be required when it is the judgment of the institution that litigation is appropriate.

Response: A change has been made. An institution may proceed to litigate to collect an account which it has not been able to recover through a first level collection effort through a collection firm, or through use of its own personnel.

Comment: Many commenters noted that the terminology "significantly more intensive effort" as used in § 674.45(c)(1), is not defined. Many of these commenters said it was confusing and that it should be defined or deleted.

Response: A change has been made. The Secretary agrees with the commenters and has deleted this phrase from § 674.45(c)(1).

Section 674.46 Litigation procedures.

Comment: Some commenters expressed concern over the Department's suggestion in the preamble to the proposed rule that institutions pursue litigation by filing a claim in small claims court. These commenters were of the opinion that the filing of a claim in small claims court would be costly and unproductive. Some commenters believed that not all States have small claims courts. A few commenters suggested that the Secretary use the following regulatory language: "use court of appropriate jurisdiction, only when practical for the institution."

Response: No change has been made. When all other efforts fail and the account meets the conditions in § 674.46(a)(1), the institution is required to litigate. The proposed regulations did not require use of any particular kind of court; the use of small claims court is encouraged, but not mandated by regulation.

Comment: Many commenters opposed the proposal to sue the borrower if the outstanding principal and interest on all of the borrower's Perkins Loans held by that institution is more than $200. These commenters felt that it would not be cost-effective to pursue accounts this small, and that the minimum amount should be much higher. The commenters noted that some institutions are required to use State legal services that will not accept for collection accounts with balances under $500; also, the current level of legal fees discourages the pursuit of such small amounts. Other commenters questioned whether it was cost-effective to litigate small accounts as required in the proposed rule, and recommended that the minimum amount of accounts which must be litigated be raised from $200 to $700.

Response: No change has been made. The Secretary continues to believe that the requirement in the proposed rule that institutions litigate those accounts of more than $200 which meet the requirements of § 674.46(a) is a realistic and cost-effective collection criterion. Several factors enter into this analysis of cost-effectiveness. The first of these, although not specifically addressed in the rule, is the deterrent value of an aggressive collection posture demonstrated through predictable resort to litigation. Second, litigation is cost-effective if used only where there is a reasonable prospect that the debtor has assets or earnings sufficient to satisfy a judgment. The proposed rule, like current regulations, requires litigation only in cases in which recovery of the amount owed, including costs, is feasible. Third, litigation is cost-effective to the extent that the costs of litigation are passed along to the borrower sand do not unreasonably negate the value to the Fund of the judgment or unduly tax institutional resources to achieve that judgment.

Litigation costs fall into two categories, for purposes of analysis under the HEA: attorneys fees and collection costs. The latter is not defined is the statute, but logically includes those costs incurred in attempting collection, including court costs such as filling fees, service costs, witness fees, if any, and similar expenses which are not included in the fees charged by attorneys. Regardless of limitations on assessment of such costs under State law, section 484A of the HEA permits the institution to recover these costs, if reasonable, from the debtor. Since these costs are included within the judgment to be taken against a debtor, § 674.46(a)(1)(iii) and (2) require the institution to initiate suit only against a debtor from whom the institution can collect a "major portion" of that judgment debt, including costs.

Attorney fees are not commonly understood to fall within the phrase "costs" or "collection costs," and therefore, Federal law does not create a new rule authorizing their recovery, which is usually permitted only where the debtor has agreed to pay them. The Department has included such a provision as an option in the model promissory note published since 1977, and has required litigation on particular categories of accounts since the August 13, 1979 NDSL regulations. Institutions that wished to pass this cost on to the debtor have had ample opportunity to develop promissory notes which included this provision. The Secretary concludes from the Department's program experience that many, if not most, of the institutions participating in the Perkins Loan Program now have these provisions in their notes, and can pass on to the debtor the full cost of attorneys fees incurred to collect the debt. Because the final rule requires the institution to sue only those debtors with resources to satisfy a major portion of judgments which should include the full amount of those very costs which the institution might otherwise have to absorb, for this majority of accounts, litigation of small balance accounts will

be cost-effective on those accounts which must be litigated under § 674.46(a) (1) and (2).

The question of cost-effectiveness therefore becomes a real issue only with regard to the collection of those promissory notes which do not authorize the recovery of attorney fees. In those cases, institutions must use either Fund assets or institutional funds, or both, to pay attorney fees. The final rule requires litigation of only those accounts on which the expected cost of litigation, including attorneys fees, does not exceed recovery in the judgment; the minimum amount of such a recovery, under the final rule, is $200. Where attorney fees would exceed recovery in the judgment, litigation is not required; but even where, on small balance accounts, the attorneys fees might consume a substantial part of the recovery, the institution's burden is still quite limited. Under § 674.47(e)(5), the institution may charge against the Fund, attorney fees in an amount up to one-half the judgment, and will therefore be responsible only for fees charged over that limit on these small accounts. The Secretary considers the benefits derived from deterrent effect of litigation sufficient to warrant both the use of the Fund assets for these attorney fees, and the requirement that the institution, where necessary, pay any remainder not chargeable to the Fund. Moreover, as more than one commenter noted, the threat of immediate litigation, when made by counsel, can result in repayments without additional costs, making referral of even these small balance accounts for litigation a cost-effective procedure.

Any consideration of the cost-effectiveness of litigating small balance Perkins Loan accounts must recognize that many jurisdictions have small claims courts in which creditors may pursue small balance accounts with or without attorney representations. Many commenters acknowledged extensive and successful use of these courts. The Secretary recognizes that not all jurisdictions have such courts, and that institutions not located in the jurisdiction in which the debtor can be served with process may not be able conveniently and economically to use a small claims court in that jurisdiction. However, the wide availability of this collection tool for many institutions can be reasonably expected to reduce the number of instances in which payment of attorney fees must be made from the Fund or institutional resources.

Comment: Some commenters stated their belief that they would have difficulty securing counsel to litigate small accounts on which the proposed rule would require them to sue.

Response: No change has been made. Lawyers commonly charge for collection litigation on a contingent-fee basis, under which the attorney agrees to be compensated only from amounts received in successful litigation, usually in an amount equal to 30 or 40 percent of the debt received. The Secretary recognizes that an institution may not be able to secure counsel willing to handle a single, or even a few, low balance accounts on a contingent-fee basis at rates similar to those commonly used on larger accounts, but for several reasons does not believe that this warrants changing the rule. First, in those instances in which the institution retains counsel to handle significant numbers of accounts, it should attempt to negotiate a countingent-fee arrangement which commits the law firm to accept referrals of a certain number of small-balance accounts at reasonable fee rates in consideration of the number and size of the other accounts expected to be referred by that institution. Secondly, the rule requires institutions to refer accounts for litigation only where the expected recovery exceeds the costs of litigation. If an institution were unable to secure counsel to litigate a small-balance account under a contingent-fee arrangement, the institution would then determine whether such accounts could be referred on an hourly-rate reimbursement basis. If the institution reasonably determines that the expected cost of litigation, based on estimates of attorney fees on an hourly-rate basis, would exhaust the amount which can be recovered under a judgment, then the institution, under § 674.46(a)(1)(v), is not required to litigate that account. As discussed in an earlier response, this consideration would ordinarily apply mostly to those accounts which are based on notes that do not authorize the assessment of attorney fees against the borrower.

Comment: Several commenters suggested thast the reference to referrals in proposed § 674.46(c)(1) should be rewritten as it may be misinterpreted to mean that the Department is reinstating the referral procedures.

Response: No change has been made. As stated in the Preamble, the referral procedure has not been implemented by the Secretary at this time. It remains in the final regulations in § 674.46(d)(2) as an optional activity should the Secretary reinstate it at a later date.

Comment: Two commenters questioned whether proposed § 674.46(c)(2) permitted an institution not to litigate and still assign the note to the United States.

Response: As clarified in § 674.50(a), the final rule requires litigation on an account before assignment in those cases in which litigation would otherwise have been mandated. The institution must follow the procedures set forth in §§ 674.41 through 674.46 before assignment of the note to the United States.

Comment: Several commenters suggested that § 674.46(a)(1)(iv) concerning suing the borrower when he or she has a known legal defense be deleted. The commenters stated that it would not be cost-effective for an institution to sue in situations where a known legal defense exists.

Response: A change has been made. The Secretary does not require the institution to initiate suit in those cases in which the institution has good reason to believe that the debtor can establish a meritorious legal or factual defense to the obligation. Where the institution determines that a partial defense may be established, the determinations required in this section regarding the cost of litigation compared to recovery must be based on the amount of the enforceable portion of the obligation.

In some instances, the defense identified may be based on facts over which the institution has no control, such as the expiration of the statute of limitations with regard to a debtor whom the institution has been unable to locate, despite recurring and bona fide attempts, until more than six years after the debtor defaulted. (Note: Pursuant to section 484A of the HEA, institutions are now entitled to at least a six-year limitation period within which to bring suit against a Perkins Loan or NDSL defaulter, regardless of any State law which would establish a shorter period; State law may, however, provide for periods greater than six years. This provision assures that at least a Federal minimum applies to all NDSLs and Perkins Loans, including those made before the date on which section 484A was enacted.)

In other cases, the institution may be responsible for the defense available to the borrower; for example, when the other conditions of § 674.46(a) are met, but the period of limitation has run with regard to a loan which the institution has not attempted suit in a timely manner, the Secretary does not require the institution to attempt litigation. However, in such cases, the institution has failed to enforce properly an obligation which it was responsible to collect. The Secretary considers the institution liable for the loss caused to

the Fund by that or any other action or omission which bars the institution from securing a judgment for the full amount outstanding on a loan which met the other conditions in § 674.46(a). The institution is similarly liable for losses caused to the Fund by acts or omissions in the past that prevent successful litigation at present; for example, an institution that did not sue a defaulter is liable for the loss to the Fund on that loan if the debtor later leaves the State and cannot be located unless the institution demonstrates that when the debtor was able to be served with process, litigation would not have been successful, and therefore, that it was not then required to litigate the account.

Comment: Two commenters suggested that institutions not sue for small amounts but be allowed to use an offset of Federal income tax refunds by the Internal Revenue Service.

Response: No change has been made. The tax refund offset program is presently authorized only through 1987, and Congress has not yet taken any action to extend this program. In addition, under 31 U.S.C. 3720A, only Federal agencies may refer debts to the IRS for collection by offset; as presently interpreted, the statute permits such referrals only after Perkins Loan notes have been assigned to the United States.

Section 674.47 Costs chargeable to the Fund

Comment: Several commenters requested more clarification on the word "actual" as used in § 674.47(a)(1)(ii). They cite great difficulty in individualizing borrowers' accounts in this process.

Response: A change has been made. As explained in §§ 674.43(b)(3) and 674.45(e)(2), the institution may assess late charges and collection costs based on either the actual costs of actions taken on the particular account, or on average costs. Therefore, individualized recordkeeping is not necessarily required, but documentation must be retained to support the determination in either case.

Comment: Many commenters were opposed to institutions being limited to charging the Fund an amount not to exceed $25 for each successful address search for a borrower. The commenters believed that instead of an amount being cited in the regulations, the regulations should say "reasonable." A few of these commenters were opposed to using the word "successful" on grounds of not knowing whether an address search would be successful or unsuccessful until the search is completed. These same commenters felt that costs for unsuccessful searches should also be chargeable to the Fund.

Response: A change has been made. Based on comments received, the Secretary has decided that an institution may charge the Fund a "reasonable amount" for each successful address search rather than the proposed $25. It is not the Secretary's intention to mandate the kind of skip-tracing service an institution can employ, or to limit the kind of compensation arrangement reached between the services and the institutions. The institution may limit its costs by using a contingent fee agreement with the contractor.

Comment: A number of commenters opposed the requirement to assess collection costs against the borrower. Many of these commenters recommended that assessment of collection costs be an option of the institution to use as a negotiating tool. Other commenters opposed this rule, citing a possible conflict with the Fair Debt Collection Practices Act (Pub. L. 95–109), State laws prohibiting this practice, potential negative public relations with alumni, and conflicting language in the promissory note.

Response: A change has been made. The Secretary continues to believe that, to the extent possible, the institution should shift the burden of collection costs from the institution and from the taxpayer to the defaulting borrower. However, the Secretary agrees with the commenters' agrument that the ability to waive some or all collection costs is a valuable collection tool, and he has modified the rule to comply with this comment. Under § 674.47(d), the institution may waive collection from the borrower of the same percentage of the accrued collection costs as that percentage of the outstanding balance then due on the account that the debtor repays within thirty days of the date the debtor enters into a repayment agreement with the institution. Thus, if the debtor and the institution reach a written repayment agreement, and the debtor repays one-half of the outstanding principal and interest balance then due on as delinquent or defaulted loan within thirty days of the date of that agreement, the institution may waive the collection of one-half of the collection costs that have accrued on the account through the date of that payment; payment in full can permit a full waiver of collection costs. To the extent that these accrued costs have been waived under this rule, the institution may charge them against the Fund, subject to the limitations otherwise applicable under § 674.47.

The Secretary recognizes that some promissory notes may not include language regarding the assessment of collection costs. As discussed in an earlier comment, the omission of such a provision does not prevent the institution from assessing such costs because the imposition of these costs, unlike attorney fees, is authorized by section 484A of the HEA, as added by section 16033 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), for all loans. The Secretary has revised the language of the suggested promissory note to clarify that the borrower is liable for collection costs.

Although some commenters cited adverse alumni reaction as a reason for not assessing collection costs, it is not at all clear why this factor deserves serious consideration. Whether the alumni approve this collection practice is at this point no longer a controlling consideration; by accepting a fiduciary responsibility over these Perkins Loan funds, the institution bound itself to pursue enforcement of these debts without regard to whether such action may at times impair its own self-interest. Moreover, the rule has been revised to permit waiver of collection costs for those alumni who demonstrate a good-faith effective effort to cure a past default.

As previously noted, section 484A of the HEA authorizes the institution to assess collection costs against the borrower without regard to the provisions of State law. This assessment of collection cost against the borrower does not conflict with requirements of the Fair Debt Collection Practices Act (FDCPA) as suggested by a commenter. Section 808 of the FDCPA prohibits a third-party collecting a debt on behalf of a creditor from collecting any charges or expense incidental to the principal obligation unless expressly authorized by the original agreement or permitted by law. 15 U.S.C. 1692f(1). Because section 484A of the HEA now specifically authorizes assessment of collection costs, a debt collector can attempt to collect them as permitted by law.

Comment: Many commenters opposed the proposal to limit the costs chargeable to the Fund to "successful" collection efforts. The commenters noted that they would not be able to distinguish successful from unsuccessful until after collection efforts were completed, and therefore the same expenses would have been incurred in either case.

Response: A change has been made, but the basic principle has been retained. As noted earlier, where the regulations mandate specific actions

with fixed costs, such as telephone contacts (§ 674.43(f)), credit bureau reporting (§ 674.45(a)(1)), and opposing relief in bankruptcy (§ 674.49) on all accounts, § 674.47(a) and (b) permit the institution to charge these costs, if not paid by the debtor, to the Fund without regard to whether they were "successful"; or not. The other costs incurred after the billing cycle, such as costs of address searches (§ 674.44(b)), collection action (§§ 574.45(a)(2) and 674.45(c)(1)(ii)), and litigation (§ 674.46) can typically be obtained by the institution on a contingent-fee basis: the institution incurs no cost unless the service is successful. The Secretary therefore considers it reasonable to permit the institution to charge these latter costs to the Fund only when they are successful. § 674.47(e) (1), (3), (4), (5), and (6). If the insititution provides these services in-house or on a non-contingent basis, it need only apportion these costs between successful and unsuccessful attempts in a reasonable and documented manner.

Comment: Many commenters objected to proposed § 674.47(c)(3) which provided that an amount not to exceed 50 percent would be charged against the Fund for second collection efforts. One commenter was of the opinion that 50 percent was excessive and 33⅓ percent as used in first collection efforts would be more appropriate. Other commenters believed that the establishment of two different percentage rates was counterproductive. They felt that the higher allowance for second efforts would encourage collectors to work less in the first time effort for a higher profit margin in the second. They urged that the 50 percent rate be used for both.

Response: No change has been made. The rule requires the institution generally to use different parties for first and second collection efforts, thereby reducing the possibility of allowing accounts to slip from first to second levels of efforts. The Secretary intends to consider the need for a 50 percent allowance for second effort in the near future, and after further consideration and public comment, may reduce that level.

Comment: Several commenters were opposed to the wording of proposed § 674.47(c)(4), which the commenters stated would have permitted the institution to charge the Fund only for the salary of an institutional employee performing collection functions. These commenters believed that fringe benefits, a portion of office space and equipment, and other related employment costs should also be chargeable against the Fund.

Response: A change has been made. The Secretary's intent was not to exclude cost categories from the expenses that an institution could charge to the Fund if it performed its own collections, but to give an example of permissible charges. An institution may include in the costs to be charged against the borrower, and, if not paid by the borrower, against the Fund, any expense reasonably incurred in carrying out the activities described in § 674.47(b), including both direct and indirect costs properly allocated to these activities.

Comment: Many commenters objected to the limitations on litigation costs that could be charged to the Fund under proposed § 674.47(d)(2). The commenters approved a limitation on such costs, but believed a higher limit than $2,000 or one-third of the amount of any judgment obtained was necessary.

Response: A change has been made. The Secretary believes that a higher limit may be warranted; and has therefore increased the amount of litigation costs that can be charged to the Fund to an amount not to exceed 50 percent of the amount of any judgment obtained. § 674.47(e)(5). This increase is intended to provide institutions a level commensurate with their new burden of litigating smaller balance accounts, and enable them to negotiate referrals of groups of accounts of varying sizes for litigation. The Secretary intends to review the affect of this level on program costs and recoveries, and may propose to reduce that level in the future.

Comment: A number of commenters opposed § 674.47(e) of the proposed rule regarding write-offs. Some commenters felt that $200 was too high and students would not pay the last $200 owed if the rule allowed that amount to be written-off. One commenter asked where any money collected after the write-off procedure would be deposited. A few commenters recommended a smaller write-off figure with no strings attached. Other commenters questioned the value of the write-off procedure if continued collection efforts were required; they recommended deleting these requirements in the proposed rule.

Response: A change has been made. Under § 674.47(g) of this final rule, the amount which may be written off remains at $200 or less. Under the final rule, the institution must exhaust the due diligence procedures prescribed in these rules, which include not only a sequence of contacts immediately after default, but semi-annual attempts to locate "skips," annual dunning contacts, and annual evaluation of accounts for litigation until litigation to collect the account would be barred by the statute of limitations, now six years, unless State law provides a longer period. 20 U.S.C. 1091a(a). The Secretary believes that it is not cost-effective to require collection efforts beyond that point, and write-off is then reasonable for small balances. For larger balances, the institution is urged to consider assignment to the Department for further enforcement action.

Section 674.48 Use of contractors to perform billing and collection or other program activities.

Comment: Many commenters opposed § 674.48(c)(1) of the proposed rule which would require that any billing or collection firm under contract by an institution to collect Perkins Loans be bonded in an amount covering the amount of collections on loans expected to be in its control for a two-month period of time. The commenters stated that most billing firms work in conjunction with financial institutions—with accounts set up in the name of the institution using their services for billing. The commenters believed that it is unnecessary to ask a billing firm to be bonded when it does not handle money nor have signatory powers on the account. Several other commenters questioned why the Department is requiring a bond and at the same time requiring that funds be deposited in an institutional trust account or lock-box.

Several commenters suggested that the bond should be a "performance bond," while other commenters requested guidance as to how an institution would verify the existence of a bond and what types of bonds should be provided. Three commenters stated the bond should cover the amount of all portfolios a firm is handling.

Many commenters opposed the proposed rule as financially burdensome because they would have to get bonding agents to increase the amount of their bonds. Two commenters opposed the bonding proposal if the institution uses a law firm to collect because of the extensive insurance coverage they already maintain to protect their clients.

Response: A change has been made. Section 674.48 has been revised to clarify the requirement that an institution retain only bonded billing services and collection firms to carry out billing and collection procedures. Section 668.15 of the title IV General Provisions regulations requires that an institution shall obtain and keep current adequate fidelity bond coverage in order to protect the Government's interest in the title IV funds it receives as a trustee.

A fidelity bond, or similar insurance, indemnifies the holder or beneficiary against losses resulting from the fraud or defalcation of an individual. The Secretary believes that it is reasonable to require the institution to assure the same sort of protection for the Federal and institutional interest from third parties who handle its loan accounts as it is required to provide with regard to its own employees.

The Secretary believes that reasonable people exercising normal prudence in the administration of their financial affairs would require a third party to demonstrate adequate fidelity bond protection before entrusting that party with duties which might permit embezzlement of their funds. Third parties engaged in student loan collection in the past have embezzled funds repaid by borrowers, and there can be no assurance that the firm retained by the institution will continue in business after a misappropriation by its employees, so that the institution could recover for its loss from assets of the firm. Indeed, history suggests that the contrary will be true. An institution which allows a third party to handle its loan accounts without satisfying itself that a financially responsible surety will indemnify it in the event of loss is therefore negligent in the performance of its duties as trustee of the Fund.

A fidelity bond adequately protects the institution only if it provides coverage in an amount sufficient to indemnify the institution for the full amount of any misappropriation of funds belonging to the institution.

To respond to those commenters who believed that collection firms should be permitted to deduct their fees, while at the same time assuring minimum adequate bonding coverage, the Secretary has revised the proposed rule with regard to bonding requirements for third-party collectors to provide two alternative methods of assuring adequate coverage. First, if the institution does not authorize the third party to deduct its fees, but requires it either to deposit payments in an institutional trust account or to direct payments to the institution itself or to a lock-box, § 674.48(f)(2) of the final rule provides that the institution may meet its duty of care if it assures itself that the billing or collection firm is bonded in an amount equal to two months' expected repayments on referred accounts.

Second, the final rule provides that if the third party collector is authorized to receive payments and deduct its fees from the receipts, the institution must more actively undertake to assure the protection. If the amount of expected receipts is very large, over $100,000 over a two-month period, the institution has substantial exposure, and must assure itself that it will not have to compete with other clients for a share of a common bond by ensuring that it is the named beneficiary on a bond or policy in the full amount of those repayments. Section 674.48(f)(3)(ii). If the amount of expected receipts is less than $100,000, the institution must still make a reasonable effort to assure itself that the bond coverage will protect its interest. It can do so by assuring itself that the collector is bonded in an amount ten times larger than the amount of repayments expected to be generated in a two-month period on accounts the institution itself refers to the agent, a multiple designed to provide some protection from the effects of competing claims. Section 674.48(f)(3)(i)(A). The institution should be able to satisfy this requirement with a minimum of investigation. If this multiple, on the other hand, exceeds the amount the collector will be receiving during the two-month period for all its clients, and demonstrates that to the satisfaction of the institution, the final rule provides that a smaller bond is reasonable. Section 674.48(f)(3)(i)(B). It must be emphasized that these particular bonding requirements apply only in those instances in which the institution permits the third party to pay itself out of receipts on the loan accounts, and therefore only apply to contracts with collection firms.

An institution that engages a law firm to perform collection services on its accounts (other than actual collection litigation) must assure itself of this protection in the same manner as with any other third-party, by reviewing the bond or insurance policy to determine whether it protects against misappropriations by employees of the firm. Where a law firm's malpractice insurance also indemnifies for misappropriation of funds by any of the employees of the firm in the course of collection activity, such a policy would provide coverage comparable to that of a fidelity bond.

Comment: A number of commenters opposed the provision in proposed § 674.48 (c)(2) and (d)(4) that would require institutions to use billing services and collection firms that provide monthly statements to institutions to show activities with regard to each borrower. Some commenters stated that the proposed requirements are unnecessarily burdensome due to lack of personnel to review statements, and a costly duplication of effort because institutions already receive information regarding the borrower's status from various other reports. Several commenters suggested that the proposal be dropped due to increased programming costs which the commenters believed would be very high.

All of these commenters opposed the requirement that the monthly statements from billing and collection firms should include amounts applied to principal, interest, and late charges. The commenters stated that the requirement is redundant due to the fact that this information is already kept by the institution in its accounting system.

Several commenters stated that collection firms should be required to furnish the information listed in proposed § 674.48(d)(4) of this section, only upon the close and return of the account to the institution. A few commenters suggested that the regulations require quarterly statements which show only payments and commissions charged.

Response: A change has been made. The Secretary agrees with the commenters that some of the information required is available to the institution through various other reports. Therefore, many of the items previously listed in § 674.48 (c)(2) and (d)(4) have been deleted; these provisions now require an institution that uses a billing service or a collection firm to secure from these contractors a quarterly statement instead of a monthly statement as proposed in the NPRM.

Comment: Many commenters objected to § 674.48 (c)(5)(i) and (d)(3)(i) of the proposed rules which gave the institution an option to use billing services and collection firms that instruct the borrower to pay the institution directly. The commenters suggested the requirement be deleted or reworded as follows: "* * * instructs the borrower to make checks payable to the institution, but remit to the service or firm." Several commenters stated that it is a responsibility of a billing service and collection firm to receive payments. The commenters also expressed the concern that this requirement would delay the communicating of account activities and result in inaccurate information.

Response: No change has been made. The institution is primarily responsible for Perkins Loan funds, and the Secretary sees no reason to bar the institution, if it chooses, from receiving payments directly from the borrower. Therefore, this will remain as an institutional option. § 674.48 (c)(4)(i) and (d)(1)(i).

Comment: Many commenters disagreed with proposed § 674.48(d)(3)

(ii) and (iii) which would require a collection firm to deposit funds collected from the borrower in a lock-box or institutional trust account. The commenters stated that in most States, collection firms are licensed and bonded, and are required by law to pay clients on a regular monthly basis. The commenters also stated that by State law, funds are supposed to be kept in an agency client trust fund. Several commenters believed that this proposal would require more bookkeeping for the institutions and agencies and establishment of additional bank accounts. Other commenters stated that it would be costly because of monthly box rental fees. Some of these commenters stated that this proposal will not provide any additional protection against unlawful use of loan funds beyond that already provided by bonding requirements.

Response: No change has been made. The Secretary believes that the proposed provisions best satisfy the Secretary's goals of protecting the Federal Government's interest in the title IV funds. It is difficult to see any basis for concluding that loan repayments commingled in a single client trust fund would be protected in the event of either embezzlement or insolvency by the firm as fully as if they had been promptly deposited in an institutional trust account, after deduction of the firm's commissions. Therefore, if an institution chooses not to use a collection firm that instructs the borrower to pay the institution directly, it must employ one that deposits those funds in a lock-box or institutional trust account.

Comment: Many commenters objected to requiring an institution to ensure that a collection firm does not deduct its fees from the amount it receives from the borrower. The commenters suggested that the Secretary allow such a firm to retain its commission before remitting payment to the institution provided that borrowers' accounts are credited. The commenters believed that firms would be forced to extend credit to their clients—creating paperwork and expense. A number of these commenters also noted that attorneys usually deduct their fees from the payment. The commenters suggested that this proposal be deleted and that the institution be allowed to use its discretion in establishing mutual agreements with the collection firms. They believed that this proposal offered no additional protection against abuse. The commenters stated that the additional institutional workload to audit collection firms, to process invoices and payments, and the adversarial relationships between institutions and collection firms which, they felt, would be created by this proposal, would not make this requirement cost-effective.

Response: A change has been made. The Secretary agrees with the commenters that the proposed requirement may not be cost-effective and this provision has been deleted.

Comment: Numerous commenters responded to the Secretary's invitation to comment on whether or not the prohibition against an institution using a commonly owned billing service and collection firm should be revoked. These commenters believed that allowing the use of commonly owned services would present a conflict of interest. The commenters stated that revoking this prohibition would make it more advantageous for a company to pursue an account after default, when the percentage of return would be greater. Some commenters believed that smaller firms collect more aggressively and are more sensitive to institutional needs and that removing the prohibition would enable large firms to underbid them and monopolize the provision of these services, to the ultimate detriment of the institutions and the loan program. Several commenters expressed concern that an environment for misuse would be created and the system of checks and balances would be eliminated. The commenters believed that deleting this requirement would also increase the per-dollar cost of collections, and therefore, they recommended that the regulation not be revoked.

However, a smaller number of commenters responded favorably to revoking the provision that prohibits an institution from using a collection firm and billing service that are commonly owned. These commenters provided the following reasons as to why this provision should be revoked: (1) Allowing institutions to use collection firms and billing services that are commonly owned may improve communications, thus improving the efficiency of the billing/collection process; (2) The prohibition may stifle and prohibit the establishment of consortium agreements which can be an effective means of performing collection efforts; (3) There may be a reduction in operating costs to institutions because it would eliminate the paperwork of sending accounts from billing to collection firms; (4) There would be consistency between the Perkins Loan and Guaranteed Student Loan programs; and (5) Maintaining the regulation may prohibit normal effective operations and restrain trade.

Response: No change has been made. The Secretary appreciates the comments received regarding the provision which prohibits institutions from contracting with commonly owned billing services and collection firms. After considering the comments, the Secretary agrees with the majority of the commenters that the checks and balances which this prohibition provides are necessary to protect the Fund, and therefore does not believe that revoking this prohibition is prudent at this time.

Comment: Several commenters responded to the Secretary's invitation to comment on whether a provision should be added to require an institution that contracts with a single firm or with commonly owned firms to perform both billing and collecting to obtain biennial audits of the Perkins Loan accounts of the firm(s). All of these commenters opposed this provision and stated that audits should only be conducted when and if the school needs them.

Response: The Secretary appreciates the comments and does not include such a provision in the regulation. In view of the bonding requirement for billing services and collection firms, the Secretary no longer believes that the provision regarding biennial audits of these firms is necessary. However, the Secretary considers periodic auditing of the institution's accounts held by a firm to be a desirable practice.

Comment: Several commenters suggested that defaulted amounts should be subject to offset of Federal income tax refunds by the Internal Revenue Service.

Response: No change has been made. The Internal Revenue Service, on behalf of any Federal agency, if authorized by the Spending Reduction Act of 1984 (Pub. L. 98–369, Section 2653, 98 Stat. 1153) to offset Federal income tax refunds of taxpayers who owe debts to the United States. 26 U.S.C. 6402(d). Because loan debts are not regarded as owed to a Federal agency until assigned to the Department of Education, the Secretary has no basis for requesting an offset for such debts against a borrower's Federal income tax refund. Moreover, this authority now extends only to offsets of refunds payable before December 31, 1987.

Section 674.49 Bankruptcy of borrower.

Comment: Several commenters objected to both perceived and real requirements in the proposed rule regarding institutional responsibilities with regard to borrower bankruptcies as being overly burdensome and costly in light of costs of litigation and the expected recovery, and urged that

greater reliance be placed on institutional discretion in selection of enforcement actions on such loans.

Response: The regulations require the institution to exercise due diligence in attempting to enforce a loan owed by a borrower who has filed for relief in bankruptcy. Generally speaking, they do not require the institution to do more than it would otherwise be required to do in the context of any other litigation, nor less than the institution is already required to do under bankruptcy law. For example, the regulations require the institution, upon notification of the filing of a bankruptcy petition, to suspend collection action *outside* the bankruptcy proceeding, and require the institution, at a minimum, to prepare and file a proof of claim, an extremely inexpensive and simple step in the collection process. The regulations, on the other hand, require the institution, as a trustee of the Fund, to consider carefully the various enforcement actions that other prudent creditors would take to protect their claims against a debtor in bankruptcy, and to take those actions which are legally authorized and which are not expected to cost more than the size of the loan and the future recovery from the debtor can justify.

Institutions differ greatly in their experience with loan collection in general and with bankruptcy in particular; institutions likewise differ in their commitment to aggressive loan collection. In light of these differences and the substantial Federal interest at stake in this matter, it is entirely appropriate for the Department to provide in these rules specific guidance and minimum standards for the exercise of due diligence in the context of student loan bankruptcies, rather than leaving the choice of actions to the discretion of each institution.

The Department recognizes that realistic consideration of costs of litigation must be made with regard to each step in the handling of student loan bankruptcies, and the final regulations require the institution to make a reasonable estimate of the cost-effectiveness of an enforcement action with regard to a debtor in bankruptcy before it expends Fund and institutional assets on such litigation.

Comment: Several commenters believed that the proposed rule would require the institution routinely to file a complaint to have a loan in repayment less than five years from the filing of the petition determined to be nondischargeable, and objected that the law does not require this action in order to preserve the enforceability of the loan obligation.

Response: Clearly, the statute places the burden of securing a determination of dischargeability on the debtor for those loans falling under 11 U.S.C. 523(a)(8)(A), and the institution need not initiate the consideration of that issue by filing a complaint to have the loan determined to be nondischargeable. Neither the proposed rule nor the final rule requires the institution to file such a complaint in every case involving a nondischargeable loan. Consistent with the consideration of litigation costs discussed earlier, § 675.47(e)(5) (i) and (ii) permit the institution to charge actual costs to the Fund if it chooses to contest aggressively the discharge of a loan under circumstances in which the Department considers such action likely to prove cost-effective, and a contingent amount in other circumstances. The institution that chooses to file a complaint for a determination of nondischargeability under circumstances described in § 674.49(c) (3), (4), and (5) may charge the actual amount of litigation costs to the Fund. In all other cases, the institution may charge the fund only those costs not to exceed one-third of the amount of any judgment obtained by that action.

Comment: Several commenters objected to the requirement in the proposed rule that an institution include in its pleadings a request for judgment on the amount owed by the debtor in those instances in which the school files a complaint to have a loan obligation determined to be nondischargeable, or opposes a complaint seeking to have the loan held to be dischargeable. The commenters believed that such an action was not appropriate in a bankrupcty proceeding.

Response: No change has been made. Because the bankruptcy court has jurisdiction to adjudicate cases arising in or related to cases under the Bankruptcy Code, the court appears to have the power to issue an order determining the amount owed on a debt included in the bankruptcy proceeding. Moreover, the practical benefits of securing a judgment on the debt in the bankruptcy proceeding are obvious: first, the institution at this time definitely knows the location of the debtor, who either before or after the bankruptcy may be difficult to trace; second, the judgment tolls the running of the statute of limitations on the debt; and third, the action increases the likelihood that the debtor will enter into a reaffirmation agreement regarding the loan obligation, and make such an agreement, which would be incorporated in a consent judgment, more valuable to the institution after the bankruptcy is closed. Therefore, this requirement states what constitutes a good collection practice and has been retained in § 674.49(c)(5)(ii).

Comment: Some commenters believed that the institution should not be required in every Chapter 13 proceeding to seek to have the plan extended to the full five years authorized under the Code, but should be permitted to seek this extension before those courts which appear receptive to such a proposal.

Response: The comment is well taken, and this requirement has been deleted from the final rule; institutions are urged to consider this action on a case by case basis.

Comment: One commenter believed that the regulations were perhaps excessively detailed regarding the institution's responsibilities with regard to claims of undue hardship, but silent on other grounds for excepting loans from discharge, such as borrower misrepresentation of financial status, and suggested that the institution be counseled to consider weighing the cost of attempting to oppose discharge on other grounds against the likely recovery.

Response: The Department recongizes that in most instances the institution will lack the information needed to establish that a loan should be excepted from discharge under the false representations and fraud provisions of 11 U.S.C. 523(a) (2) and (4), and therefore does not require the institution to undertake an investigation that might establish that the loan should not be discharged for such fraud. On the other hand, the institution as a trustee of the Fund has a responsibility to exercise diligence in attempting to collect these loans as assets of the trust, and cannot ignore information it has in its possession that might establish that the student loan debtor obtained the loan by means of false pretenses or a false statement of his or her financial condition. Where the institution has information that shows that the debtor made such false statements, its general fiduciary responsibility for collection litigation requires it to protest the discharge on that ground where there is some likelihood that the debt can be recovered from the debtor. 34 CFR 674.46(a) (1), (2). The costs of such litigation, to the extent not recovered from the debtor, can be charged to the Fund under § 674.47(e)(5)(ii).

Comment: One commenter pointed out that the institution should not be required to oppose a discharge if a Chapter 13 debtor is unable to complete the payments required under the previously approved plan and seeks a

discharge under 11 U.S.C. 1328(b), as proposed earlier, because such a discharge, if granted, affects only loans dischargeable under the terms of 11 U.S.C. 523(a)(8). By not opposing such a request, the institution ensures that a debtor who might have been able to discharge his or her obligation without regard to the five-year, undue hardship rule in 523(a)(8) must now meet that test in order to have the loan discharged.

Response: The comment is well taken, and the final rule has been revised to require the institution, rather than opposing a discharge requested under 11 U.S.C. 1328(b), to act only where that action can potentially protest the future enforceability of the loan and is not disproportionately costly. Thus, the institution should monitor the debtor's performance under the Chapter 13 plan, and identify failure by the debtor to make the payments required under that plan. Where the institution finds repeated failures to make required payments, it should anticipate that the debtor will seek a "hardship discharge" under 11 U.S.C. 1328(b). Such a discharge, if granted, will discharge loans which entered repayment more than five years before the filing of the petition. If the institution holds a nondischargeable loan, it need take no action at this point; however, if the institution holds a dischargeable loan, it must then review the cost and likelihood of success of either moving to dismiss the case in order to preempt the expected request for a "hardship discharge," or waiting for, and opposing, that request. The institution must review its own records and pertinent court records to evaluate whether, under applicable provisions of bankruptcy law, the facts in the case support a move to dismiss the case, or an objection to the requested "hardship discharge," and further, whether the amount the institution will spend, with the amounts already spent in litigating this particular bankruptcy, exceed one-third of the amount of the loan debt that will be lost if the discharge is granted. In the case of larger, dischargeable loans and low-divided plans, the Department expects that opposition by the institution will be cost-effective, and in those cases, aggressive opposition by the institution is a necessary element of its due diligence responsibilities.

Section 674.50 Assignment of defaulted notes to the United States.

Comment: Several commenters felt that § 674.50(a)(1) of the proposed rule, which would have required that a note be in default for two years before it could be assigned to the United States, was too restrictive. They stated that institutions should have an option of assigning a note to the United States at any time after due diligence procedures have been performed.

One commenter stated that the provision for assigning notes should be deleted from the regulations because the procedures may be a disincentive for schools to do a good collections job.

Response: A change has been made. The Consolidated Omnibus Budget Reconciliation Act of 1985 eliminated the requirement that a loan must be in default for two years before an institution may assign it to the United States. In accordance with this Act, § 674.50(a)(1), as proposed in the NPRM, has been deleted. An institution may assign a defaulted loan to the United States if that institution has been unable to collect a payment after following the due diligence procedures through a first collection effort, and if litigation is required under these rules, through entry of a judgment. The assignment process is not intended as a disincentive for loan collections, but is available only if a loan cannot be collected after institutional collection efforts have been exhausted.

Comment: Many commenters expressed concern with § 674.50(a)(3) of the proposed rule which permits an institution to assign to the Secretary only those accounts greater than $200. They felt that this may be a problem for two-year institutions and that the minimum amount should be reduced to $100. Some of these commenters stated that they would support this proposal if § 674.47, "Costs chargeable to the Fund," allows institutions to cancel, forgive and cease to pursue accounts valued at $200 or less. Other commenters questioned how the accounting would be handled for accounts of $200 or less. One commenter stated that the account balance to be assigned should be no less than $500. One commenter stated that no dollar minimum should be placed on assigned accounts.

Response: No change has been made. The purpose of the provisions in the statute for assignment to the Secretary is to permit the Federal Government to use its resources to enforce the loan. Based on its experience with its current portfolio the Department considers an account balance of $200 to represent the minimum account size to be handled effectively. The Secretary is including a provision in § 674.47 for the write-off of account balances of $200 or less. Accounts that are written off should be handled according to normal institutional accounting procedures; however, if a payment is made on an account after the account has been written off, the payment must be deposited into the Fund.

Comment: Several commenters stated that the documentation requirements in proposed § 674.50(c) were excessive, particularly for institutions with default rates of 10.0 percent or less, and should be eliminated.

Response: A change has been made. The Secretary has clarified the regulation in § 674.50(c) to state explicitly that all institutions must certify in writing that due diligence required under Subpart C has been exercised on each loan submitted for assignment, but that documentation supporting institutional compliance with all of the due diligence requirements need not be submitted if the institution has a default rate of 7.5 percent or less as of June 30 of the second year preceding the submission period.

Comment: A few commenters stated that the regulations should not require submission of the "original promissory note" as part of the assignment procedure, since originals are sometimes lost in the process of litigation. The commenters proposed that the regulations should state "certified original copy" of the promissory note.

Response: A change has been made. The Secretary concurs with the commenters. The words "or certified copy of the original note," have been added to § 674.50(c)(2).

Comment: One commenter opposed the requirements in proposed § 674.50(c)(5) that copies of all approved requests for deferment and cancellation must be submitted with notes submitted for assignment. The commenter believes that this proposal is neither feasible nor cost-effective.

Response: No change has been made. In collecting assigned loans, the Department frequently encounters disputes about alleged deferments. Adequate documentation regarding all such requests is therefore essential to the Government's collection action in these accounts.

Comment: One commenter stated that proposed § 674.50(c)(7), requiring documentation that the institution has withdrawn the account from any firm that it employed for address search, billing, and collection or litigation services, would be an unnecessary burden on institutions.

Response: No change has been made. In the experience of the Department, a failure by the institution to recall assigned accounts from its collection firms causes confusion for the debtor and the Department and requires a considerable amount of time and effort by the Department to correct. These

problems justify imposing on institutions the added step of documenting that they have in fact done what they were required to do upon relinquishing their interest in the note to the United States.

Comment: One commenter stated that a Chapter 7 discharge or a Chapter 13 hardship discharge has no effect on a loan which is within the five-year period, and suggested that proposed § 674.50(d)(1) should clarify that no entry of judgment is required if the loan is expected from discharge under 11 U.S.C. 523(a)(8), and should permit assignment of this kind of loan if litigation would not otherwise be required under these rules.

Response: No change has been made. The rule requires the institution to secure either a judgment and a determination by the bankruptcy court that the loan to be assigned is nondischargeable, or a judgment on the loan obligation after entry of a general discharge order, not merely to secure an interpretation of the effect of a general discharge order on a student loan, but to make enforcement of such loans in the hands of the Government more cost-effective. The purpose of the assignment provisions of the statute is to enable the Department to recover the Federal investment in assigned, defaulted loans.

No reasonable prospect of recovery exists on a loan discharged in bankruptcy, and recovery on loans which are dischargeable on a showing of undue hardship can be expected to involve costs beyond those typically encountered in enforcing other defaulted loans. It is reasonable to expect that borrowers owing a dischargeable loan assigned to the Government will respond to a Federal demand for payment not only by asserting the defenses they might assert on the loan itself, but also by seeking to reopen their bankruptcy proceeding and demonstrate undue hardship. The institution should reasonably be expected to meet those costs under circumstances described in the final rule in order to sustain its own Fund and to establish a credible deterrent to ready recourse by its borrowers to relief in bankruptcy. The Federal Government, which has already supported the institution's collection costs, accepts assignments in order to generate revenues. It is not cost-effective for it to spend the additional time and staff resources needed to deal with these bankruptcy-related challenges in order to recover on this particular category of assigned loans. In order to assure that enforcement of loans included in a previous bankruptcy case will not be disproportionately more costly than collection of other assigned loans, it is reasonable to accept only those loans for which the institution, which currently derives financial benefit from the assignment in the form of a reduced default rate, to secure either a judicial determination of enforceability of the loan from the bankruptcy court, or from another court in which the borrower had the opportunity to assert the defense of a discharge in bankruptcy, but failed to do so.

Comment: A few commenters suggested that proposed § 674.50(d)(2) be amended to permit assignment following unsuccessful efforts by an institution to collect in the courts. The commenters expressed the belief that this proposed provision will discourage institutions from litigating difficult cases.

Response: This provision is now found in § 674.50(e)(2); no other change has been made. For the same reasons that make a judicial determination of enforceability a reasonable condition for assignment of a loan owed by a borrower who has resorted to bankruptcy, a judgment is a reasonable prerequisite for assignment of those loans which should be litigated as an element in the performance of the institution's due diligence responsibilities. The commenter, moreover, has identified precisely those loans on which this requirement is most reasonably imposed. Except with regard to claims of the defense of infancy, to which a variety of rejoinders are almost always available, in this Department's considerable experience in attempting collection on hundreds of thousands of assigned student loans, the cases described in the comment as difficult cases are difficult because of some action or inaction by the institution which the borrower claims to have caused injury and to bar enforcement of the loan obligation. It is difficult for the Government to respond to such charges, since the information needed to sustain or dispute the charges is solely in the hands of the assigning institution, which, for any of a number of reasons, may not provide the information to the Department as needed to rebut effectively the defense and recover on the loan. Not only does the Department typically lack the information needed to respond to borrower defenses, but it is hardly fair for the institution to derive the benefits now available from the assignment while the Department bears the expense and litigative risk in pursuing the borrower on these loans.

Comment: Several commenters believed that proposed § 674.50(f), which would require an institution to indemnify the Fund for any note found to be unenforceable after assignment, was unnecessary and vague and should be eliminated. One commenter believed that the term "indemnify" legally means that some type of insurance must be provided in case the note is not a legally binding instrument, and that the statute does not require an institution to purchase insurance. One commenter believed that State laws which provide that no officer or agency of the State may contract any indebtedness on behalf of the State or assume to bind the State in an amount in excess of the amounts appropriated by the legislature unless expressly authorized by law, prevented compliance with the indemnification requirements in the proposed rule.

Two commenters believed this requirement was unfair unless, in the event that an assigned account is found at a later date to lack needed documentation, the Department were to provide, at the request of an institution, a second review of the loan account and the institution's performance of due diligence before making a final determination.

One commenter questioned the unilateral determination of unenforceability in proposed paragraph (f). The commenter questioned the definition of "legally unenforceable" and asked whether an account is considered to be "legally unenforceable" when the statute of limitations has expired but when the account is still considered by the institution to be a viable obligation which may be collected through such nonjudicial remedies as offset and withholding of services.

Response: No substantive change has been made. The provision that the Secretary may determine, with or without a judicial determination, that an assigned loan is not legally enforceable and that the institution must reimburse the Fund for the amount of the loan he determines to be legally unenforceable, rests on the nature of the institution's responsibilities as a trustee of the loan Fund. By accepting responsibility for the administration of the loan Fund, the institution accepted a fiduciary responsibility with regard to the administration of assets of the Fund, including the duty to make and collect loans from the Fund in a competent manner, and the duty to avoid actions which would undermine or destroy the value of the loan obligations, which obviously constitute the primary asset of the loan Fund. The responsibility of the institution as trustee of Fund assets has long been recognized by the Department, and these particular

applications of that responsibility rest on traditionally recognized principles of common law. Moreover, as the grantor of this trust and its residual beneficiary, the Department obviously has the authority and responsibility to identify those instances in which Fund assets have been lost or rendered valueless because of the actions or omissions of the institution, and to demand that the institution reimburse the Fund for the amount of loss caused by that act or omission.

The comments that the use of the term "indemnify" implies that the institution must secure insurance for its actions with regard to the Fund, and that the statute does not authorize the imposition of such a cost, plainly miss this point, as does the comment that an institution need not comply with this provision if it is subject to a State law limiting the authority of a State officer or agency to agree to indemnify another unless funds are appropriated for that purpose. The proposed rule did not require an institution to secure an insurance policy for itself, or to enter into some new indemnification agreement with the Department. The rule merely articulated the responsibility the institution had already assumed by virtue of its existing relationship with the Department with regard to the Fund. To avoid misunderstanding, however, the final rule replaces the words "indemnify the Fund" with the more general terms "reimburse the Fund" to describe the responsibility of the institution.

The comment that "legally enforceable" means enforceable by lawful means, as opposed to merely enforceable by lawsuit, is well-taken, and the Secretary wishes to clarify that to the extent that the Department has collected an assigned loan, particularly by offset against a Federal tax refund, that loan was legally enforceable, whether or not the judicial statute of limitations had expired on the loan. Opportunities for offset by the Secretary are, at this time, quite limited: the statutory authority for tax refund offsets now extends only through December 31, 1987, and the only other prospect for offsets lies with those payments due to debtors who are identified as Federal employees.

As a practical matter, therefore, the term "enforceable," as used in these regulations, now means enforceable by the Secretary by way of lawsuit. Recent amendments to the Act may make this issue as it involves application of the statute of limitations moot for the present: section 484A of the Act, added by Pub. L. 99–272, provides a six-year limitation period, commencing on the date of assignment of the loan to the Secretary, for suits by the United States to enforce assigned loans. 20 U.S.C. 1091a(a)(4)(C). Consistent with case law governing the applicability of statutes of limitation, the Secretary considers this statute to provide the United States a full six-year period for collection litigation, from the date of assignment, whether or not any period of limitation previously applicable to that account had expired. Because of this provision, therefore, it does not appear likely that the loans assigned in the near future under this regulation will be unenforceable by virtue of the running of a statute of limitations.

As to other defenses, such as misrepresentation or failure of consideration, however, the United States as assignee of the loan enjoys no special protection. Moreover, unlike questions of the running of the period of limitations, which are more typically resolved with a minimum of documentation, the United States is unavoidably and totally dependent on the institution when confronted with defences raised by debtors based on claims of fraud, misrepresentation, and various forms of failure of consideration. Defending against these kinds of charges will require the United States to expend a considerable amount of time and effort in retrieving from the institution documents that may have been lost or discarded and identifying witnesses who may long since have left its employ or had their recollection dimmed by time. The Secretary therefore considers it reasonable to require the institution to reimburse the Fund in those cases in which he determines that allegations of these kinds of defenses are credible and would make successful enforcement of the loan doubtful. The institution will acquire title to the loan note upon making reimbursement to the Fund. If the institution disagrees with the determination that the loan is not enforceable, it may then attempt to secure a judgment on the loan in order to make itself whole for the reimbursement to the Fund.

The Secretary wishes to recover on assigned loans to the greatest extent practical and cost-effective, and has no interest in peremptorily finding a loan to be uneforceable. The Secretary therefore has every reason to permit an institution to supplement its documentation on a previously assigned account where doing so would not jeopardize Federal efforts to enforce the loan. Because it is in the interests of both the Department and the institution to handle this sort of supplementary action on an informal and expedited basis, the Secretary sees no need to prescribe procedures in these rules to govern this transaction.

Comment: Several commenters objected to the proposed § 674.50(g) which would require an institution to consider a loan in default after assignment, if the rule means that after an account is assigned, the institution must still withhold registration, transcripts, or placement services from that debtor. The commenters stated that assignment terminates the institution's title and equity in the loan, leaving no legal basis for taking further action against the borrower. One commenter recommended that if this provision were to be implemented, the Department should indemnify the institution for any suit filed by a borrower against the institution based on collection efforts after assignment. Two commenters asked what effect this paragraph would have on the institution when computing the default rate. One commenter stated that the institution should not be required to classify the borrower in default status for the purposes of reporting, default rate calculation and funding.

Response: A change has been made. The Secretary has amended § 674.50(h) of the final regulation by clarifying that no further financial aid should be awarded to a borrower whose defaulted Perkins Loan(s) have been assigned unless the borrower has made satisfactory arrangements to repay. This is required under section 484(a)(3) of the Act. The institution need take no further action to collect the loan. The institutional default rate will be calculated each year on the basis of information provided in the annual Fiscal Operations Report as of June 30. Notes reported as having been assigned and accepted by the U.S. Government are not included in the institutional default rate.

Comment: Several commenters stated that money collected on assigned notes after the costs of collection have been met should be redistributed to institutions according to the fair share process.

Response: No change has been made. Although section 463(a)(5)(B) of the Act permits the Secretary to reallocate those amounts to institutions, the Secretary does not intend to implement this authority at this time because of the overarching need to reduce the Federal deficit and the continuing high subsidy of Perkins loans.

[FR Doc. 87–27420 Filed 11–27–87; 8:45 am]
BILLING CODE 4000–01–M