by the organics monitoring system during the most recent performance test.

(f) Each owner or operator of an affected facility subject to the provisions of this subpart and seeking to demonstrate compliance with § 60.562–1 shall keep up-to-date, readily accessible records of:

(i) Any changes in production capacity, feedstock type, or catalyst type, or of any replacement, removal or addition of product recovery equipment; and

(ii) The results of any performance test performed pursuant to the procedures specified by § 60.564 (b), (c), (d), or (e).

(g) Each owner or operator of an affected facility that seeks to comply with the requirements of this subpart by complying with the uncontrolled emission rate cutoff provision in § 60.560(c) shall keep for at least 2 years up-to-date, readily accessible records of any change in process operation that increases the uncontrolled emission rate of the process line in which the affected facility is located.

(h) Each owner and operator subject to the provisions of this subpart is exempt from § 60.7(c) of the General Provisions.

(i) The Administrator will specify appropriate reporting and recordkeeping requirements where the owner or operator of an affected facility complies with the standards specified under § 60.562–1 other than as provided under § 60.565 (a) through (e).

(j) Each owner or operator that seeks to comply with the requirements of this subpart by complying with the uncontrolled emission rate cutoff provision of § 60.560(c) or the requirements of § 60.562–1 shall submit to the Administrator semiannual reports of the following recorded information, as applicable. The initial report shall be submitted within 6 months after the initial start-up date.

(1) Exceedances of monitored parameters recorded under § 60.565 (b), (c)(4), and (e).

(2) All periods recorded under § 60.565(c) or § 60.565(d) when the vent stream has been diverted from the control device or has no flow rate.

(3) All periods recorded under § 60.565(c) when the boiler or process heater was not operating.

(4) All periods recorded under § 60.565(d) in which the pilot flame was absent.

(5) All periods recorded under § 60.565(a)(7) when the 14-day rolling average exceeded the standard specified in § 60.562–1(c) (1)(iv), (2)(ii), (3)(ii), or (4)(ii), as applicable.

(6) Any change in process operations that increases the uncontrolled emission rate of the process line in which the affected facility is located, as recorded in § 60.565(g).

(k) Each owner or operator subject to the provisions of this subpart shall notify the Administrator of the specific provisions of § 60.562 or § 60.560(c), as applicable, with which the owner or operator has elected to comply. Notification shall be submitted with the notification of initial startup required by § 60.7(a)(3). If an owner or operator elects at a later date to use an alternative provision of § 60.562 with which he or she will comply or becomes subject to § 60.562 for the first time (i.e., the owner or operator can no longer meet the requirements of this subpart by complying with the uncontrolled emission rate cutoff provision in § 60.560(c)), then the owner or operator shall notify the Administrator 90 days before implementing a change and, upon implementing a change, a performance test shall be performed as specified in § 60.564.

(l) The requirements of this subsection remain in force until and unless EPA, in delegating enforcement authority to a State under section 111(c) of the Act, approves alternative reporting requirements or means of compliance surveillance adopted by such State. In that event, affected sources within the State will be relieved of the obligation to comply with this subsection, provided that they comply with the requirements established by the State.

§ 60.566 Delegation of authority.

(a) In delegating implementation and enforcement authority to a State under section 111(c) of the Act, the authority contained in paragraph (b) of this section shall be retained by the Administrator and not transferred to a State.

(b) Authority which will not be delegated to States: § 60.562–2(c).

3. Section 60.17 is amended by revising paragraphs (a)(6), (a)(38), and (a)(39) and by adding paragraphs (a)(48) and (a)(49) to read as follows:

§ 60.17 Incorporation by reference.

* * * * *

(a) * * *

(6) ASTM D1946–82, Standard Method for Analysis of Reformed Gas by Gas Chromatography, IBR approved for § 60.45(f)(5)(i) and § 60.564(c).

* * * * *

(38) ASTM D2382–76 (Reapproved 1977), Standard Test Method for Heat of Combustion of Hydrocarbon Fuel by Bomb Calorimeter (High-Precision Method), IBR approved for § 60.485(g) and § 60.564(c).

(39) ASTM D2504–67 (Reapproved 1977), Noncondensable Gases in C_3 and Lighter Hydrocarbon Products by Gas Chromatography, IBR approved for § 60.485(g) and §§ 60.564 (a) and (c).

* * * * *

(48) ASTM D2908–74, Standard Practice for Measuring Volatile Organic Matter in Water by Aqueous-Injection Chromatography, IBR approved for § 60.564(d).

(49) ASTM D3370–76, Standard Practices for Sampling Water, IBR approved for § 60.564(d).

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Wednesday
September 30, 1987

Part V

Department of Health and Human Services

Health Care Financing Administration

Medicare Program; Monthly Actuarial Rates and Part B Premium Rates Beginning January 1, 1988; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[OACT-013-N]

Medicare Program; Monthly Actuarial Rates and Part B Premium Rates Beginning January 1, 1988

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

ACTION: Notice.

SUMMARY: This notice announces the monthly actuarial rates for aged (age 65 or over) and disabled (under age 65) enrollees in the Medicare Supplementary Medical Insurance (SMI) program for calendar year 1988. It also announces the montly SMI premium rate to be paid by all enrollees during calendar year 1988. The 1988 monthly Part B premium will be increased from $17.90 to $24.80.

The $6.90 increase in the SMI premium is a result of several factors. First, because the trust fund reserve at the end of 1986 was larger than necessary to provide an adequate program contingency, the actuarial rate, and hence the premium, promulgated for 1987 was, as for the two previous years, set at a level lower than would otherwise have been required to finance projected 1987 expenditures. This reduced the 1987 premium by $1.43. In contrast, because the trust fund has since been reduced to the minimum level, the 1988 premium is increased by 6.5 cents to replenish the trust fund reserves. The difference between the $1.43 negative contingency margin for 1987 and the positive margin of 6.5 cents of 1988 accounts for $1.50 of the premium increase. Second, our current estimate of 1987 expenditures is 12.1 percent higher than projected at the time we promulgated the 1987 premium. Finally, we estimate Part B expenditures to increase by 13.9 percent in 1988. Almost 60 percent of the premium increase is due to growth in physician expenditures; from 1984 through 1988, Part B spending for physicians' services is growing at 11.5 percent annually.

EFFECTIVE DATE: January 1, 1988.

FOR FURTHER INFORMATION CONTACT: Carter S. Warfield, (301) 594–2893.

SUPPLEMENTARY INFORMATION:

I. Background

The Medicare Supplementary Medical Insurance (SMI) program is the voluntary Medicare Part B program that pays all or part of the costs for physicians' services, outpatient hospital services, home health services, services furnished by rural health clinics, ambulatory surgical centers, and comprehensive outpatient rehabilitation facilities, and certain other medical and health services not covered by hospital insurance (Medicare Part A). The SMI program is available to individuals who are entitled to hospital insurance and to U.S. residents who have attained age 65 and are citizens, or aliens who were lawfully admitted for permanent residence and have resided in the United States for five consecutive years. This program requires enrollment and payment of monthly premiums, as provided in 42 CFR Part 405, Subparts B and I, respectively.

The Secretary of Health and Human Services is required by section 1839 of the Social Security Act (42 U.S.C. 1395r) to issue two annual notices relating to the SMI program.

One notice announces two amounts that, according to actuarial estimates, will equal respectively, one-half the expected average monthly cost of SMI for each aged enrollee (age 65 or over) and one-half the expected average monthly cost of SMI for each disabled enrollee (under age 65) during the calendar year beginning the following January. These amounts are called "monthly actuarial rates."

The second notice announces the monthly SMI premium rate to be paid by aged and disabled enrollees for the calendar year beginning the following January. (Although the costs to the program per disabled enrollee are higher than for the aged, the law provides that they pay the same premium amount.) Beginning with the passage of section 203 of Pub. L. 92–603, (the Social Security Amendments of 1972) and until the passage of section 124 of Pub. L. 97–248, (the Tax Equity and Fiscal Responsibility Act of 1982) the premium rate was limited to the lesser of the actuarial rate for aged enrollees, or the current monthly premium rate increased by the same percentage as the most recent general increase in monthly title II social security benefits. The difference between the premiums paid by all enrollees and total incurred costs is met from the general revenues of the Federal Government.

Section 124 of Pub. L. 97–248 changed the premium basis to 25 percent of program costs.

Section 606 of Pub. L. 98–21, section 2302 of Pub. L. 98–369 (the Deficit Reduction Act of 1984) and section 9313 of Pub. L. 99–272 (Consolidated Omnibus Reconciliation Act) amended section 1839 of the Social Security Act ("the Act") to extend through 1988 the provision that the premium be based on 25 percent of program costs. In January 1989, calculation of the premium rate will revert to the method in section 1839(a) of the Act used before the passage of Pub. L. 97–248, Pub. L. 98–21, Pub. L. 98–369 and Pub. L. 99–272, except that it will remain on a calendar year basis.

A further provision affecting the calculation of the SMI premium is section 1839(f) of the Act that was added by section 2302 of Pub. L. 98–369. This provision refers to section 215(i) of the Act, which provides for cost-of-living increases in social security benefits. Section 1839(f)(1) of the act, as amended by section 9313 of Pub. L. 99–272, states that if no cost-of-living increase under section 215(i) of the Act becomes effective in December 1985, 1986 or 1987, there will be no increase in the SMI monthly premium paid by the enrollees for the following year. Thus, the premium will remain at the December level. (However, those individuals who enroll in the SMI program after the expiration of their initial enrollment period, or reenroll after a termination of a coverage period, are still subject to the increase in premium described in section 1839(b) of the Act. That increase is a percentage of the premium and would be based on the new premium rate.)

Section 1839(f)(2) of the Act, as added by section 2302 of Pub. L. 98–369, and amended by section 3.(a)(4) of Pub. L. 98–617, section 9313 of Pub. L. 99–272, and section 9001(c) of Pub. L. 99–509, contains provisions that are applicable if there is a cost-of-living increase for 1986, 1987 or 1988. The law provides that if an individual is entitled to benefits under section 202 or 223 of the Act (the Old-Age and Survivors Insurance Benefit and the Disability Insurance Benefit, respectively) and has the SMI premiums deducted from these benefit payments, the premium increase would be reduced to avoid causing a decrease in the individual's benefit payment. This would occur if the increase in the individual's social security benefit due to the cost of living adjustment under section 215(i) of the Act is less than the increase in the premium amount applies of the individual is entitled to benefits under section 202 or 223 of the Act for November and December of a particular year and the individual's SMI premiums for December and the following January are deducted from the respective month's section 202 or 223 benefits.[1]

[1] Note: — A check for benefits under section 202 or 223 is received in the month following the month for which the benefits are due. The SMI premium that is deducted from a particular check is the SMI payment for the month in which the check is

Continued

Generally, the reduced SMI premium for the individual for that January and for each of the succeeding 11 months for which he or she is entitled to benefits under section 202 or 223 of the Act is the greater of the following:

(1) The monthly premium for January reduced as necessary to make the December monthly benefits, after the deduction of the SMI premium for January, at least equal to the preceding November's monthly benefits, after the deduction of the SMI premium for December.

(2) The monthly premium for that individual for that December.

Again, those individuals who have enrolled in the SMI program late or have reenrolled after the termination of a coverage period are subject to an increased premium under section 1839(b) of the Act. In these cases, the monthly premium would be calculated as specified in (1) and (2) above with the addition of the amount specified under the provisions of section 1839(b) of the Act. That increase is a percentage of the premium and would be based on the new premium rate.

In determining the premium limitations under section 1839(f)(2) of the Act, the monthly benefits to which an individual is entitled under section 202 or 223 do not include retroactive adjustments or payments and deductions on account of work. Also, once the monthly premium amount has been established under section 1839(f)(2) of the Act, it will not be changed during the calendar year even if there are retroactive adjustments or payments and deductions on account of work that apply to the individual's monthly benefits.

For calendar year 1988, the notices of the monthly actuarial rates and the monthly premium rate are as follows:

II. Notice of Monthly Actuarial Rates

As required by sections 1839(a)(1) and (4) of the Act (42 U.S.C. 1395r(a)(1) and (4)), as amended, I have determined that the monthly actuarial rates applicable for calendar year 1988 are $49.60 for enrollees age 65 and over, and $48.60 for disabled enrollees under age 65. The accompanying statement (section IV.) gives the actuarial assumptions and bases from which these rates are derived.

III. Notice of Monthly Premium Rate

As required by section 1839(a)(3), (e)(1) and (f) of the Act as amended (42 U.S.C. 1395r(a)(3), (e)(1) and (f)), I have determined that the standard monthly premium amount will be $24.80 during calendar year 1988. However, if monthly Social Security benefits are not increased for 1988, the premium will not be increased, but will remain at $17.90 monthly. The accompanying statement shows how the premium amount was derived.

IV. Statement of Actuarial Assumptions and Bases Employed in Determining the Monthly Actuarial Rates and the Standard Monthly Premium Rate for the Supplementary Medical Insurance Program Beginning January 1988

A. Actuarial Status of the Supplementary Medical Insurance Trust Fund

Under the law, the starting point for determining the monthly premium is the amount that would be necessary to finance the SMI program on an incurred basis, i.e., the amount of income that would be sufficient to pay for services furnished during that year (including associated administrative costs) even though payment for some of these services will not be made until after the close of the year. The portion of income required to cover benefits not paid until after the close of the calendar year is added to the trust fund and used when needed.

Because the rates are established prospectively, they are subject to projection error. As a result, the income to the program may not equal incurred costs. Therefore, trust fund assets should be maintained at a level that is adequate to cover a moderate degree of projection error in addition to the amount of incurred but unpaid expenses.

Table 1 summarizes the estimated actuarial status of the trust fund as of the end of the financing period for 1986 through 1987.

TABLE 1. ESTIMATED ACTUARIAL STATUS OF THE SMI TRUST FUND AS OF THE END OF THE FINANCING PERIODS, JANUARY 1, 1986–DECEMBER 31, 1987

[In millions of dollars]

Financing period ending	Assets	Liabilities	Assets less liabilities
Dec. 31, 1986	$8,291	$5,106	$3,185
Dec. 31, 1987	4,793	6,287	−,494

B. Monthly Actuarial Rate for Enrollees Age 65 and Older

The monthly actuarial rate is one-half of the monthly projected cost of benefits and administrative expenses for each enrollee age 65 and older, adjusted to allow for interest earnings on assets in the trust fund and a contingency margin. The contingency margin is an amount appropriate to provide for a moderate degree of projection error and to amortize unfunded liabilities.

The monthly actuarial rate for enrollees age 65 and older for calendar year 1988 was determined by projecting per-enrollee cost for the 12-month periods ending June 30, 1988 and June 30, 1989, by type of service. Although the actuarial rates are now applicable for calendar years, projections of per-enrollee costs were determined on a July to June period, consistent with the July 1 annual fee screen update used for benefits prior to the passage of section 2306(b) of Pub. L. 98–369. The values for the 12-month period ending June 30, 1985, were established from program data. Subsequent periods were projected using a combination of program data and data from external sources. The projection factors used are shown in Table 2. Those per-enrollee values are then adjusted to apply to a calendar year period. The projected values for financing periods from January 1, 1985, through December 31, 1988, are shown in Table 3.

received. Therefore, a benefit check for November is not received until December and has the December's SMI premium deducted from it.

TABLE 2—PROJECTION FACTORS,[1] 12-MONTH PERIODS ENDING JUNE 30 OF 1985–1989

[In percent]

12-month period ending June 30	Physicians' services		Outpatient hospital services	Home health agency services	Group practice prepayment plans	Independent lab services
	Fees [2]	Residual [3]				
Aged:						
1985	0.8	4.6	27.8	6.1	12.9	23.3

TABLE 2—PROJECTION FACTORS,[1] 12-MONTH PERIODS ENDING JUNE 30 OF 1985–1989—Continued

[In percent]

12-month period ending June 30	Physicians' services		Outpatient hospital services	Home health agency services	Group practice prepayment plans	Independent lab services
	Fees [2]	Residual [3]				
1986	0.4	8.9	4.2	5.4	57.7	42.5
1987	6.8	9.5	21.7	10.8	38.0	13.1
1988	4.6	7.6	18.1	12.4	22.3	18.0
1989	3.4	5.8	18.3	10.7	19.0	17.6
Disabled:						
1985	0.8	1.7	8.3	0.0	26.4	14.8
1986	0.4	3.2	7.1	0.0	60.1	49.5
1987	6.8	9.1	13.4	0.0	18.7	9.0
1988	4.6	6.5	7.5	0.0	−1.1	−3.9
1989	3.4	6.0	10.1	0.0	30.9	14.2

[1] All values are per enrollee.
[2] As recognized for payment under the program.
[3] Increase in the number of services received per enrollee and greater relative use of more expensive services.

TABLE 3—DERIVATION OF MONTHLY ACTUARIAL RATE FOR ENROLLEES AGE 65 AND OVER, FINANCING PERIODS ENDING DECEMBER 31, 1985 THROUGH DECEMBER 31, 1988

	Financing periods			
	CY 1985	CY 1986	CY 1987	CY 1988
Covered services (at level recognized):				
Physicians' reasonable charges	$31.28	$35.45	$40.63	$45.06
Outpatient hospital and other institutions	7.34	8.30	9.94	11.75
Home health agencies	0.05	0.05	0.05	0.06
Group practice prepayment plans	1.43	2.08	2.67	3.22
Independent lab	0.77	0.96	1.11	1.31
Total services	40.87	46.84	54.40	61.40
Cost-Sharing:				
Deductible	−2.63	−2.69	−2.69	−2.68
Coinsurance	−6.98	−7.98	−9.34	−10.61
Total benefits	31.26	36.17	42.37	48.11
Administrative expenses	1.34	1.37	1.39	1.42
Incurred expenditures	32.60	37.54	43.76	49.53
Value of interest	−1.17	−0.92	−0.34	−0.06
Contingency margin for projection error and to amortize the surplus or deficit	−0.43	−5.62	−7.62	0.13
Monthly actuarial rate	31.00	31.00	35.80	49.60

The projected monthly rate required to pay for one-half of the total of benefits and administrative costs for enrollees age 65 and over for calendar year 1988 is $49.53. The monthly actuarial rate of $49.60 provides an adjustment of −$0.06 for interest earnings and $0.13 for a contingency margin. Based on current estimates, it appears that the assets are not sufficient to cover the amount of incurred but unpaid expenses and to provide for a moderate degree of projection error. Thus, a positive contingency margin is needed to build assets toward an appropriate level.

C. Monthly Actuarial Rate for Disabled Enrollees

Disabled enrollees are those persons enrolled in SMI because of entitlement (before age 65) to disability benefits for more than 24 months or because of entitlement to Medicare under the end-stage renal disease program. Projected monthly costs for disabled enrollees (other than those suffering from end-stage renal disease) are prepared in a fashion exactly parallel to projection for the aged, using appropriate actuarial assumptions (see Table 2). Costs for the end-stage renal disease program are projected differently because of the complex demographic problems involved. The combined results for all disabled enrollees are shown in Table 4.

TABLE 4—DERIVATION OF MONTHLY ACTUARIAL RATE FOR DISABLED ENROLLEES, FINANCING PERIODS ENDING DECEMBER 31, 1985 THROUGH DECEMBER 31, 1988

	Financing periods			
	CY 1985	CY 1986	CY 1987	CY 1988
Covered services (at level recognized):				
Physicians' reasonable charges	$33.74	$37.45	$42.78	$47.23
Outpatient hospital and other institutions	19.97	20.93	22.21	23.46
Home health agencies	0.00	0.00	0.00	0.00
Group practice prepayment plans	0.08	0.11	0.12	0.13
Independent lab	0.91	1.11	1.17	1.25

TABLE 4—DERIVATION OF MONTHLY ACTUARIAL RATE FOR DISABLED ENROLLEES, FINANCING PERIODS ENDING DECEMBER 31, 1985 THROUGH DECEMBER 31, 1988—Continued

	Financing periods			
	CY 1985	CY 1986	CY 1987	CY 1988
Total services	$54.70	$59.60	$66.28	$72.07
Cost-Sharing:				
Deductible	−2.35	−2.40	−2.39	−2.38
Coinsurance	−9.85	−10.66	−11.90	−12.97
Total benefits	$42.50	$46.54	$51.99	$56.72
Administrative expenses	1.82	1.76	1.70	1.67
Incurred expenditures	$44.32	$48.30	$53.69	$58.39
Value of interest	−7.45	−8.13	−9.36	−9.79
Contingency margin for projection error and to amortize the surplus or deficit	15.83	0.63	8.67	−0.00
Monthly actuarial rate	$52.70	$40.80	$53.00	$48.60

The projected monthly rate required to pay for one-half of the total of benefits and administrative costs for disabled enrollees for calendar year 1988 is $58.39. The monthly actuarial rate of $48.60 provides an adjustment of −$9.79 for interest earnings and a $0.00 for a contingency margin.

D. Sensitivity Testing

Several factors contribute to uncertainty about future trends in medical care costs. In view of this, it seems appropriate to test the adequacy of the rates announced here using alternative assumptions. The most unpredictable factors that contribute significantly to future costs are outpatient hospital costs, physician residual (as defined in Table 2), and increases in physician fees as constrained by the program's reasonable charge screens and economic index. Two alternative sets of assumptions and the results of those assumptions are shown in Table 5. One set represents increases that are lower and is, therefore, more optimistic than the current estimate. The other set represents increases that are higher and is, therefore, more pessimistic than the current version. The values for the alternative assumptions were determined from a study on the average historical error in the respective increase factors. All assumptions not shown in Table 5 are the same as in Table 2.

TABLE 5—PROJECTION FACTORS AND THE ACTUARIAL STATUS OF THE SMI TRUST FUND UNDER ALTERNATIVE SETS OF ASSUMPTIONS FOR FINANCING PERIODS THROUGH DECEMBER 31, 1988

	This Projection			Low Cost Projection			High Cost Projection		
	12-month periods ending June 30,			12-month periods ending June 30,			12-month periods ending June 30,		
	1987	1988	1989	1987	1988	1989	1987	1988	1989
Projection Factors (in present): [1]									
Physician services—fees: [2]									
Aged	6.8	4.6	3.4	6.0	3.5	1.3	7.6	5.7	5.5
Disabled	6.8	4.6	3.4	6.0	3.5	1.3	7.6	5.7	5.5
Physician services—Residual: [3]									
Aged	9.5	7.6	5.8	7.9	5.2	3.4	11.1	10.0	8.3
Disabled	9.1	6.5	6.0	5.8	2.2	2.0	12.4	10.9	9.9
Outpatient hospital services:									
Aged	21.7	18.1	18.3	15.0	10.5	12.7	28.4	25.7	23.8
Disabled	13.4	7.5	10.2	2.5	−6.4	−1.6	24.3	21.3	21.9

	As of December 31,			As of December 31,			As of December 31,		
	1986	1987	1988	1986	1987	1988	1986	1987	1988
Actuarial status (in millions):									
Assets	$8,291	$4,793	$6,184	$8,291	$6,878	$12,190	$8,291	$2,573	[4]
Liabilities	$5,106	$6,287	$7,601	$3,726	$4,654	$5,605	$6,519	$7,981	$9,721
Assets Less Liabilities	$3,185	$−1,494	$−1,417	$4,565	$2,224	$6,585	$1,772	$−5,408	[4]

	As of December 31,			As of December 31,			As of December 31,		
1986	1987	1988	1986	1987	1988	1986	1987	1988	
Ratio of assets less liabilities to expenditures (in percent)[5]	9.6	−3.9	−3.3	14.7	6.5	17.2	5.0	−12.6	(4)

[1] All values are per enrollee.
[2] As recognized for payment under the program.
[3] Increase in the number of services received per enrollee and greater relative use of more expensive services.
[4] The trust fund will be depleted by December 31, 1988 under this set of assumptions.
[5] Ratio of assets less liabilities at the end of the year to total incurred expenditures during the following year, expressed as a percent.

Table 5 indicates that, under the assumptions used in preparing this report, the monthly actuarial rates will result in an excess of assets over liabilities of −$1,417 million by the end of December 1988. This amounts to −3.3 percent of the estimated total incurred expenditures for the following year. Assumptions which are somewhat more pessimistic (and, therefore, test the adequacy of the assets to accommodate projection errors) deplete the trust fund by the end of December, 1988. Under fairly optimistic assumptions, the monthly actuarial rates will result in a surplus of $6,585 million by the end of December, 1988, which amounts to 17.2 percent of the estimated total incurred expenditures for the following year.

E. Standard Premium Rate

For calendar years 1984 through 1988, the law provides that the standard monthly premium rate for both aged and disabled enrollees shall be 50 percent of the monthly actuarial rate for enrollees age 65 and older. Therefore, the standard monthly premium rate for both aged and disabled enrollees for calendar year 1988 is $24.80, which is 50 percent of the monthly actuarial rate for this period ($49.60).

V. Explanation of 1988 Premium Increase

In 1988, the Part B premium will increase from the current $17.90 monthly to $24.80 monthly, an increase of $6.90 or 38.5 percent. The increase can be attributed to these factors:

	Dollars	Percent
• Contingency margin difference	$1.50	8.4
• 1987 expenditures exceeding projections	2.40	13.4
• Projected expenditure increase, 1987–88	3.00	16.7
	6.90	38.5

Contingency reserve

Because the trust fund reserve at the end of 1984 was larger than necessary to provide an adequate program contingency, the actuarial rates, and hence premiums, promulgated during the period 1985 to 1987 were set at levels lower than otherwise would have been required to finance projected expenditures in each year. This reduced the trust fund reserve to the minimum level deemed adequate to protect the program. For example, in 1987 the premium was $1.43 lower than necessary to finance projected 1987 expenditures, had they not been funded partially by drawing down the contingency reserve. In contrast since the trust fund reserve now has been depleted relative to estimated expenditures, the premium in 1988 is increased by 6.5 cents (half of the 13 cents margin incorporated in the monthly actuarial rate) to replenish the reserve. The difference between the negative $1.43 contingency margin for 1987 and the positive 6.5 cents 1988 margin accounts for $1.50 of the premium increase.

Expenditures in 1987 exceed projections

Current actuarial estimates of 1987 expenditures are 12.1 percent higher than projected one year ago at the time of the premium promulgation for 1987. Based on these current estimates, the reestimated 1987 premium would be $2.40 higher; this difference accounts for 13.4 percentage points of the 38.5 percentage point increase in the premium for 1988. Components of the increase are:

	Percent
• Physicians' reasonable charges	12.1
• Group practice prepayment plans	2.2
• Other categories	−0.9
	13.4

Increases in physician expenditures account for more than 90 percent of the 13.4 percentage point increase.

Projected expenditure increase, 1987–88

Current actuarial estimates show Part B expenditures increasing 13.9 percent in 1988. This growth accounts for $3.00 of the $6.90 premium increase, or 16.7 of the 38.5 percentage point increase. Components of the increase are:

	Percent
• Physicians' reasonable charges	10.6
• Outpatient hospital & other institutions	4.3
• Group practice prepayment plans	1.3
• Independent lab	0.5
• Home health agencies	0.0
	16.7

Increases in payments for physicians' services account for more than 63 percent of the 16.7 percentage point increase arising from projected Part B spending growth from 1987 to 1988.

Summary

As shown in the summary table below, almost 60 percent of the premium increase ($4.05 of the $6.90) is due to growth in physician expenditures. From 1984 through 1988, Part B spending for physicians' services is growing at 11.5 percent annually.

SUMMARY OF COMPONENTS OF 1988 PREMIUM INCREASE

	Dollars	Percent	Percent
Growth in physician spending	4.05	22.7	58.7

SUMMARY OF COMPONENTS OF 1988 PREMIUM INCREASE—Continued

	Dollars	Percent	Percent
Contingency drawdown	1.50	8.4	21.7
Growth in all other Part B spending.....	1.35	7.5	19.6
	6.90	38.4	100.0

VI. Regulatory Impact Statement

The monthly SMI premium rate of $24.80 for all enrollees during calendar year 1988 is 38.5 percent higher than the $17.90 monthly premium amount for the previous financing period. The estimated cost of this increase over the current premium to the approximately 31.7 million SMI enrollees will be about $2,622 million for calendar year 1988.

This notice merely announces amounts required by section 1839 of the Social Security Act. This notice is not a proposed rule or a final rule issued after a proposal, and does not alter any regulations. Therefore, we have determined, and the Secretary certifies, that no analyses are required under Executive Order 12291 or the Regulatory Flexibility Act (5 U.S.C. 601 through 612).

(Section 1839 of the Social Security Act; 42 U.S.C. 1395r)

(Catalog of Federal Domestic Assistance Program No. 13.774, Medicare—Supplementary Medical Insurance)

Dated: September 24, 1987.

William L. Roper,

Administrator, Health Care Financing Administration.

Approved: September 24, 1987.

Otis R. Bowen,

Secretary.

[FR Doc. 87-22490 Filed 9-25-87; 12:52 pm]

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federal register

Wednesday
September 30, 1987

Part VI

Department of the Interior

Minerals Management Service

Outer Continental Shelf Operations; Mid-Atlantic Lease Sale 121; Notice

4310-MR

UNITED STATES
DEPARTMENT OF THE INTERIOR
MINERALS MANAGEMENT SERVICE

Mid-Atlantic
OCS Lease Sale 121
Call for Information and Nominations
and
Notice of Intent to Prepare an Environmental Impact Statement

CALL FOR INFORMATION AND NOMINATIONS

Purpose of Call

The purpose of the Call is to assist the Secretary of the Interior in carrying out his responsibilities under the Outer Continental Shelf Lands Act (OCSLA) (43 U.S.C. 1331-1356 (1982)), as amended by the OCSLA Amendments of 1985 (100 Stat. 147), and the regulations issued thereunder (30 CFR Part 256) with regard to proposed OCS Lease Sale 121 in the Mid-Atlantic Planning Area tentatively scheduled for October 1989.

As a preliminary step to the Call, the Minerals Management Service (MMS) published a Request for Interest in the Federal Register on May 29, 1987, requesting information on oil and gas industry interest in leasing and exploring within the Mid-Atlantic Planning Area. A number of companies provided information. Based on the information provided, it was determined that sufficient interest exists to proceed with the issuance of a Call at this time. This information, along with the information provided in response to this Call, will be used in decisions whether to proceed with the lease sale process. This Call does not indicate a preliminary decision to lease in the areas described below.

Information submitted in response to this Call will be used for several purposes. First, responses will be used to identify the areas of potential for oil and gas development. Second, comments on possible adverse effects and use conflicts will be used in the analysis of environmental impacts in and near the Call area. Together these two considerations will allow a preliminary determination of the potential advantages and disadvantages of oil and gas exploration and development to the region and the Nation. This will make possible key decisions in connection with the next step in the leasing process--Area Identification--to further resolve conflicts by deferring blocks where there is sufficient information to justify that action. However, the Area Identification represents only a preliminary step to select the area to be analyzed in the Environmental Impact Statement (EIS). The Area Identification is scheduled for December 1987.

A third purpose for this Call is to solicit comments as part of the scoping process for the EIS. Also included in the scoping process will be a series of public meetings and an additional formal written comment period. A Notice of Intent to Prepare an EIS and a more detailed description of the scoping process for this proposed sale is included below. As a result of the scoping process, a number of alternatives to the proposed action will be identified and analyzed in the EIS. Fourth, comments may be used in developing lease terms and conditions to assure safe offshore operations. Fifth, comments may be used in understanding and considering ways to avoid or mitigate potential conflicts between offshore oil and gas activities and the Coastal Management Plans (CMP's) of affected States.

The Call area includes blocks in several military operating areas, submarine transit lanes, and shipping traffic lanes. Presale consultation with the Department of Defense and the U.S. Coast Guard will occur during the comment period for this Call. Blocks presenting defense or navigation related multiple-use conflicts, which cannot be otherwise mitigated, may be deleted at the Area Identification stage.

Areas Deferred or Highlighted in the 5-Year Program Approval Process

- The U.S.S. Monitor National Marine Sanctuary and Buffer Zone (deferred)

- The National Aeronautics and Space Administration Wallops Island Flight Center operating area (deferred except 19 blocks of interest highlighted for special consideration (see p.4))

- A minimum of 15 nautical miles or, where further, offshore areas of low potential (deferred)

Previous Sale Related Activities

Mid-Atlantic acreage has been offered for lease in seven previous sales. Four of these were Mid-Atlantic sales. The first was Sale 40, held on August 17, 1976, and the last was Sale 76, held on April 26, 1983. Additionally, two South Atlantic OCS lease sales and one reoffering sale contained acreage now situated within the Mid-Atlantic Planning Area. The U.S. Treasury has received almost $2 billion for the 272 leases issued as a result of these lease sales. A total of 200 leases have been relinquished or have expired, leaving 72 active Mid-Atlantic leases.

The last proposed lease sale in this area, Sale 111, was cancelled on June 13, 1986, following a determination that there was little industry interest in a sale at that time.

There have been 32 exploratory wells drilled in this area resulting in 27 dry holes and five discoveries. In addition, two COST (Continental Offshore Stratigraphic Test) wells were drilled. The five discoveries were considered noncommercial and were not developed at that time. All 34 wells have been plugged and abandoned.

Description of the Area

The general area of this Call is offshore the States of Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, and North Carolina. The area is shown in detail on the Call map available free from the Regional Supervisor, Leasing and Environment, Atlantic OCS Region, Minerals Management Service, 1951 Kidwell Drive, Suite 601, Vienna, Virginia 22180, telephone (703) 285-2165. The following list identifies the Official Protraction Diagrams and blocks comprising the Call area. Existing leases are included in the Call since they may expire or be relinquished before the proposed sale. These diagrams may be purchased for $2.00 each from the Regional Supervisor, Leasing and Environment, at the above address (checks or drafts payable to the U.S. Department of the Interior--MMS).

Official Protraction Diagram NK 18-12

429	646-650	761-767	849-856	937-945
470-473	675-677	778-783	865-876	951-966
514-517	690-694	805-812	893-900	980-989
558-562	718-723	821-827	909-922	992-1010
602-606	734-739			

Official Protraction Diagram NK 19-10

507	636-639	765-775	889	977-995
550-551	679-683	807-819	892-907	
593-595	722-727	850-863	933-951	

Official Protraction Diagram NJ 18-2

657	744-745	831-833	916-921	1002-1009
701	787-789	874-877	959-965	

Official Protraction Diagram NJ 18-3

5-35	224-255	442-475	661-695	837-872
49-79	268-299	486-519	705-739	881-916
93-123	312-343	530-563	749-784	925-960

136-167	355-387	573-607	793-828	969-1004
180-211	399-431	617-651		

Official Protraction Diagram NJ 19-1

10-28	230-248	450-468	670-688	845-864
54-72	274-292	494-512	714-732	889-908
98-116	318-336	538-556	757-776	933-952
142-160	362-380	582-600	801-820	977-996
186-204	406-424	626-644		

Official Protraction Diagram NJ 18-5

34-41	250-261	468-481	688-701	863-877
77-85	293-305	512-525	732-745	906-921
121-129	336-349	556-569	776-789	950-965
164-173	380-393	600-613	819-833	994-1009
207-217	424-437	644-657		

Official Protraction Diagram NJ 18-6

All Federal Blocks

Official Protraction Diagram NJ 19-4

All Federal Blocks

Official Protraction Diagram NJ 19-5

All Federal Blocks

Official Protraction Diagram NJ 19-6

All Federal Blocks

Official Protraction Diagram NJ 18-8

37-41	301-305	*546-548	*677-680	808-833
81-85	345-349	565-569	697-701	853-877
125-129	389-393	*589-592	*721-724	898-921
169-173	433-437	609-613	741-745	942-965
213-217	477-481	*633-636	764-789	986-1009
257-261	521-525	653-657		

Official Protraction Diagram NJ 18-9

All Federal Blocks

* Pursuant to the 5-year program, these 19 blocks are highlighted for special presale consideration.

Official Protraction Diagram NJ 19-7

All Federal Blocks

Official Protraction Diagram NJ 19-8

All Federal Blocks

Official Protraction Diagram NJ 18-11

18-41	237-261	455-481	676-701	897-921
62-85	280-305	499-525	720-745	941-965
106-129	324-349	544-569	765-789	986-1009
150-173	367-393	588-613	809-833	1030-1053
193-217	411-437	632-657	853-877	

Official Protraction Diagram NJ 18-12

All Federal Blocks

Official Protraction Diagram NJ 19-10

All Federal Blocks

Official Protraction Diagram NI 18-2

18-41	240-261	461-481	680-701	855-877
63-85	285-305	504-525	724-745	898-921
107-129	329-349	548-569	767-789	941-965
152-173	373-393	592-613	811-833	985-1009
196-217	417-437	636-657		

Official Protraction Diagram NI 18-3

All Federal Blocks

Official Protraction Diagram NI 19-1

All Federal Blocks

Instructions on Call

Respondents are asked to nominate blocks within the Call area that they would like to see included in proposed OCS Lease Sale 121. Although the identities of those submitting nominations become a matter of public record, the individual indications of interest are considered to be proprietary information. Those indicating such interest are required to do so on the Call map by outlining the area(s) of interest along block lines.

A detailed list of whole and partial blocks nominated (by Official Protraction Diagram designations) should be submitted to ensure correct interpretation of nominations. The telephone number and name of a person to contact in the respondent's organization for additional information should be included.

Respondents should rank areas in which they have expressed interest according to priority of their interest (e.g., priority 1 (high), 2 (medium), or 3 (low)). We encourage respondents to be specific in indicating blocks by priority. This information is very helpful in assessing the area to be identified for further study at future sale decision points. Blanket nominations on large areas are not as useful in providing information pertinent to analysis of industry interests. Areas where interest has been indicated but on which respondents have not indicated priorities will be considered priority 3. Information concerning both location and priority of interest submitted by individual respondents will be held proprietary. In addition to indications of interest by respondents, further consideration of areas for analysis in the EIS will be based on hydrocarbon potential and environmental, economic, and multiple-use conditions.

The Call map outlines the MMS interpretation of the area of hydrocarbon potential and identifies the highlighted area that will be subject to special consideration. While primary consideration will be given to the area of hydrocarbon potential (as outlined on the Call map), respondents may nominate and comment on any acreage within the Call area. Commenters who recommend that all or portions of the highlighted area or other parts of the Call area be deferred from Sale 121 should be as specific as possible in describing why they believe those areas are incompatible with offshore oil and gas drilling and production operations. Such information will be helpful in designing and analyzing deferral alternatives.

Comments or suggestions are requested on the following:

-technology that is presently available or anticipated for exploration and development operations in deepwater areas.

-procedures which may lead to enhanced understanding of the oil and gas resources of the Mid-Atlantic OCS.

-particular geologic, environmental, biological, archaeological, or socioeconomic conditions or conflicts or other information which might bear upon potential leasing and development in particular areas.

-potential conflicts that may result from future oil and gas activities resulting from this sale and approved State and local CMP's. If possible, these comments should identify specific CMP policies, the nature of the conflicts foreseen, and steps that MMS can take to avoid or mitigate potential conflict. Comments may either be in terms of broad areas or restricted to particular blocks. Those submitting comments are requested to outline the subject area on the standard Call map.

Indications of interest and comments should be received within 45 days following publication of this Call in the Federal Register to ensure inclusion in the decision process for Area Identification. Responses should be sent in envelopes labeled "Nominations for Proposed Lease Sale 121, Mid-Atlantic" or "Comments on the Call for Information and Nominations for Proposed Lease Sale 121, Mid-Atlantic," as appropriate.

The original Call map and indications of interest and/or comments must be submitted to the Regional Supervisor, Leasing and Environment, at the address stated under "Description of Area." A copy of the Call map showing interest and any comments should also be sent to the Chief, Offshore Leasing Management Division, U.S. Department of the Interior, MMS, Room 4230, 18th and C Streets, NW., Washington, D.C. 20240.

Tentative Schedule

Final delineation of the area for possible leasing will be made at a later date and in accordance with established departmental procedures and applicable laws, including all requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321) and the OCSLA, as amended. If a decision to offer blocks is made, a notice of Availability of the Proposed Notice of Sale and a final Notice of Sale will be published in the Federal Register detailing areas to be offered for competitive bidding, stating the terms and conditions for leasing, and announcing the location, date, and time bids will be received and opened.

The following is a list of tentative milestones which will precede the sale:

Milestones	Date
Comments Due on the Call	November 1987
Area Identification	December 1987
Draft EIS Published	September 1988

Public Hearings on Draft EIS	October 1988
Final EIS Published	March 1989
Proposed Notice of Sale Issued	May 1989
Governor's Comments Due on Proposed Notice	July 1989
Final Notice of Sale Published	September 1989
Sale	October 1989

Existing Information

Information already available for the Call area includes the results of studies and EIS analyses conducted in conjunction with previous sales and the results of past exploration activities in this planning area. Also available is information gathered during the EIS and decision processes for the 1980, 1982, and the current 5-Year OCS Oil and Gas Leasing Program. In addition, comments previously received by the Department of Interior (DOI) from State and local governments, other Federal Agencies, environmental groups, and the oil and gas industry concerning past OCS actions will be used.

An extensive environmental studies program has been underway in this area since 1973 (see Environmental Studies Program Information in the Atlantic OCS Region, below). Additional information will be available to the DOI for consideration regarding the proposed OCS Lease Sale 121. For example, six Atlantic OCS Indices (1975-1986), eight Summary Reports (1979-1986), and various geology reports have been prepared for this planning area.

Environmental Studies Program Information in the Atlantic OCS Region

The DOI initiated the Environmental Studies Program in 1973. The emphasis has been on geological mapping, environmental characterization of biologically sensitive habitats, physical oceanography, ocean circulation modeling, and ecological effects of oil and gas activities. These studies provide useful information for a number of environmental issues, including topographic features, deepwater biological communities on the continental slope, and major circulation patterns on the continental shelf and slope.

A complete listing of available studies reports and information on ordering copies can be obtained from the Atlantic OCS Region at the address stated under "Description of Area," or by telephone at (703)285-2728. In addition, a status

report for active studies in this area can be obtained from the Chief, Environmental Studies and Leasing Section, Atlantic OCS Region, at this same address.

NOTICE OF INTENT TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT

Purpose of Notice of Intent

Pursuant to the regulations implementing the procedural provision of the National Environmental Policy Act of 1969 (42 U.S.C. 4321), the MMS is announcing its intent to prepare an EIS, subsequent to Area Identification, regarding the oil and gas leasing proposal known as Mid-Atlantic OCS Lease Sale 121. The Notice of Intent also serves to announce the scoping process which will be followed for this EIS. Throughout the scoping process, Federal, State, and local governments and other interested parties aid the MMS in determining the significant issues and alternatives to be analyzed in the EIS.

The EIS analysis will focus on the potential environmental effects of leasing, exploration, and development of the blocks included in the area defined in the Area Identification procedure as the proposed area of the Federal action. Alternatives to the proposal which may be considered are to delay the sale, cancel the sale, or modify the sale.

Instructions on Notice of Intent

Federal, State, and local governments and other interested parties are requested to send their written comments on the scope of the EIS, significant issues which should be addressed, and alternatives which should be considered to the Regional Supervisor, Leasing and Environment, Atlantic OCS Region, at the address stated under Description of Area above. Comments should be enclosed in an envelope labeled "Comments on the Notice of Intent to Prepare an EIS on the proposed Mid-Atlantic Lease Sale 121." Comments are due no later than 45 days from publication of this notice. Also, scoping meetings will be held in appropriate locations for the purpose of obtaining additional comments and information regarding the

scope of the EIS. The times and locations of these scoping meetings will be announced at a future date in the Federal Register and by press release.

Deputy Director, Minerals Management Service
D. W. Crow

Approved:

Assistant Secretary - Land and Minerals Management
J. Steven Griles

SEP 25 1987

Date

[FR Doc. 87-22555 Filed 9-29-87; 8:45 am]
BILLING CODE 4310-MR-C

federal register

Wednesday
September 30, 1987

Part VII

Department of Commerce

Patent and Trademark Office

37 CFR Parts 1 and 5

Miscellaneous Amendments of Patent Rules; Notice of Proposed Rulemaking

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 1 and 5

[Docket No. 70754-7154]

Miscellaneous Amendments of Patent Rules

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Patent and Trademark Office proposes amendments to the rules of practice in patent cases, Parts 1 and 5 of Title 37, Code of Federal Regulations, (1) to bring the rule relating to swearing back of a reference into conformity with current interference practice; (2) to limit the length of the appellant's brief and reply brief in an *ex parte* appeal, and require that the brief contain certain specific items; (3) to reset the time period for requesting an oral hearing in *ex parte* appeals where the examiner's answer states a new ground of rejection; (4) to clarify the procedure following a final rejection after a remand to the examiner under § 1.196(b)(1); (5) to give the examiner-in-chief the authority to decide certain requests for access by an interference party; (6) to clarify the rule relating to access to pending or abandoned applications; (7) to modify the rules concerning requests for interference with an application or patent; (8) to amplify the rule concerning the requirements of a motion to declare an additional interference; (9) to more clearly define the application of interference estoppel; (10) to make more comprehensive the rule concerning the filing of a reissue application by a patentee involved in an interference; and (11) to conform the rule concerning applications under secrecy order to current interference practice.

DATES: Comments and suggestions should be received by December 1, 1987. A public hearing will be held on December 9, 1987, beginning at 9:00 a.m.; requests to make oral presentations at the hearing should be received on or before December 1, 1987.

ADDRESSES: Address written comments to Box Interference, Commissioner of Patents and Trademarks, Washington, DC 20231. The public hearing will be held in Room 11C10, Crystal Plaza Building 3, 2021 Jefferson Davis Highway, Arlington, Virginia. Written comments and a transcript of the public hearing will be available for public inspection in Room 10C01, Crystal Gateway II, 1225 Jefferson Davis Highway, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Saul I. Serota by telephone at (703) 557-4072 or Ian A. Calvert by telephone at (703) 557-4000 or by mail marked to the attention of either and addresed to Box Interference, Commissioner of Patents and Trademarks, Washington, DC 20231.

SUPPLEMENTARY INFORMATION:

(1) Swearing Back of a Reference

The Patent and Trademark Office published its notice of final rule amending the rules of practice in patent interference cases in the **Federal Register** of December 12, 1984 (49 FR 48416 through 48471) and in the Official Gazette of January 29, 1985 (1050 O.G. 385 through 440). Included in the rules adopted was § 1.601(n), which defines "same patentable invention."

Section 1.131(a), if amended as proposed, would insert "the same patentable invention, as defined in § 1.601(n), as" before the phrase "the rejected invention". The amendment does not change the present practice where the inventor of the rejected claim, the owner of a patent under reexamination, or the person qualified under §§ 1.42, 1.43 or 1.47 can swear behind a domestic patent which disclose but does not claim the same invention as the rejected invention, a foreign patent or a printed publication. Rather, the amendment is necessary to define precisely the term "does not claim the rejected invention." See *In re Eickmeyer*, 602 F.2d 974, 202 USPQ 655 at 661 (CCPA 1979) where the Court stated:

> * * * we conclude that the phrase "does not claim the rejected invention" should be construed favorably to an applicant, if possible, so that unless the applicant is clearly *claiming the same invention* as the U.S. patent reference, he will not lose his rights under Rule 131. [Emphasis added.]

and also expressed its dissatisfaction with the PTO for

> * * * leaving an applicant in a position where he cannot overcome the reference claims by a 131 affidavit because the PTO has decided that the reference claims his invention, while at the same time, he is denied an interference because the PTO has decided that the claims of his application and those of the reference are not for substantially the same invention.

Possibly because of this decision, some patent practitioners seem to have been of the opinion that an affidavit under 37 CFR 1.131 can be used to overcome a rejection on a domestic patent so long as there is no verbatim correspondence between the claims of the application or the patent under reexamination rejected on that domestic patent and the claims of the domestic patent.

Such an opinion is not in accord with the law expressed in such cases as *In re Clark*, 53 CCPA 954, 457 F.2d 1004, 173 USPQ 359 (1972); *In re Hidy*, 49 CCPA 1152, 303 F.2d 954, 133 USPQ 650 (1962); *In re Teague*, 45 CCPA 877, 254 F.2d 145, 117 USPQ 284 (1958); and *in re Ward*, 43 CCPA 1007, 236 F.2d 428, 111 USPQ 101 (1956). In *In re Hidy*, supra, 133 USPQ at 652, the Court stated:

> A Rule 131 affidavit is ineffective to overcome a United States patent, not only where there is a verbatim correspondence between claims of the application and of the patent, but also where there is no patentable distinction between the respective claims. *In re Wagenhorst*, 20 CCPA 829, 62 F.2d 831, 16 USPQ 126; *In re Teague*, 45 CCPA 877, 254 F.2d 145, 117 USPQ 284.

If the application (or patent under reexamination) and the domestic patent contain claims which are identical, or which are not patentably distinct, then the application and patent are claiming the "same patentable invention," defined by § 1.601(n) as follows:

> Invention "A" is the "same patentable invention" as an invention "B" when invention "A" is the same as (35 U.S.C. 102) or is obvious (35 U.S.C. 103) in view of invention "B" assuming invention "B" is prior art with respect to invention "A".

As provided in § 1.601(i), an interference may be declared whenever an examiner is of the opinion that an application and a patent contain claims for the "same patentable invention." The purpose of the proposed amendment to § 1.131(a) is to insure that an applicant who is claiming an invention which is identical to, or obvious in view of, the invention claimed in a domestic patent cannot employ an affidavit under § 1.131 as a means for avoiding an interference with the patent. To allow an applicant to do so would result in the issuance of two patents to the same invention.

Section 1.131(b), if amended as proposed, would insert in the first sentence thereof the language, "prior to" before the words "said date". This amendment makes clear that the showing of facts under § 1.131(b) must establish due diligence from a date prior to the effective date of the reference to affiant's subsequent reduction to practice or to the filing of his application as set forth in *In re Mulder*, 716 F.2d 1542, 219 USPQ 189 (Fed. Cir. 1983).

(2) Appellant's Brief and Reply Brief

A. Limitation on Length

Section 1.192(a), if amended as proposed, would delete the last sentence and insert the following sentence after the first sentence: "If the brief exceeds

30 pages, in addition to the appendix required by paragraph (c)(7) of this section, it will be returned to the appellant."

Section 1.193(b), if amended as proposed, would insert the following as the third sentence: "If the reply brief exceeds 15 pages, or the examiner determines that it is not directed only to new points of argument raised in the examiner's answer, the examiner will so notify the appellant and at the same time return the reply brief to the appellant."

The last sentence of § 1.192(a) is proposed to be deleted in view of the proposed addition of paragraph (c), which would impose more specific requirements for the contents of the brief.

The sentences proposed to be added to §§ 1.192(a) and 1.193(b) would limit the length of an appellant's brief and reply brief in an *ex parte* appeal to 30 and 15 pages, respectively, by providing that briefs or reply briefs which exceed these limits will be returned. These numbers of pages are for pages which comply with the requirements of 37 CFR 1.52. In determining whether a brief exceeds the 30-page limit, the pages of the appendix required by proposed § 1.192(c)(7) would not be counted.

While the length of the majority of briefs and reply briefs filed in *ex parte* appeals is substantially less than the 30- and 15-page limits proposed, in some instances briefs and reply briefs greatly exceed these limits. In many instances, these lengthy briefs and reply briefs are unnecessary; rather than focusing upon the issues involved in the appeal, they are verbose and repetitious, beclouding the issues and taking up an inordinate amount of the time spent by the examiner and examiners-in-chief in considering the appeal. The page limits set in proposed §§ 1.192(a) and 1.193(b) are intended to eliminate such lengthy briefs and reply briefs while at the same time giving appellants adequate scope to fully develop their arguments.

The proposed amendment to § 1.193(b) would also provide for return of the reply brief to the appellant if the examiner determines that the reply brief did not comply with the requirement of § 1.193(b) that it be limited to any new points of argument raised in the examiner's answer.

B. Contents of the Main Brief

Section 1.192, if amended as proposed, would add paragraphs (c) and (d). Paragraph (c) lists a number of items which would have to be included in the appellant's brief, while paragraph (d) would permit dismissal of the appeal for failure to include any of the items required by paragraph (c), in the order specified in paragraph (c). Paragraph (d) would also add the following sentence: "Any arguments or authorities not included in the brief may be refused consideration by the Board of Patent Appeals and Interferences." This sentence emphasizes that all arguments and authorities which an appellant wishes the Board to consider must be included in the brief. It should be noted that arguments not presented in the brief and made for the first time at oral hearing are not entitled to consideration. *In re Chiddix*, 209 USPQ 78 (Comr. 1980); *Rosenblum v. Hiroshima*, 220 USPQ 383 (Comr. 1983).

Proposed paragraph (c) would require that the brief contain, in order, seven specific items. This proposed requirement arose from the recommendations of a committee which was appointed by the Commissioner of Patents and Trademarks in 1986 to study and report on alternatives for reducing the backlog of *ex parte* appeals at the Board of Patent Appeals and Interferences. One of the committee's recommendations was the § 1.192 be amended to require that the appellant's brief include certain items. Items (3), (4), (5) and (6) of proposed § 1.192(c) are based upon the committee's recommendations. The committee indicated that the inclusion of those items in the brief would crystallize the issues involved in the appeal. By eliminating inadequate briefs, the Board of Patent Appeals and Interferences would not need to engage in what might be called "*de novo*" examination of a patent application, but rather could confine its activities to review of the appealed rejections.

The committee also recommended that certain items be required to be included in the examiner's answer. It is expected that the Manual of Patent Examining Procedure will be amended to require that the examiner's answer contain these and other items, substantially as indicated in Appendix A.

In addition to the committee's recommendations, some of the proposed items are supported by the evaluation of selected practices conducted as a part of the PTO's Quality Reinforcement Program. A summary of the results of that evaluation is published at 1078 Official Gazette 22 (May 19, 1987).

The specific items required by proposed § 1.192(c) are:

(1) A statement of the status of all the claims in the application, or patent under reexamination, i.e., for each claim in the case, appellant should state whether it is cancelled, allowed, rejected, etc. Each claim on appeal must be identified.

(2) A statement of the status of any amendment filed subsequent to final rejection, i.e., whether or not the amendment has been acted upon by the examiner, and if so, whether it was entered, denied entry, or entered in part.

Items (1) and (2) are included in proposed § 1.192(c) because in the past confusion has sometimes arisen as to which claims are on appeal, and the precise wording of those claims, particularly where the appellant has sought to amend claims after final rejection. The inclusion of items (1) and (2) in the brief would advise the examiner of what the appellant considers the status of the claims and post-final rejection amendments to be, allowing any disagreement on these questions to be resolved before the appeal was taken up for decision by the Board of Patent Appeals and Interferences.

(3) A concise explanation of the invention defined in the claims involved in the appeal. This explanation would be required to refer to the specification by page and line number, and, if there were a drawing, to the drawing by reference characters. Where applicable, it would be preferable to read the appealed claims on the specification and any drawing.

(4) A concise statement of the issues presented for review. Each stated issue would correspond to a separate ground of rejection which appellant wished the Board of Patent Appeals and Interferences to review. While the statement of the issues would have to be concise, it could not be so concise as to omit the basis of each issue. For example, the statement of an issue as "Whether claims 1 and 2 are unpatentable" would not comply with proposed § 1.192(c)(4). Rather, the basis of the alleged unpatentability would have to be stated, e.g., "Whether claims 1 and 2 are unpatentable under 35 U.S.C. 103 over Smith in view of Jones", or "Whether claims 1 and 2 are unpatentable under 35 U.S.C. 112, first paragraph, as being based on a non-enabling disclosure." The statement would be limited to the issues presented, and should not include any argument concerning the merits of those issues.

(5) If an appealed ground of rejection applied to more than one claim and appellant considered the rejected claims to be separately patentable, proposed § 1.192(c)(5) would require appellant to state that the claims do not stand or fall together, and the reasons why they were considered separately patentable. The absence of such a statement would be

taken by the PTO as a concession by the applicant that, if the ground of rejection were sustained as to any one of the rejected claims, it would be equally applicable to all of them. Proposed § 1.192(c)(5) continues the current practice of the Board of Patent Appeals and Interferences, and is consistent with the practice of the Court of Appeals for the Federal Circuit indicated in such cases *In re Semaker*, 702 F.2d 989, 217 USPQ 1 (Fed. Cir. 1983), and *In re King*, 801 F.2d 1324, 231 USPQ 136 (Fed. Cir. 1986).

(6) The appellant's contentions with respect to each of the issues presented for review in proposed § 1.192(c)(4), and the basis for those contentions, including citations of authorities, statutes, and parts of the record relied on. Included in this proposed paragraph are five subparagraphs, (i) to (v). Subparagraphs (i) to (iv) concern the grounds of rejection most commonly involved in *ex parte* appeals, namely, 35 U.S.C. 112, first and second paragraphs, 35 U.S.C. 102, and 35 U.S.C. 103. Subparagraph (v) is a general provision concerning grounds of rejection not covered by subparagraphs (i) to (iv).

The purpose of subparagraphs (i) to (iv) is to insure that the appellant's argument concerning each appealed ground of rejection will include a discussion of the questions relevant to that ground. It is believed that compliance with the requirements of the particular subparagraphs which are pertinent to the grounds of rejection involved in an appeal would be beneficial both to the PTO and to appellants. It would not only facilitate a decision by the Board of Patent Appeals and Interferences by enabling the Board to determine more quickly and precisely the appellant's position on the relevant issues but also would help appellants to focus their arguments on those issues.

For each rejection not falling under subparagraphs (i) to (iv), proposed subparagraph (v) provides that the argument should specify the specific limitations in the rejected claims, if appropriate, or other reasons, which cause the rejection to be in error. This proposed language recognizes that for some grounds of rejection, it may not be necessary to specify particular claim limitations; for example, a rejection under 35 U.S.C. 101, as in *Ex parte Hibberd*, 227 USPQ 443 (BPAI 1985), or a rejection for violation of the duty of disclosure under 37 CFR 1.56(d), as in *Ex part Harita*, 1 USPQ2d 1887 (BPAI 1986).

(7) An appendix containing a copy of the claims involved in the appeal.

C. Contents of Reply Brief

Section 1.193(b), if amended as proposed, would insert the following as the second sentence: "The new points of argument shall be specifically identified in the reply brief."

Since the reply brief must be limited to any new points of argument raised in the examiner's answer, compliance with the requirement of this proposed sentence would facilitate both preparation of the reply brief by appellant and consideration of the reply brief by the PTO.

The final sentence of § 1.193(b), if amended as proposed, would provide that the reply may be accompanied by, rather than include, any amendment or material appropriate to the new ground of rejection. This proposed change in the rule makes clear that the amendment or other material must be presented in a separate paper, rather than in the reply itself.

(3) Time Period for Requesting an Oral Hearing

Section 1.194(b), if amended as proposed, would add the following sentence after the first sentence: "If the examiner's answer states a new ground of rejection and if appellant files a reply as provided by § 1.193(b), then the written request must be made within three months after the date of the filing of the reply."

The present rule does not provide the appellant an additional time period for requesting an oral hearing in the event that the examiner's answer states a new ground of rejection. If an answer states a new ground of rejection, § 1.193(b) provides that appellant's reply may also include any amendment or material appropriate to the new ground of rejection. However, under § 1.194(b) appellant must file the request for oral hearing within one month after the date of the answer whereas the reply thereto must be filed within two months from the date of the answer. Consequently, appellant must file a request for oral hearing before having the benefit of the examiner's views, if any, with respect to the reply.

Although the examiner does not normally issue a supplemental answer in response to a reply, see Manual of Patent Examining Procedure § 1208.01 (5th Ed., Aug. 1983), the proposed amendment to § 1.194(b) would permit the appellant to postpone filing a request for an oral hearing until three months after the date the reply is filed. This will give the appellant time to receive the examiner's response, if any, to the reply before the appellant has to decide whether to request an oral hearing.

(4) Procedure Following Final Rejection, Remand Under § 1.196(b)

Section 1.196(b)(1), if amended as proposed, would add the following sentence as the penultimate sentence of the section: "Should the examiner make the rejection final the applicant may again appeal to the Board of Patent Appeals and Interferences."

Under § 1.196(b), the Board of Patent Appeals and Interference may, in its decision on an *ex parte* appeal, make a new rejection of one or more appealed claims, in which case the appellant has the option of (1) submitting an appropriate amendment of the rejected claims, and/or a showing of facts, (2) requesting reconsideration, or (3) treating the decision as a final decision. If the appellant elects option (1), the case is remanded to the examiner for consideration. If the examiner does not consider that the amendment and/or showing of facts overcome the rejection, he or she will make the rejection final.

An applicant in whose application such a final rejection has been made may mistakenly believe that he or she is entitled to review of the final rejection by the Board of Patent Appeals and Interferences by virtue of the fact that the application was previously on appeal. The proposed amendment would correct this belief by making clear that after such a final rejection, an applicant who desires further review of the matter must file a new appeal to the Board of Patent Appeals and Interferences. The language of the proposed amendment is similar to the fourth sentence of § 1.196(d).

(5) Request for Access by Interference Party

Section 1.612(a), if amended as proposed, would add the following sentence as the last sentence of the section: "A party seeking access to any abandoned or pending application referred to in the opposing party's involved application or access to any pending application referred to in the opposing party's patent must file a motion under § 1.635." The proposed amendment would require an interference party seeking access either to a pending or abandoned application referred to in an opposing party's involved application or to a pending application referred to in an opposing party's involved patent to file a motion under 37 CFR 1.635. Such a motion is decided by an examiner-in-chief (§ 1.640(b)).

Under the present practice, access can only be obtained by filing an *ex parte* petition to the Commissioner accompanied by the petition fee set forth in § 1.17(i) and normally no decision is rendered on the petition until after the opposing party has had an opportunity to respond to the petition. The proposed amendment would expedite the interference proceeding by eliminating the delays inherent in the petition process. By requiring the party seeking access to file a motion under § 1.635, that party would first have to confer with the opposing party in an effort to resolve the issue of access as required by § 1.637(b). The examiner-in-chief would not have to decide the issue unless it could not be resolved by the parties.

(6) Access to Applications

Section 1.14(e), if amended as proposed, would delete the word "of" from the phrase "or of any papers relating thereto" and would add a reference to § 1.612(a) by adding the following sentence as the last sentence thereof: "See § 1.612(a) for access by an interference party to a pending or an abandoned application."

Section 1.14(e) as presently worded appears to limit a request by a member of the public to copies of, but not access to, any papers relating to any pending or abandoned application. Any such limitation was unintentional. The amended language will permit a member of the public to request both access to and copies of those papers.

(7) Request for Interference with an application or Patent

Sections 1.604(a) and 1.607(a), if amended as proposed, would provide for the situation in which a patent applicant requests an interference with another application or patent, respectively, on the basis of one or more claims which are already present in his or her application. The present rules require that when an applicant seeks an interference with another application or an unexpired patent, he or she must present a claim corresponding to the proposed count. The proposed rules would eliminate this requirement if a claim or claims corresponding to the proposed count are already in the application, and the applicant identifies them as such.

(8) Motion to Declare Additional Interference

Section 1.637(e)(1)(vi), if amended as proposed, would clearly state that a motion to declare an additional interference under 37 CFR 1.633(e)(1) between an additional application not involved in the interference and owned by a party and an opponent's application or patent involved in the interference shall designate the claims of the opponent's application or patent which define the same patentable invention defined by the proposed count or if the opponent's application does not contain any such claim, the moving party shall propose a claim to be added to the opponent's application. The present section states that when the opponent is a patentee, the motion shall designate the patent claims which define the same patentable invention defined by the proposed count. The present section does not require, although such a requirement is inferred from § 1.637(e)(2)(vi), that when the opponent is an applicant, the motion shall designate the application claims which define the same patentable invention defined by the proposed count or, if the opponent's application does not contain any such claim, the moving party shall propose a claim to be added to the opponent's application.

(9) Interference Estoppel

Section 1.658(c), if amended as proposed, would insert in the first sentence the language "by a motion under § 1.633(e)" after the words "(3) could have been properly raised" and substitute the language "on an invention which was claimed during the pendency of the original interference either (i) in the winning party's involved application or patent or (ii) in a noninvolved application owned by a losing party" for the words "with a motion under § 1.633(e)". In the second sentence, the language "who could have properly moved, but failed to move, under §§ 1.633 or 1.634" appearing after the words "losing party" would be deleted. Also in the second sentence, the language "that party's failure to properly move" would be deleted and the language "the issues settled by the judgement" inserted in its place. The proposed amendment incorporates into § 1.658(c) the guidelines set forth in the interference rules correction notice (50 Fed. Reg. 23122, May 31, 1985, 1059 Official Gazette 27, October 22, 1985) for the application of the doctrine of interference estoppel under 37 CFR 1.658(c) with respect to a losing party's failure to move under 37 CFR 1.633(e) to declare an "additional interference" between an additional application not involved in the interference and owned by the party and an opponent's application or patent involved in the interference on a separate patentable invention. The correction notice states that generally a losing party will be estopped for failure to move when the spearate patentable invention (subject matter) which could have been the subject of the "additional interference" as *claimed* (during the pendency of the interference) (1) in the opponent's involved application or patent or (2) in a non-involved application owned by the party during the pendency of the interference. Should a losing party after the termination of the interference acquire an application which discloses or claims the separate patentable invention and which could have been the subject of the "additional interference", estoppel would not apply because the party did not own the application during the pendency of the interference.

The correction notice illustrates the general applicability of interference estoppel in certain situations where a losing party fails to move under § 1.633(e) to declare an "additional interference" on a separate patentable invention as follows:

Losing party's non-involved application	Winning opponent's involved application or patent	Estoppel
Claimed	Claimed	Yes
Disclosed	Claimed	Yes
Claimed	Disclosed (Application).	Yes
	(Patent)	No*
Disclosed	Disclosed	No

* An invention disclosed and not claimed in a winning opponent's *patent* would not form the basis for a count because the patent does not contain a claim which can be designated to correspond to the count. Thus, a motion to declare an additional interference under § 1.633(e) could not have been properly brought, and interference estoppel therefore would not apply.

(10) Filing of Reissue Application During Interference

Section 1.662(b), if amended as proposed, would insert a comma after § 1.633(h)" and add the language "or would not be appropriate" at the end of the last sentence. The present rule contemplates that a reissue application may be filed by a patentee involved in an interference only for one of two reasons: either for the purpose of avoiding the interference, or for some other purpose relating to the interference, e.g., to add claims corresponding to a proposed new count. In the first case, judgment would be entered against the patentee, and in the second case, a motion under § 1.633(h) to add the reissue application to the interference would be appropriate.

However, it has been found that a patentee involved in an interference may file a reissue application for some other reason not contemplated by the rule, and for which the entry of judgment or a motion under § 1.633(h) would not be appropriate. For example, the patentee might file a reissue application for the purpose of amending claims of the patent which are directed to an invention which is patentably distinct from the issue of the interference and which is not disclosed by the opposing party. In such a situation, addition of the reissue application to the interference would be unnecessary. The proposed amendment of § 1.662(b) would accommodate this third possibility by providing that, instead of filing a motion under § 1.633(h) to add the reissued application to the interference, a patentee could show good cause why such a motion would not be appropriate under the particular circumstances involved.

(11) Applications Under Secrecy Order

Section 5.3(b), if amended as proposed, would delete the language "under secrecy order copies claims from an issued patent" and insert in its place the language "is under secrecy order seeks to provoke an interference with an issued patent" to make the section's language consistent with that of § 1.607(d). In addition, it is proposed to correct the reference to "§ 1.205(c)" to read " § 1.607(d)"

Environmental, Energy and Other Considerations

The proposed rule change will not have a significant impact on the quality of the human environment or conservation of energy resources.

The proposed rule change is in conformity with the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, Executive Order 12291, and the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

The General Counsel of the Department of Commerce certified to the Small Business Administration that the proposed rule change will not have a significant adverse economic impact on a substantial number of small entities (Regulatory Flexibility Act, 5 U.S.C. 605(b)), because it is intended to expedite the disposition of appeals and to simplify by clarification and amplification certain of the rules governing the conduct of an interference. The expedited disposition of appeals will permit the small entity to make earlier business decisions which may be affected by a pending appeal. The effect of the clarification and amplification of the rules relating to interferences will be to reduce the costs associated with involvement in an interference.

The Patent and Trademark Office has determined that this proposed rule change is not a major rule under Executive Order 12291. The annual effect on the economy will be less than $100 million. There will be no major increase in costs or prices for consumers, individual industries, federal, state or local government agencies, or geographic regions. There will be no significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rule change will not impose a burden under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, since no significant additional record keeping or reporting requirements are placed upon the public.

List of Subjects in 37 CFR Parts 1 and 5

Administrative practice and procedure, Authority delegations (government agencies), Conflict of interests, Courts, Inventions and patents, Lawyers.

Notice is hereby given that, pursuant to the authority granted to the Commissioner of Patents and Trademarks by 35 U.S.C. 6, the patent and Trademark Office proposes to amend Title 37 of the Code of Federal Regulations as set forth below. It is proposed to amend 37 CFR, Parts 1 and 5, as follows with deletions indicated by brackets and additions by arrows.

PART 1—RULES OF PRACTICE IN PATENT CASES

1. The authority citation for 37 CFR Part 1 would continue to read as follows:

Authority: 35 U.S.C. 6, unless otherwise noted.

2. Section 1.14 is proposed to be amended by revising paragraph (e) to read as follows:

§ 1.14 Patent applications preserved in secrecy.

* * * * *

(e) Any request by a member of the public seeking access to, or copies of, any pending or abandoned application preserved in secrecy pursuant to paragraphs (a) and (b) of this section, or [of] any papers relating thereto, must (1) be in the form of a petition and be accompanied by the petition fee set forth in § 1.17(i) or (2) include written authority granting access to the member of the public in that particular application from the applicant or the applicant's assignee or attorney or agent of record. ►see § 1.612(a) for access by an interference party to a pending or abandoned application.◄

3. Section 1.131 is proposed to be revised to read as follows:

§ 1.131 Affidavit for declaration of prior invention to overcome cited patent or publication.

(a) When any claim of an application or a patent under reexamination is rejected on reference to a domestic patent which substantially shows or describes but does not claim ►the same patentable invention, as defined in § 1.601(n), as◄ the rejected invention, or on reference to a foreign patent or to a printed publication, and the inventor of the subject matter of the rejected claim, the owner of the patent under reexamination, or the person qualified under §§ 1.42, 1.43 or 1.47, shall make oath or declaration as to facts showing a completion of the invention in this country before the filing date of the application on which the domestic patent issued, or before the date of the foreign patent, or before the date of the printed publication, then the patent or publication cited shall not bar the grant of a patent to the inventor or the confirmation of the patentability of the claims of the patent, unless the date of such patent or printed publication is more than one year prior to the date on which the inventor's or patent owner's application was filed in this country.

(b) The showing of facts shall be such, in character and weight, as to establish reduction to practice prior to the effective date of the reference, or conception of the invention prior to the effective date of the reference coupled with due diligence from ►prior to◄ said date to a subsequent reduction to practice or to the filing of the application. Original exhibits of drawings or records, or photocopies thereof, must accompany and form part of the affidavit or declaration or their absence satisfactorily explained.

4. Section 1.192 is proposed to be amended by revising paragraph (a) and adding new paragraphs (c) and (d) to read as follows:

§ 1.192 Appellant's brief.

(a) The appellant shall, within 2 months from the date of the notice of appeal under § 1.191 in an application, reissue application, or patent under reexamination, or within the time allowed for response to the action appealed from, if such time is later, file a

brief in triplicate. ►If the brief exceeds 30 pages, in addition to the appendix required by paragraph (c)(7) of this section, it will be returned to the appellant.◄ The brief must be accompanied by the requisite fee set forth in § 1.17(f) and must set forth the authorities and arguments on which the appellant will rely to maintain the appeal. [The brief must include a concise explanation of the invention which should refer to the drawing by reference characters, and a copy of the claims involved.]

* * * * *

►(c) The brief shall contain the following items under appropriate headings and in the order here indicated:

(1) *Status of claims.* A statement of the status of all the claims, pending or cancelled, and identifying the claims appealed.

(2) *Status of amendments.* A statement of the status of any amendment filed subsequent to final rejection.

(3) *Summary of invention.* A concise explanation of the invention defined in the claims involved in the appeal, which shall refer to the specification by page and line number, and to the drawing, if any, by reference characters.

(4) *Issues.* A concise statement of the issues presented for review.

(5) *Grouping of claims.* For each ground of rejection which appellant contests and which applies to more than one claim, it will be presumed that the rejected claims stand or fall together unless a statement is included that the rejected claims do not stand or fall together, accompanied by reasons as to why appellant considers the rejected claims to be separately patentable.

(6) *Argument.* The contentions of the appellant with respect to each of the issues presented for review in paragraph (c)(4) of this section, and the basis therefor, with citations of the authorities, statutes, and parts of the record relied on. Each issue should be treated under a separate heading.

(i) For each rejection under 35 U.S.C. 112, first paragraph, the argument shall specify the errors in the rejection and how the first paragraph of 35 U.S.C. 112 is complied with, including, as appropriate, how the specification and drawings, if any, (A) describe the subject matter defined by each of the rejected claims, (B) enable any person skilled in the art to make and use the subject matter defined by each of the rejected claims, and (C) set forth the best mode contemplated by the appellant of carrying out his or her invention.

(ii) For each rejection under 35 U.S.C. 112, second paragraph, the argument shall specify the errors in the rejection and how the claims particularly point out and distinctly claim the subject matter which applicant regards as the invention.

(iii) For each rejection under 35 U.S.C. 102, the argument shall specify the errors in the rejection and why the rejected claims are patentable under 35 U.S.C. 102, including any specific limitations in the rejected claims which are not described in the prior art relied upon in the rejection.

(iv) For each rejection under 35 U.S.C. 103, the argument shall specify the errors in the rejection and, if appropriate, the specific limitations in the rejected claims which are not described in the prior art relied on in the rejection, and shall explain how such limitations render the claimed subject matter unobvious over the prior art. If the rejection is based upon a combination of references, the argument shall explain why the references, taken as a whole, do not suggest the claimed subject matter, and shall include, as may be appropriate, an explanation of why features disclosed in one reference may not properly be combined with features disclosed in another reference. A general argument that all the limitations are not described in a single reference does not satisfy the requirements of this paragraph.

(v) For any rejection other than those referred to in paragraphs (c)(6) (i) to (iv) of this section, the argument shall specify the errors in the rejection and the specific limitations in the rejected claims, if appropriate, or other reasons, which cause the rejection to be in error.

(7) *Claims appealed.* An appendix containing a copy of the claims involved in the appeal.

(d) Failure to comply with any of the requirements of paragraph (c) of this section may result in dismissal of the appeal. Any arguments or authorities not included in the brief may be refused consideration by the Board of Patent Appeals and Interferences.◄

5. Section 1.193 is proposed to be amended by revising paragraph (b) to read as follows:

§ 1.193 Examiner's answer.

* * * * *

(b) The appellant may file a reply brief directed only to such new points of argument as may be raised in the examiner's answer, within one month from the date of such answer. ►The new points of argument shall be specifically identified in the reply brief. If the reply brief exceeds 15 pages, or the examiner determines that it is not directed only to new points of argument raised in the examiner's answer, the examiner will so notify the appellant and at the same time return the reply brief to the appellant.◄ [However, if] ►If◄ the examiner's answer states a new ground of rejection appellant may file a reply thereto within two months from the date of such answer; such reply may [include] ►be accompanied by◄ any amendment or material appropriate to the new ground.

6. Section 1.194 is proposed to be amended by revising paragraph (b) to read as follows:

§ 1.194 Oral hearing.

* * * * *

(b) If appellant desires an oral hearing, appellant must file a written request for such hearing accompanied by the fee set forth in § 1.17(g) within one month after the date of the examiner's answer. ►If the examiner's answer states a new ground of rejection and if appellant files a reply as provided for by § 1.193(b), then the written request must be made within three months after the date of the filing of the reply.◄ If appellant requests an oral hearing and submits therewith the fee set forth in § 1.17(g), an oral argument may be presented by, or on behalf of, the primary examiner if considered desirable by either the primary examiner or the Board.

* * * * *

7. Section 1.196(b)(1) is proposed to be revised to read as follows:

§ 1.196 Decision by the Board of Patent Appeals and Interferences.

* * * * *

(b) * * *

(1) The appellant may submit an appropriate amendment of the claims so rejected or a showing of facts, or both, and have the matter reconsidered by the examiner in which event the application will be remanded to the examiner and the decision of the Board of Patent Appeals and Interferences shall not be considered final for the purpose of judicial review. The statement shall be binding upon the examiner unless an amendment or showing of facts not previously of record be made which, in the opinion of the examiner, overcomes the new ground for rejection stated in the decision. ►Should the examiner make the rejection final the applicant may again appeal to the Board of Patent Appeals and Interferences.◄ When appropriate, upon conclusion of proceedings on remand before the examiner, the Board of Patent Appeals

and Interferences may enter an order otherwise making its decision final.

* * * * *

8. Section 1.604(a) is proposed to be revised to read as follows:

§ 1.604 Request for interference between applications by an applicant.

(a) An applicant may seek to have an interference declared with an application of another by—

(1) Suggesting a proposed count and presenting [a] ►at least one◄ claim corresponding to the proposed count ► or identifying at least one claim in his or her application that corresponds to the proposed count◄,

(2) Identifying the other application and, if known, a claim in the other application which corresponds to the proposed count, and

(3) Explaining why an interference should be declared.

* * * * *

9. Section 1.607(a) is proposed to be revised to read as follows:

§ 1.607 Request by applicant for interference with patent.

(a) An applicant may seek to have an interference declared between an application and an unexpired patent by—

(1) ►Identifying the patent,

(2)◄ Presenting a proposed count ►

(3) identifying at least one claim in the patent corresponding to the proposed count, (4) presenting at least one◄ [and a] claim corresponding to the proposed count ► or identifying at least one claim already pending in his or her application that corresponds to the proposed count,◄ and, if any claim of the patent or application ►identified as corresponding to the proposed count◄ does not correspond exactly to the proposed count, explaining why [an interference should be declared, (2) identifying the patent and indicating which claim in the application and which claim or claims of the patent correspond to the proposed count] ►each such claim corresponds to the proposed count◄, and [3] ►(5)◄ applying the terms of ►and◄ [the] application claim ►(i) identified as ◄ corresponding to the count and (ii) not previously in the application◄ to the disclosure of the application.

* * * * *

10. Section 1.612(a) is proposed to be revised to read as follows:

§ 1.612 Access to applications.

(a) After an interference is declared, each party shall have access to and may obtain copies of the files of any application set out in the notice declaring the interference, except for affidavits filed under § 1.131 and any evidence and explanation under § 1.608 filed separate from an amendment. ►A party seeking access to any abandoned or pending application referred to in the opposing party's involved application or access to any pending application referred to in the opposing party's patent must file a motion under § 1.635.◄

* * * * *

11. Paragraph (e)(1)(vi) of § 1.637 is proposed to be revised to read as follows:

§ 1.637 Content of motions.

* * * * *

(e) * * *

(1) * * *

(vi) [When the opponent is a patentee, designate the claims of the patent which define the same patentable invention defined by the proposed count] ►Identify all claims in the opponent's application or patent which should be designated to correspond to each proposed count; if the opponent's application does not contain any such claim, the motion shall propose a claim to be added to the opponent's application.◄ * * *

* * * * *

12. Paragraph (c) of § 1.658 is proposed to be revised to read as follows:

§ 1.658 Final decision

* * * * *

(c) A judgment in an interference settles all issues which (1) were raised and decided in the interference, (2) could have been properly raised and decided in the interference by a motion under § 1.633 (a) through (d) and (f) through (j) or § 1.634 and (3) could have been properly raised ► by a motion under § 1.633(e) ◄ and decided in an additional interference [with a motion under § 1.633(e)] ► on an invention which was claimed during the pendency of the original interference either (i) in the winning party's involved application or patent or (ii) in a non-involved application owned by a losing party ◄. A losing party [who could have properly moved, but failed to move, under §§ 1.633 or 1.634] shall be estopped to take *ex parte* or *inter partes* action in the Patent and Trademark Office after the interference which is inconsistent with [that party's failure to properly move] ► the issues settled by the judgment ◄, except that a losing party shall not be estopped with respect to any claims which correspond, or properly could have corresponded, to a count as to which that party was awarded a favorable judgment.

13. Paragraph (b) of § 1.662 is proposed to be revised to read as follows:

§ 1.662 Request for entry of adverse judgment; reissue filed by patentee.

* * * * *

(b) If a patentee involved in an interference files an application for reissue during the interference and omits all claims of the patent corresponding to the counts of the interference for the purpose of avoiding the interference, judgment may be entered against the patentee. A patentee who files an application for reissue other than for the purpose of avoiding the interference shall timely file a preliminary motion under §1.633(h)►,◄ or show good cause why the motion could not have been timely filed ► or would not be appropriate ◄.

* * * * *

PART 5—SECRECY OF CERTAIN INVENTIONS AND LICENSES TO EXPORT AND FILE APPLICATIONS IN FOREIGN COUNTRIES

14. The authority citation for 37 CFR Part 5 would continue to read as follows:

Authority: 35 U.S.C. 6, 41, 181–188 and the Export Administration Act of 1979, as amended, the Arms Export Control Act, as amended, the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, and the delegations in the regulations under these acts to the Commissioner (15 CFR 370.10(j), 22 CFR 125.04, and 10 CFR 810.7).

15. Paragraph (b) of § 5.3 is proposed to be revised to read as follows:

§ 5.3 Prosecution of application under secrecy orders; withholding patent.

* * * * *

(b) An interference will not be declared involving national applications under secrecy order. However, if an applicant whose application [under secrecy order copies claims from] ► is under secrecy order seeks to provoke an interference with ◄ an issued patent, a notice of that fact will be placed in the file wrapper of the patent. (See [§ 1.205(c)] ► § 1.607(d) ◄).

* * * * *

Date: July 16, 1987.

Donald J. Quigg,

Assistant Secretary and Commissioner of Patents and Trademarks.

Note: This Appendix A will not appear in the code of Federal Regulations.

Appendix A—Proposed Requirements for Examiner's Answer

Chapter 1200 of the Manual of Patent Examining Procedure would be amended to require that the examiner's answer include, in the order indicated, the following items:

(1) *Status of claims.* A statement of whether the examiner agrees or disagrees

with the statement of the status of claims contained in the brief and a correct statement of the status of all the claims pending or cancelled, if necessary.

(2) *Status of Amendments.* A statement of whether the examiner agrees or disagrees with the statement of the status of amendments contained in the brief, and an explanation of any disagreement.

(3) *Summary of invention.* A statement of whether the examiner agrees or disagrees with the summary of invention contained in the brief, an explanation of why the examiner disagrees, and correct summary of invention, if necessary.

(4) *Issues.* A statement of whether the examiner agrees or disagrees with the statement of the issues in the brief and an explanation of why the examiner disagrees, including:

(i) Identification of any issues which are petitionable rather than appealable, and

(ii) Identification of any issues or grounds of rejection which the examiner no longer considers applicable.

(5) *Grouping of Claims.* A statement of whether the examiner agrees or disagrees with any statement in the brief that certain claims do not stand or fall together, and, if the examiner disagrees, an explanation as to why those claims are not separately patentable.

(6) *Claims appealed.* A statement of whether the copy of the appealed claims contained in the appendix to the brief is correct and if not, a correct copy of any incorrect claim.

(7) *References of record.* A listing of the references of record relied on, including (where appropriate, and especially in the case of non-patent references) the page or pages in each reference relied on.

(8) *New references.* A statement of whether or not any new reference is being applied and a listing of each such reference being cited for a new ground of rejection in the examiner's answer, including (where appropriate, and especially in the case of non-patent references) the page or pages in each reference relied on.

(9) *Grounds of rejection.* For each ground of rejection applicable to the appealed claims, and explanation of the ground of rejection, or reference to a final rejection or other single prior action for clear exposition of the rejection.

(i) For each rejection under 35 U.S.C. 112, first paragraph, the examiner's answer, or the single prior action, shall explain how the first paragraph of 35 U.S.C. 112 is not complied with, including, as appropriate, how the specification and drawings, if any, (a) do not describe the subject matter defined by each of the rejected claims, (b) would not enable any person skilled in the art to make and use the subject matter defined by each of the rejected claims, and (c) do not set forth the best mode contemplated by the appellant of carrying out his or her invention.

(ii) For each rejection under 35 U.S.C. 112, second paragraph, the examiner's answer, or single prior action, shall explain how the claims do not particularly point out and distinctly claim the subject matter which applicant regards as the invention.

(iii) For each rejection under 35 U.S.C. 102, the examiner's answer, or single prior action, shall explain why the rejected claims are anticipated or not patentable under 35 U.S.C. 102, pointing out where all of the specific limitations recited in the rejected claims are found in the prior art relied upon in the rejection.

(iv) For each rejection under 35 U.S.C. 103, the examiner's answer, or single prior action, shall state the ground of rejection and point out where each of the specific limitations recited in the rejected claims is found in the prior art relied on in the rejection, shall identify any difference between the rejected claims and the prior art relied on and shall explain how the claimed subject matter is rendered unpatentable over the prior art. If the rejection is based upon a combination of references, the examiner's answer, or single prior action, shall explain the rationale for making the combination.

(v) For each rejection under 35 U.S.C. 102 or 103 where there may be questions as to how limitations in the claims corresponds to features in the prior art, the examiner, in addition to the requirements of (9)(iii) and (iv) above, should compare at least one of the rejected claims feature by feature with the prior art relied on in the rejection. The comparison shall align the language of the claim side by side with a reference to the specific page, line number, drawing reference number and quotation from the prior art, as appropriate.

(vi) For each rejection, other than those referred to in paragraphs (i) to (v) of this section, the examiner's answer, or single prior action, shall specifically explain the basis for the particular rejection.

(10) *New ground of rejection.* A statement of whether or not any new ground of rejection is being made in the examiner's answer and a complete statement and explanation of any such new ground. The requirements of section (9) shall be complied with for any new ground of rejection.

(11) *Response to argument.* A statement of whether the examiner agrees or disagrees with each of the contentions of appellant in the brief with respect to the issues presented and an explanation of the reasons for disagreement with any such contention. If any ground or rejection is not argued and responded to by appellant, the response shall point out each claim affected.

(12) *Period of response to new ground of rejection.* A statement setting the period for appellant to file a reply to any new ground of rejection, if necessary.

[FR Doc. 87-22476 Filed 9-29-87; 8:45am]

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federal register

Wednesday
September 30, 1987

Part VIII

Department of Health and Human Services

Health Care Financing Administration

Public Health Service

42 CFR Parts 110 and 417

Medicare and Medicaid Programs; Redesignation of Rules Concerning Federal Requirements for Health Maintenance Organizations; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

Public Health Service

42 CFR Parts 110 and 417

[OPH-2-F]

Medicare and Medicaid Programs; Redesignation of Rules Concerning Federal Requirements for Health Maintenance Organizations

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

ACTION: Final rule.

SUMMARY: This rule moves the regulations that implement title XIII of the Public Health Service Act from 42 CFR Part 110 to a new Subpart A of 42 CFR Part 417. We are moving these regulations, which generally govern Federal qualification and Federal aid for health maintenance organizations (HMOs), to HCFA's regulations because the authority to administer these regulations has been transferred from the Public Health Service to HCFA.

EFFECTIVE DATE: October 1, 1987.

FOR FURTHER INFORMATION CONTACT: Larry Sobel, (202) 245-0197.

SUPPLEMENTARY INFORMATION:

I. Background

Until recently, the authority for determining whether an entity is a Federally qualified health maintenance organization (HMO) within the meaning of section 1310(d) of the Public Health Service Act (42 U.S.C. 300e-9(d)) was delegated to the Assistant Secretary for Health of the Department of Health and Human Services (the Department). This delegation was published in the **Federal Register** on April 22, 1983 (48 FR 17395) and is set forth in regulations at 42 CFR 417.406. However, that authority was redelegated to the Administrator of HCFA, as described in the **Federal Register** on March 21, 1986 (51 FR 9894). That document states that the "* * * change in authority for the Federal HMO program was made in order to more closely coordinate the Health Maintenance Organization Program with the Medicare Program and improve the objectives of both programs to improve health care and the use of prepaid health care."

In a proposed rule (51 FR 30520), published on August 27, 1986, concerning charging application fees for Federal qualification of HMOs, we indicated our intention to move the regulations that implement title XIII of the Public Health Service Act from 42 CFR Part 110 to a new Subpart A of 42 CFR Part 417.

II. Redesignation

We are moving these regulations, which govern Federal qualification of, and Federal aid for, HMOs and which complement the regulations implementing the Medicare and Medicaid HMO programs, to HCFA's portion of the Code of Federal Regulations (that is, Title 42, Chapter IV). As explained above, the authority for administering these regulations has been transferred from the Assistant Secretary for Health in the Department to the Administrator of HCFA.

In making this redesignation, we have made some minor editorial changes. For example, references to "the Act" have been appropriately changed throughout the regulations text to read "the Public Health Service Act" to distinguish that Act from the Social Security Act.

Although we are not making any other changes now, we are reviewing these regulations in order to determine which technical changes need to be made (for example, correcting addresses) and whether any substantive changes need to be made. Any such changes will be published later in the **Federal Register**.

III. Regulatory Impact Statement

Since this rule is merely a redesignation and makes no substantive changes in current regulations, there is no need for the analysis required by Executive Order 12291 for rules that have a significant impact on the economy.

In addition, because this rule does not require a general notice of proposed rulemaking under the Administrative Procedure Act (5 U.S.C. 553(b)), it is not subject to the requirements for regulatory flexibility analysis imposed under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 through 612).

IV. Other Required Information

A. Paperwork Reduction Act

This final rule consists of a redesignation of regulations text and, as such, does not change in any way the requirements reflected in the regulations. Therefore, this rule need not be reviewed by the Executive Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501).

B. Waiver of Proposed Rulemaking

The changes in regulations text made as part of this redesignation are minor, and of an editorial nature. Because these changes do not alter any policies or procedures, the usual notice and opportunity for prior public comment are unnecessary and we find good cause to waive notice of proposed rulemaking.

C. Waiver of 30-day Delay in the Effective Date

As noted above, these redesignated regulations are effective October 1, 1987. If we were to provide the customary 30-day delay in the effective date, the next updated issue of Title 42 of the CFR, which will be revised as of October 1, 1987, would show two sets of extensive, essentially duplicative regulations text regarding HMOs. One set would continue to be located in 42 CFR Part 110 and would remain in effect through whatever portion of the 30 day period extends past October 1, 1987. The second set would be located in 42 CFR Part 417, which would become effective after the 30-day delay had expired. Such a confusing and perverse effect would be unintended but would result from the interaction of a 30-day delay in the effective date of this final rule and the annual date of revision of 42 CFR. Therefore, the usual delay in effective date is impractical. In addition, because we are not revising the regulations in any substantive way, but merely redesignating them, the delay is unnecessary.

Accordingly, we find good cause to waive the 30-day delay in the effective date of this final rule and to make it effective on October 1, 1987.

List of Subjects in 42 CFR Part 417

Administrative practice and procedures, Health maintenance organization (HMO), Medicare, Grant programs/health, Health care, Health facilities, Health insurance, Loan programs/health.

Title 42 would be amended as set forth below:

TITLE 42—PUBLIC HEALTH

PART 417—[AMENDED]

1. The authority citation for Subpart A of Part 417 is added to read as follows:

Authority: Sections 215 and 1301 through 1318 of the Public Health Service Act, as amended (42 U.S.C. 216 and 300e through 300e-17).

2. Part 110, Health Maintenance Organizations is redesignated as a new Subpart A, Federally Qualified Health Maintenance Organizations, of Part 417 and all internal cross-references are corrected accordingly. All subpart headings in Part 110 are revised to uncoded internal headings in Part 417, Subpart A. All references to "the Act" are revised throughout to read "the Public Health Service Act." All

references to "this part" are revised to read "this subpart." This redesignation is set forth in the table below:

Redesignation Table for 42 CFR Part 417, Subpart A

Old Section	*New Section*
110.101	417.100
110.102	417.101
110.103	417.102
110.104	417.103
110.105	417.104
110.106	417.105
110.107	417.106
110.108	417.107
110.109	417.108
110.110	417.109
110.201	417.110
110.202	417.111
110.203	417.112
110.204	417.113
110.205	417.114
110.206	417.115
110.207	417.116
110.208	417.117
110.209	417.118
110.210	417.119
110.401	417.120
110.402	417.121
110.403	417.122
110.404	417.123
110.405	417.124
110.406	417.125
110.407	417.126
110.501	417.130
110.502	417.131
110.503	417.132
110.504	417.133
110.505	417.134
110.506	417.135
110.507	417.136
110.508	417.137
110.601	417.140
110.602	417.141
110.603	417.142
110.604	417.143
110.605	417.144
110.801	417.150
110.802	417.151
110.803	417.152
110.804	417.153
110.805	417.154
110.806	417.155
110.807	417.156
110.808	417.157
110.809	417.158
110.810	417.159
110.901	417.160
110.902	417.161
110.903	417.162
110.904	417.163
110.905	417.164
110.906	417.165
110.907	417.166
110.1001	417.170
110.1002	417.171
110.1003	417.172
110.1004	417.173
110.1005	417.174
110.1006	417.175
110.1007	417.176
110.1008	417.177
110.1009	417.178
110.1010	417.179
110.1011	417.180

(Catalog of Federal Domestic Assistance Program No. 13.773, Medicare-Hospital Insurance; No. 13.774, Medicare Supplementary Medical Insurance; No. 13.714, Medical Assistance Program)

Dated: September 3, 1987.

William L. Roper,

Administrator, Health Care Financing Administration.

Dated: September 8, 1987.

Robert E. Windom,

Assistant Secretary for Health.

Approved: September 21, 1987.

Otis R. Bowen,

Secretary.

[FR Doc. 87-22737 Filed 9-29-87; 10:58 am]
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